



## POST-HELLER LITIGATION SUMMARY Updated July 19, 2010

### I. Introduction and Overview

Legal Community Against Violence (LCAV) is tracking litigation involving Second Amendment challenges to federal, state and local gun laws asserted in the aftermath of the United States Supreme Court's landmark decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (U.S. 2008).

LCAV has examined over 200 federal and state post-*Heller* decisions discussing the Second Amendment in the preparation of this analysis. This collection of cases was last updated in a search of the Lexis database on July 8, 2010. LCAV has a wide variety of [Second Amendment resources](#) available on our web site, including [summaries of all federal appellate post-\*Heller\* Second Amendment decisions](#).

#### A. The *Heller* Decision

In *Heller*, the Supreme Court held for the first time that the Second Amendment protects an individual right to possess a firearm in the home for self-defense. In a 5-4 ruling, the Court struck down Washington, D.C.'s decades-old ban on handgun possession, and the District's requirement that firearms in the home be stored unloaded and disassembled or bound by a locking device (a requirement which had no exception for self-defense).

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

A reversal of the Supreme Court's prior interpretation of the Second Amendment – and over seventy years of well-established case law – the *Heller* decision represented a watershed moment in Second Amendment jurisprudence. For more information about the case, please visit the [Heller resources](#) on our web site.

#### B. *McDonald v. Chicago*

The United States Supreme Court recently announced its decision in *McDonald v. Chicago*, 2010 U.S. LEXIS 5523 (U.S. June 28, 2010), holding in a 5-4 ruling that the Second Amendment applies to state and local governments in addition to the federal government. In doing so, the

Court reversed a Seventh Circuit decision that affirmed the dismissal of Second Amendment challenges to handgun bans in Chicago and Oak Park, Illinois. The Supreme Court did not reach the issue of whether the Second Amendment applies against the states in *Heller*, because that case involved only the laws of the District of Columbia (which is a federal enclave).

As it held in *Heller*, the Court reiterated in *McDonald* that the Second Amendment only protects a right to possess a firearm in the home for self-defense, and that a wide variety of gun laws are constitutionally permissible. The *McDonald* Court repeated that, “the right to keep and bear arms is not ‘a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,’” and listed again the presumptively lawful measures identified in *Heller*. “Despite municipal respondents’ doomsday proclamations,” the Court stated, “incorporation does not imperil every law regulating firearms.”

For more information about the *McDonald* decision, please visit the [McDonald v. Chicago resources](#) on our web site.

### **C. Lawsuits After *Heller* and *McDonald***

The bulk of Second Amendment challenges following *Heller* have involved unsuccessful attempts by criminal defendants to challenge their indictments or convictions under a wide spectrum of firearm regulations. Courts have found that the Second Amendment is consistent with federal statutes prohibiting firearm possession by persons convicted of felonies and domestic violence misdemeanors, and state and local laws requiring firearm registration, banning assault weapons and prohibiting the unlicensed carrying of concealed weapons.

The *Heller* decision has also resulted in the initiation of a flood of civil lawsuits, including twenty ongoing suits against state and local governments and the District of Columbia. A number of these cases were stayed pending the *McDonald* decision, but will proceed following the Supreme Court’s holding that the Second Amendment applies to state and local governments. Additionally, two lawsuits have already been filed that challenge the firearms ordinance adopted by the City of Chicago following *McDonald*, as well as others challenging state and local laws around the country.

Significant questions about the scope and application of the Second Amendment remain unresolved following *Heller* and *McDonald*, questions with which post-*Heller* courts continue to struggle. For example, although the *Heller* Court noted that its list of “presumptively lawful” regulations was not exhaustive, it did not provide guidance as to what qualities would make a law fall within that category. Moreover, *Heller* did not articulate how courts should evaluate challenges to firearms statutes beyond its “presumptively lawful” list, and lower courts have split over how to proceed in these cases.

