

# POST-HELLER LITIGATION SUMMARY

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## INTRODUCTION AND OVERVIEW

Since the United States Supreme Court's landmark decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), Giffords Law Center to Prevent Gun Violence has tracked all Second Amendment challenges to federal, state, and local gun laws. This document analyzes the state of Second Amendment jurisprudence after *Heller* and examines its implications for many different laws designed to reduce gun violence. In preparing this analysis, we have examined over 1,370 federal and state post-*Heller* Second Amendment decisions.

We summarize here the most important Second Amendment lawsuits and decisions since *Heller*. We also provide a wide variety of Second Amendment resources on our website: <http://lawcenter.giffords.org/2A>.

## I. 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 of law-abiding citizens 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.

The Supreme Court cautioned, however, that the Second Amendment right is “not unlimited,” and does not confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>1</sup> The Court noted, for example, that courts historically have concluded that “prohibitions on carrying concealed weapons were lawful under the Second Amendment,” and it 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.<sup>2</sup> The Court also noted that laws banning “dangerous and unusual weapons,” such as M-16 rifles and other firearms that are most useful in military service, are consistent with the Second Amendment.<sup>3</sup> Finally, the Court declared that its analysis should not be read to suggest “the invalidity of laws regulating the storage of firearms to prevent accidents.”<sup>4</sup>

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<sup>1</sup> *Heller*, 554 U.S. at 626.

<sup>2</sup> *Id.* at 626–27, 627 n.26.

<sup>3</sup> *Heller*, 554 U.S. at 627 (citations omitted).

<sup>4</sup> *Id.* at 632.

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 among the “fundamental rights”<sup>5</sup> that limit state and local governments as well as 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.<sup>6</sup>

## **II. THE POST-HELLER LANDSCAPE: COURTS HAVE CONSISTENTLY UPHELD STRONG GUN SAFETY LAWS**

Since *Heller* and *McDonald*, courts have been inundated with claims that various federal, state, and local laws regulating firearms violate the Second Amendment. These claims have been asserted in both civil lawsuits and criminal prosecutions—and the vast majority of these challenges to gun safety laws have failed, largely because the Supreme Court already rejected them in *Heller*. As described above, that decision expressly endorsed lifesaving gun regulations like concealed carry regulations, laws prohibiting dangerous people from accessing guns, and safe storage laws. Most lower courts have taken seriously *Heller*’s instruction that the Second Amendment is “not unlimited” by consistently [voting to uphold](#) laws like these that protect the public without infringing constitutional rights.

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

- 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 gun possession by dangerous persons including those convicted of felonies and domestic violence crimes, and those who have been involuntarily committed to mental institutions;
- Requiring the registration of all firearms;
- Forbidding persons under 21 years old from possessing firearms or carrying guns in public;
- Regulating firing ranges, including zoning, construction, and operation requirements;

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<sup>5</sup> *McDonald*, 561 U.S. at 778.

<sup>6</sup> *Id.* at 785–86 (restating “presumptively valid” categories identified in *Heller*, 554 U.S. at 627 n.26, and noting that “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment”) (quoting the brief of *amici* supporting petitioners).

- Requiring that handguns sold within a state meet certain safety requirements;
- Imposing fees on the commercial sale of handguns to fund firearm safety regulations; and
- Requiring a waiting period before completing a firearm sale.

By contrast, courts have struck down gun laws in a relatively small number of cases, and even then, most have been careful to note that the Second Amendment does not prohibit most laws designed to reduce gun violence.

Moreover, the Supreme Court has declined to review over 150 Second Amendment cases since *Heller*, leaving lower court decisions upholding many reasonable gun laws 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. Among the significant issues left open were major methodological questions regarding how courts should evaluate Second Amendment claims, as well as important substantive questions, such as the extent of the Second Amendment's application outside the home.

### **III. LOWER COURTS HAVE COME TO A NEAR CONSENSUS ON HOW TO ANALYZE SECOND AMENDMENT CLAIMS**

Although different lower courts have suggested a variety of different ways to handle Second Amendment claims, a near-consensus has emerged around a basic two-step inquiry. That methodology asks, first, whether a challenged law imposes a burden on conduct falling within the scope of the Second Amendment. If the court finds that it does not, the Second Amendment challenge fails at the threshold, without requiring any further analysis. If a court finds, by contrast, that a regulation indeed implicates conduct protected by the Second Amendment, it then turns to the second step of the analysis, determining the appropriate level of constitutional scrutiny and asking whether the law satisfies that scrutiny.<sup>7</sup> As 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.<sup>8</sup>

#### **A. STEP ONE: THE SCOPE OF THE SECOND AMENDMENT**

The first step of the two-pronged inquiry asks whether a challenged law “imposes a burden on conduct falling

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<sup>7</sup> See, e.g., *Woollard v. Gallagher*, 712 F.3d 865, 874-75 (4th Cir. 2013) (collecting cases applying two-step approach).

<sup>8</sup> See *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (“[T]he 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 and citations 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.”).

within the Second Amendment’s guarantee.”<sup>9</sup> 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” is the type of longstanding law historically understood as consistent with the Second Amendment.<sup>10</sup> In describing the proper scope of the Second Amendment, the *Heller* Court identified a number of categorical limitations, described below.

## 1. “PRESUMPTIVELY LAWFUL” REGULATIONS

*Heller* identified a non-exhaustive list of “presumptively lawful” regulatory measures that courts have generally agreed do not offend the Second Amendment. As noted above, they 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.”<sup>11</sup> Because *Heller* suggested that these “presumptively lawful” regulations fall outside the scope of the Second Amendment,<sup>12</sup> most courts have had little trouble upholding them.<sup>13</sup> At the least, courts have pointed to laws’ “presumptively lawful” status in rejecting the application of the most rigorous form of judicial scrutiny, so-called strict scrutiny, to them.<sup>14</sup>

## 2. “DANGEROUS AND UNUSUAL” WEAPONS

The *Heller* Court also noted that civilian ownership of powerful, military-style weapons such as M-16s, and

<sup>9</sup> *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (citation omitted).

<sup>10</sup> *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (citation omitted).

<sup>11</sup> *Heller*, 554 U.S. 570, 626-27 (2008).

<sup>12</sup> See *United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010) (“[W]e 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*, 982 N.E.2d 495, 499-500 (Mass. 2013) (“[W]e 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 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*, No. 5:11-cr-00474-VEH-HGD, 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.’ . . . Thus, 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 could permit “prohibiting the commercial sale of firearms,” which the court said would be inconsistent with *Heller*).

<sup>13</sup> See, e.g., *United States v. Pruess*, 703 F.3d 242, 245-46 n.1 (4th Cir. 2012) (felon in possession statute is “presumptively lawful” and does not violate Second Amendment); *United States v. Mendez*, 584 F. App’x 679, 679 (9th Cir. 2014) (unpublished) (“Section 922(g)(1) is a presumptively lawful regulatory measure and does not unconstitutionally burden whatever Second Amendment rights” challenger may have) (quotations omitted); *Peña v. Lindley*, No. 09-01185, 2015 U.S. Dist. LEXIS 23575, at \*39 (E.D. Cal. Feb. 26, 2015), *affirmed on other grounds*, No. 15-15449, 2018 U.S. App. LEXIS 21565 (9th Cir. Aug. 3, 2018) (“[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.”) (citations omitted). But see *Marzzarella*, 614 F.3d at 92 n.8, discussed in footnote 12, above.

<sup>14</sup> *Nat’l Rifle Ass’n v. ATF*, 700 F.3d 185, 196 (5th Cir. 2012) (“[E]ven 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 [*United States v. Skoien*, 614 F.3d 638, 640 (7th Cir. 2010) (en banc)] that some sort of showing must be made to support the adoption of a new categorical limit on the Second Amendment right.”).

similarly dangerous weapons, falls outside the protection of the Second Amendment. Lower courts have used this rationale to uphold laws prohibiting or regulating particularly “dangerous and unusual” weapons.<sup>15</sup> Courts have uniformly held, for example, that machine guns are “dangerous and unusual” and that barring civilian possession of them does not offend the Second Amendment.<sup>16</sup> Courts have also deemed silencers, grenades, bombs, mines, and short-barreled shotguns unprotected “dangerous and unusual” weapons.<sup>17</sup> Several courts have also held that military-style assault weapons and large-capacity magazines are unprotected by the Second Amendment, either because they are dangerous and unusual, or because they are comparable to the M-16, a weapon *Heller* permits prohibiting.<sup>18</sup>

### 3. “LONGSTANDING” REGULATIONS

*Heller* recognized that laws sufficiently “longstanding” to be considered consistent with how the right to bear arms has historically been understood also fall outside the Second Amendment. As the D.C. Circuit 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

<sup>15</sup> *Heller*, 554 U.S. 570, 627 (2008) (“We also recognize another important limitation on the right to keep and carry arms. [*United States v. Miller* 307 U.S. 174, 179 (1939)] 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.’”) (citation omitted); see also *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 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, 142 (3d Cir. 2016) (“In case [*United States v. Marzzarella*, 614 F.3d 85, 91 (3d Cir. 2010)] 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.”).

<sup>16</sup> E.g., *Hollis v. Lynch*, 827 F.3d 436, 451 (5th Cir. 2016); *United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136, 142 (3d Cir. 2016); see also *United States v. Zaleski*, 489 F. App’x 474, 475 (2d Cir. 2012) (upholding 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”).

<sup>17</sup> See *United States v. Cox*, 906 F.3d 1170, 1185-86 (10th Cir. 2018) (short-barreled shotguns and silencers are not within the scope of the Second Amendment), cert. denied, 2019 U.S. LEXIS 3931 (U.S., June 10, 2019); *United States v. McCartney*, 357 F. App’x 73, 76 (9th Cir. 2009) (unpublished) (silencers, grenades, and directional mines not protected by the Second Amendment); *Stauder v. Stephens*, No. 2:13-CV-11, 2016 U.S. Dist. LEXIS 31222, at \*25 (N.D. Tex. Feb. 19, 2016) (upholding state law prohibiting possession of smoke grenade); *United States v. Garcia*, No. CR. S-11-290 LKK, 2011 U.S. Dist. LEXIS 113748, at \*6-7 (E.D. Cal. Oct. 3, 2011) (upholding federal prohibition on possession of pipe bombs).

<sup>18</sup> *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017) (en banc), cert. denied, 2017 U.S. LEXIS 7002 (U.S. Nov. 27, 2017) (“Because the banned assault weapons and large-capacity magazines are ‘like’ ‘M-16 rifles’—‘weapons that are most useful in military service’—they are among those arms that the Second Amendment does not shield.”); *Commonwealth v. Cassidy*, 479 Mass. 527, 528 (2018) (Mass. 2018) (the Second Amendment “does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes,” including assault weapons); *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. 2018) (“The AR-15 [assault weapon] and the M16 were designed and manufactured simultaneously for the military and share very similar features and functions”; “because the undisputed facts convincingly demonstrate that AR-15s and LCMs are most useful in military service, they are beyond the scope of the Second Amendment.”), *aff’d on other grounds*, No. 18-1545, 2019 U.S. App. LEXIS 12588 (1st Cir. Apr. 26, 2019); see also *People v. Zondorak*, 220 Cal. App. 4th 829, 836 (Cal. Ct. App. 2013); *People v. James*, 174 Cal. App. 4th 662, 677 (Cal. Ct. App. 2009). Note that a number of other courts have also upheld laws prohibiting civilian possession of assault weapons and large-capacity magazines, but used a different rationale—these courts did not determine whether these items are protected by the Second Amendment, but held that even if they do, the prohibitions survived heightened scrutiny at “step two” of the two-step analysis, so were constitutional. See, e.g., *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 256-57, 261 (2d Cir. 2015).

activities covered by a longstanding regulation are presumptively not protected from regulation by the Second Amendment.”<sup>19</sup>

## **B. STEP TWO: APPLYING THE APPROPRIATE LEVEL OF SCRUTINY**

If a court finds at the first step of the two-pronged inquiry that a challenged law does, in fact, burden conduct protected by the Second Amendment, it proceeds to step two, and applies “an appropriate form of means-end scrutiny.”<sup>20</sup> While what constitutes the “appropriate” level of scrutiny is a subject of continued disagreement among Second Amendment *litigants*, the majority of *courts* have embraced so-called intermediate scrutiny.

### **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. The Court noted that “[i]f 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.”<sup>21</sup> Courts have, accordingly, uniformly rejected rational basis scrutiny.

### **2. THE EMERGING CONSENSUS IN FAVOR OF INTERMEDIATE SCRUTINY**

With rational basis review off the table, courts have chosen 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,” which asks whether a law is narrowly tailored to achieve a compelling government interest.

Courts have generally agreed that the appropriate level of scrutiny depends on the severity of the challenged law’s burden on Second Amendment rights.<sup>22</sup> 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.<sup>23</sup> 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.’”<sup>24</sup>

<sup>19</sup> *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1253 (D.C. Cir. 2011) (citations omitted).

<sup>20</sup> *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010) (“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 v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252 (D.C. Cir. 2011) (“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.”).

<sup>21</sup> *Heller*, 554 U.S. at 628 n.27.

<sup>22</sup> *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 703 (7th Cir. 2011) (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, 1123–24 (N.D. Ill. 2012) (following the *Ezell* approach); *Nat’l Rifle Ass’n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185, 195 (5th Cir. 2012).

<sup>23</sup> *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 93 (2d Cir. 2012); *United States v. Decastro*, 682 F.3d 160, 166 (2d Cir. 2012).

<sup>24</sup> *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (quoting *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010)); *Nat’l*



Using this framework, almost all of the federal courts of appeal, including the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits, have applied intermediate scrutiny in resolving Second Amendment challenges.<sup>25</sup> Courts have identified different reasons for applying intermediate scrutiny, 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 be analyzed under intermediate scrutiny.

