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WHERE ARE WE AFTER *HELLER* AND *McDONALD*?

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I. INTRODUCTION

The Second Amendment to the United States Constitution guarantees a right to keep and bear arms. A written constitution is a reminder that governments can be unreasonable and unjust. Rights selected for protection in the United States Constitution are considered to be peculiarly important and uniquely vulnerable to infringement. The rights guaranteed by the Constitution protect individuals against even popular conceptions of the public good. Consequently, the judiciary's role is to act as a check on overbearing majorities and overreaching executives.

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It is settled that the right to arms is an enumerated civil right. *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2600, 183 L.Ed.2d 450, 489 (2012): "protected civil rights, such as the right to bear arms or vote in elections." *DuPont v. Nashua Police Dept.*, 167 N.H. 429, 439, 113 A.3d 239, 247 (2015), cert. denied *McDonough v. DuPont*, 136 S.Ct. 533 (2015) ("Second Amendment right to keep and bear arms is a civil right"; *Ferguson v. Perry*, 740 S.E.2d 598, 604 (Ga. 2013) (noting that "this Court and other courts have said that the right to possess firearms is indeed a 'civil right'"). *See, e.g.*, *United States v. Wulff*, 758 F.2d 1121 (6th Cir. 1985) (among civil rights is right to vote, sit on jury, and possess a gun); *United States v. Stone*, 139 F.3d 822, 830–31 (11th Cir. 1998) (explaining that felony convictions "carry disabilities" including the deprivation of "civil rights as important as the right to vote, the right to keep and bear arms, and the right to engage in a chosen business or profession") (quoting *United States v. Sharp*, 12 F.3d 605, 608 (6th Cir.1993)); *Smith v. State*, 697 S.E.2d 177, 184 (Ga.2010) (noting that a criminal conviction may impact the defendant's "civil rights, such as the right to vote or possess firearms"). *Florida Carry, Inc. v. Univ. N. Fla*., 133 So.3d 966, 983 (Fla. App. 2013) (Makar, J., concurring, right to arms is a civil right). State courts, interpreting state guarantees to arms, hold that the right to possess a firearm is a civil right. *Williams v. State*, 402 So.2d 78, 79 (Fla. App. 1981); *State v. Trower*, 629 N.W.2d 594, 597 (S.D. 2001); *Andrews v. State*, 50 Tenn. 165, 182 (1871). "*Heller* is a victory for civil rights…." Anders Walker, *From Ballots to Bullets: District of Columbia v. Heller and the New Civil Rights*, 69 LA. L. REV. 509, 510 (2009).

II. SUPREME COURT PROTECTS THE RIGHT TO KEEP AND BEAR ARMS

In *District of Columbia v. Heller*, a District of Columbia law that banned all handguns and any operable firearm in the home was held to be an unconstitutional infringement of the Second Amendment.[2] This holding was reached after dissecting the Second Amendment's guarantee – "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed" - and interpreting its words.[3]

The Court stated that the prefatory clause announces a purpose.[4] With all prefatory clauses, the prefatory clause does not limit the operative clause where the operative clause is expressed in clear, unambiguous terms.[5] The Court noted that "the 'militia' … consisted of a subset of 'the people,'"[6] and that "reading the Second Amendment as protecting only the right to 'keep and

[2] *District of Columbia v. Heller (Heller I), 554 U.S. 570, 635-636 (2008).*

[3] *Heller I, 554 U.S. at 576.*

[4] *Id. at 599.*

[5] *Id. at 577-78.*

[6] *Id. at 580.*

bear Arms' in an organized militia therefore fits poorly with the operative clause's description of the holder of that right as 'the people.'"[7]

"Arms" include modern firearms,[8] and the Court dismissed as "bordering on the frivolous" the argument that the Second Amendment protects only "those arms in existence in the 18th century."[9] The Court held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding."[10]

The Court held in *Heller* that "keep arms" means "possessing arms, for militiamen and everyone else," and that bearing arms means "carrying for a particular purpose - confrontation." Bearing arms "was unambiguously used to refer to the carrying of weapons outside of an organized militia." The Second Amendment is meant to protect the right of the people to be "better able to resist tyranny,"[11] to prevent the government from "taking away the people's arms,"[12] "to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down,"[13] and "for self-defense and hunting."[14] Self-defense is the most important guarantee of the Second Amendment because a person must be alive to enjoy any right.[15] The "right of self-defense has been central to the Second Amendment right."[16] The home is "where the need for defense of self, family, and property is most acute."[17]

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[7] *Id. at 580-81.*

[8] *Id. at 581-82.*

[9] *Id. at 582.*

[10] Id.

[11] *Id. at 597-98;* see also Robert J. Cottrol, Second Amendment: Not Constitutional Dysfunction but Necessary Safeguard, *94 B.U. L. Rev. 835, 845-48 (2014)* ("Nearly 170 million people were murdered by their own governments in the twentieth century.").

[12] *Heller I, 554 U.S. at 598.* Framers had experience with disarmament by the British. Bostonians surrendered 1,778 muskets, 634 pistols, and 38 blunderbusses to General Gage's forces. Richard Frothingham, History of the Siege of Boston, and of the Battles of Lexington, Concord and Bunker Hill 95 (6th ed. 1903).

[13] *Heller I, 554 U.S. at 599.*

[14] Id.

[15] There is a practical reason for the right to keep and bear arms: Courts have held that neither the state nor the police owe a duty to protect the individual. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201 (1989); Hernandez v. City of Goshen, Ind., 324 F.3d 535, 538 (7th Cir. 2003); Fox v. Custis, 712 F.2d 84, 85 (4th Cir. 1983); Zelig v. Cnty. of Los Angeles, 45 P.3d 1171, 1182 (Cal. 2002); Warren v. District of Columbia, 444 A.2d 1, 5 (D.C. 1981)* (en banc); *Everton v. Willard, 468 So. 2d 936, 938 (Fla. 1985); Ashburn v. Anne Arundel Cnty., 510 A.2d 1078, 1083 (Md. 1986); Weiner v. Metro. Transp. Auth., 433 N.E.2d 124 (N.Y. 1982).* One federal court even stated, "There is no constitutional right to be protected by the state against being murdered by criminals or madmen." *Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).*

[16] *Heller I, 554 U.S. at 628.*

[17] Id.

The Second Amendment protects those arms that are "typically possessed by law-abiding citizens for lawful purposes" and those "in common use."[18] This includes the "handgun."[19] However, excluded is the short-barreled shotgun, "dangerous and unusual weapons," and "M-16 rifles and the like."[20]

The Court provided examples of permissible regulation:

The right secured by the Second Amendment is not unlimited…. The right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose…. Prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues…. Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualification on the commercial sale of arms.[21]

The Court noted: "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."[22]

The Court did not confine the right to bear arms to the home. There would be no need to mention hunting, bans on concealed carrying of arms, and bans on carrying arms in sensitive places if the right were confined to the home.[23] *Heller* provided examples of impermissible regulation of the right to carry arms, such as a law that would ban both open and concealed carrying of a pistol "without regard to time, place, or circumstances," and a law requiring "arms to be so borne as to render them wholly useless for the purpose of defence."[24] Consequently, the Court voided the District of Columbia law that required firearms in the home to be inoperable at all times because it made "it impossible for citizens to use them for the core lawful purpose of self-defense and [was] hence unconstitutional."[25]

The Court did not establish a standard of review for Second Amendment cases because "under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning

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[18] *Id. at 625, 627.*

[19] *Id. at 628.*

[20] *Id. at 625, 627.*
[21] *Id. at 626-27.*

[22] Id. at 627 n.26. *Binderup v. Atty. Gen. of U.S.*, 836 F.3d 336, 350 (3d Cir. 2016) (en banc), cert. denied 137 S.Ct. 2323 (2017), reminds that unless flagged as irrebuttable, presumptions are rebuttable.