## II. Civil Litigation Raising Second Amendment Claims After *Heller*

### A. Significant Pending Lawsuits Against State and Local Governments

State and local governments and the District of Columbia presently face twenty lawsuits challenging various firearms laws under the Second Amendment, including:<sup>1</sup>

- Chicago, Illinois: challenging ordinance adopted following the *McDonald* decision, including provisions prohibiting the sale of firearms, the carrying of firearms outside of the home, the registration of unsafe handguns, and the possession of more than one operable firearm, and provisions establishing firearm training and minimum age requirements (*Benson v. Chicago*, No. 10-4184: complaint filed on July 6, 2010); challenging same and numerous additional provisions (*Second Amendment Arms v. Chicago*, No. 10-4257: complaint filed on July 9, 2010)
- Alameda County, California: challenging ordinance prohibiting firearm possession on County property (*Nordyke v. King*, No. 07-15763: remanded to Ninth Circuit panel for reconsideration in light of *McDonald*; parties have been ordered to file supplemental briefing)
- Evanston, Illinois: challenging ordinance prohibiting possession of handguns<sup>2</sup> (*NRA v. Evanston*, No. 08-3693: stayed pending resolution of *McDonald*)
- Washington, D.C.: challenging laws establishing certain registration requirements and prohibiting registration of assault weapons and large capacity ammunition magazines (*Heller v. District of Columbia*, No. 10-7036: on appeal to the D.C. Circuit Court of Appeals following district court's decision rejecting plaintiffs' claims<sup>3</sup>); challenging laws prohibiting the open or concealed carrying of handguns (*Palmer v. District of Columbia*, No. 09-1482: summary judgment motions argued in January)
- San Francisco, California: challenging ordinances requiring safe storage of handguns, prohibiting the discharge of firearms, and prohibiting the sale of certain ammunition that "serves no sporting purpose" or is designed to expand or fragment upon impact (*Jackson v. San Francisco*, No. 09-2143: stayed pending resolution of *Nordyke*; plaintiffs have filed motion seeking to lift stay following *McDonald*); challenging same and state law granting local law enforcement discretion in the issuance of licenses to carry concealed weapons (*Pizzo v. San Francisco*, No. 09-4493: case dismissed on July 13, 2010 due to parties' failure to attend case management conference; present status is unclear)
- Sacramento and Yolo Counties, California: challenging the denial of plaintiffs' applications for concealed handgun licenses by County sheriffs (*Sykes v. McGinness*, No. 09-1235: stay

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<sup>1</sup> Note *Hodgkins v. Holder*, No. 09-587, brought on behalf of plaintiffs who are United States citizens but reside outside the U.S. According to the complaint, the plaintiffs are unable to purchase and receive firearms under federal law due to their lack of residence within any state, allegedly in violation of the Second Amendment and other constitutional provisions. Following the district court's dismissal of the litigation for lack of standing, the case is currently on appeal at No. 10-5062.

<sup>2</sup> This ordinance was amended to permit handguns kept at a person's residence for self-protection, but is still the subject of ongoing litigation.

<sup>3</sup> *Heller v. District of Columbia*, 2010 U.S. Dist. LEXIS 29063 (D.D.C. Mar. 26, 2010).

on filing of summary judgment motions for 60 days following *McDonald*; same issue raised with respect to Sacramento County in *Rothery v. Sacramento*, No. 09-16852: currently on appeal to the Ninth Circuit following district court dismissal and stayed until August 16, 2010)

- San Jose, California; Santa Clara County, California: challenging state law prohibiting the carrying of a concealed weapon without a permit and state law vesting discretion in issuing permits with local law enforcement (*Jacobs v. Reed*, No. 10-913: litigation is presently stayed)
- State of California: challenging law granting local law enforcement discretion in the issuance of licenses to carry concealed weapons (issue raised in *Pizzo v. San Francisco*, *Sykes v. McGinness*, *Rothery v. Sacramento* and *Jacobs v. Reed*, all discussed above); challenging law prohibiting the sale of any unsafe handgun (any handgun not included on a state roster of handguns meeting certain safety requirements) (*Pena v. Cid*, No. 09-1185: stay on litigation has been lifted)
- Westchester County, New York: challenging state law requiring showing of good cause for issuance of concealed carry permit (*Kachalsky v. Cacace*, No. 10-5413: complaint filed in federal court on July 15, 2010)
- Denver, Colorado; State of Colorado: challenging residency requirement for the issuance of a concealed carry permit (*Peterson v. LaCabe*: No. 10-59: cross-motions for summary judgment filed)
- State of Georgia (and seeking injunction against Upson County, Georgia): challenging a state law prohibiting the possession of firearms in places of worship (*GeorgiaCarry.org v. Georgia*: complaint filed in state court on July 9, 2010)
- State of North Carolina (and seeking injunction against City of King and Stokes County, North Carolina): challenging state laws prohibiting the carrying of firearms and ammunition during states of emergency, and enabling government officials to prohibit the purchase, sale and possession of firearms during states of emergency (*Bateman v. Perdue*, No. 10-265: complaint filed in federal court on June 28, 2010)
- San Diego, California: challenging sheriff's denial of an application for a license to carry a concealed weapon and the licensing requirements of good cause and of a duration of residency within a jurisdiction (*Peruta v. County of San Diego*, No. 09-2371: County's motion to dismiss denied by district court; plaintiffs filed first amended complaint on June 25, 2010)
- Seattle, Washington: challenging City Parks Department rule prohibiting the possession of firearms in city parks (*Warden v. Nickels*, No. 10-35243: lawsuit dismissed by federal district court; appeal is currently stayed until August 13, 2010)
- Cook County, Illinois: challenging ordinance prohibiting the possession or sale of any assault weapon or large capacity magazine (*Wilson v. County of Cook*, No. 1-08-1202: state appellate court affirmed dismissal of plaintiffs' complaint; plaintiffs have requested review by the Illinois Supreme Court)