A few isolated district courts, and some dissenting appellate judges, have called for the application of strict scrutiny in Second Amendment challenges, primarily in cases involving as-applied challenges to federal laws imposing lifetime firearm prohibitions.<sup>26</sup> But, to date, federal circuit courts have rejected the calls for strict scrutiny,<sup>27</sup> even in cases involving as-applied challenges to lifetime firearm prohibitions.<sup>28</sup> Thus far, no circuit court majority opinion has called for strict scrutiny when reviewing a Second Amendment challenge.

Even the three circuits that have not joined the intermediate scrutiny consensus have not rejected it in favor of traditional strict scrutiny. When the City of Chicago mandated regular training at a shooting range as a condition for gun ownership—but then enacted an absolute ban on shooting ranges in the City of Chicago—a panel of the Seventh Circuit panel struck down the law, applying a standard “more rigorous” than traditional intermediate

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*Rifle Ass’n v. McCraw*, 719 F.3d 338, 347 (5th Cir. 2013).

<sup>25</sup> *Gould v. Morgan*, 907 F.3d 659, 672-73 (1st Cir. 2018); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 96 (2d Cir. 2012); *United States v. Marzzarella*, 614 F.3d 85, 97 (3d Cir. 2010); *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011); *Nat’l Rifle Ass’n v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013); *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc); *Baer v. Lynch*, 636 F. App’x 695, 698 (7th Cir. 2016); *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1252-53 (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, 876-78 (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).

<sup>26</sup> See *Bateman v. Perdue*, 881 F. Supp. 2d 709, 715 (E.D.N.C. 2012); *Taylor v. City of Baton Rouge*, 39 F. Supp. 3d 807, 816 (M.D. La. 2014); *United States v. Bay*, No. 2:09-CR-83 TS, 2009 U.S. Dist. LEXIS 106874, at \*6 (D. Utah Nov. 13, 2009); *United States v. Engstrom*, No. 2:08-CR-430 TS, 2009 U.S. Dist. LEXIS 33072, at \*10-11 (D. Utah Apr. 17, 2009); but see *In re United States*, 578 F.3d 1195, 1200 (10th Cir. 2009); *United States v. Luedtke*, 589 F. Supp. 2d 1018, 1024-25 (E.D. Wis. 2008); *United States v. Erwin*, No. 1:07-CR-556 (LEK), 2008 U.S. Dist. LEXIS 78148, at \*2—7 (N.D.N.Y. Oct. 6, 2008). One Texas district court applied strict scrutiny to strike down federal statutes requiring out-of-state handgun purchases to be processed in-state by a licensed dealer, but the Fifth Circuit reversed, upholding the statutes after assuming strict scrutiny applied (without determining conclusively whether strict scrutiny was actually appropriate). Compare *Mance v. Holder*, 74 F. Supp. 3d 795, 807, 811-12 (N.D. Tex. 2015), with *Mance v. Sessions*, No. 15-10311, 2018 U.S. App. LEXIS 20270, at \*9 (5th Cir. July 20, 2018).

<sup>27</sup> For example, although a panel of the Fourth Circuit had held that strict scrutiny should be applied in a Second Amendment challenge to Maryland’s assault weapons ban, the court reheard the matter en banc and issued an opinion concluding that intermediate scrutiny was applicable. *Kolbe v. Hogan*, 849 F.3d 114, 137, 139, 140-41 (4th Cir. 2017) (en banc), cert. denied, 2017 U.S. LEXIS 7002 (U.S. Nov. 27, 2017) (upholding ban as outside the scope of the Second Amendment, but in the alternative, applying intermediate scrutiny to uphold the ban). The only federal appellate court to have applied strict scrutiny in a Second Amendment challenge simply assumed for purposes of argument that strict scrutiny applied without definitively resolving the applicable standard of review. *Mance v. Sessions*, No. 15-10311, 2018 U.S. App. LEXIS 20270, at \*9 (5th Cir. July 20, 2018).

<sup>28</sup> See *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 692, 699 (6th Cir. 2016) (en banc) (directing that intermediate scrutiny be applied on remand to evaluate as-applied challenge to federal firearm prohibition for persons who have been involuntarily committed to a mental institution—a departure from the vacated panel opinion which applied strict scrutiny); *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 398, 351 (3d Cir. 2016) (en banc) (applying intermediate scrutiny to invalidate federal firearms prohibition as applied to two plaintiffs with decades-old misdemeanor convictions the court concluded were not “serious”).

scrutiny, “if not quite ‘strict scrutiny.’”<sup>29</sup> The only remaining circuits, the Eighth and the Eleventh, have not squarely decided what level of scrutiny to apply to Second Amendment challenges.<sup>30</sup> And while some dissenting and concurring federal circuit judges have rejected levels of scrutiny altogether in favor of a test based on history and tradition,<sup>31</sup> this view has not been adopted in a majority opinion by any circuit court.<sup>32</sup>

In rejecting a frequently asserted argument that strict scrutiny should always apply in Second Amendment cases because it is a “fundamental right,” the Tenth Circuit explained that “[t]he 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.”<sup>33</sup> 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.”<sup>34</sup> With the very limited exceptions discussed above, courts have widely embraced this logic in deeming intermediate scrutiny appropriate in many Second Amendment cases.<sup>35</sup>

<sup>29</sup> *Ezell v. City of Chicago (Ezell I)*, 651 F.3d 684, 708 (7th Cir. 2011); see also *Ezell v. City of Chicago (Ezell II)*, 846 F.3d 888, 894 (7th Cir. 2017) (applying similar standard when evaluating zoning laws which the court found “severely restrict[ed] the right of Chicagoans to train in firearm use at a range”).

<sup>30</sup> E.g., *GeorgiaCarry.Org v. U.S. Army Corps of Eng’rs*, 788 F.3d 1318, 1326-29 (11th Cir. 2015) (affirming the denial of a preliminary injunction in a Second Amendment challenge, but holding that record was insufficiently developed to perform “full constitutional scrutiny,” and not deciding whether strict or intermediate scrutiny would be appropriate); see also *United States v. Hughley*, 691 F. App’x 278, 279 n.3 (8th Cir. 2017) (unpublished).

<sup>31</sup> See *Mance v. Sessions*, No. 15-10311, 2018 U.S. App. LEXIS 20271, at \*9 (5th Cir. July 20, 2018) (Elrod, J., dissenting from the denial of rehearing *en banc*) (“Simply put, unless the Supreme Court instructs us otherwise, we should apply a test rooted in the Second Amendment’s text and history . . . rather than a balancing test like strict or intermediate scrutiny”); *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 710 (6th Cir. 2016) (en banc) (Sutton, J., concurring) (“What determines the scope of the right to bear arms are the ‘historical justifications’ that gave birth to it . . .”; “[t]iers of review have nothing to do with” as-applied challenge at issue); *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 363 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) (in as-applied Second Amendment challenge, “any resort to means-end scrutiny is inappropriate once it has been determined that the challenger’s circumstances distinguish him from the historical justifications supporting the regulation”); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (“*Heller* and *McDonald* leave little doubt that courts are to assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”); *Houston v. City of New Orleans*, 675 F.3d 441, 448 (5th Cir. 2012) (Elrod, J., dissenting) (“Judge Kavanaugh is correct”; “*Heller* and *McDonald* dictate that the scope of the Second Amendment be defined solely by reference to its text, history, and tradition.”), *withdrawn and superseded on reh’g*, 682 F.3d 361 (5th Cir. 2012).

<sup>32</sup> Recently, divided panels of the Ninth and D.C. Circuits employed a categorical approach to invalidate public carry laws in Hawaii and the District of Columbia, but neither panel purported to overrule prior circuit precedent applying tiers of scrutiny. Instead, the panels concluded that they should apply a categorical approach since the challenged laws would be invalid under any level of scrutiny. See *Young v. Hawaii*, 896 F.3d 1044, 1070-71 (9th Cir. 2018) (holding that Hawaii’s licensing laws for public carry of firearms, which the panel interpreted to operate as a total ban on public carry, are unconstitutional under any level of scrutiny), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. Feb. 8, 2019); *Wrenn v. District of Columbia*, 864 F.3d 650, 666-67 (D.C. Cir. 2017) (striking down Washington, D.C.’s good-cause concealed carry licensing standard, finding that a “categorical approach is appropriate here even though our previous cases have always applied tiers of scrutiny to gun laws” but “this approach would rarely (if ever) apply in cases we can imagine arising in the future”). The view that a categorical test should *always* be applied, or should be applied much more broadly, has not been adopted in a majority opinion by any circuit court, but has been expressed only in the concurring and dissenting opinions cited *supra* note 31.

<sup>33</sup> *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015).

<sup>34</sup> *Id.*

<sup>35</sup> See *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc) (“A non-exhaustive review of [post-*Heller*] cases reveals a near unanimous preference for intermediate scrutiny.”).



## IV. AFTER HELLER, COURTS HAVE OVERWHELMINGLY UPHELD REASONABLE GUN REGULATIONS LIKE THOSE ENDORSED IN HELLER

Regardless of any methodological divisions among the lower courts, in a significant majority of post-*Heller* cases, courts have rejected Second Amendment challenges and upheld the laws or criminal convictions at issue. Below, we discuss specific gun safety laws and policies that courts have upheld over the last eleven years.

### A. GUNS IN PUBLIC

Among the most-litigated questions after *Heller* has been the extent to which the Second Amendment restricts government from regulating the carrying of guns in public. *Heller* did not reach this issue, and some courts have declined to extend *Heller*'s holding outside the home.<sup>36</sup> Others have either assumed<sup>37</sup> or explicitly ruled<sup>38</sup> that the Second Amendment applies at least to some degree outside the home.

There is a strong consensus among all of these courts, however, that the public carry of firearms may be subject to reasonable regulations. Even the courts that have held or assumed that the Second Amendment protects some right to carry a gun in public have expressly recognized the government's broad authority to regulate guns in this context.<sup>39</sup> As courts have observed, the government has much *more* authority to regulate guns in public,

<sup>36</sup> E.g., *Williams v. State*, 10 A.3d 1167, 1177-78 (Md. 2011) (holding that law requiring a permit to carry a gun outside the home is "outside of the scope of the Second Amendment"; "[i]f the Supreme Court . . . meant [*Heller*] to extend beyond home possession, it will need to say so more plainly"); *Commonwealth v. Williams*, 951 N.E.2d 55, 2011 Mass. App. Unpub. LEXIS 934, at \*9 (Mass. App. Ct. Aug. 3, 2011) ("The Second Amendment does not protect [defendant] because he was in possession of the firearm outside of his home."); see also *Jennings v. McCraw*, No. 5:10-CV-141-C, 2012 U.S. Dist. LEXIS 195595, at \*14 (N.D. Tex. Jan. 19, 2012); *In re Pantano*, 60 A.3d 507, 514 (N.J. Super. Ct. App. Div. 2013); *State v. Robinson*, No. A-0280-09T3, 2011 N.J. Super. Unpub. LEXIS 2274, at \*10 (N.J. Super. Ct. App. Div. Aug. 23, 2011); *People v. Yarbrough*, 86 Cal. Rptr. 3d 674, 682-83 (Cal. Ct. App. 2008); *People v. Davis*, 155 Cal. Rptr. 3d 128, 136 (Cal. Ct. App. 2013).

<sup>37</sup> E.g., *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) ("[W]e merely assume that the *Heller* right exists outside the home"; "We are free to make that assumption" since challenged law "passes constitutional muster under . . . intermediate scrutiny."); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013) ("[W]e decline to definitively declare that the individual right to bear arms for the purpose of self-defense extends beyond the home"; "we refrain from answering this question definitively because it is not necessary to our conclusion" that the challenged law is constitutional); *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) ("There may or may not be a Second Amendment right in some places beyond the home," but that issue is "a vast *terra incognita* that courts should enter only upon necessity. . . . There is no such necessity here" because challenged regulation is constitutional).

<sup>38</sup> *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012) (while "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 . . . 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) (concluding "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home"); *Norman v. State*, 215 So. 3d 18, 36 (Fla. 2017) (law prohibiting open carry of firearms implicates the Second Amendment since it "prohibits, in most instances, one manner of carrying arms in public"); *Murphy v. Guerrero*, No. 14-00026, 2016 U.S. Dist. LEXIS 135684, at \*76 (D. N. Mar. I. Sept. 28, 2016) ("This Court agrees that the Second Amendment . . . must protect a right to armed self-defense in public.").

<sup>39</sup> E.g., *Moore v. Madigan*, 702 F.3d 933, 940, 942 (7th Cir. 2012) (holding there is a Second Amendment right to carry firearms in public, but "Illinois has lots of options for protecting its people from being shot without having to eliminate all possibility of armed self-defense in public," including adopting a discretionary licensing scheme); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 89, 94 (2d Cir. 2012) (holding that "the Amendment must have some application" outside the home, but "[t]he state's ability to regulate firearms and, for that matter, conduct, is qualitatively different in public" where "firearm rights have always been more limited" and there is a "tradition of states regulating firearm possession and use"); see also *supra* note 37 (cases assuming the Second Amendment does apply outside the home and nonetheless upholding public carry restrictions under heightened scrutiny).

where firearms may endanger third parties, than in private homes.<sup>40</sup>

Reflecting this consensus, courts generally have affirmed the constitutionality of laws restricting the carry of guns in public. For example, while the Second Circuit assumed that the Second Amendment has some application in public, it upheld New York’s law limiting the carrying of handguns to those with “a special need for self-protection.”<sup>41</sup> And the Florida Supreme Court, which also ruled that the Second Amendment applies to some extent in public, similarly upheld Florida’s ban on the open carry of firearms, emphasizing that both the Second Amendment right and Florida’s constitutional right to bear arms are “subject to legislative regulation.”<sup>42</sup>

Overall, except when confronting laws that prohibit all people from publicly carrying guns in all circumstances, most courts have rejected challenges to laws regulating the carry of guns. They have decisively upheld laws requiring a license to carry a gun outside the home,<sup>43</sup> as well as 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;”<sup>44</sup>
- Requiring applicants for concealed carry licenses to submit affidavits showing good character;<sup>45</sup>
- Prohibiting the issuance of a concealed carry license based on a misdemeanor assault conviction;<sup>46</sup>
- Requiring a concealed carry applicant to be a state resident;<sup>47</sup> or to be at least twenty-one years old;<sup>48</sup>
- Barring out-of-state residents from applying for a concealed carry permit if the state determines it is

<sup>40</sup> *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011) (“[A]s we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense.”); *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (declining to rule definitively on scope of Second Amendment outside the home, but recognizing the government’s “considerable flexibility to regulate gun safety” in public).

