



*LCAV Model Law*  
**REQUIRING PERSONALIZED HANDGUNS**  
**Current as of July 12, 2007**

## **Introduction**

Legal Community Against Violence (LCAV) is a national public interest law center dedicated to preventing gun violence. We focus on policy reform at the state and local levels, marshaling the expertise and resources of the legal community to transform America's gun policies from the grassroots up. LCAV fills a unique role as the first and only lawyers' organization in the gun violence prevention movement – and the only organization exclusively dedicated to providing legal assistance in support of gun violence prevention.

LCAV serves governmental and nonprofit organizations nationwide. Our services include legal and technical assistance in the form of legal research and analysis, development of regulatory strategies, legislative drafting, and in certain circumstances, calling upon our network of attorney members to help secure *pro bono* litigation assistance. We also engage in educational outreach and advocacy, producing reports, analyses and model laws. Our website, [www.lcav.org](http://www.lcav.org), is the most comprehensive resource on U.S. firearm laws in either print or electronic form.

Model laws serve as an important resource for policymakers and advocates seeking to adopt effective, legally-defensible policies to reduce gun violence. Our model laws provide a starting point from which state or local legislation can be drafted, reviewed, debated and ultimately adopted. Jurisdictions using LCAV model laws must integrate them with existing codes and statutes, as appropriate. Note that not all local governments have the authority to regulate firearms, and that even when they do, such ordinances must be carefully tailored to ensure conformity with state law. LCAV is available to review regulatory options and assist in the research, analysis and drafting of laws for both state and local jurisdictions.

## **This Model Law**

LCAV has developed a model law to require personalization of handguns. Personalized handguns are equipped with technology that prevents them from firing when operated by a child or other unauthorized user. Studies show that children as young as 3 years old are strong enough to fire handguns. Thousands of children and young people are victims of unintentional shootings and firearm suicides each year. In addition, every year thousands of handguns are stolen and many end up in the hands of criminals. A 2003 study concluded that of 117 firearm deaths studied, 37 percent could have been prevented by a personalized handgun.<sup>1</sup>

The model law is based on our review of existing laws, judicial decisions, policy research, studies, and other gun violence prevention data.<sup>2</sup> It is our hope that the model law and

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<sup>1</sup> See the findings on pages 13–14 for citations to the research surrounding personalized handguns and the risks associated with unauthorized use of handguns.

<sup>2</sup> In particular, LCAV acknowledges the important work of the Johns Hopkins Center for Gun Policy and Research on the issue of personalized guns, including their publication of “A Model Handgun Safety Standard Act” in 2000.

accompanying discussion will answer many questions about the options available in individual states and communities regarding adoption of personalized handgun laws.

This report contains our nonpartisan analysis, study, and research on gun violence prevention case law and policies, and is intended for broad distribution to the public. Our presentation of this model law is based upon our independent and objective analysis of the relevant law and pertinent facts and should enable public readers to form their own opinions and conclusions about the merits of this sample legislation.

Part I of these materials provides a summary of common legal challenges to gun violence prevention laws. This summary includes examples of legal challenges typically brought against firearms laws and explains that in the majority of cases, courts reject these arguments. Part II provides a summary of the key components of LCAV's model law requiring personalized handguns. Part III provides the text of the model law.

LCAV is ready to provide additional legal research, analysis, and drafting assistance to those seeking to enact a law requiring personalized handguns. Please see [www.lcav.org](http://www.lcav.org) for more information about our services.

## I. Common Legal Challenges to Gun Violence Prevention Laws

Litigation challenging firearm laws has become a routine strategy of the gun industry, the National Rifle Association and other “gun rights” groups. These challenges often raise the following issues: (1) the Second Amendment and state right to bear arms provisions; (2) equal protection; (3) due process; (4) the First Amendment; and (5) in the context of local gun regulations, preemption and local authority to regulate firearms. This section provides an overview of these issues.

### The Second Amendment and State Right to Bear Arms

The Second Amendment and state right to bear arms provisions are often raised as a bar to gun violence prevention laws and regulations. In fact, these provisions permit a broad range of gun violence prevention measures.

#### The Second Amendment

The Second Amendment to the U.S. Constitution states, “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.”

The U.S. Supreme Court addressed the scope of the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939). In that case, the Court rejected a Second Amendment challenge brought by two individuals charged with violating a federal law prohibiting the interstate transportation of sawed-off shotguns. The Court held that the “obvious purpose” of the Amendment is to “assure the continuation and render possible the effectiveness” of the state militia, and the Amendment “must be interpreted and applied with that end in view.”<sup>3</sup>

Since *Miller*, the scope of the Second Amendment has been addressed in more than 200 federal and state appellate cases. These decisions overwhelmingly reject Second Amendment challenges to firearm laws, including laws that ban certain types of weapons, require safety devices on others, mandate registration and licensing and otherwise impose regulatory oversight of the firearm industry.<sup>4</sup>

In fact, only one federal appellate court has ever struck down a firearm law based on Second Amendment grounds. In *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *rehearing en banc denied*, 2007 U.S. App. LEXIS 11029 (D.C. Cir. 2007), the United States Court of Appeals for the District of Columbia found that the Second Amendment protects an individual right to keep and bear arms, despite the Supreme Court precedent and vast body of law to the contrary. The *Parker* case involved a challenge by District residents to various gun regulations in the District Code, including the District’s strict laws banning most handgun possession. In a 2-1 decision, the court ruled that the restrictions were unconstitutional.<sup>5</sup> The

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<sup>3</sup> *Miller*, 307 U.S. at 178.