[23] See *id. at 599, 604, 626-27.*

[24] *Id. at 629* (quoting *State v. Reid, 1 Ala. 612, 616-17 (1840); Andrews v. State, 50 Tenn. (3 Heisk.) 165, 187 (1871))* (citing *Nunn v. State, 1 Ga. 243, 251 (1846)).*

[25] Id. at 630.

from the home 'the most preferred firearm in the nation to 'keep' and use for protection of one's home and family' would fail constitutional muster."[26] However, the Court rejected rational basis scrutiny and an "interest-balancing inquiry."[27] The Court noted that the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in the defense of hearth and home."[28] The Court held that "the enshrinement of constitutional rights necessarily takes certain policy choices off the table…. It is not the role of this Court to pronounce the Second Amendment extinct."[29]

Two years later, in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), the Second Amendment right recognized in *Heller* was held to be applicable to the states through the due process clause of the Fourteenth Amendment. The Court held that the right to bear arms is "fundamental to our scheme of ordered liberty" and is "deeply rooted in this Nation's history and tradition." Justice Thomas reached the same result but by applying the privileges or immunities clause of the Fourteenth Amendment. Id. 561 U.S. at 805-06.

Heller and *McDonald* were the offsprings of respected scholarship and receptive judges.

III. INTERPRETATION OF HELLER & McDONALD BY INFERIOR COURTS

Some inferior courts have followed the Supreme Court's *Heller* and *McDonald* decisions. On the other hand, some inferior courts have engaged in massive resistance to *Heller* and *McDonald*.

Most courts have adopted a two-step framework for analyzing a Second Amendment challenge. First, courts must consider whether the restricted activity is protected by the Second Amendment. If that question is answered in the affirmative, only then does the court proceed to the second step of the inquiry, which involves applying the appropriate level of scrutiny and considering the strength of the state's justification for regulating or restricting the activity. Intermediate scrutiny has been held to be usually the appropriate level of scrutiny. To pass **intermediate scrutiny**, the challenged law must further an important government interest and must do so by means that are substantially related to that interest. The burden of proof is on the government.

A. THE FOLLOWERS

[26] Id. at 628-29 (footnote omitted) (citations omitted).

[27] Id. at 628 n.27, 634-35.

28 Id. at 635.

29 Id. at 636.

Some courts have given *Heller* and *McDonald* clout and purpose. Below are helpful cases: (1) protecting arms; (2) magazines; (3) carrying outside the home; (4) ammunition; (5) practice in arms; (6) providing relief to people with certain prior convictions; (7) providing relief to former mental patients; (8) holdings that there is a right to sell arms; (9) narrowly construing sensitive places; (10) striking reregistration of registered firearms and restricting registration to one pistol per month; (11) construing possession under the influence as not to apply to constructive possession; (12) striking down a ban in public housing, and (13) striking down an excessive fee.

(1) Protected Arms

People v. Webb, 2019 Ill. LEXIS 439, 2019 WL 1291586 (Ill.Supr.Ct. March 21, 2019): "[W]e hold the portion of section 24-1(a) (4) that prohibits the carriage or possession of stun guns and tasers is facially unconstitutional under the second amendment."

Avitable v. Beach, 368 F.Supp.3d 404 (N.D. N.Y. 2019), held that New York's law banning possession of tasers and stun guns is an unconstitutional infringement of the Second Amendment.

Maloney v. Singas, 351 F.Supp.3d 222 (E.D. N.Y. 2018), held that New York's law banning possession of a nunchaku is an unconstitutional infringement of the Second Amendment.

Ramirez v. Commonwealth, 479 Mass. 331, 94 N.E.3d 809 (2018), remanded the case to the county court for entry of a judgment (a) declaring that the absolute prohibition in G. L. c. 140, § 131J, against the civilian possession of stun guns is in violation of the Second Amendment to the United States Constitution, and therefore that § 131J in its current form, as amended by St. 2004, c. 170, § 1, is facially invalid; and (b) vacating the District Court's order denying the defendant's motion to dismiss the charge of unlawfully possessing a stun gun in violation of § 131J, and directing the judge to allow the motion and to dismiss that charge. *Ramirez* was compelled by *Caetano v. Massachusetts*, 136 S.Ct. 1027, 194 L.Ed.2d 99 (2016), a challenge to the stun gun ban, where the court reminded the Massachusetts Supreme Court that arms are not limited to firearms and are not limited to technology of 18th century.

Murphy v. Guerrero, 2016 U.S. Dist. LEXIS 135684 (D.N.Mariana Islands 28 Sept. 2016), held as follows:

Judgment is entered in favor of Murphy and against the Commonwealth on the following issues:

a. The registration of firearms;

b. The ban on long gun caliber restrictions above .223;

c. The ban on the following "assault weapon" attachments to semiautomatic rifles:

i. a pistol grip under the action of the weapon;

ii. a thumbhole stock;

iii. a folding or telescoping stock;

iv. a flare launcher;

v. a flash suppressor; and

vi. a forward pistol grip;

d. The ban on carrying a handgun in public, as implemented in the transportation regulations; and

e. The $1,000 excise tax on pistols.

Radich v. Guerrero, 2016 U.S. Dist. LEXIS 41877, 2016 WL 1212437 (D.N. Mariana Islands, March 28, 2016), the court ordered that:

1. The handgun and handgun ammunition ban is declared unconstitutional and in violation of the Covenant that incorporated the Second Amendment to the U.S. Constitution;

2. The handgun and handgun ammunition import ban is declared unconstitutional and in violation of the Covenant that incorporated the Second Amendment;

3. The prohibition on issuing weapon identification cards to lawful permanent residents is declared unconstitutional and in violation of the Covenant that incorporated the Fourteenth Amendment to the U.S. Constitution;

4. The implied prohibition on issuing weapon identification cards for self-defense, or "family defense," is declared unconstitutional and in violation of the Covenant that incorporated the Second Amendment;

5. Defendant Deleon Guerrero, in his official capacity as Commissioner of the DPS, and Defendant Larson, in her official capacity as the Secretary of the Department of Finance, are permanently enjoined from enforcing the unconstitutional handgun and handgun ammunition bans against Plaintiffs;

6. Defendant Deleon Guerrero, in his official capacity as Commissioner of the DPS, is permanently enjoined from enforcing the prohibition on issuing weapon identification cards to lawful permanent aliens against Plaintiff Li-Rong Radich;

7. Defendant Deleon Guerrero, in his official capacity as Commissioner of the DPS, is permanently enjoined from refusing to issue weapon identification cards to Plaintiffs for self-defense purposes, or “family defense”;

8. Defendant Deleon Guerrero, in his official capacity as Commissioner of the DPS, shall issue weapon identification cards to Plaintiffs, if he finds that they satisfy the unchallenged provisions of the Weapons Control Act, no later than 30 days after the issuance of this Decision and Order.

State v. Herrmann, 366 Wis.2d 312, 873 N.W.2d 257 (Wis. App. 2015), was a successful as-applied challenge under the Second Amendment and Wisconsin's guarantee to arms to the constitutionality of Wisconsin statute which prohibited possession of switchblade knives. It was the State's burden to establish that the law satisfied intermediate scrutiny, and it failed to do so by showing the existence of real, not merely conjectural, harm. The State's contention that the statute served an important governmental objective, protecting the public from the danger of potentially lethal surprise attacks, was not supported by evidence that this danger actually existed to any significant degree. Further, the statute was not substantially related to the State's cited objective of protecting the public from surprise attacks because defendant possessed his switchblade in his own home for his protection. The threat to the public by a person possessing a switchblade in his own home was negligible.