<sup>41</sup> *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (“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. . . . [W]e decline Plaintiffs’ invitation to . . . question the state’s traditional authority to extensively regulate handgun possession in public.”) (citation omitted).

<sup>42</sup> *Norman v. State*, 215 So. 3d 18, 28 (Fla. 2017), cert. denied, 2017 U.S. LEXIS 6976 (U.S. Nov. 27, 2017).

<sup>43</sup> See, e.g., *State v. Christian*, 307 P.3d 429, 444 (Or. 2013); *Williams v. State*, 10 A.3d 1167, 1177-78 (Md. 2011).

<sup>44</sup> *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Mishtaku v. Espada*, 699 Fed. App’x 35 (2d Cir. 2016) (summary order); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012); *Hightower v. Boston*, 693 F.3d 61 (1st Cir. 2012); *Batty v. Albertelli*, 2017 U.S. Dist. LEXIS 26124 (D. Mass. Feb. 24, 2017); *Gendreau v. Canario*, 188 F. Supp. 3d 140 (D.R.I. 2016); *Aron v. Becker*, 48 F. Supp. 3d 347 (N.D.N.Y. 2014); *Kuck v. Danaher*, 822 F. Supp. 2d 109 (D. Conn. 2011); *Godbout v. Bd. of Firearms Permit Examiners*, 2017 Conn. Super. LEXIS 4359 (Conn. Super. Ct. 2017) (unreported); *In re Pantano*, 60 A.3d 507 (N.J. Super. Ct. App. Div. 2013).

<sup>45</sup> *Williams v. Puerto Rico*, 910 F. Supp. 2d 386 (D.P.R. 2012).

<sup>46</sup> *Kelly v. Riley*, 733 S.E.2d 194 (N.C. Ct. App. 2012).

<sup>47</sup> *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. District of Columbia*, 59 F. Supp. 3d 173, 184 n.5 (D.D.C. 2014).

<sup>48</sup> *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015); *Nat’l Rifle Ass’n v. McCraw*, 719 F.3d 338 (5th Cir. 2013); *Powell v. Tompkins*, 926 F. Supp. 2d 367 (D. Mass. 2013).

unable to adequately vet their criminal records and mental health history;<sup>49</sup>

- Allowing the revocation of a concealed carry permit if law enforcement determines that the permit holder poses a material likelihood of harm;<sup>50</sup> and
- Restricting how guns may be carried, such as an open carry ban where concealed carry is permitted.<sup>51</sup>

Most notably, out of the eight federal courts of appeal that have directly reviewed challenges to regulations on concealed or open carry, six upheld the laws at issue in their entirety, including the First, Second, Third, Fourth, Ninth, and Tenth Circuits.<sup>52</sup> Most of these decisions involved laws requiring all applicants for a concealed carry permit to show “good cause,” or a particularized need to carry a gun for self-defense. For instance, in *Kachalsky*, the Second Circuit rejected a challenge to New York’s requirement that applicants for a concealed weapons permit show “a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession.”<sup>53</sup> Though the court assumed that the Second Amendment had “some” application outside of the home, it found, nonetheless, that the “special need” requirement satisfied intermediate scrutiny.<sup>54</sup> The First, Third, and Fourth Circuits upheld similar requirements in Massachusetts, New Jersey, and Maryland law that limit the issuance of concealed carry permits to applicants who can show a particularized need to carry a firearm in public.<sup>55</sup>

Other courts have gone even farther by determining that concealed carry is outside of the scope of the Second Amendment. In *Peterson v. Martinez*, for example, the Tenth Circuit held that “the Second Amendment does not confer a right to carry concealed weapons,” in light of substantial historical evidence showing that most states banned concealed carry in the nineteenth century.<sup>56</sup> The court upheld the concealed carry regulation at issue as outside the scope of the Second Amendment, without applying any heightened scrutiny.<sup>57</sup> In 2016, an en banc panel of the Ninth Circuit reached the same conclusion in *Peruta v. County of San Diego*.<sup>58</sup> The Ninth Circuit

<sup>49</sup> *Culp v. Raoul*, No. 17-2998, 2019 U.S. App. LEXIS 10837 (7th Cir. Apr. 12, 2019); *Culp v. Madigan*, 840 F.3d 400 (7th Cir. 2016).

<sup>50</sup> *Embodry v. Cooper*, 2013 Tenn. App. LEXIS 343 (Tenn. Ct. App. May 22, 2013).

<sup>51</sup> *Norman v. State*, 215 So. 3d 18, 28 (Fla. 2017); *Flanagan v. Harris*, No. 16-cv-06164, 2018 U.S. Dist. LEXIS 82844, at \*28 (C.D. Cal. May 7, 2018), *appeal docketed*, No. 18-55717 (9th Cir. Jun. 4, 2018); *Gottwalt v. Oxtan*, No. 16-1098, 2017 U.S. Dist. LEXIS 46908 (D. Minn. Mar. 28, 2017); *Nichols v. Brown*, No. CV 11-09916, 2013 U.S. Dist. LEXIS 96425 (C.D. Cal. Jul. 3, 2013); *Nichols v. Harris*, 17 F. Supp. 3d 989 (C.D. Cal. 2014), *report & recommendation adopted by* 17 F. Supp. 3d 989 (C.D. Cal. 2014), *appeal docketed*, No. 14-55873 (9th Cir. May 29, 2014).

<sup>52</sup> *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Kachalsky v. Cty. 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. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc); *Peterson v. Martinez*, 707 F.3d 1197 (10th Cir. 2013). The exceptions are the Seventh Circuit, which struck down Illinois’ total prohibition on the public carry of firearms in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), and the D.C. Circuit, which invalidated a District of Columbia law requiring concealed carry permit applicants to show a “special need for self-protection” in *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

<sup>53</sup> *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 86 (2d Cir. 2012) (quotations and citations omitted).

<sup>54</sup> *Id.* at 89, 98-99.

<sup>55</sup> *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013).

<sup>56</sup> *Peterson v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013).

<sup>57</sup> *Id.* at 1212 (“[B]ecause we conclude that the concealed carrying of firearms falls outside the scope of the Second Amendment’s guarantee, Peterson’s Second Amendment claim was properly subject to summary judgment.”).

<sup>58</sup> *Peruta v. Cty. of San Diego*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc) (“[T]he 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.”).

upheld California’s requirement that a person show “good cause” for a concealed carry permit after finding, as the Tenth Circuit did, that the Second Amendment does not protect the right of members of the general public to carry concealed firearms in public.<sup>59</sup>

The Seventh Circuit reached a different conclusion from the courts above,<sup>60</sup> but significantly, that court was considering an Illinois law that amounted to a blanket ban on *all* carrying of guns in public by *all* persons. Illinois was one of the last jurisdictions to completely prohibit the public carry of firearms.<sup>61</sup> In 2012, the Seventh Circuit struck down Illinois’ law that entirely banned the carrying of loaded and accessible guns in public, calling it “the most restrictive gun law of any of the 50 states.”<sup>62</sup> But in striking down the law, the Seventh Circuit was careful to note that Illinois has many policy options available to it to regulate the carry of firearms in public, including discretionary permit systems.<sup>63</sup> After the Seventh Circuit’s decision was issued, Illinois adopted a new public carry licensing system, which has already survived multiple legal challenges.<sup>64</sup>

In a decision from 2018 that is now non-precedential, a divided Ninth Circuit panel used similar reasoning as the Seventh Circuit to sustain a Second Amendment challenge to Hawaii’s public carry permitting laws—which the panel determined were applied so restrictively that the laws operated like the total ban on public carry that the Seventh Circuit struck down.<sup>65</sup> However, after the panel’s decision, the Hawaii Attorney General issued an opinion clarifying that Hawaii’s permitting system is not a total ban and noting ways in which the panel had misconstrued the state’s open carry law.<sup>66</sup> The Ninth Circuit later granted Hawaii’s petition for *en banc* rehearing by an 11-judge panel.<sup>67</sup> This means the original panel opinion may “not be cited as precedent by or to any court of the Ninth Circuit”<sup>68</sup> and the outcome in *Young* is uncertain until the Ninth Circuit rehears the case *en banc*.

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<sup>59</sup> *Id.*; but see *Young v. Hawaii*, 896 F.3d 1044, 1070 (9th Cir. 2018) (concluding that the Second Amendment protects *open* carry, and that “the right to carry a firearm openly for self-defense falls within the core of the Second Amendment”), *petition for en banc reh’g granted*, 915 F.3d 681 (9th Cir. Feb. 8, 2019).

<sup>60</sup> *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012).

<sup>61</sup> See *id.* at 940 (“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”). The District of Columbia and the Commonwealth of the Northern Mariana Islands also maintained bans on carrying firearms outside the home relatively recently, until district courts in each jurisdiction issued decisions striking down the bans. See *Palmer v. District of Columbia*, 59 F. Supp. 3d 173, 183 (D.D.C. 2014) (striking down the District’s “complete ban on the carrying of handguns in public,” while recognizing that the District could “adopt[] a licensing mechanism consistent with constitutional standards”); *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684, \*76-77 (D. N. Mar. I. Sept. 28, 2016) (following the Seventh Circuit’s decision in *Moore* and sustaining a Second Amendment challenge to the Commonwealth of the Northern Mariana Islands’ public carry ban.).

<sup>62</sup> *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012).

<sup>63</sup> *Id.* at 940-42.

<sup>64</sup> *Berron v. Ill. Concealed Carry Licensing Review Bd.*, 825 F.3d 843 (7th Cir. 2016) (upholding aspects of Illinois’ concealed carry permitting regime); *Culp v. Raoul*, No. 17-2998, 2019 U.S. App. LEXIS 10837 (7th Cir. Apr. 12, 2019) (upholding Illinois rules prohibiting concealed carry permit applications from most out-of-state residents); *Culp v. Madigan*, 840 F.3d 800 (7th Cir. 2016) (affirming denial of a preliminary injunction in same challenge to non-resident application ban); *Jankovich v. Ill. State Police*, 2017 IL App (1st) 160706 (Ill. Ct. App. 2017) (a discretionary denial of an Illinois concealed carry permit, based on police officers’ objections that the applicant is dangerous, does not violate the Second Amendment).

<sup>65</sup> *Young v. Hawaii*, 896 F.3d 1044, 1070-71 (9th Cir. 2018), *petition for en banc reh’g granted*, 915 F.3d 681 (9th Cir. Feb. 8, 2019).

<sup>66</sup> State of Haw., Dep’t of the Att’y Gen., Opinion Letter No. 18-1, Availability of Unconcealed-Carry Licenses (Sept. 11, 2018), available at <https://ag.hawaii.gov/wp-content/uploads/2018/09/AG-Opinion-No.-18-1.pdf>.

<sup>67</sup> *Young v. Hawaii*, 915 F.3d 681 (9th Cir. Feb. 8, 2019) (granting petition for rehearing *en banc*).

<sup>68</sup> *Id.*

The narrow scope of the Seventh Circuit's ruling, and the uncertain status of the Ninth Circuit panel's ruling, means that the true outlier decision in this area is *Wrenn v. District of Columbia*, where a divided D.C. Circuit panel struck down the District's "good cause" law. Like the laws in California, New Jersey, Maryland, and New York that had previously been upheld in other circuits, the District's law limited the concealed carrying of loaded handguns to people who could show a heightened need for self-defense.<sup>69</sup> The *Wrenn* panel held that responsible, law-abiding citizens have a broad Second Amendment right to carry guns in public that is "on par" with the right to keep a gun in the home, and which cannot be cabined through a "good cause" law.<sup>70</sup> The panel's conclusion contradicts the historical evidence (relied on by other courts) that the carrying of loaded, concealed weapons has long been seen as uniquely dangerous and more stringently regulated than home possession of firearms—and even prohibited in many early laws.<sup>71</sup>

The decision in *Wrenn* would have been a strong candidate for Supreme Court review, because it created a circuit split on the important issue of regulating loaded firearms carried on city streets. However, after the D.C. Circuit denied the District's petition for rehearing *en banc*, the District declined to seek Supreme Court review. For this reason, *Wrenn* remains an outlier opinion, impacting only the District of Columbia. Contrary case law remains in place in other circuits, including the four decisions upholding statewide "good cause" laws. *Wrenn* makes it more likely the Supreme Court will someday consider the constitutionality of a law regulating the public carry of firearms, but it remains to be seen if and when the Court will take up the issue.