<sup>4</sup> See LCAV’s web site, [www.lcav.org](http://www.lcav.org), for summaries of over 200 federal and state appellate cases rejecting Second Amendment arguments to firearms laws.

<sup>5</sup> Note that in *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), the Fifth Circuit Court of Appeals considered a Second Amendment challenge to a federal law prohibiting firearm possession by

District of Columbia has until August 6, 2007 to petition for *certiorari* to the U.S. Supreme Court.

Following decisions by the U.S. Supreme Court rendered prior to *Miller*, lower courts considering challenges to state and local gun laws also have held that the Second Amendment constrains only the federal government, and not actions by state or local government.<sup>6</sup>

### State Right to Bear Arms

The constitutions of most states recognize a “right to bear arms.”<sup>7</sup> Unlike the Second Amendment, many of these state provisions specifically recognize an individual right to bear arms or have been interpreted by the courts to protect an individual right. However, every state court that has considered a state right to bear arms challenge to a firearms law has determined that the right at issue is not absolute.<sup>8</sup>

Nearly every state with a right to bear arms clause in its constitution, or a similar statutory provision, uses a reasonableness test to determine whether a state or local law violates this right.<sup>9</sup> When this test is applied, firearms regulations are generally upheld against state right to bear arms challenges.

For instance, article I, section 4 of the Constitution of the State of Ohio provides in part: “The people have the right to bear arms for their defense and security....” However, Ohio courts have repeatedly rejected article I, section 4 challenges to firearm regulations such as those banning assault weapons, semi-automatic firearms, and large capacity ammunition magazines, restricting certain classes of persons from possessing firearms, requiring firearms dealers to be licensed and

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persons subject to a domestic violence restraining order. Although all three judges on the panel rejected the Second Amendment claim, two of the judges expressed their view, *in dicta*, that the Amendment protects an individual right to possess firearms apart from service in a well-regulated militia, subject only to limited government regulation. Some subsequent Fifth Circuit decisions have reiterated *Emerson’s dicta*, while holding that laws prohibiting felons from possessing firearms do not violate the Second Amendment. See *U.S. v. Patterson*, 431 F.3d 832, 835 (5th Cir. 2005); *U.S. v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004). See [www.lcav.org](http://www.lcav.org) for summaries of these cases.

<sup>6</sup> Prior to *Miller*, the Supreme Court held that the Second Amendment is a limitation upon the power of Congress and not upon that of the states. See *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875). See LCAV’s website, [www.lcav.org](http://www.lcav.org), for additional appellate court cases reiterating this position.

<sup>7</sup> California, Iowa, Maryland, Minnesota, New Jersey and the District of Columbia have no provision granting a right to bear arms. Kansas, Massachusetts, and New York grant a right to bear arms for militia service only (note that New York’s state right to bear arms is conferred by statute, not by the state’s constitution. N.Y. Civ. Rights Law art. 2, § 4). This analysis of state right to bear arms provisions is based in part on Sayre Weaver, Analysis of State Constitutional “Right to Keep and Bear Arms” Provisions (© 2004 by Sayre Weaver) (on file with the author).

<sup>8</sup> Sayre Weaver, Analysis of State Constitutional “Right to Keep and Bear Arms” Provisions, *supra* note 7.

<sup>9</sup> *Id.* Note that in Alaska and New Hampshire, state courts apply a higher standard than the reasonableness test to firearms laws challenged under the right to bear arms clauses in their state constitutions. *Id.* In Alaska, regulations must bear a “close and substantial relationship to the state’s legitimate interest in protecting the health and safety of its citizens.” *Gibson v. State*, 930 P.2d 1300, 1302-3 (Alaska Ct. App. 1997) (upholding state law prohibiting possession of firearms while intoxicated). In New Hampshire, a regulation will be deemed reasonable if it “narrowly serve[s] a significant governmental interest.” *State v. Smith*, 571 A.2d 279, 281 (N.H. 1990) (upholding state law prohibiting firearm possession by persons convicted of certain felonies).

keep certain records, and prohibiting the carrying of firearms in vehicles.<sup>10</sup> For example, in rejecting an article I, section 4 challenge to a ban on carrying concealed weapons, the Ohio Supreme Court recently concluded that the goal of maintaining an “orderly and safe society” was reasonable, as was the means employed – banning concealed weapons – to obtain that goal.<sup>11</sup>

## Equal Protection

The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction, the equal protection of the laws.” The federal government is similarly limited by the Fifth Amendment. However, when a law makes a classification neither “involving fundamental rights nor proceeding along suspect lines,” the law will withstand constitutional scrutiny so long as it bears a rational relationship to a legitimate governmental interest.<sup>12</sup>

In *Olympic Arms v. Buckles*, 301 F.3d 384 (6th Cir. 2002) the National Rifle Association (“NRA”) and gun manufacturers, owners and retailers brought an equal protection challenge against the definition of “assault weapon” in the 1994 federal assault weapon ban (which expired in 2004). The court first established that individual weapon ownership did not involve a fundamental right and that the NRA, gun retailers and owners were not a suspect class. Therefore, the law would be found constitutional if it bore a rational relationship to a legitimate governmental interest. Upholding the law, the court concluded, “it is entirely rational for Congress, in an effort to protect public safety, to choose to ban those weapons commonly used for criminal purposes and to exempt those weapons commonly used for recreational purposes.”<sup>13</sup>