State v. Deciccio, 315 Conn. 79, 105 A.3d 165 (2014), held that the defendant's conviction under Connecticut law for using his vehicle to transport a dirk knife and a police baton from his former residence to his new residence violated his right, under the Second Amendment, to keep and bear arms, and, therefore, the defendant was entitled to a judgment of acquittal. Both dirk knives and police batons are protected arms within the meaning of the Second Amendment.

People v. Yanna, 297 Mich.App. 137, 824 N.W.2d 241 (2012), held that Taser and stun gun ban violates right to keep and bear arms under the Second Amendment and Michigan's constitutional right to keep and bear arms. The court also concluded that a total prohibition of the open carrying of protected arms such as a Taser or stun gun is unconstitutional.

N.Y. State Rifle & Pistol Assn. v. Cuomo, 804 F.3d 242 (2nd Cir. 2015), struck down the ban on the Remington 7615 rifle, which is a pump-action .223 caliber that takes AR magazines, and struck down the ban on loading not more than 7 rounds into a magazine. However, the court held that the core provisions of the New York and Connecticut laws prohibiting possession of firearms labeled as semiautomatic assault weapons and large-capacity magazines, those holding more than 10 rounds, did not violate the Second Amendment. The court assumed that the prohibited conduct fell under the Second Amendment, applied intermediate scrutiny, and upheld the statutes because they were substantially related to public safety and crime reduction. No substantial burden exists, and hence heightened scrutiny is not triggered, because adequate alternatives remain for law-abiding citizens to acquire a firearm for self-defense. The prohibition of semi-automatic rifles and large-capacity magazines does not effectively disarm individuals or substantially affect their ability to defend themselves. NOTE: In N.Y. City it is unlawful to possess a magazine for a rifle or shotgun with a capacity of more than 5 rounds. N.Y. City Admin. Code § 10-306 [6].

(2) Protecting Magazines

Duncan v. Becerra, 366 F.Supp.3d 1131 (S.D. Calif. 2019), held that magazines holding more than 10 rounds are "arms" and ban on such magazines is unconstitutional under the Second Amendment and also violates Taking Clause.

(3) Right to Carry Arms Outside the Home

Young v. Hawaii, 896 F.3d 1044 (9th Cir. 2018), held that Hawaii's law which is essentially a ban on both open and concealed carrying is unconstitutional. The Second Amendment encompassed a right to carry firearms openly in public for self-defense because "bear" implied such a right. Haw. Rev. Stat. § 134-9, restricting the right to carry a firearm openly to those engaged in the protection of life and property, amounted to a destruction of the core Second Amendment right to carry a firearm openly for self-defense, and was thus unconstitutional under any level of scrutiny, because the typical, law-abiding citizen in Hawai'i was entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense, and its "good cause" exception provided no administrative or judicial review of any license denial. **NOTE:** Subsequent ORDER by 9th Circuit: En banc proceedings are stayed and submission of this case for decision by the en banc court is deferred pending the issuance of an opinion by the United States Supreme Court in *New York State Rifle & Pistol Association, Inc. v. City of New York*, No. 18-280 and further order of this Court. *Young v. Hawaii*, 2019 U.S. App. LEXIS 4527 (9th Cir. Feb. 14, 2019).

People v. Chairez, 423 Ill.Dec. 69, 104 N.E.3d 1158 (2018), held that a statute forbidding carrying or possession of firearm within 1,000 feet of public park abridges Second Amendment right to arms. The law is subject to elevated intermediate scrutiny. *Chairez* was followed in *People v. Green*, 121 N.E.3d 911 (Ill. App. 1st Dist. 2018), where the court held that the State failed to show a close fit between the restriction on gun possession within 1000 feet of a school and the protection of children. The data did not reflect that the gun violence plaguing schools was perpetrated within 1000 feet of the schools (as opposed to inside the schools themselves) or that the perpetrators of that violence were the law-abiding adults whose conduct the statute regulates.

Wrenn v. District of Columbia, 864 F.3d 650 (D.C. Cir. 2017), held that at the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions. These traditional limits include, for instance, licensing requirements, but not bans on carrying in urban areas like D.C. or bans on carrying absent a special need for self-defense. In fact, the Amendment's core at a minimum shields the typically situated citizen's ability to carry common arms generally. The District's good-reason law is necessarily a total ban on exercises of that constitutional right for most D.C. residents. That's enough to sink this law under *Heller I.*

Morris v. U.S. Army Corps of Engineers, 60 F.Supp.3d 1120 (D. Idaho 2014), held that the Second Amendment protects the right to carry a firearm for self-defense purposes. That right extends outside the home. This regulation imposes an outright ban, and is therefore unconstitutional under any level of scrutiny, as set forth in the U.S. Supreme Court in *Heller*. The appeal was dismissed without prejudice to reinstate when Corps modified its firearm policy. *Nesbitt v. U.S. Army Corps of Engineers*, 2017 U.S. App. LEXIS 26751 (9th Cir. Dec. 15, 2017).

Palmer v. District of Columbia, 59 F.Supp.3d 173 (D.D.C. 2014), held that to confine the right to be armed to the home is to divorce the Second Amendment from the right of self-defense described by the Supreme Court. Carrying a handgun outside the home for self-defense comes

within the meaning of "bearing arms" under the Second Amendment. There is no longer any basis on which a court can conclude that the District of Columbia's total ban on the public carrying of ready-to-use handguns outside the home is constitutional under any level of scrutiny. Therefore, the District of Columbia's complete ban on the carrying of handguns in public is unconstitutional. The court also held that this injunction prohibits the District of Columbia from completely banning the carrying of handguns in public for self-defense by otherwise qualified non-residents based solely on the fact that they are not residents of the District. District of Columbia dismissed its appeal. *Palmer v. District of Columbia*, 2015 U.S.App. LEXIS 6414, 2015 WL 1607711 (D.C. Cir. Apr. 2, 2015).

People v. Aguilar, 377 Ill.Dec. 405, 2 N.E.3d 321 (Ill. 2013), ban on carrying firearms outside home violates Second Amendment.

Moore v. Madigan, 702 F.3d 933 (7th Cir. 2012), held that a ban on carrying firearms outside the home violates the Second Amendment. The constitutional right of armed self-defense is broader than the right to have a gun in one's home. Both *Heller* and *McDonald* said that the need for defense of self, family, and property was most acute in the home, but that did not mean it was not acute outside the home. A right to bear arms implied a right to carry a loaded gun outside the home. To confine the right to be armed to the home was to divorce the Second Amendment from the right of self-defense described in *Heller* and *McDonald*. Illinois had to provide more than merely a rational basis for believing that its uniquely sweeping ban was justified by an increase in public safety. It failed to meet that burden. The Supreme Court's interpretation of the Second Amendment therefore compelled declarations of unconstitutionality.

People v. Yanna, 297 Mich.App. 137, 824 N.W.2d 241 (2012), struck down Michigan's ban on Tasers and stun guns as an infringement of the right to keep and bear arms under the Second Amendment and Michigan's constitutional right to arms. The court also concluded that a total prohibition of the open carrying of protected arms such as a Taser or stun gun is unconstitutional.

(4) Right to Ammunition is Ancillary Right of Keeping and Bearing Arms

Radich v. Guerrero, 2016 U.S. Dist. LEXIS 41877, 2016 WL 1212437 (D.N. Mariana Islands, March 28, 2016), struck down on Second Amendment grounds the ban on importation and possession of ammunition, other than calibers .22, .223, and .410.