## **B. PARTICULARLY DANGEROUS WEAPONS AND AMMUNITION**

As mentioned above, in *Heller*, the Supreme Court noted that one limitation on the Second Amendment right is "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'"<sup>72</sup> The Court acknowledged that "weapons that are most useful in military service—M-16 rifles and the like—may be banned" without violating the Second Amendment.<sup>73</sup> The Court also recognized that its prior decision in *Miller* explained that the weapons protected by the Second Amendment are those "in common use at the time"; *Miller* held that for this reason, short-barreled shotguns are unprotected.<sup>74</sup>

Seizing upon *Heller*'s citation to *Miller*, gun lobby lawyers have urged courts to rely *solely* on a broad version of what has become known as the "common use" test when deciding whether a dangerous weapon or accessory may be regulated consistently with the Second Amendment. Under the gun lobby's proposed standard, once any gun or accessory achieves a sufficient market share that it can be considered "common," it becomes constitutionally immune from regulation. In a dissent from the denial of certiorari in *Friedman v. City of Highland Park*, Supreme Court Justices Scalia and Thomas appeared to endorse this version of the common use test, and

<sup>69</sup> *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (under the challenged law, applicants must show a "good reason to fear injury," meaning a "special need for self-protection distinguishable from the general community").

<sup>70</sup> *Id.* at 663–67.

<sup>71</sup> This historical evidence was highlighted in *Heller* itself, when the Supreme Court observed that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller*, 554 U.S. at 626.

<sup>72</sup> *Heller*, 554 U.S. at 627.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (citing *United States v. Miller*, 307 U.S. 174, 179 (1939)).

suggested that under the test, civilians have a Second Amendment right to possess assault weapons simply because they are somewhat popular among gun owners.<sup>75</sup>

But Justices Scalia and Thomas wrote in dissent, suggesting other justices may not find the common use test dispositive in challenges to assault weapon regulations. And many lower courts to consider challenges to restrictions on civilian possession of military-style firearms and accessories—including assault weapons and large-capacity magazines—have rejected the argument that weapons in “common use” (however measured) are constitutionally immune from regulation. Some have observed that the test is problematic because it is unclear how popular weapons must be to be “common,”<sup>76</sup> and further, the test is illogical, because it would only allow governments to restrict access to those weapons that are uncommon because they are already prohibited.<sup>77</sup> Others have noted that in addition to referencing arms in “common use,” *Heller* stated that protected arms are those “typically possessed by law-abiding citizens for lawful purposes.”<sup>78</sup> This means challengers may need evidence about typical *possession*—not just sales or manufacturing figures evidencing commonality—in order to show that a particular class of arms is protected under the Second Amendment.<sup>79</sup>

Many courts have held that, even if a weapon is in “common use” or “typically possessed,” that does not end the inquiry. Instead, they have determined that even if a gun is commonly owned and typically possessed, so presumptively within the scope of the Second Amendment, courts must still apply heightened scrutiny to assess the constitutionality of the law at issue. Using assault weapons and large-capacity magazines as an example, in

<sup>75</sup> *Friedman v. City of Highland Park*, 136 S. Ct. 447, 449 (2015) (Thomas, J., dissenting from the denial of certiorari) (“The City’s ban is thus highly suspect because it broadly prohibits common semiautomatic firearms used for lawful purposes. Roughly five million Americans own AR-style semiautomatic rifles. (citation omitted) The overwhelming majority of citizens who own and use such rifles do so for lawful purposes, including self-defense and target shooting. (citation omitted) Under our precedents, that is all that is needed for citizens to have a right under the Second Amendment to keep such weapons.”); *but see Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (“The record shows that perhaps 9% of the nation’s firearms owners have assault weapons, but what line separates ‘common’ from ‘uncommon’ ownership is something the [Supreme] Court did not say.”).

<sup>76</sup> *E.g., Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017) (en banc), *cert. denied*, 2017 U.S. LEXIS 7002 (U.S. Nov. 27, 2017) (“[T]he *Heller* decision raises various questions. Those include: How many assault weapons and large-capacity magazines must there be to consider them ‘in common use at the time’? In resolving that issue, should we focus on how many assault weapons and large-capacity magazines are owned; or on how many owners there are; or on how many of the weapons and magazines are merely in circulation? Do we count the weapons and magazines in Maryland only, or in all of the United States?”); *Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (“[W]hat line separates ‘common’ from ‘uncommon’ ownership is something the [Supreme] Court did not say.”).

<sup>77</sup> *E.g., Friedman v. City of Highland Park*, 784 F.3d 406, 409 (7th Cir. 2015) (“relying on how common a weapon is at the time of litigation would be circular to boot. Machine guns aren’t commonly owned for lawful purposes today because they are illegal; semi-automatic weapons with large-capacity magazines are owned more commonly because, until recently (in some jurisdictions), they have been legal. Yet it would be absurd to say that the reason why a particular weapon can be banned is that there is a statute banning that it, so that it isn’t commonly owned. A law’s existence can’t be the source of its own constitutional validity.”).

<sup>78</sup> *See Heller*, 554 U.S. at 625 (“We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.”); *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254-55 (2d Cir. 2015) (citing *Heller* for proposition that “[t]he Second Amendment protects only ‘the sorts of weapons’ that are (1) ‘in common use’ and (2) ‘typically possessed by law-abiding citizens for lawful purposes’”) (emphasis added); *Commonwealth v. Cassidy*, 479 Mass. 527, 528 (2018) (Mass. 2018) (the Second Amendment “does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes”).

<sup>79</sup> *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 256 (2d Cir. 2015) (“While ‘common use’ is an objective and largely statistical inquiry, ‘typical[] possess[ion]’ requires us to look into both broad patterns of use and the subjective motives of gun owners”); *see also Avitabile v. Beach*, 2017 U.S. Dist. LEXIS 163338 (N.D.N.Y. Sept. 28, 2017) (applying approach from *N.Y. State Rifle & Pistol Ass’n* and declining to hold that stun guns are in common use or typically possessed based on the evidence presented in preliminary injunction motion).



the vast majority of cases, courts have upheld laws restricting these weapons and accessories after assuming common use, but then applying intermediate scrutiny or a similar test.<sup>80</sup> In other cases, instead of applying intermediate scrutiny, courts have resolved challenges at step one of the two-step analysis, by relying on *Heller*'s recognition that "M-16 rifles and the like" may permissibly be banned. These courts have upheld prohibitions on the civilian possession of assault weapons by reasoning that these are "like" the machine guns that *Heller* expressly permits prohibiting, because "the AR-15 [ ] is simply the semiautomatic version of the M16 rifle used by our military and others around the world."<sup>81</sup>

In addition to upholding restrictions on assault weapons and large-capacity magazines, courts have upheld laws banning other particularly dangerous weapons, as well. These include laws:

- Prohibiting the possession, sale, and manufacture of machine guns and requiring registration of machine guns already in circulation;<sup>82</sup>

<sup>80</sup> *Worman v. Healey*, No. 18-1545, 2019 U.S. App. LEXIS 12588 (1st Cir. Apr. 26, 2019) (upholding Massachusetts law prohibiting possession of assault weapons and large-capacity magazines); *Ass'n of N.J. Rifle & Pistol Clubs v. Grewal*, 910 F.3d 106 (3d Cir. 2018) (affirming denial of preliminary injunction in challenge to New Jersey law prohibiting possession of large-capacity magazines, determining law is constitutional under the Second Amendment); *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261-64 (2d Cir. 2015) (New York and Connecticut laws prohibiting possession of assault weapons and large-capacity magazines survive intermediate scrutiny and 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 magazines, after examining evidence including that "linking the availability of assault weapons to gun-related homicides"); *Heller v. District of Columbia ("Heller II")*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011) (upholding the District's ban on assault weapons and large capacity ammunition magazines after applying intermediate scrutiny); *Edlund v. Cook Cnty.*, 17-7002, 2018 U.S. Dist. LEXIS 130507 (N.D. Ill. Aug. 3, 2018); *Colo. Outfitters Ass'n v. Hickenlooper*, 24 F. Supp. 3d 1050 (D. Colo. 2014), *vacated on other grounds*, 823 F.3d 537 (10th Cir. Colo., Mar. 22, 2016); *see also Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015) (affirming denial of preliminary injunction in challenge to local law prohibiting large-capacity magazine possession); *Wiese v. Becerra*, 306 F. Supp. 3d 1190 (E.D. Cal. 2018) (granting motion to dismiss Second Amendment challenge to California law prohibition possession of large-capacity magazines); *but see Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. Mar. 29, 2019) (granting permanent injunction in Second Amendment challenge to same California large-capacity magazine possession ban, and finding California's magazine regulations unconstitutional in their entirety), *judgment stayed in part*, No. 17-1017 (S.D. Cal. Apr. 4, 2019), ECF No. 97, 2019 U.S. Dist. LEXIS 63045, *appeal docketed*, No. 19-5537 (9th Cir. Apr. 4, 2019); *Duncan v. Becerra*, No. 17-56081, 2018 U.S. App. LEXIS 19690 (9th Cir. Jul. 17, 2018) (unpublished) (divided, unpublished opinion affirming district court's earlier preliminary injunction order under the abuse of discretion standard, without opining on the merits of Second Amendment challenge to California law prohibiting large-capacity magazine possession).

<sup>81</sup> *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017) (en banc), *cert. denied*, 2017 U.S. LEXIS 7002 (U.S. Nov. 27, 2017) ("Because the banned assault weapons and large capacity magazines are 'like' 'M-16 rifles'—'weapons that are most useful in military service'—they are among those arms that the Second Amendment does not shield."); *Commonwealth v. Cassidy*, 479 Mass. 527, 528 (2018) (Mass. 2018) (assault weapons ban is constitutional because it "is more similar to the restriction on short-barreled shotguns upheld in *United States v. Miller*, 307 U.S. 174, 178 (1939), than the handgun ban overturned in *Heller*"); *Worman v. Healey*, 293 F. Supp. 3d 251, 266 (D. Mass. Apr. 5, 2018) ("[B]ecause the undisputed facts convincingly demonstrate that AR-15s and LCMs are most useful in military service, they are beyond the scope of the Second Amendment."), *aff'd on other grounds*, No. 18-1545, 2019 U.S. App. LEXIS 12588 (1st Cir. Apr. 26, 2019); *People v. Zondorak*, 220 Cal. App. 4th 829, 836 (Cal. Ct. App. 2013) ("assault weapons are only slightly removed from M-16-type weapons that *Heller*" concluded were outside the Second Amendment); *People v. James*, 174 Cal. App. 4th 662, 677 (Cal. Ct. App. 2009) (assault weapons fall outside the scope of the Second Amendment because they are "at least as dangerous and unusual as the short-barreled shotgun"); *see also Kampf v. Cuomo*, 993 F. Supp. 2d 188, 195-196, 195 n.10 (N.D.N.Y. 2014) (upholding New York's assault weapons ban by finding it does not substantially burden Second Amendment rights).

<sup>82</sup> *Hollis v. Lynch*, 827 F.3d 436 (5th Cir. 2016); *Watson aka United States v. One (1) Palmetto State Armory PA-15 Machinegun Receiver/Frame*, 822 F.3d 136 (3rd Cir. 2016); *United States v. Henry*, 688 F.3d 637 (9th Cir. 2012); *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008); *see also Bezet v. United States*, 2017 U.S. App. LEXIS 21395 (5th Cir. Oct. 27, 2017) (unpublished).

- Prohibiting the sale of “particularly dangerous ammunition” that has no sporting purpose;<sup>83</sup>
- Prohibiting the possession of silencers, short-barreled shotguns, grenades, pipe bombs, and mines;<sup>84</sup>
- Requiring registration and taxation of short-barreled shotguns and silencers;<sup>85</sup>
- Requiring owners to register assault weapons, including by providing the date they acquired their weapon and the source from whom they bought their weapon;<sup>86</sup>
- Forbidding the possession of a firearm with an obliterated serial number;<sup>87</sup>
- Prohibiting the carrying of a concealed dirk or dagger outside of the home;<sup>88</sup> and
- Prohibiting the possession of switchblades or gravity knives.<sup>89</sup>

### C. POSSESSION OF FIREARMS BY CRIMINALS

Another significant policy courts have near-uniformly upheld is prohibitions on gun possession by criminals. Courts have repeatedly upheld laws banning gun possession by people convicted of felonies and some misdemeanors, including domestic violence crimes. Courts have rejected most challenges to laws prohibiting:

- Possession of firearms by persons convicted of felonies;<sup>90</sup>

<sup>83</sup> *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014).

<sup>84</sup> See *United States v. Cox*, 906 F.3d 1170, 1185-86 (10th Cir. 2018) (short-barreled shotguns and silencers are not within the scope of the Second Amendment); *United States v. McCartney*, 357 Fed. Appx. 73, 76 (9th Cir. 2009) (unpublished) (“Silencers, grenades, and directional mines are not ‘typically possessed by law-abiding citizens for lawful purposes’ (citation omitted) 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 ... was referring to pipe bombs.”).

<sup>85</sup> *United States v. Cox*, 906 F.3d 1170 (10th Cir. 2018); *United States v. Stepp-Zafft*, No. 17-1558, 2018 U.S. App. LEXIS 12341 (8th Cir. May 11, 2018) (unpublished).

<sup>86</sup> *Rupp v. Becerra*, No. 17-cv-00746, 2018 U.S. Dist. LEXIS 80388, \*35-36 (C.D. Cal. May 9, 2018).

<sup>87</sup> *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010).

<sup>88</sup> *People v. Mitchell*, 209 Cal. App. 4th 1364 (2012).

<sup>89</sup> E.g., *Commonwealth v. Battle*, 2017 Pa. Super. Unpub. LEXIS 908 (Super. Ct. Pa. Mar. 9, 2017) (statute prohibiting possession of switchblades and automatic knives does not violate the Second Amendment); *People v. Sosa-Lopez*, 54 Misc. 3d 545 (N.Y. City Crim. Ct. Nov. 10, 2016) (gravity knife ban does not violate the Second Amendment).