The majority of cases also have rejected equal protection challenges to firearms laws under the U.S. Constitution and analogous state constitutional provisions.<sup>14</sup>

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<sup>10</sup> *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993)(upholding Cleveland assault weapon ban); *City of Cincinnati v. Langan*, 640 N.E.2d 200, 206 (Ohio Ct. App. 1994)(upholding Cincinnati semi-automatic firearm and large capacity ammunition magazine ban); *City of Akron v. Williams*, 177 N.E.2d 802, 804 (Ohio Ct. App. 1960) (upholding Akron ban on firearm possession by convicted felons); *Photos v. City of Toledo*, 19 Ohio Misc. 147 (Ohio Ct. C.P. 1969)(upholding Toledo ordinance prohibiting certain classes of persons from possessing firearms, requiring identification cards to acquire or possess handguns, requiring firearms dealers to be licensed and keep certain records, and prohibiting the carrying of firearms in vehicles).

<sup>11</sup> *Klein v. Leis*, 795 N.E.2d 633, 638 (Ohio 2003). Note that in 2004, Ohio passed a law allowing the carrying of concealed weapons.

<sup>12</sup> *Heller v. Doe*, 509 U.S. 312, 320 (1993), see also *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). Classifications along “suspect lines” can include a suspect class (e.g., race) or quasi-suspect class (e.g., gender). See, e.g., *Lavia v. Pennsylvania*, 224 F.3d 190, 200 (3d Cir. 2000).

<sup>13</sup> *Buckles*, 301 F.3d at 388-390.

<sup>14</sup> See, e.g., *United States v. Lewitzke*, 176 F.3d 1022 (7th Cir. 1999) (rejecting equal protection challenge to federal law banning possession of firearm by person convicted of domestic violence misdemeanor); *United States v. McKenzie*, 99 F.3d 813 (7th Cir. 1996) (rejecting equal protection challenge to federal law banning possession of firearm by felon); *California Pistol and Rifle Ass’n. v. City of West Hollywood*, 66 Cal. App. 4th 1302 (Cal. Ct. App. 1998) (rejecting equal protection challenge to ban on the sale of “junk guns”); *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109 (Cal. Ct. App. 1997) (rejecting equal protection challenge to ordinance regulating operation of firearms dealers). But see *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998) (upholding equal protection challenge against federal law banning possession of firearms by government employees convicted of domestic violence misdemeanors but allowing possession by government employees convicted of domestic violence felonies).

## Due Process

The Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person shall be deprived of “life, liberty, or property, without due process of law...” A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or failing to provide explicit standards for those who apply the law, violates due process under the federal constitution. As the U.S. Supreme Court has explained, “[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.”<sup>15</sup> Note, however, that clearly written laws also can violate due process when they are overbroad, impinging on constitutionally-protected conduct.<sup>16</sup>

In *United States v. Hutzell*, 217 F.3d 966 (8th Cir. 2000), the defendant appealed his conviction under 18 U.S.C. § 922(g)(9) for possession of a firearm by any person previously convicted of a misdemeanor crime of domestic violence. The defendant argued that possession of a firearm by a person previously convicted of misdemeanor domestic violence was not “intuitively unlawful” and therefore he did not have sufficient notice that his ability to possess a gun might be restricted after such a conviction. The court rejected this argument, finding that a domestic violence conviction in itself was sufficient notice that subsequent possession of a firearm may be subject to regulation.<sup>17</sup>

Most courts have rejected due process challenges to firearms laws under the U.S. Constitution and analogous state constitutional provisions.<sup>18</sup>

## The First Amendment

The First Amendment to the U.S. Constitution provides that “Congress shall make no law...abridging the freedom of speech...” or “abridging...the right of the people to assemble.”

In *Gun Owners’ Action League, Inc. v. Swift*, 284 F.3d 198 (1st Cir. 2002), firearms dealers, associations and individuals challenged a Massachusetts law that, among other things, prohibited certain gun clubs from allowing patrons to shoot at targets depicting human figures. The plaintiffs argued that shooting targets such as those depicting specific historical figures like Adolf Hitler was expressive conduct protected by the First Amendment. The court found that the law was content-neutral, intending to reduce gun fatalities rather than suppress a particular viewpoint. The court further found that the law was narrowly tailored to serve a significant

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<sup>15</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>16</sup> *Id.* at 114-15.

<sup>17</sup> *Hutzell*, 217 F.3d at 968-69.

<sup>18</sup> *See, e.g., United States v. Lim*, 444 F.3d 910 (7th Cir. 2006) (rejecting due process challenge to federal law requiring registration of sawed off shotguns); *United States v. Edwards*, 182 F.3d 333 (5th Cir. 1999) (rejecting due process challenge to federal law banning possession of firearm by an unlawful user of a controlled substance); *Kalodimos v. Morton Grove*, 470 N.E.2d 266 (Ill. 1984) (rejecting due process challenge to local ordinance banning handgun possession); *City of Cincinnati v. Langan*, 640 N.E.2d 200 (Ohio Ct. App. 1994) (rejecting due process challenge to local assault weapon ban). *But see Robertson v. City & County of Denver*, 874 P.2d 325 (Colo. 1994) (upholding a due process challenge to parts of the definition of “assault weapon” in local assault weapon ban); *United States v. Vest*, 448 F. Supp. 2d 1002 (S.D. Ill. 2006) (upholding as applied due process challenge to law enforcement exception to federal laws restricting transfer and possession of machine guns).

governmental interest and allowed for reasonable alternative channels of communication and thus did not violate the First Amendment.<sup>19</sup>

As with equal protection and due process, discussed above, the majority of cases have rejected First Amendment challenges to federal and state firearm laws.<sup>20</sup>

## **Preemption and Local Authority to Regulate Firearms**

Preemption occurs when a higher level of government removes regulatory power from a lower level of government. For example, Congress may remove legislative authority from the states in certain areas. Likewise, state governments may, in some cases, remove local legislative authority.