Jackson v. San Francisco, 746 F.3d 953, 967-68 (9th Cir. 2014), conducted an historical review, and concluded that prohibitions on the sale of ammunition do not fall outside the historical understanding of the scope of the Second Amendment right. The court noted that *Heller* does not include ammunition regulations in the list of "presumptively lawful" regulations. San Francisco did not point to historical prohibitions discussed in case law or other historical evidence in the record indicating that restrictions on ammunition fall outside of the historical scope of the Second Amendment. Because restrictions on ammunition may burden the core Second Amendment right of self-defense and the record contains no persuasive historical evidence suggesting otherwise, the ordinance regulates conduct within the scope of the Second

Amendment. However, the restriction on sale of hollow-point ammunition survives intermediate scrutiny.

Herrington v. United States, 6 A.3d 1237 (D.C. App. 2010), held that the Second Amendment right to keep and bear arms extended to the possession of handgun ammunition in the home. As it was not proved at trial that defendant was disqualified from exercising his Second Amendment rights by, for example, possessing ammunition for an illegal purpose, or by failing to comply with applicable registration requirements, D.C. Code § 7-2506.01 was unconstitutional as applied. The unconstitutionality of his conviction was plain, as he was convicted solely on proof of constitutionally protected conduct.

(5) Practice in Arms is Protected by Second Amendment

Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017), held that a city's zoning restriction limiting firing ranges to manufacturing districts was unconstitutional under the Second Amendment because the right to bear arms includes learning to handle and use them; the right to bear arms implies the right to meet for voluntary discipline in arms; the city's age restriction that extinguished the right of adolescents and teens to receive supervised firearm instruction in a firing range was unconstitutional; a citizen who keeps a gun or pistol under judicious precautions, practices in safe places the use of it, and in due time teaches his sons to do the same, exercises an individual right; the city has the right to set rules about where firing ranges may locate and the terms on which minors may enter.

Wesson v. Town of Salisbury, 13 F.Supp.3d 171 (D. Mass. 2014), held that Second Amendment includes right to maintain proficiency in the use of arms.

Ezell v. Chicago, 651 F.3d 684 (7th Cir. 2011), held that right to bear arms includes shooting practice and district court was instructed to enjoin application of ordinance "[t]o the extent that these provisions prohibit law-abiding, responsible citizens from using a firing range in the city ….."). **NOTE:** *Ezell* and other cases were cited by Justice Thomas in his concurring opinion *in Luis v. United States*, 136 S.Ct. 1083, 1097-98, 194 L.Ed.2d 256, 272-73 (2016):

"Constitutional rights thus implicitly protect those closely related acts necessary to their exercise. 'There comes a point . . . at which the regulation of action intimately and unavoidably connected with [a right] is a regulation of [the right] itself.' *Hill* v. *Colorado*, 530 U.S. 703, 745, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000) (Scalia, J., dissenting). The right to keep and bear arms, for example, 'implies a corresponding right to obtain the bullets necessary to use them,' *Jackson* v. *City and County of San Francisco*, 746 F. 3d 953, 967 (CA9 2014) (internal quotation marks omitted), and 'to acquire and maintain proficiency in their use,' *Ezell* v. *Chicago*, 651 F. 3d 684, 704 (CA7 2011). See *District of Columbia* v. *Heller*, 554 U.S. 570, 617-618, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (citing T. Cooley, General Principles of Constitutional Law 271 (2d ed. 1891) (discussing the implicit right to train with weapons)); *United States* v. *Miller*, 307 U.S. 174, 180, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939) (citing 1 H. Osgood, The American Colonies in the 17th Century 499 (1904)

(discussing the implicit right to possess ammunition)); *Andrews* v. *State*, 50 Tenn. 165, 178 (1871) (discussing both rights). Without protection for these closely related rights, the Second Amendment would be toothless. Likewise, the First Amendment 'right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.' *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93, 252, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (Scalia, J., concurring in part, concurring in judgment in part, and dissenting in part)."

(6) Providing Relief for Certain Prior Convictions

Holloway v. Sessions, 349 F.Supp.3d 451 (M.D.Pa. 2018), held that 18 U.S. Code § 922(g)(1) is unconstitutional as applied to Holloway. Holloway's disqualifying conviction [DUI] was not sufficiently serious to warrant deprivation of his Second Amendment rights, and disarmament of individuals such as Holloway is not sufficiently tailored to further the government's compelling interest of preventing armed mayhem. The court granted summary judgment, declaratory judgment, and permanent injunctive relief to Holloway.

Binderup v. Atty. Gen. of U.S., 836 F.3d 336 (3d Cir. 2016) (en banc), cert. denied 137 S.Ct. 2323 (2017), held that challengers of the constitutionally of the ban on possession of firearms by convicted felons as applied to the challengers sufficiently showed that they were unconstitutionally deprived of their fundamental right to bear arms, since their state convictions for misdemeanors which met the statutory definition of felonies were not serious or violent crimes, the challengers had no criminal history in the lengthy periods after their convictions, and there was no showing that banning the challengers' possession of firearms promoted the government's interest in the responsible use of firearms. The district court previously held in *Binderup v. Holder*, 2014 U.S. Dist. LEXIS 135110 (E.D. Pa. Sept. 25, 2014), that banning possession of firearms by a person convicted of an old misdemeanor, contributing to the delinquency of a minor, that carried a maximum sentence of 5 years was unconstitutional under the Second Amendment as applied.

Wesson v. Town of Salisbury, 13 F.Supp.3d 171 (D. Mass. 2014), held that banning gun ownership to person with old misdemeanor marijuana convictions infringes Second Amendment. The plaintiffs' applications for permits to purchase a firearm were denied based on their prior convictions for possession of marijuana, Mass. Gen. Laws ch. 140, §§ 131(d)(i)(e), 131A. The court held that as applied to plaintiffs the denial infringed their Second Amendment right to possess firearms in the home for self-defense and the right to maintain proficiency in their use.

Suarez v. Holder, 255 F.Supp.3d 573 (M.D. Penn. 2015), held that 18 US Code sec. 922 (g) (1) is unconstitutional under the Second Amendment as applied. Suarez had a 1990 conviction from Montgomery County, Maryland, for carrying a revolver without a license. He was sentenced to one-year probation. However, under this Maryland "misdemeanor" the maximum sentence is three years. Affirmed in *Binderup v. Atty. Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (en banc).

Gowder v. City of Chicago, 923 F.Supp.2d 1110 (N.D. Ill. 2012), held that ordinance banning possession of firearm by a person convicted of a nonviolent misdemeanor infringes Second Amendment right to bear arms.

(7) Providing Relief for Former Mental Patients

Tyler v. Hillsdale Sheriffs Dept., 837 F.3d 678 (6th Cir. 2016) (en banc), held that a lifetime ban on firearm possession based on old mental health commitment violates the Second Amendment unless the government can prove a person is still a danger to himself or others.

Keyes v. Lynch, 195 F.Supp.3d 702 (M.D. Pa. 2016), involved a former soldier presently serving as a corrections officer who had, as a result of his involuntary commitment 10 years earlier when he was 15, lost his private capacity firearm rights by operation of 18 Pa.C.S. § 6105(c) (4) and 18 U.S.C.S. § 922(g) (4), but who had used firearms daily and professionally since the age of 18, succeeded in his as-applied challenge to § 922(g) (4). He presented facts about himself and his background that distinguished his circumstances from those of persons historically barred from Second Amendment protections. He was no more dangerous than a typical law-abiding citizen and posed no continuing threat to society. Pennsylvania's firearms disability relief program failed to satisfy all of the specified criteria under § 105(a) of the NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559, (NIAA).

United States v. Rehlander, 666 F.3d 45 (1st Cir. 2012), held that in wake of *Heller* deprivation of Second Amendment rights requires due process for mental health commitment and *ex parte* temporary mental health hospitalization is not a commitment under 18 U.S. Code § 922 (g) (4).