- Wilmington Housing Authority (a Delaware state agency): challenging lease provision prohibiting possession of firearms in public housing (*Doe v. Wilmington Housing Authority*, No. 10-473: complaint filed in chancery court on May 26, 2010; case has been removed to federal district court)

## **B. Challenges Have Been Largely Unsuccessful**

Generally, Second Amendment challenges by civil plaintiffs have been largely unsuccessful. In the wake of the *Heller* decision, for example, the District of Columbia adopted comprehensive firearms laws. In March 2010, a federal district court rejected a Second Amendment challenge to many of those laws, including D.C.’s firearms registration system, ban on assault weapons and high capacity ammunition magazines, one-handgun-a-month law, and law requiring the reporting of lost or stolen firearms.<sup>4</sup>

In another significant case, the Seventh Circuit rejected a civil suit challenging a town ordinance requiring the registration of all firearms, stating that, “Cicero has not prohibited gun possession in the town. Instead, it has merely regulated gun possession.”<sup>5</sup> Courts have also held that the Second Amendment does not prevent the government from limiting a particular individual’s right to possess or carry firearms where appropriate justification exists. Courts have rejected suits by, among others, an individual prohibited from acquiring a firearms permit due to a past conviction,<sup>6</sup> a person whose firearm was temporarily confiscated by a police officer unable to confirm that the plaintiff had a license to carry it,<sup>7</sup> and a plaintiff denied a permit to carry a concealed firearm.<sup>8</sup>

Several courts, however, have cited *Heller* in expressing concern about state action that would limit an individual’s right to possess a firearm where that person is otherwise lawfully able to do so. These cases are very fact-specific, but indicate that law enforcement agencies and other government officials should proceed with caution where they try to seize or withhold firearms from persons not prohibited from possessing them by law.<sup>9</sup>

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<sup>4</sup> *Heller v. District of Columbia*, 2010 U.S. Dist. LEXIS 29063 (D.D.C. Mar. 26, 2010). The court held that the District Council had provided “ample evidence” of a “substantial nexus” between the registration system and the government’s interest in promoting public safety sufficient to satisfy the “intermediate scrutiny” level of review (which requires the government to prove that the challenged law is substantially related to an important governmental interest). The court deferred to the Council’s conclusion that assault weapons and large capacity magazines constitute dangerous and unusual weapons that are not within the scope of the core Second Amendment right, but observed that there was also sufficient evidence to find that these prohibitions met intermediate scrutiny.

<sup>5</sup> *Justice v. Town of Cicero*, 577 F.3d 768 (7th Cir. Ill. 2009), cert. denied, 177 L. Ed. 2d 323 (2010).

<sup>6</sup> *Bethel v. Wagner*, 2009 U.S. Dist. LEXIS 76452 (D. Neb. Aug. 26, 2009).

<sup>7</sup> *Schubert v. Springfield*, 602 F. Supp. 2d 254, 257 n.4 (D. Mass. 2009) (noting that the plaintiff’s right to bear arms was “secured, not restricted, by the state’s licensing statute”).

<sup>8</sup> *Young v. Hawaii*, 2009 U.S. Dist. LEXIS 28387, at \*13 (D. Haw. Apr. 1, 2009).

<sup>9</sup> *Simmons v. Gillespie*, 2008 U.S. Dist. LEXIS 81424 (C.D. Ill. Aug. 1, 2008); *Cleveland v. Fulton*, 178 Ohio App. 3d 451 (Ohio Ct. App. 2008); *Jennings v. Mukasey*, 2008 U.S. Dist. LEXIS 82465 (M.D. Fla. Sept. 22, 2008).