### Federal Preemption

Under the Supremacy Clause of Article VI of the U.S. Constitution, a federal law is binding on all state and local governments so long as Congress duly enacted the law pursuant to one of its limited powers. When federal law removes state authority (and thus local authority) to regulate a specific subject matter, the process is called “federal preemption.” Federal preemption of state law is uncommon in the area of firearms regulation.

Congress may make its intention to preempt an area of state law clear by expressly stating its intent in the language of a statute. Absent such a statement, when considering a challenge to a state or local law based on the claim that regulation of the subject has been preempted by Congress, courts presume that the federal government does not intend to preempt state and local authority.<sup>21</sup> When the challenged law is within an area of traditional state authority, the reviewing court will find preemption only when the court is “absolutely certain” that Congress intended to take away that authority.<sup>22</sup> Courts look for the existence of a pervasive scheme of federal legislation of the particular subject, or an irreconcilable conflict between the federal regulation and the challenged law, to determine congressional intent.<sup>23</sup>

Congress has not expressly preempted the broad field of firearms regulation.<sup>24</sup> Furthermore, courts have held that congressional regulation of firearms does not create a scheme so pervasive

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<sup>19</sup> *Gun Owners’ Action League*, 284 F.3d at 210-13.

<sup>20</sup> *Nordyke v. King*, 319 F. 3d 1185 (9th Cir. 2003) (rejecting First Amendment challenge to local ordinance prohibiting possession of firearms and ammunition on county-owned property); *Coalition of N.J. Sportsmen v. Whitman*, 44 F. Supp. 2d 666 (D.N.J. 1999), *aff’d*, 263 F.3d 157 (3d Cir. 2001)(rejecting a First Amendment challenge to a state assault weapon ban defining assault weapons, in part, by naming specific weapons); *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109 (Cal. Ct. App. 1997) (rejecting argument that local ordinance regulating operation of firearms dealers warranted higher standard of review because ordinance implicated First Amendment). *But see Nordyke v. Santa Clara County*, 110 F. 3d 707 (9<sup>th</sup> Cir. 1997) (upholding a First Amendment challenge to a portion of a lease provision which banned offering firearms or ammunition for sale at a county fairground).

<sup>21</sup> *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276, 285 (E.D.N.Y. 1995), *aff’d*, 97 F.3d 681 (2d Cir. 1996) (upholding New York City’s assault weapon ban against a federal preemption challenge).

<sup>22</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (rejecting a federal preemption challenge to a Missouri law setting mandatory retirement age for state judges).

<sup>23</sup> *Richmond*, 896 F. Supp. at 285.

<sup>24</sup> Rather, courts have cited 18 U.S.C. § 927 for the proposition that Congress has expressed an intent *not* to preempt the field of firearms. *See, e.g., Oefinger v. Zimmerman*, 601 F.Supp. 405 (W.D. Pa. 1984) (rejecting a federal

that it leaves no room for state and local law.<sup>25</sup> Thus, absent a specific, irreconcilable conflict between a challenged state or local firearm law and a federal enactment, there is no federal preemption of that state or local law.

### State Preemption

Most state constitutions allocate authority to local governments to regulate in the interests of the public health, safety and welfare (which generally includes regulation of firearms). “State preemption” occurs when a state government removes a portion of a local government's legislative authority.

States differ considerably in how and to what extent they preempt the regulation of firearms. Specific questions about whether a particular type of local regulation may be preempted in any given state involve complex inquiry and analysis of existing case law. The summary offered here is intended to be only an overview of an intricate and highly specialized area of law. LCAV is available to consult with officials and advocates on specific questions relating to their jurisdiction.

Generally, preemption occurs in two ways: through express preemption and implied preemption. Express preemption occurs when a state provides explicitly, in the language of a statute or constitutional provision, that it intends to remove a lower government's regulatory authority. For example, the South Dakota legislature expressly preempts county legislative authority to regulate most aspects of firearms and ammunition with the following statutory language:

No county may pass any ordinance that restricts possession, transportation, sale, transfer, ownership, manufacture or repair of firearms or ammunition or their components. Any ordinances prohibited by this section are null and void.<sup>26</sup>

Absent an express statement, courts may infer an intent to take over a field of regulation, even though there is no express legislative statement to that effect. This is referred to as implied

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preemption challenge to a state law banning machine guns and sawed off shotguns); *C.D.M. Products, Inc., v. City of New York*, 350 N.Y.S.2d 500 (N.Y. Sup. Ct. 1973) (rejecting a federal preemption challenge to a local ordinance requiring licensing of wholesale firearm manufacturers and assemblers). 18 U.S.C. § 927 provides that "No provision of this chapter [18 U.S.C. § 921 *et seq.* which contains provisions regulating the licensing of firearms manufacturers and dealers, firearms possession, the carrying of weapons, and armor piercing ammunition] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together." Note, however, that 18 U.S.C. § 926A provides that, notwithstanding state or local law, a person may transport firearms "from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm" so long as he or she complies with the specified safety standards. Courts have found this provision to supercede local laws regulating transportation of firearms. *See, e.g., Bieder v. United States*, 662 A.2d 185 (D.C. 1995) (reversing conviction for multiple violations of District firearms laws on grounds that trial court failed to allow defense based on 18 U.S.C. 926A); *Arnold v. City of Cleveland*, 1991 Ohio App. LEXIS 5246 (Ohio Ct. App. 1991)(upholding federal preemption challenge to local law banning transportation of assault weapons). *But see Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415 (E.D. Cal. 1990) (rejecting federal preemption challenge to state law banning transportation of assault weapons).