<sup>90</sup> *United States v. Massey*, 849 F.3d 262 (5th Cir. 2017); *United States v. Swaggerty*, No. 16-6677, 2017 U.S. App. LEXIS 20656 (6th Cir. Oct. 18, 2017) (unpublished); *Baer v. Lynch*, 636 F. App'x 695, 698 (7th Cir. 2016) (unpublished); *United States v. Shields*, 789 F.3d 733 (7th Cir. 2015); *United States v. Bogle*, 717 F.3d 281 (2d Cir. 2013) (per curiam); *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. Barton*, 633 F.3d 168 (3d Cir. 2011); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Carey*, 602 F.3d 738, 741 (6th Cir. 2010); *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010); *United States v. Rozier*, 598 F.3d 768 (11th Cir. 2010); *United States v. Anderson*, 559 F.3d 348 (5th Cir. 2009); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009); *United States v. Berroth*, 2015 U.S. Dist. LEXIS 127750, at \*19 (D.

- Possession of firearms by persons convicted of felony crimes alleged to be non-violent;<sup>91</sup>
- Possession of firearms by persons convicted of domestic violence misdemeanors;<sup>92</sup>
- Possession of firearms during the scope of employment by anyone working for a convicted felon (such as a bodyguard);<sup>93</sup>
- Providing a firearm to a fugitive felon;<sup>94</sup>
- Possession of firearms by an individual who is under indictment for a felony;<sup>95</sup>
- Possession of firearms by an unlawful user of a controlled substance, or a category of individuals reasonably believed to be controlled substance users;<sup>96</sup> and

Kan. Sept 23, 2015); *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); *State v. Merritt*, 467 S.W.3d 808 (Mo. 2015); *State v. Eberhardt*, 145 So. 3d 377 (La. 2014); *State v. Craig*, 826 N.W.2d 789 (Minn. 2013); *Pohlabel v. Nevada*, 268 P.3d 1264 (Nev. 2012); *People v. Swanigan*, No. 330271, 2017 Mich. App. LEXIS 567 (Mich. App. Ct. Apr. 11, 2017) (unpublished); *Wisconsin v. Pocian*, 2012 WI App 58 (Wis. Ct. App. 2012); *People v. Spencer*, 2012 IL App (1st) 102094 (Ill. Ct. App. 2012); see also *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013) (upholding federal prohibition on gun ownership for people convicted of certain common law misdemeanors without a set sentence length); *Chardin v. Police Comm'r of Boston*, 465 Mass. 314 (Mass. 2013) (upholding prohibition on issuance of firearm carry permits to people adjudicated as juvenile delinquents for felony offenses).

<sup>91</sup> *Kanter v. Barr*, 919 F.3d 437, 438 (7th Cir. 2019) (application of felon-possession ban to challenger who committed felony Medicare fraud does not violate the Second Amendment); *Medina v. Whitaker*, 913 F.3d 152 (D.C. Cir. 2019) (application of federal felon-possession ban to challenger with 27-year-old conviction for mortgage fraud does not violate the Second Amendment); *Hamilton v. Pallozzi*, 848 F.3d 614 (4th Cir. 2017) (application of Maryland felon-possession ban to challenger with credit card fraud convictions does not violate Second Amendment), *cert. denied*, 2017 U.S. LEXIS 7187 (U.S. Dec. 4, 2017); *United States v. Phillips*, 827 F.3d 1171 (9th Cir. 2016) (application of federal felon-possession ban to allegedly non-violent felon does not violate Second Amendment); *United States v. Torres-Rosario*, 658 F.3d 110, 112 (1st Cir. 2011) (application of federal felon-possession ban to felon convicted of a nonviolent drug crime does not violate Second Amendment); *Michaels v. Lynch*, 2017 U.S. Dist. LEXIS 11563, at \*17 (D. Nev. Jan. 26, 2017) (even non-violent “felons are categorically different from individuals who have a fundamental right to bear arms”), *aff’d sub nom. Michaels v. Sessions*, 2017 U.S. App. LEXIS 22097 (9th Cir. Nov. 3, 2017) (unpublished).

<sup>92</sup> *E.g., Stimmel v. Sessions*, 879 F.3d 198 (6th Cir. 2018); *Fisher v. Kealoha*, 855 F.3d 1067 (9th Cir. 2017); *Fortson v. L.A. City Attorney’s Office*, 852 F.3d 1190 (9th Cir. 2017), *cert. denied*, 199 L. Ed. 2d 48 (U.S. 2017); *Enos v. Holder*, 858 Fed. App’x 447 (9th Cir. 2014) (unpublished); *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013), *vacated and remanded on other grounds*, 134 S. Ct. 1759 (2014); *United States v. Chovan*, 735 F.3d 1127, 1139–41 (9th Cir. 2013); *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc); *United States v. Chester*, 847 F. Supp. 2d 902 (S.D. W. Va. 2012), *aff’d*, 514 Fed. Appx. 393 (4th Cir. 2013) (per curiam) (unpublished); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011); *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).

<sup>93</sup> *United States v. Weaver*, 2012 U.S. Dist. LEXIS 29613 (S.D. W. Va. Mar. 7, 2012).

<sup>94</sup> *United States v. Stegmeier*, 701 F.3d 574 (8th Cir. 2012).

<sup>95</sup> *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).

<sup>96</sup> See, e.g., *Wilson v. Lynch*, 835 F.3d 1083 (9th Cir. 2016); *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (per curiam); *United States v. Seay*, 620 F.3d 919 (8th Cir. 2010); *United States v. Westley*, No. 17-cr-171, 2018 U.S. Dist. LEXIS 64009 (D. Conn. Apr. 17, 2018); *United States v. Conrad*, 923 F. Supp. 2d 843 (W.D. Va. 2013); *United States v. Emond*, 2012 U.S. Dist. LEXIS 149295 (D. Me. Oct. 17, 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).

- Possession of firearms during the commission of a crime.<sup>97</sup>

Courts have also rejected challenges to sentence enhancements for criminals who possessed firearms while engaging in illegal activity.<sup>98</sup> The courts have explained these decisions by citing the statements in *Heller* and *McDonald* that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons” and that such measures are “presumptively lawful.”<sup>99</sup>

Despite the near-uniformity of decisions rejecting challenges to these gun laws, a few outlier lower courts have taken a different approach. A federal district court in Illinois, for example, 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.<sup>100</sup> 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.<sup>101</sup> And an Ohio trial court dismissed, on Second Amendment grounds, a criminal 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.”<sup>102</sup>

In 2016, the *en banc* Third Circuit sustained two as-applied Second Amendment challenges to the federal law prohibiting gun possession by felons, though the court issued a badly fractured decision with no unified rationale.<sup>103</sup> Since that decision, a few district courts have sustained an as-applied Second Amendment

<sup>97</sup> *United States v. Jackson*, 555 F.3d 635 (7th Cir. 2009) (no Second Amendment right to possess a firearm during commission of a felony); *People v. Kelly*, 2018 IL App (1st) 162334 (Ill. Ct. App. Dec. 12, 2018) (no Second Amendment right to possess a firearm during misdemeanor drug offense); *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 (D.S.C. June 27, 2014); *Roberge v. United States*, 2013 U.S. Dist. LEXIS 113014 (E.D. Tenn. Aug. 12, 2013); *State v. Tucker*, 181 So. 3d 590 (La. 2015).

<sup>98</sup> 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 510 (6th Cir. 2012); *United States v. Xiao Cheng Mei*, No. 14-cr-00196, 2017 U.S. Dist. LEXIS 198232 (N.D. Cal. Dec. 1, 2017); *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).

<sup>99</sup> *Heller*, 554 U.S. at 626–27; see also, e.g., *United States v. Moore*, 666 F.3d 313, 317–20 (4th Cir. 2012) (collecting cases relying on this language to uphold federal felon-in-possession ban and noting the Fourth Circuit’s own reliance on it when upholding bans on firearm possession by persons convicted of domestic violence misdemeanors).

<sup>100</sup> *Gowder v. City of Chicago*, 923 F. Supp. 2d 1110, 1117, 1125 (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 misdemeanor, like Gowder, poses a risk to society analogous to that of a felon or a violent misdemeanor . . . the Chicago Firearm Ordinance violates Gowder’s constitutional rights under the Second Amendment.”).

<sup>101</sup> *United States v. Arzberger*, 592 F. Supp. 2d 590, 603 (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”); 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).

<sup>102</sup> *Ohio v. Thomas*, No. CR-09-526776-A (Cuyahoga Cty., Ohio Ct. Com. Pl. Dec. 7, 2010).

<sup>103</sup> *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (*en banc*), *cert. denied*, 2017 U.S. LEXIS 4091 (Jun. 26, 2017).

challenges to lifetime firearm possession prohibitions,<sup>104</sup> while others have allowed such challenges to proceed past a motion to dismiss.<sup>105</sup> These decisions represent a small minority of courts, and they apply only to particular people who are able to show that their personal circumstances potentially warrant lifting a lifetime firearms prohibition. As discussed above, the vast majority of courts have upheld laws limiting or banning gun possession by persons convicted of crimes, including in as-applied challenges.<sup>106</sup>

#### **D. POSSESSION OF FIREARMS BY OTHER DANGEROUS PEOPLE**

Besides finding that laws prohibiting firearm possession by convicted criminals do not offend the Second Amendment, courts have also routinely upheld prohibitions that apply to other categories of persons determined to be irresponsible with firearms or pose a threat to public safety. In particular, courts have upheld laws:

- Prohibiting the possession of firearms by individuals who have been involuntarily committed to a mental institution;<sup>107</sup>

<sup>104</sup> *Miller v. Sessions*, 356 F. Supp. 3d 472 (E.D. Pa. 2019); *Holloway v. Sessions*, No. 17-81, 2018 U.S. Dist. LEXIS 168996 (M.D. Pa. Sep. 28, 2018); *Clark v. Sessions*, No. 16-1804, 2018 U.S. Dist. LEXIS 141441 (W.D. Pa. Aug. 21, 2018); *Hatfield v. Sessions*, No. 16-cv-00383, 2018 U.S. Dist. LEXIS 70431 (S.D. Ill. Apr. 26, 2018), *appeal docketed*, No. 18-2385 (7th Cir. Jun. 26, 2018).

<sup>105</sup> *E.g., Corcoran v. Sessions*, 2017 U.S. Dist. LEXIS 123023 (D. Md. Aug. 3, 2017) (denied motion to dismiss complaint alleging that federal felon-in-possession ban is unconstitutional as applied to plaintiff with 40-year old misdemeanor conviction for “unauthorized use of a vehicle”; case was later dismissed by stipulation); *Zedonis v. Lynch*, 2017 U.S. Dist. LEXIS 17417 (M.D. Pa. Feb. 8, 2017) (denied motion to dismiss complaint alleging that felon-in-possession ban is unconstitutional as-applied to plaintiff with 2005 DUI conviction; case is ongoing); *Baginski v. Lynch*, 2017 U.S. Dist. LEXIS 8603 (D.D.C. Jan. 23, 2017) (denied motion to dismiss complaint alleging that felon-in-possession ban is unconstitutional as-applied to plaintiff convicted of a DUI in 2004; case was later dismissed by stipulation); *see also Doe v. Wolf*, 2017 U.S. Dist. LEXIS 134853 (E.D. Pa. Aug. 23, 2017) (denied motion to dismiss due process and Second Amendment challenge to Pennsylvania law prohibiting firearm possession by people who have been involuntarily committed on an emergency basis); *Doe I v. Evanchick*, No. 16-6039, 2019 U.S. Dist. LEXIS 5590 (E.D. Pa. Jan. 10, 2019) (rejecting same due process challenge on the merits at summary judgment).

<sup>106</sup> *See, e.g., Stimmel v. Sessions*, 879 F.3d 198 (6th Cir. 2018); *Alpert v. State*, 2018 Mo. LEXIS 94 (Mo. Apr. 3, 2018) (en banc); *People v. Martin*, 2018 IL App (1st) 152249 (Ill. Ct. App. Jun. 22, 2018); *Harley v. Barr*, No. 1:18-96, 2019 U.S. Dist. LEXIS 66056 (E.D. Va. Apr. 16, 2019); *Williams v. Barr*, No. 17-2641, 2019 U.S. Dist. LEXIS 55099 (E.D. Pa. Apr. 1, 2019); *Baumiller v. Sessions*, No. 17-1381, 2019 U.S. Dist. LEXIS 36559 (W.D. Pa. Mar. 7, 2019); *Laudenslager v. Sessions*, No. 17-00330, 2019 U.S. Dist. LEXIS 23213 (M.D. Pa. Feb. 13, 2019); *United States v. Triggs*, 347 F. Supp. 3d 385, 389 (W.D. Wis. 2018); *United States v. Brooks*, No. 17-250, 2018 U.S. Dist. LEXIS 159793 (W.D. Pa. Sep. 18, 2018); *Tripodi v. Sessions*, No. 18-2482, 2018 U.S. Dist. LEXIS 153559 (E.D. Pa. Sep. 10, 2018); *United States v. Irving*, No. 14-cr-520-5, 2018 U.S. Dist. LEXIS 125799 (E.D. Pa. July 27, 2018); *King v. Sessions*, No. 17-cv-884, 2018 U.S. Dist. LEXIS 100501 (E.D. Pa. Jun. 15, 2018); *United States v. Harvey*, 16-cr-109, 2018 U.S. Dist. LEXIS 97205 (N.D. Ind. Jun. 11, 2018); *Gurten v. Sessions*, No. 17-cv-1841, 2018 U.S. Dist. LEXIS 697 (E.D. Pa. Jan. 3, 2018); *Kanter v. Sessions*, No. 16-cv-1121, 2017 U.S. Dist. LEXIS 213181 (E.D. Wis. Dec. 29, 2017).