(8) Right to Arms Includes Right to Sell Arms

Illinois Assn. of Firearms Retailers v. City of Chicago, 961 F.Supp.2d 928 (N.D. Ill. 2014), involved Chicago, Ill., Mun. Code §§ 8-20-100 and 17-16-0201, barring gun sales and transfers in the city other than inheritance. The court held the ordinances were unconstitutional because defendant city did not show they regulated activity unprotected by the Second Amendment in 1791, and, under strict scrutiny, the city did not justify their Second Amendment burden. Restricting criminal access to legal dealers did not justify them because the threat of legal businesses breaking the law did not justify banning all businesses. Restricting gun acquisition in the illegal market did not justify the ordinances because nothing showed they kept illegal-market transaction costs high, or that they affected Chicago's low household gun ownership. Lax gun store regulation did not justify them because few criminals bought guns from legal dealers, so they burdened legal owners more.

Kole v. Village of Norridge, 941 F.Supp.2d 933 (N.D. Ill. 2013), held that although judicial precedent explains that laws regulating the commercial sale of firearms are presumptively lawful, it does not purport to exempt those laws from constitutional scrutiny. To the contrary, judicial precedent makes clear that the standard of review must be more exacting than rational basis review. If 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. The village's motion to dismiss the firearm dealer business license applicants was denied as to a Second Amendment claim where under judicial precedent, the village was required to establish that its regulatory efforts were constitutional, the applicants had standing, and the court needed to analyze the strength of the village's justifications for the ordinance under intermediate scrutiny.

(9) Sensitive Places

People v. Green, 121 N.E.3d 911 (Ill. App. 1st Dist. 2018), where the court held that the State failed to show a close fit between the restriction on gun possession within 1000 feet of a school and the protection of children. The data did not reflect that the gun violence plaguing schools was perpetrated within 1000 feet of the schools (as opposed to inside the schools themselves) or that the perpetrators of that violence were the law-abiding adults whose conduct the statute regulates.

People v. Chairez, 423 Ill.Dec. 69, 104 N.E.3d 1158 (2018), held that a statute forbidding carrying or possession of firearm within 1,000 feet of public park abridges Second Amendment right to arms. The law is subject to elevated intermediate scrutiny.

Taylor v. Baton Rouge, 39 F.Supp.3d 807 (M.D. La. 2014), held that Ordinance § 13:95.3, forbidding the possession of a firearm on premises where alcoholic beverages are sold and/or consumed on the premises, unlawfully infringes upon the right of Plaintiff and other citizens to keep and bear firearms, in violation of the Second Amendment, because premises "shall include all of the licensed premises, including the parking lot."

(10) Reregistration of Registered Firearms and Restricting Registration to One Pistol Per 30-day Period Infringes Second Amendment

Heller v. District of Columbia, 801 F.3d 264 (D.C. Cir. 2015), was Mr. Heller's third challenge to local laws of the District of Columbia. *Heller III* upheld the basic registration requirement as applied to long guns, the requirement that a registrant be fingerprinted and photographed and make a personal appearance to register a firearm, the requirement that an individual pay certain fees associated with the registration of a firearm, and the requirement that registrants complete a firearms safety and training course. However, the court voided the requirement that a person bring with him or her the firearm to be registered, the requirement that a gun owner re-register his firearm every three years, the requirement that conditions registration of a firearm upon passing a test of knowledge of the District's firearms laws, and the prohibition on registration of more than one pistol per registrant during any 30-day period.

(11) Possession Under the Influence Does Not Extend to Constructive Possession

People v. DeRoche, 299 Mich. App. 301, 829 N.W.2d 891 (2013), presented a question of first impression, namely whether the Second Amendment precludes a prosecution for possession or use of a firearm by a person under the influence of alcoholic liquor, MCL 750.237, when the prosecution's theory is one of constructive possession in the defendant's own home. The court concluded that it does. The court applied intermediate scrutiny.

(12) Ban in Public Housing

Doe v. East St. Louis Housing Authority, 2019 U.S. Dist. LEXIS 62673 (S.D. Ill. April 11, 2019): held that "Pursuant to Plaintiffs' as-applied Second Amendment and Fourteenth Amendment Due Process and Equal Protection claims, Defendants are permanently enjoined from taking any action to enforce any provisions in the ESLHA Lease, including Sections IX(p) and XIV, as applied to the inability of N. DOE and other ESLHA residents from possessing functional firearms that are legal in their jurisdiction for self-defense and defense of others in their residences, provided they are otherwise-qualified and in compliance with all local, state, and federal legal requirements applicable to the ownership, possession, transportation and use of firearms.

(13) Excessive Fee

Murphy v. Guerrero, 2016 U.S. Dist. LEXIS 135684 (D.N.Mariana Islands 28 Sept. 2016), banned the enforcement of the $1,000 excise tax on pistols.

B. MINIMALIST INTERPRETATION OF HELLER AND McDONALD

Some courts apply intermediate scrutiny to all challenges, even to the core right to possess a firearm in the home. To pass *intermediate scrutiny*, the challenged *law* must: (1) further an important government interest and (2) must do so by *means* that are substantially related to that interest. A perfect fit between the means and the governmental objective is not required.

Some courts have held (1) some arms to be unprotected, (2) some magazines to be unprotected, (3) the bearing arms has been restricted to those capable of showing need that is satisfactory to a licensing authority, (4) some common ammunition is unprotected, (5) prohibited persons, even with old nonviolent felony convictions, usually do not prevail, (6) persons subject to a protective order lose right to arms, (7) persons with old mental health commitments usually do not prevail, (8) unlawful drug users do not prevail, (9) waiting periods are permissible, (10) high fees are permissible, (11) registration is permissible, (12) there is no right for commercial proprietors to sell firearms, and (13) a parking lot may be a sensitive place.

(1) Unprotected Arms

Worman v. Healey, 922 F.3d 26 (1st Cir. 2019), held that so-called assault firearms and magazines with a capacity of over 10 rounds are not protected by the Second Amendment. The court held that although Mass. Gen. Laws ch. 140, §§ 121, 131M, which proscribed the sale, transfer, and possession of certain semiautomatic assault weapons and large-capacity magazines, implicated the Second Amendment right of self-defense in the home by law-abiding, responsible individuals, it did not violate the Second Amendment because its burden on that core right was minimal and it withstood intermediate scrutiny. Specifically, the Act did not ban all semiautomatic firearms and magazines, but only proscribed specifically enumerated semiautomatic assault weapons, magazines of a particular capacity, and semiautomatic assault weapons that had certain combat-style features, which were not commonly used for home self-defense. The Act withstood intermediate scrutiny because it protected the safety and well-being

of citizens due to the inordinate dangers of the proscribed weapons. The court cited numerous other decisions upholding such laws.

Cox v. United States, 906 F.3d 1170 (10th Cir. 2018), cert. denied 204 L.Ed.2d 1090 (2019), adopted the familiar two step analysis: (1) does the law implicate the Second Amendment and (2) what standard of review is to be applied if the answer to step 1 is yes. In *Cox* the court never went beyond step 1. It concluded neither silencers (also known as mufflers or suppressors) nor short barreled rifles fall under the Second Amendment's protective umbrella. The court concluded that such instruments are not typically possessed by law-abiding citizens.

Gun Owners of America v. Barr, 363 F.Supp.3d 823 (W.D. Mich. 2019), held that bump stocks are covered by the machine statute, that an agency is entitled to change its definition of a statutory term, and that machine guns are not protected by the Second Amendment. *Heller* already informed that machine guns are not protected.

Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc), up held Maryland's Firearm Safety Act of 2013. It held that because the banned assault weapons and large-capacity magazines were like M-16 rifles—weapons that were most useful in military service—they were among those arms that the Second Amendment did not shield. Assuming that the assault weapons and large-capacity magazines prohibited by the Maryland law were somehow entitled to Second Amendment protection, the law was constitutional under the intermediate scrutiny standard of review because its prohibitions were reasonably adapted to a substantial governmental interest, which was Maryland's interest in the protection of its citizenry and the public safety. There was a dissent.

Hollister v. Lynch, 827 F.3d 436, 451 (5th Cir. 2016), held that a machine gun is not protected by the Second Amendment. Using the familiar two step analysis, the machine gun fails the analysis at step one and thus there is no need to determine what level of scrutiny to apply to the machine gun statute. *Heller* already informed that machine guns are not protected.

United States v. Hatfield, 2010 U.S.App. LEXIS 8271, 376 F.Appx. 706 (9th Cir. Apr. 16, 2010), noted that Hatfield contended that his possession of a sawed-off shotgun was protected under the Second Amendment because he had a lawful purpose in possessing the shotgun. He also contended that the Second Amendment protects possession of a sawed-off shotgun because a sawed-off shotgun resembles a blunderbuss, a short-barreled, muzzle-loading firearm used around the time of the Second Amendment's ratification. The court held these contentions fail because modern sawed-off shotguns are not typically possessed for lawful purposes and constitute "dangerous and unusual weapons" that are beyond the scope of the Second Amendment's protection, and cited *District of Columbia v. Heller,* 554 U.S. 570, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008).

(2) Limited Protection for Magazines

Assn. of N.J. Rifle & Pistol Clubs, Inc. v. Atty. Gen. of N.J., 910 F.3d 106, 116 (3rd Cir. 2018), held: "Because magazines feed ammunition into certain guns, and ammunition is necessary for such a gun to function as intended, magazines are 'arms' within the meaning of the Second

Amendment." However, the court utilized intermediate scrutiny and upheld the ban on magazines holding more than 10 rounds.

Fyock v. Sunnyvale, 779 F.3d 991, 998 (9th Cir. 2015), held that there is a corollary, but not unfettered, right to possess magazines necessary to render firearms operable. However, the restrictions on magazines holding more than 10 rounds survive intermediate scrutiny.

(3) Carrying Outside the Home

Peruta v. County of San Diego, 824 F.3d 919 (9th Cir. 2016) (en banc), held that the right of a member of the general public to carry a concealed firearm in public was not, and never had been, protected by the Second Amendment. The Second Amendment did not protect in any degree the right to carry concealed firearms in public, and any prohibition or restriction a state might choose to impose on concealed carry, including a requirement of good cause, however defined, was necessarily allowed by the Amendment. The court conceded that there might be a Second Amendment right for a member of the general public to carry a firearm openly in public, but the United States Supreme Court had not answered that question. There was a dissent.

Drake v. Filko, 724 F.3d 426 (3rd Cir. 2013), was a Second Amendment challenge to the New Jersey statute that forbids the open or concealed carrying of a pistol without a permit. A permit may be issued upon a showing of justifiable need. The court held that assuming that the Second Amendment conferred upon individuals some right to carry arms outside the home, the "justifiable need" standard of N.J. Stat. Ann. § 2C:58-4 was a long-standing regulation that enjoyed presumptive constitutionality. Accordingly, it regulated conduct falling outside the Second Amendment. Even if the "justifiable need" standard did not qualify as a presumptively lawful, long-standing regulation, it would withstand intermediate scrutiny, providing a second, independent basis for concluding that the standard was constitutional. To require applicants to demonstrate a "justifiable need" was a reasonable implementation of the State's substantial, critical interest in public safety. There was a dissent.

Woollard v. Gallagher, 712 F.3d 865 (4th Cir. 2013), involved a Second Amendment challenge to a Maryland law that forbids the open or concealed carrying of pistol without a permit. The court held that assuming (without deciding) the good-and-substantial-reason requirement of Maryland law for obtaining a handgun carrying permit implicated the Second Amendment, it passed constitutional muster under intermediate scrutiny. The favorable decision of the U.S. District Court was reversed.

Kachalsky v. County of Westchester, 701 F.3d 81 (2nd Cir. 2012), was an unsuccessful Second Amendment challenge to New York's requirement to show proper cause in order to obtain a pistol carrying permit. New York forbids the open carrying of a pistol, and a permit is required to carrying a pistol concealed. The court held that because our tradition so clearly indicates a substantial role for state regulation of the carrying of firearms in public, we conclude that intermediate scrutiny is appropriate in this case. The proper cause requirement passes constitutional muster if it is substantially related to the achievement of an important governmental interest. The parties agreed that New York has substantial, indeed compelling, governmental interests in public safety and crime prevention. The label intermediate scrutiny

carries different connotations depending on the area of law in which it is used. A perfect fit between the means and the governmental objective is not required. Here, instead of forbidding anyone from carrying a handgun in public, New York took a more moderate approach to fulfilling its important objective and reasonably concluded that only individuals having a bona fide reason to possess handguns should be allowed to introduce them into the public sphere. That New York has attempted to accommodate certain particularized interests in self-defense does not somehow render its concealed carry restrictions unrelated to the furtherance of public safety.

Williams v. State, 10 A.3d 1167, 1177 (Md. 2010), held that "If the Supreme Court, in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly." Consequently, a Second Amendment challenge failed to a ban on carrying a pistol openly or concealed without a license.

(4) Hollow Point Ammunition

Jackson v. San Francisco, 746 F.3d 953 (9th Cir. 2014), held that restrictions on ammunition may burden the core Second Amendment right of self-defense. However, the restriction on sale of hollow-point ammunition survives intermediate scrutiny.

(5) Prohibited Persons Usually Do Not Prevail

Medina v. Whitaker, 913 F.3d 152 (D.C. Cir. 2019), held that because felons were not among the law-abiding, responsible citizens entitled to the protections of the Second Amendment, a felony conviction removes one from the scope of the Second Amendment. To the extent that it could be possible for a felon to show that his crime was so minor or regulatory that he did not forfeit his right to bear arms by committing it, defendant had not done so, as he was convicted of felony fraud, a serious crime, punishable in every state, and just a few years after the end of his probation for his first crime he was convicted of three more counts of misdemeanor fraud. Thus *Medina* lost at step one of the two step analysis normally applied in Second Amendment challenges.

Kanter v. Barr, 919 F.3d 437 (7th Cir. 2019), rejected an as-applied Second Amendment challenge to the federal law disarming persons convicted of a felony (crime punishable by imprisonment exceeding 1 year but exempting crimes punishable by up to 2 years and classified as a misdemeanor). The court noted that some circuits may allow an as-applied challenge. On the other hand, some circuits always hold the law constitutional as applied to felons as a class regardless of their individual circumstances or nature of the offense. The 7th Circuit applied the two step analysis and upheld the law under intermediate scrutiny. There was a dissent.

Hatfield v. Barr, 925 F.3d 950 (7th Cir. 2019), relied on *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), and reversed *Hatfield v. Sessions*, 322 F.Supp.3d 885 (S.D. Ill. 2018), which was a successful as-applied challenge, on Second Amendment grounds, to federal law prohibiting a person convicted of felony to possess a firearm, 18 U.S. Code sec. 922 (g) (1). The Court held that the "class" of as-applied challengers here should be more specific to Hatfield's general circumstances: non-violent felons who received no prison time and a small monetary fine for

their offense. The Court also held that Hatfield is correct: the Government has not demonstrated (1) an extremely strong public-interest justification for banning non-violent felons who received no prison time from possessing firearms for self-defense purposes, and (2) a close fit between that purpose and § 922(g)(1). However, the 7th Circuit used *Kanter* as justification to hold in *Hatfield* that in an as-applied challenge to a felon-dispossession law, the plaintiff "bear[s] the burden of production and the risk of non-persuasion."