<sup>25</sup> *Richmond*, 896 F. Supp. at 285.

<sup>26</sup> S.D. Codified Laws § 7-18A-36.

preemption. In general, courts may find that a local law is preempted if it conflicts directly with state law by requiring what the state law prohibits, or prohibiting what the state law requires. In addition, when a comprehensive scheme of state regulation exists on a particular subject matter, many state courts find that the state legislature thereby indicated an implied intent to assert exclusive authority over that subject matter.<sup>27</sup>

The existence and degree of express state preemption of local firearms regulation varies from state to state,<sup>28</sup> as do the tests courts use to determine whether implied preemption exists.

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<sup>27</sup> See, e.g., *California Rifle & Pistol Ass'n v. City of West Hollywood*, 78 Cal. Rptr. 2d 591 (Cal. Ct. App. 1998) (discussing the doctrine of implied preemption in California and rejecting a preemption challenge to a local ban on Saturday Night Specials).

<sup>28</sup> States with no provision or statute expressly preempting local regulation of firearms include Connecticut, Hawaii, Illinois, Kansas, Massachusetts, New Jersey, and New York. States with provisions expressly preempting local regulation of one or more aspects of firearms but otherwise permitting broad regulation of firearms at the local level include Alaska, California and Nebraska. In the remaining states, express preemption statutes preempt all, or substantially all, aspects of local government authority to regulate firearms.

At least one court has found that state laws expressly preempting firearm regulation unconstitutionally infringed a city's home rule authority with respect to ordinances addressing the open carrying of firearms and banning assault weapons and Saturday Night Specials. *State v. City and County of Denver*, 139 P.3d 635 (Colo. 2006). LCAV has not conducted a comprehensive, 50-state analysis of the extent to which home rule jurisdictions in states with express preemption may regulate firearms. LCAV is available to conduct this analysis for a specific jurisdiction upon request.

## II. Summary of Model Law Requiring Personalized Handguns<sup>29</sup>

The principal elements of LCAV's model law to require personalization of handguns include:

- Findings. The findings show that children as young as 3 years old are strong enough to fire handguns. Thousands of children and young people are victims of unintentional shootings and firearm suicides each year. In addition, every year thousands of handguns are stolen and many end up in the hands of criminals. The findings cite a 2003 study concluding that of 117 firearms deaths studied, 37 percent could have been prevented by a personalized handgun.
- Definition of personalized handgun. The term “personalized handgun” is generally defined as a handgun which has technology that renders the gun inoperable except when activated by a recognized user.
- Personalization Technology. Technology to personalize handguns is still being developed and personalized handguns are not yet available for retail sale. The model provides two options for dealing with this issue:
  - Option 1 requires the Attorney General to monitor the availability of personalized handguns for retail sale. The ban on manufacture, importation, purchase, sale, and other transfer of a non-personalized handgun takes effect 18 months after the Attorney General determines that personalized handguns are available for retail sale. This approach addresses the uncertainty regarding the date personalization technology will be available for retail sale. The approach is modeled after New Jersey's personalized handgun law enacted in 2002 which, after personalization technology is deemed available for retail sale, bans sale of non-personalized handguns by licensed manufacturers and dealers. N.J. Stat. Ann. §§ 2C:39-1dd, 2C:58-2, 2C:58-2.2 – 2C:58-2.5.<sup>30</sup>
  - Option 2 requires development of personalized handgun technology within 4 years<sup>31</sup> of the effective date of the Act. The ban on manufacture, importation, purchase, sale, and other transfer of a non-personalized handgun becomes effective 12 months thereafter. Note that numerous advances have already been made toward perfecting a variety of approaches to personalizing handguns.<sup>32</sup> Option 2 is modeled on such “technology-forcing laws” as the

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<sup>29</sup> Note that some legislators may prefer to use the term “childproof handgun.” In 2002 New Jersey enacted a law banning the sale of non-personalized handguns by licensed manufacturers and dealers after personalization technology is deemed available for retail sale. The New Jersey law uses both the terms “childproof” and “personalized” interchangeably. LCAV uses the term “personalized handgun” because it encompasses benefits of the personalization technology such as deterring sales of stolen handguns on the secondary market.

<sup>30</sup> Note that in 2003, Maryland adopted a law requiring a commission to monitor the development of personalized handgun technology. The law does not contain any current or future ban on non-personalized handguns. Md. Code Ann., Pub. Safety § 5-132.

<sup>31</sup> Note that the four-year time frame used in this model law will likely differ depending on the date the model is adopted and the status of personalization technology at that time.

<sup>32</sup> Teret S.P. et al., *Policy and Technology for Safer Guns: An Update*, 41 Annals of Emergency Medicine 32 (2003).

Clean Air Act<sup>33</sup> and the National Traffic and Motor Vehicle Safety Act,<sup>34</sup> among others, which set standards that require regulated industries to develop technology not yet in existence or widely used in order to protect the health and safety of the public.