<sup>107</sup> *Doe I v. Evanchick*, No. 16-6039, 2019 U.S. Dist. LEXIS 5590 (E.D. Pa. Jan. 10, 2019) (rejecting facial due process challenge to Pennsylvania laws prohibiting gun possession after an involuntary emergency mental commitment); *Mai v. United States*, 2018 U.S. Dist. LEXIS 21020 (W.D. Wash. Feb. 8, 2018) (rejecting as-applied Second Amendment challenge to 18 U.S.C. § 922(g)(4), the federal law prohibiting firearm possession by persons who have been involuntarily committed to a mental institution); *Simpson v. Sessions*, 2017 U.S. Dist. LEXIS 71109 (E.D. Pa. May 10, 2017) (same); *Heendeniya v. St. Joseph’s Hosp. Health Ctr.*, 2015 U.S. Dist. LEXIS 160968, at \*38 (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.”); *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 the laws would also satisfy intermediate scrutiny); *cf. Keyes v. Lynch*, 195 F. Supp. 3d 702, 720 (M.D. Pa. 2016) (as-applied Second Amendment violation found where plaintiff was committed for eight days at age 15, and had since served in the military and



- Prohibiting gun possession by people subject to a domestic violence restraining order;<sup>108</sup>
- Authorizing the seizure of firearms in cases of domestic violence;<sup>109</sup>
- Prohibiting the possession of handguns by juveniles,<sup>110</sup> and restricting gun access by minors under 21;<sup>111</sup>
- Prohibiting or restricting the carrying of firearms by minors under 21;<sup>112</sup>
- Prohibiting gun possession after a dishonorable discharge from the military;<sup>113</sup>
- Prohibiting gun possession by individuals who pose an imminent risk of danger to self or others;<sup>114</sup> and
- Prohibiting firearm possession by aliens present in the country illegally.<sup>115</sup>

worked as a correctional officer); *Keyes v. Sessions*, 2017 U.S. Dist. LEXIS 168498 (M.D. Pa. Oct. 11, 2017) (as-applied Second Amendment violation found where plaintiff was committed in 2006 and subsequently authorized to use firearms as a state police officer).

<sup>108</sup> *United States v. Elkins*, 495 F. App'x 330 (4th Cir. 2012) (per curiam) (unpublished); *United States v. Chapman*, 666 F.3d 220 (4th Cir. 2012); *United States v. Mahin*, 668 F.3d 119 (4th Cir. 2012); *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); *United States v. Collins*, No. 18-cr-00068, 2018 U.S. Dist. LEXIS 105737 (S.D. W. Va. Jun. 5, 2018), *report & recommendation adopted by* 2018 U.S. Dist. LEXIS 104599 (S.D. W. Va. Jun. 22, 2018); *United States v. Mailoto*, No. 17-cr-0148, 2018 U.S. Dist. LEXIS 76263 (E.D. Wash. May 4, 2018); *United States v. Taylor*, 2017 U.S. Dist. LEXIS 112318, *report & recommendation adopted by* 2017 U.S. Dist. LEXIS 111895 (E.D. Wis. Jul. 19, 2017); *United States v. Harris*, 2016 U.S. Dist. LEXIS 19654 (E.D. Wis. Feb. 2, 2016); *United States v. Garretson*, 2013 U.S. Dist. LEXIS 154246 (D. Nev. June 12, 2013); *United States v. Gillman*, 2010 U.S. Dist. LEXIS 63453 (D. Utah June 24, 2010); *United States v. Erwin*, No. 07-CR-556, 2008 U.S. Dist. LEXIS 78148 (N.D.N.Y. Oct. 6, 2008); *United States v. Luedtke*, 2008 U.S. Dist. LEXIS 117970 (E.D. Wis. 2008); *see also United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (pre-*Heller*, holding that the Second Amendment protects an individual right to bear arms, but upholding the federal law prohibiting firearm possession by subject of a domestic violence restraining order); *Padgett v. Padgett*, No. 76543-4-I, 2018 Wash. App. LEXIS 2329, at \*11 (Ct. App. Oct. 15, 2018) ("A valid restraining order does not violate the Second Amendment right to bear arms."); *Webb v. Schlagal*, 2017 Tex. App. LEXIS 8331 (Tex. Ct. App. 2017) (rejecting Second Amendment challenge to lifetime restraining order, issued to protect a stalking victim, that prohibits possession of firearms for the duration of the order), *petition for review denied*, 2017 Tex. LEXIS 1127 (Dec. 8, 2017).

<sup>109</sup> *In re State for Forfeiture of Pers. Weapons & Firearms Identification Card Belonging to F.M.*, 225 N.J. 487 (N.J. 2016); *Crespo v. Crespo*, 201 N.J. 207 (N.J. 2010).

<sup>110</sup> *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009); *State ex rel. J.M.*, 144 So. 3d 853 (La. 2014).

<sup>111</sup> *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 714 F.3d 334 (5th Cir. 2013) (upholding law prohibiting federally licensed gun dealers from selling handguns to minors under 21); *People v. Jordan G.* 2015 IL 116834 (Ill. 2015) (upholding prohibition on handgun possession by minors under 21); *see also United States v. Mickle*, No. 2018 CF2 1671, 2018 D.C. Super. LEXIS 9 (D.C. Super. Ct. Oct. 29, 2018); *State ex rel. J.M.K.*, 2011 N.J. Super. Unpub. LEXIS 1346 (N.J. Ct. App. May 25, 2011) (per curiam) (unpublished).

<sup>112</sup> *Horsley v. Trame*, 808 F.3d 1126 (7th Cir. 2015); *Nat'l Rifle Ass'n of Am., Inc. v. McCraw*, 719 F.3d 338, 348 (5th Cir. 2013); *Powell v. Tompkins*, 926 F. Supp. 2d 367 (D. Mass. 2013).

<sup>113</sup> *United States v. Jimenez*, 895 F.3d 228 (2d Cir. 2018).

<sup>114</sup> *Hope v. State*, 163 Conn. App. 36, 43 (Conn. Ct. App. 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."); *Redington v. Indiana*, 992 N.E.2d 823 (Ind. Ct. App. 2013) (rejecting Second Amendment challenge to law that allows police officers to petition for a court order removing firearms from a person who is adjudged to be imminently dangerous).

<sup>115</sup> *United States v. Torres*, 911 F.3d 1253 (9th Cir. 2019) (upholding federal ban on possession of firearms by aliens unlawfully present in the US, under intermediate scrutiny); *United States v. Carpio-Leon*, 701 F.3d 974, 979 (4th Cir. 2012) ("illegal aliens do not belong to the class of law-abiding members of the political community to whom the Second Amendment gives protection"); *United States v. Portillo-Munoz*, 643



Courts have reached a different outcome in only limited circumstances. For example, when reviewing the federal law that prohibits gun possession by people who have been involuntarily committed to a mental institution, two courts departed from the categorical reasoning employed in the above decisions, suggesting that in some cases, the lifetime nature of that prohibition might violate the Second Amendment. Both cases involved as-applied challenges brought by plaintiffs who had been involuntarily committed many years ago; both plaintiffs alleged that they had since recovered from mental illness, but had no available means to restore their gun rights other than by bringing a Second Amendment challenge.<sup>116</sup>

In *Tyler v. Hillsdale County Sheriff's Department*, the *en banc* Sixth Circuit ruled that a 74-year-old plaintiff who was involuntarily committed thirty years ago after a difficult divorce could bring an as-applied challenge to the federal law prohibiting him from possessing firearms on the basis of his commitment.<sup>117</sup> A fractured majority of the court agreed that intermediate scrutiny governed the plaintiff's challenge, and the court remanded the case to the district court, explaining that in order to justify the lifetime ban under this standard, the government should present specific evidence either that the plaintiff is still mentally ill, or that a lifetime possession prohibition is necessary for all who have been involuntarily committed, regardless of how long ago it occurred.<sup>118</sup>

A district court in the Third Circuit went even further in a set of as-applied challenges, holding that two plaintiffs had, in fact, shown it was unconstitutional to prohibit them from possessing guns on the basis of mental commitments that occurred more than ten years ago.<sup>119</sup> One of the plaintiffs in *Keyes v. Lynch* was involuntarily committed when he was fifteen years old; after his commitment, plaintiff recovered, served in the army, and became a corrections officer. In both roles, he was permitted to possess and use firearms in his professional capacity, but not in his home, because of his prior commitment.<sup>120</sup> The other plaintiff, a state police officer, was committed in 2006 after a difficult divorce, and after he recovered was similarly authorized to use firearms on the job only.<sup>121</sup> In separate decisions, the court concluded these plaintiffs had "compellingly demonstrated" that they no longer pose a mental health-related threat, particularly because it is "illogical" that each plaintiff may now "possess firearms in his professional capacities but not . . . for protection in his own home."<sup>122</sup>

The above decisions suggest that in exceptional circumstances, courts may impose individualized exceptions to

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F.3d 437, 442 (5th Cir. 2011) ("the phrase 'the people' in the Second Amendment of the Constitution does not include" illegal aliens); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (Second Amendment does not protect "aliens illegally present in this country"); see also *Velazquez v. United States*, 2018 U.S. Dist. LEXIS 115872, \*23-25 (E.D. Tenn. Jul. 12, 2018); *United States v. Luviano-Vega*, 2010 U.S. Dist. LEXIS 98432, at \*5 (E.D.N.C. Sept. 19, 2010); *United States v. Lewis*, 2010 U.S. Dist. LEXIS 86409 (N.D. Ga. 2010); *United States v. Yanez-Vasquez*, 2010 U.S. Dist. LEXIS 8166 (D. Kan. January 28, 2010); *United States v. Solis-Gonzalez*, 2008 U.S. Dist. LEXIS 110133 (W.D.N.C. September 26, 2008).

<sup>116</sup> *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 682-83 (6th Cir. Sept. 15, 2016) (*en banc*) (noting that states may establish "a relief-from-disabilities program that allows individuals barred by § 922(g)(4) to apply to have their rights restored," but that plaintiff's home state of Michigan has not established such a program); *Keyes v. Lynch*, 195 F. Supp. 3d 702, 712 (M.D. Pa. 2016) (plaintiff's state, Pennsylvania, also does not have a qualifying relief program).

<sup>117</sup> *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (*en banc*).

<sup>118</sup> *Id.* at 699. The case was remanded to the Western District of Michigan, where plaintiff's challenge is still pending.

<sup>119</sup> *Keyes v. Lynch*, 195 F. Supp. 3d 702 (M.D. Pa. 2016) ("*Keyes I*"); *Keyes v. Sessions*, 2017 U.S. Dist. LEXIS 168498 (M.D. Pa. Oct. 11, 2017) ("*Keyes II*").

<sup>120</sup> *Keyes I*, 195 F. Supp. 3d at 706-08.

<sup>121</sup> *Keyes II*, 2017 U.S. Dist. LEXIS 168498 at \*1-\*2.

<sup>122</sup> *Keyes I*, 195 F. Supp. 3d at 722; see also *Keyes II*, 195 F. Supp. 3d at \*40-\*41.

the federal law that imposes a lifetime firearm ban on the basis of an involuntary mental commitment. Even then, the decisions do not cast doubt on the overall constitutionality of laws prohibiting gun possession by individuals whose mental illnesses or mental health history currently makes them a risk to themselves or others: the *Tyler* and *Keyes* decisions apply only to the specific plaintiffs in those cases, who alleged that their commitment took place many years ago, and who were required by the reviewing courts to show that they had recovered from mental illness. And, of course, the decisions do not cast doubt on the constitutionality of laws disarming other dangerous people, like domestic abusers or people subject to restraining orders.

## **E. COMMERCIAL SALE OF FIREARMS**

The Supreme Court stated in *Heller* that “laws imposing conditions and qualifications on the commercial sale of arms” are presumptively lawful regulatory measures that do not offend the Second Amendment.<sup>123</sup> Relying on this statement, courts have routinely upheld laws regulating the sale of guns and accessories, including laws:

- Prohibiting the sale of guns and ammunition to people younger than twenty-one;<sup>124</sup>
- Requiring a waiting period before firearms may be transferred to a purchaser, to discourage impulsive criminal acts and suicides;<sup>125</sup>
- 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;<sup>126</sup>
- Requiring firearm dealers to comply with zoning regulations that prohibit gun stores near schools, residential neighborhoods, and other sensitive places, or outside specified commercial districts;<sup>127</sup>

<sup>123</sup> *Heller*, 554 U.S. at 626-27.

<sup>124</sup> *Nat'l Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 700 F.3d 185 (5th Cir. 2012); see also *L.S. v. State*, 120 So. 3d 55 (Fla. Dist. Ct. App. 2013).

<sup>125</sup> *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016). Note that the court's rationale did not rest on the *Heller* presumption of lawfulness for conditions on the commercial sale of arms, but rather a determination that even assuming the presumption did not apply, waiting periods would satisfy intermediate scrutiny. See *id.* at 828 (noting that waiting periods serve an important function even for people who already own firearms, because “[a]n individual who already owns a hunting rifle, for example, may want to purchase a larger capacity weapon that will do more damage when fired into a crowd. A 10-day cooling-off period would serve to discourage such conduct and would impose no serious burden on the core Second Amendment right of defense of the home identified in *Heller*”). However, one judge would have relied solely on the *Heller* presumption to uphold the waiting period law. *Id.* at 829 (Thomas, J., concurring).

<sup>126</sup> *Peña v. Lindley*, No. 15-15449, 2018 U.S. App. LEXIS 21565 (9th Cir. Aug. 3, 2018) (upholding Second Amendment challenge to provisions of California's Unsafe Handgun Act, rejecting claim that purchasers “have a constitutional right to purchase a particular handgun”); *Draper v. Healey*, 98 F. Supp. 3d 77 (D. Mass. 2015) (upholding law requiring that handguns sold in Massachusetts contain a load indicator or magazine disconnect), *aff'd on other grounds by Draper v. Healey*, 827 F.3d 1 (1st Cir. 2016).