### III. Post-*Heller* Second Amendment Challenges by Criminal Defendants

#### A. Federal Firearms Statutes

Courts have almost uniformly rejected Second Amendment challenges to federal firearms laws raised by criminal defendants. Post-*Heller* courts have cursorily dismissed challenges by defendants indicted or convicted under the federal statute prohibiting possession of a firearm by a convicted felon, holding that the *Heller* Court's unequivocal statement that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons" forecloses challenges to this law.<sup>10</sup> Criminal defendants have been similarly unsuccessful in Second Amendment challenges to federal laws prohibiting possession of a firearm while committing another crime,<sup>11</sup> possession of an illegal weapon (e.g., a machine gun, a sawed-off shotgun, or other prohibited weapon),<sup>12</sup> possession in violation of a court order,<sup>13</sup> and possession in a prohibited place.<sup>14</sup>

##### 1. Challenges to Federal Law Prohibiting Firearm Possession Following Conviction of a Domestic Violence Misdemeanor

Some courts have struggled, however, when evaluating Second Amendment challenges relating to the federal crime of possessing a firearm following a conviction for a misdemeanor crime of domestic violence.<sup>15</sup> Unlike the prohibition against possession by felons, the statute cannot technically be considered a "longstanding prohibition," as it was enacted in 1996. Additionally, defendants have argued that a lifetime prohibition on firearm possession is too severe a penalty to apply automatically following a misdemeanor conviction.

The majority of post-*Heller* courts confronting this issue have rejected Second Amendment challenges to this law on the grounds that the statute is within the category of "presumptively lawful" laws discussed in *Heller*.<sup>16</sup> The Seventh Circuit en banc recently reversed a decision that had vacated a defendant's conviction under this statute. The original circuit panel had held that the government failed to prove that the statute met an intermediate scrutiny level of review, but ordered that the defendant's conviction be reinstated if the government successfully meets this burden on remand.<sup>17</sup> The en banc court, however, found that "[b]oth logic and data establish

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<sup>10</sup> *Heller*, 128 S. Ct. at 2816-2817. See, e.g., *United States v. Miller*, 604 F. Supp. 2d 1162 (W.D. Tenn. 2009); *United States v. Anderson*, 559 F.3d 348 (5th Cir. 2009).

<sup>11</sup> See, e.g., *United States v. Prince*, 2009 U.S. Dist. LEXIS 54116 (D. Kan. June 26, 2009); *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).

<sup>12</sup> See, e.g., *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008), cert. denied, 129 S. Ct. 1369 (2009).

<sup>13</sup> See, e.g., *United States v. Luedtke*, 589 F. Supp. 2d 1018 (E.D. Wis. 2008).

<sup>14</sup> See, e.g., *United States v. Lewis*, 2008 U.S. Dist. LEXIS 103631 (D.V.I. Dec. 24, 2008); *United States v. Masciandaro*, 648 F. Supp. 2d 779 (E.D. Va. 2009) (affirming defendant's conviction for possession of a loaded weapon in a motor vehicle in a national park).

<sup>15</sup> 18 U.S.C. § 922(g)(9).

<sup>16</sup> See, e.g., *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *United States v. Holbrook*, 613 F. Supp. 2d 745 (W.D. Va. 2009); *United States v. Booker*, 570 F. Supp. 2d 161 (D. Me. 2008).

<sup>17</sup> *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), vacated, 2010 U.S. App. LEXIS 6584 (7th Cir. Feb. 22, 2010). Intermediate scrutiny requires the government to prove that the challenged law is substantially related to an important governmental interest.

a substantial relation” between the federal domestic violence statute and the goal of protecting public safety.<sup>18</sup>

In an unpublished decision, the Fourth Circuit vacated a defendant’s conviction for possession of a firearm following a conviction for a misdemeanor crime of domestic violence, remanding the case to the district court for a determination of the level of scrutiny to apply to the statute and full consideration of the defendant’s Second Amendment challenge.<sup>19</sup> In another case, a federal district court granted a defendant’s motion arguing that the Second Amendment required that he be allowed to offer an affirmative defense that he possessed “no prospective risk of violence,” and should therefore be able to possess a firearm for self-defense. The Tenth Circuit subsequently overturned this decision, however.<sup>20</sup>