- Prohibitions. The model law makes it unlawful for any person to manufacture, import, purchase, sell, or otherwise transfer a non-personalized handgun.
- Exceptions. The model law includes exceptions for manufacture, purchase and sale of non-personalized handguns for law enforcement and the military, and for some dealer transfers of non-personalized handguns.

### **Note about Opposition Arguments**

Opponents of personalized handguns argue that they are unnecessary because handguns can be made safe with existing locking devices. However, it should be noted that any benefit to be gained from most existing locking devices depends on actions that must be taken by the gun owner; personalization technology is designed to be automatic. In addition, some opponents fear that the public mistakenly will believe that personalized handguns are 100% childproof and will therefore be more likely to purchase guns for their homes (see 1996 National Gun Policy Survey, National Opinion Research Center 18) and/or leave personalized handguns accessible to children. No gun, even a personalized handgun, can be made 100% safe. Therefore, the sale of personalized handgun technology must be accompanied by education about gun safety.

Another argument against personalizing guns is that doing so may impede the ability of potential crime victims to use a handgun in self-defense. Existing data conflict regarding whether self-defensive gun use reduces injury to crime victims and at least one study concludes that it increases the likelihood of a victim being killed. For a summary of both sides of this debate, see David Hemenway, *Private Guns, Public Health* 64-78 (University of Michigan Press ed., 2004).

Opponents also argue that personalization of handguns should not be mandated because the technology is not currently available for retail sale. See e.g. National Academy of Sciences, *Technological Options for User-Authorized Handguns: A Technology-Readiness Assessment*

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<sup>33</sup> 42 U.S.C. 7401 *et. seq.* See Justice Souter's concurring opinion in *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 491 (2001) in which he cites the Act's legislative history to conclude that the intention of Congress "was not 'to be limited by what is or appears to be technologically or economically feasible,' but, 'to establish what the public interest requires to protect the health of persons,' even if that means that 'industries will be asked to do what seems to be impossible at the present time.'" (quoting Senator Edmund Muskie in 116 Cong. Rec. 32901-32902 (1970)).

<sup>34</sup> 15 U.S.C. 1381 *et. seq.* See *Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (holding that the National Highway Traffic Safety Administration failed to present an adequate basis for rescinding a requirement that cars be equipped with passive restraint devices (e.g., airbags)). "Indeed, the Act was necessary because the industry was not sufficiently responsive to safety concerns. The Act intended that safety standards not depend on current technology and could be 'technology-forcing' in the sense of inducing the development of superior safety design." *Id.* at 49.

(2005) (note that this assessment is focused largely on personalized handgun use by law enforcement).<sup>35</sup>

Finally, opponents complain that personalization technology will add to the price of a handgun. It is predicted, however, that this increase in cost will decline as the technology becomes widely available, as happened with airbags in automobiles that are now standard equipment. Robinson K.D. et al., *Personalized Guns: Reducing Gun Deaths through Design Changes* 9 The Johns Hopkins Center for Gun Policy and Research (1996).

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<sup>35</sup> See, however, footnotes 33 and 34 for case law upholding laws mandating the use of technology not yet readily available on the market.

### III. Text of Model Law

#### A. Findings

*[Findings in support of a law are most effective when they are specific and localized. When possible, incorporate state and/or local data from law enforcement, the public health community, and the media. General findings are included below.]*

*Whereas, firearms killed over 29,000 people in the United States in 2004, the most recent year for which statistics are available;*<sup>36</sup>

*Whereas, between 1999 and 2004, over 4,500 people in the United States died from unintentional shootings;*<sup>37</sup>

*Whereas, over 1,600 victims of unintentional shootings between 1999 and 2004 were under twenty-five years of age;*<sup>38</sup>

*Whereas, many young children, including children as young as three years old, are strong enough to fire handguns;*<sup>39</sup>

*Whereas, over 16,700 people in the United States committed suicide using a firearm in 2004; 1,070 of these victims were under twenty-one years of age;*<sup>40</sup>

*Whereas, the suicide rate for children between the ages of five and fourteen years old in the United States is twice the average of that in other developed countries;*<sup>41</sup>

*Whereas, the overall firearm-related death rate among U.S. children under age 15 is nearly 12 times higher than that among children in 25 other industrialized nations combined.*<sup>42</sup>

*Whereas, more than half a million firearms are stolen each year in the United States and more than half of stolen firearms are handguns, many of which are subsequently sold illegally;*<sup>43</sup>

*Whereas, in 2002 New Jersey enacted a law defining “personalized handgun” to include “a handgun that incorporates within its design, and as part of its original manufacture, technology which automatically limits its operational use and which cannot be readily deactivated, so that it*

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<sup>36</sup> The Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Web-based Injury Statistics Query and Reporting System (WISQARS) Injury Mortality Reports, 1999 – 2004*.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Naureckas, S.M. et al, *Children's and Women's Ability to Fire Handguns*, 149 *Archives of Pediatric and Adolescent Medicine*, 1318-1322 (1995).

<sup>40</sup> The Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, *Web-based Injury Statistics Query and Reporting System (WISQARS) Injury Mortality Reports, 1999 – 2004*.

<sup>41</sup> The Centers for Disease Control Morbidity and Mortality Weekly Report, *Rates of Homicide, Suicide, and Firearm-Related Death Among Children--26 Industrialized Countries*, February 7, 1997, Vol. 46, No.5.