<sup>127</sup> *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc) (upholding gun dealer zoning ordinance that required dealers to be located at least 500 feet from residentially zoned districts, schools and day-care centers, other firearm retailers, and liquor stores); *Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 754 (N.D. Ill. 2015) (“Requiring an individual to drive to one part of a city as opposed to another in order to purchase a firearm does not, on its face, burden the core right to possess a firearm for protection”).

- Giving municipal zoning boards the authority to deny permits to build gun ranges;<sup>128</sup>
- Imposing a fee on all firearm sales conducted with a state;<sup>129</sup>
- Requiring out-of-state handgun purchases to be processed by an in-state dealer;<sup>130</sup> and
- Requiring a license to engage in firearms dealing.<sup>131</sup>

One federal circuit court, sitting *en banc*, has upheld a regulation of the commercial sale of arms—a gun dealer zoning law—on the grounds that the historical prevalence of laws regulating gun sales demonstrates that gun sellers do not have Second Amendment rights independent of their customers. In *Teixeira v. County of Alameda*, the Ninth Circuit rejected a Second Amendment challenge brought by plaintiffs seeking to open a gun store in a location that was off-limits under the county’s zoning ordinance. The court reviewed historical sources and held that the prospective sellers did not have a viable Second Amendment claim because they were unable to allege that the county’s ordinance prevented any potential customers from purchasing firearms within or near the county, where there are a reasonable number of gun stores already.<sup>132</sup>

## F. FIREARMS IN SENSITIVE PLACES

Courts have relied on similar reasoning to uphold laws prohibiting the carry of firearms in sensitive public areas. As with conditions on the commercial sale of firearms, “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” are among the presumptively lawful regulatory measures *Heller* recognized.<sup>133</sup> Since the *Heller* list is non-exhaustive,<sup>134</sup> courts have upheld laws prohibiting guns in a variety of sensitive public areas (in addition to schools and government buildings). Courts have also upheld such laws by applying intermediate scrutiny. Overall, under either approach, the vast majority of courts have upheld laws:

- Prohibiting the possession of firearms in school zones,<sup>135</sup>

<sup>128</sup> *Chi. Gun Club, LLC v. Vill. of Willowbrook*, No. 17-cv-6057, 2018 U.S. Dist. LEXIS 95340 (N.D. Ill. Jun. 6, 2018) (municipal zoning decision not to allow an indoor shooting range was “an example of a presumptively lawful ‘condition[] and qualification[] on the commercial sale of arms’ under *Heller*”); see also *Drummond v. Robinson Twp.*, No. 18-1127, 2019 U.S. Dist. LEXIS 10023 (W.D. Pa. Jan. 22, 2019).

<sup>129</sup> *Bauer v. Harris*, 94 F. Supp. 3d 1149, 1155 (E.D. Cal. 2015), *aff’d on other grounds by Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (upholding California’s \$19 Dealer Record of Sale (“DROS”) fee, and stating that the “fee is a condition on the sale of firearms” and therefore, “constitutional because it ‘falls outside the historical scope of the Second Amendment’”); see also *Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (upholding DROS fee under intermediate scrutiny, without deciding if fee falls outside the scope of the Second Amendment).

<sup>130</sup> *Mance v. Sessions*, No. 15-10311, 2018 U.S. App. LEXIS 20270 (5th Cir. July 20, 2018).

<sup>131</sup> *United States v. Focia*, 869 F.3d 1269 (11th Cir. 2017) (federal law prohibiting unlicensed dealing of firearms “merely ‘impos[es] conditions and qualifications on the commercial sale of arms’” so “qualifies as the kind of ‘presumptively lawful regulatory measure[]’ described in *Heller*”); *United States v. Hosford*, 843 F.3d 161, 166 (4th Cir. 2016) (federal law prohibiting unlicensed firearms dealing is a facially constitutional “longstanding condition or qualification on the commercial sale of arms”).

<sup>132</sup> *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 2017 U.S. App. LEXIS 19795, \*36, 42–43 (9th Cir. 2017) (*en banc*).

<sup>133</sup> *Heller*, 554 U.S. at 626–27.

<sup>134</sup> *Id.* at 627 n.6 (“We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”).

<sup>135</sup> *United States v. Redwood*, 2016 U.S. Dist. LEXIS 109735 (N.D. Ill. Aug. 18, 2016) (rejecting Second Amendment challenge to 18 U.S.C. §

- Prohibiting the possession of firearms on college campuses, in college facilities, and at campus events;<sup>136</sup>
- Prohibiting the carrying of a loaded and accessible firearm in a motor vehicle;<sup>137</sup>
- Forbidding possession of a firearm in national parks or other federal property;<sup>138</sup>
- Prohibiting the possession of firearms in places of worship;<sup>139</sup>
- Prohibiting the possession of firearms in common areas of public housing units,<sup>140</sup> or by nonresidents visiting public housing complexes;<sup>141</sup>
- Prohibiting the possession of guns on county-owned property,<sup>142</sup> and
- Prohibiting the possession of guns in a federal court facility.<sup>143</sup>

## G. OTHER REGULATIONS

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

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922(q)(2)(A), the federal Gun-Free School Zones Act); *S.B. v. Seymour Cmty. Sch.*, 2018 Ind. App. LEXIS 111 (Ind. Ct. App. Mar. 26, 2018 (rejecting Second Amendment challenge to protective order prohibiting parent from carrying firearm on school property)); *but see People v. Green*, 2018 IL App (1st) 143874 (Ill. Ct. App. Jun. 14, 2018) (sustaining Second Amendment challenge to prior version of Illinois unlawful use of a weapon statute that prohibited concealed weapon permit-holders from carrying firearms within 1,000 feet of a school).

<sup>136</sup> *Wade v. Univ. of Mich.*, 2017 Mich. App. LEXIS 904 (Mich. Ct. App. Jun. 6, 2017) (rejecting Second Amendment challenge to University of Michigan's firearm ban); *Digiaccinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 136, 704 S.E.2d 365, 370 (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 Dec. 7, 2011) (upholding University of Idaho policy prohibiting firearms in University-owned housing); *Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 147 (Fla. Dist. Ct. App. 2015) (upholding policy prohibiting guns in university housing, citing the 'presumptively lawful' language in *Heller* that included "laws forbidding the carrying of firearms in sensitive places such as schools.").

<sup>137</sup> *Clark v. City of Shawnee*, 2017 U.S. Dist. LEXIS 1758 (D. Kan. Jan. 5, 2017); *State v. Smith*, 2018-Ohio-4297 (Ohio Ct. App. Oct. 23, 2018); *Ohio v. Rush*, 2012-Ohio-5919 (Ohio Ct. App. 2012).

<sup>138</sup> *E.g., United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 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.*, 790 F.3d 1121 (10th Cir. 2015) (upholding federal regulation prohibiting the storage and carry of firearms on U.S. Postal Service property); *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318 (11th Cir. 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. 2013); *United States v. Lewis*, 2008 U.S. Dist. LEXIS 103631 (D.V.I. Dec. 24, 2008); *cf. Morris v. U.S. Army Corps of Engineers*, 60 F. Supp. 3d 1120 (D. Idaho 2014) (striking down regulations prohibiting the possession and carrying of firearms on property owned by the U.S. Army Corps of Engineers).

<sup>139</sup> *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), *aff'd*, 687 F.3d 1244 (11th Cir. 2012).

<sup>140</sup> *Doe v. Wilmington Hous. Auth.*, 880 F. Supp. 2d 513 (D. Del. 2012), *rev'd on other grounds*, *Doe v. Wilmington Hous. Auth.*, 568 Fed. Appx. 128 (3d Cir. 2014); *but see Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 665 (Del. 2014) (striking down public housing firearm restrictions under the Delaware constitution's right to bear arms, which court held is "intentionally broader than the Second Amendment").

<sup>141</sup> *People v. Cunningham*, 2019 IL App (1st) 160709 (Ill. Ct. App. 2019).

<sup>142</sup> *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc).

<sup>143</sup> *United States v. Giraitis*, 127 F. Supp. 3d 1 (D.R.I. 2015) (upholding conviction for possession of a handgun in a federal court facility).

- Firearm Ownership
  - Generally requiring the registration of all firearms;<sup>144</sup>
  - Requiring background checks for private firearm transfers;<sup>145</sup>
  - Requiring an individual to possess a license to own a handgun;<sup>146</sup>
  - Requiring handgun permit applicants to pay \$340 every three years,<sup>147</sup> and
- Firearm Safety
  - Requiring the safe storage of handguns in the home;<sup>148</sup>
  - Prohibiting the possession of a firearm while intoxicated;<sup>149</sup> and
  - Requiring the safe storage of firearms in vehicles.<sup>150</sup>
- Firearms in the Scope of Employment
  - A “use of force” policy requiring police officers to use deadly force reasonably and proportionately, and employ de-escalation techniques when safe to do so.<sup>151</sup>

<sup>144</sup> *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009) (finding that registration “merely regulated gun possession” rather than prohibiting it); *Heller v. District of Columbia* (“*Heller III*”), 801 F.3d 264 (D.C. Cir. 2015) (firearm registration generally 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 requirement to bring the firearm in person to register).

<sup>145</sup> *Colo. Outfitters Ass’n v. Hickenlooper*, 24 F. Supp. 3d 1050 (D. Colo. 2014), *vacated on other grounds*, 823 F.3d 537 (10th Cir. 2016).

<sup>146</sup> *Libertarian Party of Erie v. Cuomo*, 300 F. Supp. 3d 424 (W.D.N.Y. 2018), *appeal docketed*, No. 18-386 (2d Cir. Feb. 8, 2018); *Cruz-Kerkado v. Puerto Rico*, No. 16-cv-2748, 2018 U.S. Dist. LEXIS 59290 (D. P.R. Apr. 5, 2018); *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. 3d Dep’t May 21, 2009).

<sup>147</sup> *Kwong v. Bloomberg*, 723 F.3d 160 (2d Cir. 2013) (upholding \$340 fee); *see also Bauer v. Becerra*, 858 F.3d 1216 (9th Cir. 2017) (upholding law requiring all firearm purchasers to pay a \$19 background check fee, when a portion of the fee goes to maintaining a database to track prohibited persons who have purchased firearms); *Cruz-Kerkado v. Puerto Rico*, No. 16-cv-2748, 2018 U.S. Dist. LEXIS 59290 (D. P.R. Apr. 5, 2018) (upholding a \$250 licensing fee for concealed handgun permits); *People v. Stevens*, 2018 IL App (4th) 150871 (Ill. App. Ct. May 16, 2018) (upholding a \$300 licensing fee for concealed handgun permits issued to out-of-state residents); *Commonwealth v. Cassidy*, 81 N.E.3d 822 (Mass. App. Ct. 2017) (summary decision) (rejecting argument that firearm license fee is an “excise tax on [the] fundamental right” of “private gun ownership”), *aff’d*, 479 Mass. 527 (2018).

<sup>148</sup> *Jackson v. City & Cty. 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 (N.Y. Sup. Ct. 2012) (city ordinance applicable to weapons wherever located, except weapons being carried).

<sup>149</sup> *State v. Weber*, 2019-Ohio-916 (Ohio Ct. App. 2019); *Ohio v. Beyer*, 2012 Ohio 4578 (Ohio Ct. App. 2012); *People v. Wilder*, 307 Mich. App. 546 (Mich. Ct. App. 2014) (finding no Second Amendment violation for defendant convicted of possessing firearm while intoxicated); *cf. Michigan v. DeRoche*, 299 Mich. App. 301 (Mich. Ct. App. 2013) (law prohibiting gun possession by intoxicated people was unconstitutional as applied to defendant, who was in his own home and his possession was only constructive).

<sup>150</sup> *Clark v. City of Shawnee*, 2017 U.S. Dist. LEXIS 1758 (D. Kan. Jan. 5, 2017).

<sup>151</sup> *Mahoney v. Sessions*, 871 F.3d 873 (9th Cir. 2017).

## V. SUCCESSFUL SECOND AMENDMENT CLAIMS

Despite judicial decisions upholding the overwhelming majority of gun laws, in a few outlier cases, courts have sustained Second Amendment claims. As discussed above, the Seventh Circuit and two district courts struck down laws interpreted to completely ban the carry of guns in public,<sup>152</sup> while the D.C. Circuit invalidated Washington D.C.’s “good cause” concealed carry permit law, departing from all other federal circuit courts to have considered such a law.<sup>153</sup> In addition, while upholding the central components of Washington’s gun registration system, the D.C. Circuit struck down other provisions in the law, including a ban on registering multiple guns each month and a requirement that residents pass a test on the District’s gun laws.<sup>154</sup> The Illinois Supreme Court struck down a law that prohibited carrying guns within 1,000 feet of a public park, finding the law “effectively prohibit[ed] the possession of a firearm for self-defense within a vast majority of the acreage in the city of Chicago.”<sup>155</sup> In 2011, the Seventh Circuit enjoined enforcement of a Chicago ordinance banning firing ranges in city limits where range training was a condition of lawful handgun ownership,<sup>156</sup> and the same panel later struck down a zoning law restricting where firing ranges could operate and an age restriction barring entry into ranges by supervised minors.<sup>157</sup> Finally, as previously mentioned, courts have approved a handful of as-applied challenges to federal prohibitions on firearm possession, including in the Third and Sixth Circuits.<sup>158</sup>

Federal trial courts have ruled in favor of Second Amendment claims in various cases, several of which are currently being appealed. A district court in the Seventh Circuit struck down a Chicago law completely banning the sale or transfer of firearms except through inheritance, but explicitly reiterated that cities and states have broad authority to regulate the sale of firearms, including limits on the locations where dealers may operate.<sup>159</sup> A district court in the Ninth Circuit, citing the now-vacated *Peruta* panel opinion, struck down regulations prohibiting the possession of firearms on U.S. Army Corps of Engineers property.<sup>160</sup> A district court in the Ninth Circuit also issued an injunction blocking implementation of a California law prohibiting the possession of large-

<sup>152</sup> *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012); *Palmer v. District of Columbia*, 59 F. Supp. 3d 173 (D.D.C. 2014); *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684 (D. N. Mar. 1. Sept. 28, 2016).