United States v. Skoien, 614 F.3d 638 (7th Cir. 2010) (en banc), upheld the federal law disarming persons convicted of misdemeanor domestic violence. The United States conceded that some form of strong showing ("intermediate scrutiny," many opinions say) is essential, and that 18 U.S. Code § 922(g)(9) is valid only if substantially related to an important governmental objective. The court noted that the concession is prudent, and that the court need not get more deeply into the "levels of scrutiny" quagmire, for no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective. Both logic and data establish a substantial relation between § 922(g)(9) and this objective. There was a dissent.

(6) Protective Order

United States v. Reese, 627 F.3d 792 (10th Cir. 2010), reversed a favorable U.S. District Court order and rejected a Second Amendment challenge to the federal law that disarms a person subject to a domestic violence protective order. A family court had entered a protective order against defendant in favor of his then-wife. Defendant had agreed to imposition of a protective order. The order, which had a term of 50 years, prohibited defendant from possessing firearms or ammunition. Defendant was indicted for violating 18 U.S. Code § 922(g)(8) after firearms were found at his residence. The district court found that § 922(g)(8) was unconstitutional as applied to defendant because it violated his right to keep and bear arms. The court of appeals held that § 922(g)(8), viewed under intermediate scrutiny, did not violate the Second Amendment, as it was substantially related to an important government objective of keeping firearms out of the hands of domestic abusers.

(7) Mental Health Disqualification

Beers v. Atty. Gen. United States, 927 F.3d 150 (3rd Cir. 2019), was an as-applied Second Amendment challenge to 18 U.S. Code § 922 (g) (4), which forbids the possession of a firearm or ammunition by a person who was previously committed to a mental institution. The court held a challenger must (1) identify the traditional justifications for excluding from Second Amendment protections the class of which he appears to be a member, and then (2) present facts about himself and his background that distinguish his circumstances from those of persons in the historically barred class. If a challenger passes these two hurdles, the burden shifts to the Government to demonstrate that the regulation satisfies some form of heightened scrutiny. Having identified the traditional justification for denying the mentally ill the right to arms — that they present a danger to themselves or to others — the court asked whether Beers had presented sufficient facts to distinguish his circumstances from those of members in this historically-barred class. The court noted that Beers's only bases for distinguishing himself, however, are that a substantial amount of time has passed since he was institutionalized and that he is now rehabilitated. That was not enough. He failed at step one. Beers received restoration of rights

from Pennsylvania. However, that did not help him because the court concluded that the state restoration failed to satisfy the NICS Improvement Amendments Act of 2007, section 105, 121 Stat. 2559.

(8) Unlawful Drug Users

United States v. Yancey, 621 F.3d 681 (7th Cir. 2010) (per curiam), was a Second Amendment challenge to 18 U.S.C.S. § 922(g)(3), which makes it a felony for a person who is an unlawful user of or addicted to any controlled substance to possess a gun. An "unlawful user" is someone who regularly ingests controlled substances in a manner except as prescribed by a physician. The court held that keeping guns away from habitual drug abusers was analogous to disarming felons and it had previously concluded that barring felons from firearm possession was constitutional. Moreover, habitual drug abusers, like the mentally ill, were more likely to have difficulty exercising self-control, making it dangerous for them to possess firearms. Ample academic research confirmed the connection between drug use and violent crime. The court found that Congress acted within constitutional bounds by prohibiting illegal drug users from firearm possession because it was substantially related to the important governmental interest in preventing violent crime. An unlawful drug user like Yancey could regain his right to possess a firearm simply by ending his drug abuse. In that sense, the restriction in § 922(g)(3) is far less onerous than those affecting felons and the mentally ill.

(9) Waiting Period

Silvester v. Harris, 843 F.3d 816 (9th Cir. 2016), held that a ten-day waiting period on subsequent purchaser of firearm is constitutional under intermediate scrutiny. Ten day waiting period also serves as cooling off period. It reversed *Silvester v. Harris*, 41 F.Supp.3d 927 (E.D. Calif. 2014), which held that the 10-day waiting periods violate the Second Amendment as applied to those who already lawfully possess a firearm as confirmed in the Automated Firearms System ("AFS"), to those who possess a valid Carry Concealed Weapon ("CCW") license, and to those who possess a valid Certificate of Eligibility ("COE") and possess a firearm. NOTE: In New York an application for a pistol permit must be acted upon within six months of presentment, but may be delayed with written notice. N.Y. Penal Law § 400.00 [4-a.].

(10) High Fees Are Permitted.

Kwong v. Bloomberg, 723 F.3d 160 (2nd Cir. 2013), held that New York City, N.Y., Admin. Code § 10-131(a)(2), which set the residential handgun licensing fee in the city at $340 for a three-year license, was a constitutionally permissible licensing fee because the fee was designed to defray, and did not exceed, the administrative costs associated with the licensing scheme. The fee was not prohibitive or exclusionary as applied to plaintiffs because they all were able to obtain the residential handgun licenses they sought. The licensing fee did not impose an unconstitutional burden on the exercise of plaintiffs' Second Amendment rights. Because the fee was designed to allow the city to recover the costs incurred through operating its licensing scheme, which was designed to promote public safety and prevent gun violence, § 10-131(a)(2) easily survived intermediate scrutiny. In addition to the $340 licensing fee, the record indicates that applicants are required to pay an additional $94.25 fee for fingerprinting and background

checks conducted by the New York State Division of Criminal Justice Services. This fee is paid only for initial applications, not for renewals, and was not contested on appeal.

Bauer v. Becerra, 858 F.3d 1216, 1225 n. 6 (9th Cir. 2017), upheld a smaller fee as have other courts.

(11) Registration Is Permitted.

Heller v. District of Columbia, 801 F.3d 264 (D.C. Cir. 2015), which was Mr. Heller's third challenge to District of Columbia law, upheld the basic registration requirement as applied to long guns, the requirement that a registrant be fingerprinted and photographed and make a personal appearance to register a firearm, the requirement that an individual pay certain fees associated with the registration of a firearm, and the requirement that registrants complete a firearms safety and training course. However, the court voided the requirement that a person bring with him or her the firearm to be registered, the requirement that a gun owner re-register his firearm every three years, the requirement that conditions registration of a firearm upon passing a test of knowledge of the District's firearms laws, and the prohibition on registration of more than one pistol per registrant during any 30-day period.

(12) No Right for Commercial Proprietors to Sell Firearms

Teixeira v. County of Alameda, 873 F.3d 670 (9th Cir. 2017) (en banc), held that the county did not violate the Second Amendment when it denied plaintiffs conditional use permits to open a gun shop because the proposed location of the shop fell within a prohibited county zone. Plaintiffs had not plausibly alleged that the county's ordinance impeded any resident of the county who wished to purchase a firearm from doing so, and thus, plaintiffs failed to state a claim for relief based on infringement of the Second Amendment rights of their potential customers. Plaintiffs could not state a Second Amendment claim based solely on the ordinance's restriction on their ability to sell firearms because the Constitution did not confer a freestanding right on commercial proprietors to sell firearms. There was a dissent.

(13) Sensitive Places

United States v. Class, 2019 U.S. App. LEXIS 21406 (D.C. Cir. July 19, 2019), challenged on Second Amendment grounds his conviction for possessing a firearm on Capitol Grounds, namely, the capitol parking lot. The court held that to evaluate the constitutionality of firearms regulations, the court first determines whether a particular provision impinges upon a right protected by the Second Amendment. If it does, the court asks whether the provision passes muster under the appropriate level of constitutional scrutiny. The court held that because the Capitol Grounds ban does not impinge upon a right protected by the Second Amendment, it need not reach the second question. The court concluded that because the Maryland Avenue lot has been set aside for the use of government employees, is in close proximity to the Capitol building, and is on land owned by the government, the lot is to be considered as a single unit with the Capitol building, and thus the lot is a "sensitive" place where firearms prohibitions are presumptively lawful.