<sup>42</sup> *Id.*

<sup>43</sup> Philip J. Cook & James A. Leitzel, “Smart” Guns: A Technological Fix for Regulating the Secondary Market 7 (2001).

may only be fired by an authorized or recognized user....” The New Jersey law bans sale of non-personalized handguns by licensed manufacturers and dealers after personalization technology is deemed available for retail sale. N.J. Stat. Ann. §§ 2C:39-1dd, 2C:58-2, 2C:58-2.2 – 2C:58-2.5.<sup>44</sup>

*Whereas*, a 2003 study of 117 firearms deaths revealed that 37 percent could have been prevented by a personalized handgun;<sup>45</sup>

*Whereas*, there is strong public support for personalizing handguns. For example, a 2001 survey found that 73.6 percent of respondents supported requiring that all new handguns be personalized;<sup>46</sup>

*Whereas*, [jurisdiction/governing body] believes that personalization technology, which would prevent a handgun from firing unless a recognized user handles the gun, would significantly reduce the number of unintentional shootings, firearm suicides and firearms sold illegally on the secondary market;

*Therefore*, the [jurisdiction/governing body] hereby adopts the following:

## **B. Definitions**

- 1) “Handgun”<sup>47</sup> means any:
  - a) Firearm which is designed or redesigned, made or remade, and intended to be fired while held in one hand;
  - b) Firearm having a barrel of less than ten inches (10”) in length;
  - c) Firearm of a size which may be concealed upon the person; or
  - d) Combination of parts from which a firearm described in subsection (1)(a)-(c) can be assembled.
- 2) “Antique firearm”<sup>48</sup> shall have the same meaning as that specified in 18 U.S.C. § 921(a)(16).
- 3) "Personalized handgun" means a handgun which has as a permanent feature and part of its original design and manufacture, technology which cannot be readily deactivated and which automatically renders the gun inoperable unless fired by an authorized or recognized user. The technology limiting the handgun's operational use may include, but not be limited to: radio frequency tagging, touch memory, remote control, fingerprint, magnetic encoding and

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<sup>44</sup> Note that in 2003, Maryland adopted a law requiring a commission to monitor the development of personalized handgun technology. The law does not contain any current or future ban on non-personalized handguns. Md. Code Ann., Pub. Safety § 5-132.

<sup>45</sup> Vernick, J.S. *et al.*, *Unintentional and Undetermined Firearm Related Deaths: A Preventable Death Analysis for Three Safety Devices*, 9 *Inj. Prevention* 307, 308 (2003).

<sup>46</sup> Smith, T.W. *2001 National Gun Policy Survey of the National Opinion Research Center: Research Findings*, Nat'l Opinion Res. Center, U. Chi., 2, 18 (Dec. 2001).

<sup>47</sup> Note that many state laws define the term “handgun.” A jurisdiction may opt to refer to the relevant state definition for consistency.

<sup>48</sup> A jurisdiction may wish to substitute this reference to federal law with a reference to the relevant state definition, if one exists.

other automatic user identification systems utilizing biometric, mechanical or electronic systems.<sup>49</sup>

**Option I** – Monitor development of technology. For this option, jurisdictions should include Section C below.

*This option requires personalization of handguns only after the technology to do so has been deemed available for retail sale by the Attorney General. The Attorney General is required to monitor the status of the development of the technology and report to the Legislature and the Governor every six months as to its availability. After personalized technology is deemed available, a ban on the manufacture, importation, purchase, sale, and other transfer of non-personalized handguns takes effect.*

**Option II** – Require development of technology within four years. For this option, jurisdictions should eliminate Section C and go to Section D, Option II.

*This option requires that personalized handgun technology be developed within four years from the effective date of the Act. Manufacture, importation, purchase, sale, and other transfer of a non-personalized handgun is banned 12 months thereafter.<sup>50</sup>*

### **C. Monitoring Status of Technology** [Option I only]

- 1) The Attorney General shall submit a written report to the Governor and the Legislature<sup>51</sup> every six months, commencing on the first day of the sixth month following the effective date of this Act, summarizing the current availability of personalized handguns, as defined in Section B(4), for retail sale;
- 2) For each report described in section C(1), the Attorney General shall:
  - a) Explicitly state in the report whether personalized handguns as defined in Section B(4) are available for retail sale and, if not, what progress, if any, has been made in the development of such technology since the previous report;
  - b) Rely on sources with information and/or expertise to assist in determining whether, through performance and other relevant indicators, a handgun meets the definition of personalized handgun provided in Section B(4). To the extent practicable, the Attorney General shall consult with sources including, but not limited to, each of the following individuals:
    - i) The head of the state police;
    - ii) The director of the state department of health;

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<sup>49</sup> Note that, if feasible from a technological perspective, it would also be very effective to require that a personalized handgun be automatically rendered inoperable when the personalization technology has been deactivated. Alternatively, a jurisdiction may want to simply prohibit the deactivation of personalization technology.

<sup>50</sup> Note that the four-year time frame used in this model law will likely differ depending on the date the model is adopted and the status of personalization technology at that time.

<sup>51</sup> The terms “Attorney General,” “Governor” and “Legislature” are appropriate only for states adopting this model. Local governments adopting this law may consider relying on the New Jersey Attorney General for determination of when personalized handguns are available for retail sale pursuant to New Jersey Rev. Stat. § 2C:58-2.3a.