<sup>153</sup> *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017).

<sup>154</sup> *Heller v. District of Columbia* (“*Heller III*”), 801 F.3d 264 (D.C. Cir. 2015).

<sup>155</sup> *People v. Chairez*, 2018 IL 121417, \*55 (Ill. 2018); see also *People v. Green*, 2018 IL App (1st) 143874 (Ill. Ct. App. 2018) (applying *Chairez* and sustaining Second Amendment challenge to Illinois statute no longer in effect which prohibited concealed weapon permit-holders from carrying firearms within 1,000 feet of a school, finding that the school zone restriction similarly effectively “operates as a total ban on the carriage of weapons for self-defense outside the home in Chicago”).

<sup>156</sup> See *Ezell v. City of Chicago* (“*Ezell I*”), 651 F.3d 684 (7th Cir. 2011).

<sup>157</sup> *Ezell v. City of Chicago* (“*Ezell II*”), 846 F.3d 888, 894 (7th Cir. 2017).

<sup>158</sup> *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678 (6th Cir. 2016) (en banc) (directing that intermediate scrutiny be applied on remand to as-applied challenge to firearm prohibition brought by plaintiff with past involuntary mental commitment); *Binderup v. Att’y Gen.*, 836 F.3d 336 (3d Cir. 2016) (en banc) (applying intermediate scrutiny and invalidating federal gun prohibition as applied to plaintiffs with decades-old misdemeanor convictions the court concluded were not “serious”); see also *Hatfield v. Sessions*, No. 16-cv-00383, 2018 U.S. Dist. LEXIS 70431 (S.D. Ill. Apr. 26, 2018), appeal docketed, No. 18-2385 (7th Cir. Jun. 26, 2018); *Keyes v. Lynch*, 195 F. Supp. 3d 702 (M.D. Pa. 2016).

<sup>159</sup> See *Ill. Ass’n of Firearms Retailers v. Chicago*, 961 F. Supp. 2d 928, 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. ... [N]othing in this opinion prevents the City from considering other regulations—short of the complete ban—on sales and transfers of firearms”). Similarly, another district court in the Seventh Circuit held that a local ordinance that prohibited gun dealers likely violated the Second Amendment, as did a subsequent village ordinance that operated as a “functional” ban by limiting gun stores to two parcels of land that could not be rented. See *Kole v. Village of Norridge*, No. 11 C 3871, 2017 U.S. Dist. LEXIS 178248, \*32-\*46 (N.D. Ill. Oct. 27, 2017).

<sup>160</sup> *Morris v. U.S. Army Corps of Engineers*, 60 F. Supp. 3d 1120 (D. Idaho 2014), appeal docketed, No. 14-36049 (9th Cir. Dec. 10, 2014).



capacity magazines; the court found that California's prohibitions on the sale, transfer, and possession of large-capacity magazines violate the Second Amendment and that the possession restrictions also violate the Takings Clause.<sup>161</sup> The district court's order is an extreme outlier that contradicts decisions reached by six federal appellate courts.<sup>162</sup> Recognizing that the district court's "decision [to enjoin California's law] cuts a less-traveled path," the district judge stayed his own injunction order in part, allowing California to continue to enforce the ban on the manufacture, sale, and transfer of large-capacity magazines pending the state's appeal to the Ninth Circuit.<sup>163</sup> Note that the district court had earlier issued a preliminary injunction that was narrowly affirmed by the Ninth Circuit in an unpublished decision that did not reach the merits of the constitutional challenge, but found only that the district court's preliminary assessment was not an abuse of discretion.<sup>164</sup>

In 2016, in *Radich v. Guerrero*, a federal district court struck down a regulatory system in the Commonwealth of the Northern Mariana Islands (CNMI), 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 "the Commonwealth's ban on handguns cannot be squared with the Second Amendment right described in *Heller* and *McDonald*."<sup>165</sup> Later that year, the same federal district court struck down other aspects of CNMI's gun laws, including a \$1,000 handgun excise tax, a blanket prohibition on the public carry of firearms, a ban on certain assault weapons features, and a ban on long guns with caliber greater than .223.<sup>166</sup>

Other outliers include: a North Carolina district court decision finding that a state law prohibiting the carrying of firearms during states of emergency violated the plaintiffs' Second Amendment rights,<sup>167</sup> an Ohio state-court decision sustaining a constitutional challenge to a domestic violence restraining order that prohibited the respondent from possessing firearms,<sup>168</sup> a Massachusetts federal district court decision finding that a U.S. citizenship requirement for possessing and carrying firearms violated the plaintiffs' Second Amendment rights,<sup>169</sup> and decisions in Massachusetts, Illinois, Michigan, and New York striking down state laws prohibiting the possession of Tasers and stun guns, concluding that the Second Amendment protects those devices.<sup>170</sup>

<sup>161</sup> *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. Mar. 29, 2019), judgment stayed in part, No. 17-1017 (S.D. Cal. Apr. 4, 2019), ECF No. 97, 2019 U.S. Dist. LEXIS 63045, appeal docketed, No. 19-5537 (9th Cir. Apr. 4, 2019).

<sup>162</sup> See *supra* note 80.

<sup>163</sup> Order Staying in Part Judgment Pending Appeal, *Duncan v. Becerra*, No. 17-1017 (S.D. Cal. Apr. 4, 2019), ECF No. 97, 2019 U.S. Dist. LEXIS 63045.

<sup>164</sup> See *Duncan v. Becerra*, No. 17-56081, 2018 U.S. App. LEXIS 19690 (9th Cir. Jul. 17, 2018) (unpublished). Note that the Ninth Circuit previously affirmed a decision denying a preliminary injunction in a challenge to a local ordinance that ended grandfathering by prohibiting the possession of large-capacity magazines. *Fyock v. City of Sunnyvale*, 779 F.3d 991 (9th Cir. 2015). As discussed above and in footnotes 80 and 81, every federal circuit court to have considered the issue on the merits has upheld the constitutionality of laws prohibiting large-capacity magazines, and until *Duncan v. Becerra*, every federal district court had upheld these laws as well. See, e.g., *Wiese v. Becerra*, 2017 U.S. Dist. LEXIS 101522 (E.D. Cal. June 29, 2017); see also *Wiese v. Becerra*, 306 F. Supp. 3d 1190 (E.D. Cal. 2018) (granting motion to dismiss Second Amendment challenge to California large-capacity magazine possession ban).

<sup>165</sup> *Radich v. Guerrero*, 2016 U.S. Dist. LEXIS 41877 at \*7 (D. N. Mar. I. Mar. 28, 2016).

<sup>166</sup> *Murphy v. Guerrero*, 2016 U.S. Dist. LEXIS 135684 (D. N. Mar. I. Sept. 28, 2016).

<sup>167</sup> *Bateman v. Perdue*, 881 F. Supp. 2d 709 (E.D.N.C. 2012).

<sup>168</sup> *Cee v. Stone*, 2017-Ohio-8687 (Ohio Ct. App. Nov. 27, 2017).

<sup>169</sup> *Fletcher v. Haas*, 851 F. Supp. 2d 287 (D. Mass. 2012).

<sup>170</sup> *Ramirez v. Commonwealth*, 479 Mass. 331 (Mass. 2018); *People v. Webb*, 2019 IL 122951 (Ill. 2019); *Michigan v. Yanna*, 297 Mich. App. 137

## VI. THE SUPREME COURT HAS DENIED CERTIORARI IN MOST SECOND AMENDMENT CASES

Since issuing its opinions in *Heller* and *McDonald*, the Supreme Court has declined to hear a number of appeals from decisions upholding gun safety laws. In January 2019, the Court broke from this pattern by granting review in *New York State Rifle & Pistol Association v. City of New York* ("*NYSRPA*"), a case involving a challenge to a unique provision in New York City's handgun licensing regulations that restricts transportation of handguns licensed for the home. Briefing is ongoing and as of June 2019, the *NYSRPA* case will likely be argued in fall 2019 with a decision by winter or spring 2020.

The sole other exception is *Caetano v. Massachusetts* (2016), involving a Massachusetts law prohibiting private possession of stun guns.<sup>171</sup> In a *per curiam* opinion, the Court did not rule that stun guns are protected by the Second Amendment, but vacated and remanded the Massachusetts Supreme Court's decision upholding the constitutionality of the state's stun gun ban.<sup>172</sup> The state later dropped the prosecution at issue, so the *Caetano* case did not continue after remand, though the Massachusetts Supreme Court determined in a later case that the stun gun ban violated the Second Amendment.<sup>173</sup>

To date, other than in *NYSRPA* and *Caetano*, **the Supreme Court has denied certiorari in at least 150 Second Amendment cases since *Heller***, including:

- Cases challenging laws restricting the concealed and/or open carrying of firearms in public;<sup>174</sup>
- Cases challenging the constitutionality of laws prohibiting felons, domestic abusers, and/or certain misdemeanants from possessing firearms;<sup>175</sup>
- Cases challenging laws enhancing sentences for possessing a firearm while committing a crime;<sup>176</sup>
- Cases challenging laws restricting the possession of machine guns, assault weapons, large capacity

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(Mich. Ct. App. 2012); *Avitabile v. Beach*, No. 1:16-CV-1447, 2019 U.S. Dist. LEXIS 47506 (N.D.N.Y. Mar. 22, 2019).

<sup>171</sup> *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (*per curiam*).

<sup>172</sup> *Id.* at 1027-28 (concluding that "the explanation the Massachusetts court offered for upholding the law contradicts this Court's precedent. Consequently ... The judgment of the Supreme Judicial Court of Massachusetts is vacated, and the case is remanded for further proceedings not inconsistent with this opinion."); *but see id.* at 1032-33 (concurrence of Alito, J., and Thomas, J.) ("[T]he pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today....While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country. Massachusetts' categorical ban of such weapons therefore violates the Second Amendment.").

<sup>173</sup> *Ramirez v. Commonwealth*, 479 Mass. 331 (Mass. 2018).

<sup>174</sup> *Norman v. State*, 2017 U.S. LEXIS 6976 (U.S. Nov. 27, 2017); *Peruta v. California*, 137 S. Ct. 1995 (2017); *Berron v. Ill. Concealed Carry Licensing Rev. Bd.*, 137 S. Ct. 843 (2017); *Drake v. Jerejian*, 134 S. Ct. 2134 (2014); *Kachalsky v. Cacace*, 133 S. Ct. 1806 (2013); *Woollard v. Gallagher*, 134 S. Ct. 422 (2013); *Brown v. United States*, 131 S. Ct. 819 (2010); *Dawson v. Illinois*, 131 S. Ct. 2880 (2011).

<sup>175</sup> *Hamilton v. Pallozzi*, 2017 U.S. LEXIS 7187 (U.S. Dec. 4, 2017); *United States v. Phillips*, 2017 U.S. LEXIS 5717 (U.S. Oct. 2, 2017); *Enos v. Holder*, 2015 U.S. LEXIS 4416 (2015); *Schrader v. Holder*, 134 S. Ct. 512 (2013); *Booker v. United States*, 132 S. Ct. 1538 (2012); *Torres-Rosario v. United States*, 132 S. Ct. 1766 (2012).

<sup>176</sup> *Kearns v. United States*, 181 L. Ed. 2d 226 (2011).

magazines, and other military-style weapons,<sup>177</sup>

- Cases challenging firearm registration requirements, waiting periods, and related fees,<sup>178</sup> and
- Cases challenging firearm restrictions in national parks and other publicly owned places.<sup>179</sup>

As a result, the many federal and state court decisions upholding the laws described above have been left undisturbed.<sup>180</sup>

## CONCLUSION

Following 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. As described above, in the vast majority of these cases, courts have rejected Second Amendment attacks on reasonable gun laws and recognized that most federal, state and local firearms laws are plainly constitutional, including because they were recognized as constitutional in the *Heller* decision itself. Nevertheless, there is little reason to believe that the volume of Second Amendment litigation will decrease, particularly in light of the shifting composition of the Supreme Court and the justices' recent decision to grant certiorari in *NYSRPA*. Past experience suggests that the gun lobby will continue to bring costly lawsuits and to employ the threat of litigation to obstruct state and local efforts to enact commonsense gun violence prevention measures. Policymakers should rest assured, however, that as things stand today, a comprehensive body of Second Amendment law affirms their ability to adopt a wide variety of reasonable laws to reduce gun violence.

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## ABOUT GIFFORDS LAW CENTER

For nearly 25 years, the legal experts at Giffords Law Center to Prevent Gun Violence have been fighting for a safer America by researching, drafting, and defending the laws, policies, and programs proven to save lives from gun violence.

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<sup>177</sup> *Kolbe v. Hogan*, 2017 U.S. LEXIS 7002 (U.S. Nov. 27, 2017); *Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015); *Jackson v. City & Cty. 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).

<sup>178</sup> *Justice v. Town of Cicero*, 130 S. Ct. 3410 (2010); *Silvester v. Becerra*, 138 S. Ct. 945 (2018); *Kwong v. De Blasio*, 2014 U.S. LEXIS 3857 (2014); *Bauer v. Becerra*, 2018 U.S. LEXIS 1307 (Feb. 20, 2018).

<sup>179</sup> *Bonidy v. United States Postal Serv.*, 136 S. Ct. 1486 (2016); *Masciandaro v. United States*, 565 U.S. 1058 (2011); *United States v. Dorosan*, 176 L. Ed. 2d 198 (U.S. 2010).

<sup>180</sup> For more information on Court's pattern of denying certiorari in Second Amendment cases, see Giffords Law Center's report, at <https://lawcenter.giffords.org/protecting-strong-gun-laws-the-supreme-court-leaves-lower-court-victories-untouched/>.