IV. THE FUTURE

Where are we after *Heller* and *McDonald*?

A. WAITING FOR SUPREME COURT ON TRANSPORTING OUTSIDE THE HOME

The U.S. Supreme has granted the petition for a writ of certiorari in *N.Y. State Rifle & Pistol Assn. v. City of N.Y.*, cert. granted 139 S.Ct. 939 (2019). QUESTION PRESENTED: New York City prohibits its residents from possessing a handgun without a license, and the only license the City makes available to most residents allows its holder to possess her handgun only in her home or en route to one of seven shooting ranges within the city. The City thus bans its residents from transporting a handgun to any place outside city limits—even if the handgun is unloaded and locked in a container separate from its ammunition, and even if the owner seeks to transport it only to a second home for the core constitutionally protected purpose of self defense, or to a more convenient out-of-city shooting range to hone its safe and effective use. The City asserts that its transport ban promotes public safety by limiting the presence of handguns on city streets. But the City put forth no empirical evidence that transporting an unloaded handgun, locked in a container separate from its ammunition, poses a meaningful risk to public safety. Moreover, even if there were such a risk, the City's restriction poses greater safety risks by encouraging residents who are leaving town to leave their handguns behind in vacant homes, and it serves only to increase the frequency of handgun transport within city limits by forcing many residents to use an in-city range rather than more convenient ranges elsewhere. The question presented is: Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel. The 2nd Circuit denied relief. It applied intermediate scrutiny to the Second Amendment challenge. 883 F.3d 45 (2nd Cir. 2018).

Rogers v. Grewal, petition for writ of certiorari filed in U.S. Supreme Court, No. 18-824, on December 20, 2018, is pending before the court. The case is from New Jersey. Despite the wealth of authority demonstrating that the Second Amendment guarantees a right not just to keep arms, but also to bear them outside the home for self-defense, several Courts of Appeals continue to resist that conclusion, leaving the law in a state of chaos and the fundamental right to carry a firearm dependent on where one lives. The Supreme Court is requested to grant certiorari, resolve this untenable circuit split, and restore to all the People protected by the Second Amendment the right to keep and bear arms. Like all the right to "bear arms" with a license or permit outside the home cases, the petitioners are law-abiding, trained people, who are not disqualified from possessing firearms and ammunition.

Gould v. Lipson, petition for writ of certiorari filed in U.S. Supreme Court, No. 18-1272, on April 1, 2019, is pending before the court. The case is from Massachusetts. It is another challenge to the good cause requirement to obtain a carrying license. The 1st Circuit applied intermediate scrutiny and upheld the statute. *Gould v. Morgan*, 907 F.3d 659 (1st Cir. 2018).

B. SO-CALLED ASSAULT WEAPONS OR ASSAULT FIREARMS

Thus far the U.S. Supreme Court has not reviewed a so-called assault weapon or assault firearm case. See the dissent by Justice Thomas, joined by Justice Scalia, from denial of certiorari in the Highland Park, Illinois, "assault weapon" ban. *Friedman v. City of Highland Park*, 136 S.Ct. 447 (2015). Here is some helpful information on this topic.

The military defines assault rifles as "short, compact, selective-fire weapons that fire a cartridge intermediate in power between submachinegun and rifle cartridges. Assault rifles have mild recoil characteristics and, because of this, are capable of delivering effective full automatic fire at ranges up to 300 meters." This is in contradistinction to a submachinegun, which is a full automatic or selective fire firearm chambered for a pistol cartridge, and an automatic rifle, which is a full automatic or selective fire rifle chambered for a full power rifle cartridge. Machine pistols differ from submachine guns only in size; they are quite compact. **Sources**: HAROLD E. JOHNSON, DEFENSE INTELLIGENCE AGENCY, SMALL ARMS IDENTIFICATION AND OPERATION GUIDE-EURASIAN COMMUNIST COUNTRIES 105 (1976); see, e.g., Keith R. Fafarman, State Assault Rifle Bans and the Militia Clauses of the U.S. Constitution, *67 IND. L.J. 187 (1991);* Eric C. Morgan, Assault Rifle Legislation: Unwise and Unconstitutional, 17 AM. J. CRIM. L. 143 (1990); see also GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 65 (1991) (discussing pro-control groups' insistence on controlling "various special weapon categories"). IAN V. HOGG & JOHN WEEKS, MILITARY SMALL ARMS OF THE 20TH CENTURY 13, 69, 78, 158-59 (5th ed. 1985). Id. at 11, 31, 40, 53, 67.

Confusion is exploited. "The weapons' menacing looks, coupled with the public's confusion over fully automatic machine guns versus semi-automatic assault weapons--anything that looks like a machine gun is assumed to be a machine gun--can only increase the chance of public support for restrictions on these weapons." JOSH SUGARMANN, ASSAULT WEAPONS AND ACCESSORIES IN AMERICA 26 (1988), *available at http://www.vpc.org/studies/awaconc.htm.*

The pejorative term "assault weapon" and the confusion over firearms were exploited to enact legislation in California. Bruce H. Kobayashi & Joseph E. Olson, In Re 101 California Street: *A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of "Assault Weapons*," *8 STAN. L. & POL'Y REV. 41, 45-47 (1997).* Opponents of gun ownership also exploit this. "Powerful and emotionally-engaging images are vitally important reinforcers of strong messages. For example, intimidating images of military-style weapons help bring to life the point that we are dealing with a different situation than in earlier times." FRANK O'BRIEN, JOHN BEFFINGER, MATTHEW KOHUT & AL QUINLAN, PREVENTING GUN VIOLENCE THROUGH EFFECTIVE MESSAGING 5 (2012). This booklet provides "language dos and don'ts" and advises to focus on emotion. *Id*. at 6, 9.

V. SOME HELPFUL ARTICLES & JURY INSTRUCTION IN SELF-DEFENSE CASES

Stephen P. Halbrook, *Taking Heller Seriously: Where Has The Roberts Court Been, And Where Is It Headed, On The Second Amendment*, 13 Charleston Law Review 175 (2018); Alice Marie Beard, *Gay Rights Strengthen Gun Rights*, 57 South Tex. L. Rev. 215 (2016); Alice Marie Beard,

Resistance By Inferior Courts to Supreme Court's Second Amendment Decisions, 81 Tenn. L. Rev. 673 (2014).

The evidence shows that the defendant possessed a firearm. You may not draw an adverse inference from the mere possession of a firearm. Defendant is entitled to possess a firearm under our constitution. Authority: *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008); *McDonald v. Chicago*, 130 S.Ct. 3020 (2010); *State v. Rupe*, 101 Wash.2d 664, 683 P.2d 571, 595 (1984); State Constitutional right to arms, e.g., Del. Const. Art. I, § 20.

Furthermore, NRA members and their families, former members, and people who support the principles of the NRA may not be automatically prevented from serving on a jury. *United States v. Salamone*, 800 F.2d 1216 (3d Cir. 1986). In turn, you should ask potential jurors if they are members, contributors, or supporters of any organization that favors gun control.

VI. LOOK AT YOUR STATE CONSTITUTION

Remember that the federal constitution is a floor and not a ceiling. Generally state constitutions are at liberty to protect rights more broadly than the federal constitution. For example, *Doe v. Wilmington Housing Authority*, 88 A.3d 654 (Del. 2014), teaches that the Delaware Supreme Court uses intermediate scrutiny. The court held that under the state guarantee to arms, Article I, § 20, a housing authority policy that bans gun possession in common areas and requires production of a permit or license upon request, based on reasonable cause that the policy has been violated, is unconstitutional.