- iii) An injury prevention specialist;
  - iv) A handgun industry representative; and
  - v) A mechanical engineer;
  - c) Explicitly state in the report all sources consulted and relied upon; and
  - d) Ensure that the report and the names and affiliations of the sources relied upon are made accessible to the public for review.
- 3) The Attorney General shall continue to submit the report detailed in section C(1) every six months until he or she has reported that personalized handguns are available for retail sale.
  - 4) Personalized handguns shall be deemed available for retail sale when at least one manufacturer has delivered at least one production model of a personalized handgun to a federally licensed wholesale or retail dealer in any state.

#### **D. Testing Methods and Laboratory Certification**

*Note that for jurisdictions using Option I (monitoring technology), this section takes effect six months from the date personalized handguns are deemed available for retail sale. For jurisdictions using Option II (requiring development of technology within four years) the provisions take effect four years from the effective date of the Act.*

[Option I:] Commencing on the first day of the sixth month after the Attorney General has reported to the Governor and the Legislature that personalized handguns are available for retail sale, the Attorney General shall:

[Option II:] Commencing on the first day of the forty-eighth month following the effective date of this Act, the Attorney General shall:

- 1) Promulgate regulations describing specific test(s), and methods to be used to perform such test(s), for the purpose of certifying a handgun for inclusion on the Personalized Handgun Roster pursuant to section E below. Separate tests and methods shall be formulated to correspond to different personalization technology as appropriate;
- 2) Publish a list of certified, independent, neutral laboratories to test handguns to determine whether they meet the personalized handgun standard provided in Section B(4).

#### **E. Testing and Roster of Approved Personalized Handguns**

- 1) Commencing on the first day of the sixth month following the promulgation of the Attorney General's regulations in compliance with Section D, a sample of all handgun models manufactured in, imported for sale into, [jurisdiction] shall be submitted by the manufacturer or importer of the handgun for testing by a certified testing laboratory;
- 2) For each handgun submitted to it, the certified laboratory shall perform tests in accordance with the methods described in the Attorney General's regulations promulgated pursuant to Section D. The laboratory shall submit a report to the Attorney General indicating its determination as to whether the handgun is a personalized handgun as provided in Section

B(4) and pursuant to the regulations promulgated by the Attorney General pursuant to Section D(1);

- 3) The Attorney General shall compile, publish and maintain a Personalized Handgun Roster listing all of the handguns that have been tested by a certified testing laboratory and have been determined to satisfy the personalized handgun safety standard provided in Section B(4) and pursuant to the regulations promulgated by the Attorney General pursuant to Section D(1). The roster shall list, for each handgun, the manufacturer, model number, and model name.

## **F. Prohibitions**

- 1) Commencing the first day of the sixth month following the first publication of the Personalized Handgun Roster by the Attorney General, handguns that do not appear on the Personalized Handgun Roster shall not be manufactured, imported, purchased, sold, or otherwise transferred in [jurisdiction],<sup>52</sup>
- 2) Section F (1) shall not apply to:
  - a) Antique firearms purchased and possessed in accordance with applicable federal, state and local law;
  - b) The sale or transfer of a non-personalized handgun by a dealer licensed under federal and any applicable state and local laws to another licensed dealer, manufacturer or wholesaler; any branch of the armed forces of the United States, or to a law enforcement agency for use by that agency or its employees for law enforcement purposes;
  - c) The sale or transfer of a non-personalized handgun by a private person to a dealer licensed under federal and any applicable state and local laws;
  - d) The manufacture of a handgun by a firearms manufacturer for the purpose of sale to any branch of the armed forces of the United States, or to a law enforcement agency for use by that agency or its employees, provided the manufacturer is properly licensed under federal, state and local laws; or
  - e) The purchase or acquisition of a handgun by any branch of the armed forces of the United States, or a law enforcement agency in this state for use by that agency or its employees for law enforcement purposes.
- 3) It shall be unlawful for any person to program or re-program a personalized handgun to recognize a user under the age of 18;<sup>53</sup>
- 4) Where neither party to a transaction involving the sale or transfer of a personalized handgun is a licensed dealer, the sale shall be completed through a licensed dealer who shall not

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<sup>52</sup> Note that, like the New Jersey law, this model law does not ban possession of non-personalized handguns. However, the model does ban purchase of new non-personalized handguns. The law could be broadened to include a ban on possession of non-personalized handguns. Such an approach could include grandfathering preexisting handguns with a requirement that the owners of grandfathered guns register their weapons with law enforcement within a given time period. LCAV is available for assistance with drafting this and other additional language a jurisdiction may want to include.

<sup>53</sup> Note that a jurisdiction may want to substitute the existing minimum age for handgun possession in the state, if higher than 18.

transfer the handgun until he or she has verified via a background check that the potential transferee is not currently a prohibited purchaser under 18 U.S.C. § 922 [add appropriate state and local citations].

### **G. Penalties**

[Penalties vary significantly based on the standards of each state and local government. Local penalties are usually limited to one year in jail and/or a \$1,000 fine, although these penalties may be lower in some cases/jurisdictions. In almost all cases, the weapons are subject to seizure and destruction.]

### **H. Liability**

Any person who knowingly violates section F of this Chapter shall be strictly liable in tort if the violation was a proximate cause of the harm for which relief is sought;

### **I. Severability**

If any provision or term of this Chapter is for any reason declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or the effectiveness of the remaining portions of this Chapter or any part thereof. [Jurisdiction] hereby declares that it would have adopted this Chapter notwithstanding the unconstitutionality, invalidity or ineffectiveness of any one or more of its articles, sections, subsections, sentences or clauses.