## **2. Other Challenges to Conduct by the Federal Government in Criminal Cases**

Several federal courts have cited *Heller* in decisions curtailing the federal government’s ability to penalize otherwise lawful possession of a firearm during criminal proceedings. One court found a pretrial bail condition unconstitutional under the Second Amendment, where that condition would have prohibited the defendant from possessing firearms without any particularized finding that he was a threat to public safety.<sup>21</sup> In another case, a court cited the Second Amendment in holding that the government needed to prove that the defendant had knowledge that he was a convicted felon and therefore unable to possess a firearm, where he had been previously told that his felony conviction would be set aside following his cooperation with law enforcement.<sup>22</sup> In a third decision, a court refused to enhance a defendant’s sentence for illegal firearm possession where a handgun found in his home was owned by the defendant’s wife for self-defense.<sup>23</sup>

### **B. State and Local Firearms Laws**

Most courts that have heard criminal defendants’ Second Amendment challenges to state and local laws have upheld the statutes at issue.<sup>24</sup> While a number of courts dismissed these challenges on the ground that the Second Amendment does not apply to the states, the issue recently decided by the U.S. Supreme Court in *McDonald v. Chicago*, others have held that even if the Amendment does apply, the statutes at issue are permissible exercises of a jurisdiction’s police power to regulate firearms. For example, state courts have published decisions affirming

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<sup>18</sup> *United States v. Skoien*, 2010 U.S. App. LEXIS 14262 (7th Cir. July 13, 2010).

<sup>19</sup> *United States v. Chester*, 2010 U.S. App. LEXIS 3739 (4th Cir. Feb. 23, 2010) (Unpublished).

<sup>20</sup> *In re United States*, 578 F.3d 1195 (10th Cir. 2009).

<sup>21</sup> *United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008). However, see *United States v. Kennedy*, 2009 U.S. App. LEXIS 9881 (9<sup>th</sup> Cir. May 6, 2009) (Unpublished) (directing the district court to apply the mandatory firearm prohibition).

<sup>22</sup> *United States v. Kitsch*, 2008 U.S. Dist. LEXIS 58904 (E.D. Pa. Aug. 1, 2008).

<sup>23</sup> *United States v. Skeens*, 589 F. Supp. 2d 757 (W.D. Va. 2008).

<sup>24</sup> See, e.g., *Wilson v. State*, 207 P.3d 565 (Alaska Ct. App. 2009) (upholding statute prohibiting handgun possession by felons); *People v. Flores*, 169 Cal. App. 4th 568 (Cal. App. 4th Dist. 2008) (upholding statutes prohibiting possession following misdemeanor conviction, carrying of a concealed firearm, and carrying of a loaded firearm in a public place).

New Jersey's law authorizing the seizure of firearms in cases of domestic violence,<sup>25</sup> California's ban on possession of assault weapons and 50-caliber rifles,<sup>26</sup> New York's requirement that an individual possess a license to own a handgun.<sup>27</sup>

The Massachusetts Supreme Judicial Court recently reversed a trial court's decision dismissing criminal charges against a defendant for violating a state law that requires all firearms not within an individual owner's possession or control to be stored and either secured by a trigger lock or kept in a locked container.<sup>28</sup> The trial court had found that the state law was not significantly different from the trigger lock statute struck down by the Supreme Court in *Heller*. Although the Supreme Judicial Court based its decision on the holding that the Second Amendment does not apply to the states, the court suggested that the law would survive Second Amendment scrutiny regardless. The court observed that Massachusetts' law was materially different from the unconstitutional DC law, commenting that the state law "does not require that firearms in the home be rendered and kept inoperable at all times and does not prohibit a licensed gun owner from carrying a loaded firearm in the home; the statute therefore does not make it impossible for those persons licensed to possess firearms to rely on them for lawful self-defense."

#### **IV. Conclusion**

Because of the Court's decisions in *Heller* and *McDonald*, LCAV anticipates a substantial increase in the volume of Second Amendment litigation already clogging the nation's courts, despite the fact that most, if not all, state and local firearms laws do not prevent a law-abiding citizen from possessing a firearm in the home for self-defense, and thus, would satisfy the Supreme Court's holdings. It is also likely that the gun lobby will continue to employ the threat of litigation to obstruct state and local efforts to enact common sense gun violence prevention measures. Policymakers should rest assured, however, that nothing in either *Heller* or *McDonald* decision prevents the adoption of many types of reasonable laws to reduce gun violence.

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<sup>25</sup> *Crespo v. Crespo*, 989 A.2d 827 (N.J. 2010).

<sup>26</sup> *People v. James*, 174 Cal. App. 4th 662 (Cal. App. 3rd Dist. June 2, 2009).

<sup>27</sup> *People v. Perkins*, 880 N.Y.S.2d 209 (N.Y. App. Div. May 21, 2009).

<sup>28</sup> *Commonwealth v. Runyan*, 456 Mass. 230 (Mass. 2010).