



## *LCAV Model Law* **REGULATING THE CARRYING AND POSSESSION OF FIREARMS IN PUBLIC PLACES**

**February 2011**

### **About LCAV and Our Model Laws**

Legal Community Against Violence (LCAV) is a national public interest law center dedicated to preventing gun violence. Formed in the wake of an assault weapons massacre at a San Francisco law firm, LCAV focuses on policy reform at the state and local levels, marshaling the expertise and resources of the legal community in support of gun violence prevention.

LCAV serves governmental entities 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 provide a starting point: a framework from which state or local legislation can be drafted, reviewed, debated, and ultimately adopted. Jurisdictions may choose to adopt this model law in whole or in part. Jurisdictions using this model must integrate it with existing laws as appropriate, and any jurisdiction considering firearms legislation should seek the advice of an attorney. LCAV is available to provide assistance to jurisdictions seeking to tailor this law to their particular needs.

*This report and model law do not offer, and are not intended to constitute, legal advice.*

### **Executive Summary**

Firearms that are possessed in public places, whether carried openly or hidden from view, present significant safety concerns for law enforcement, property owners, and members of the public. The presence of firearms in public places increases the chances that firearms will be used to settle disputes and increases the risk of an accidental discharge at a place where large numbers of people are gathered. In addition, the carrying of exposed firearms in public can intimidate the public and cause the wasteful diversion of law enforcement resources. Despite these dangers, current state laws inadequately address the presence of firearms in public places. While most states require a permit for someone to carry a concealed firearm, such permits are generally too easy to acquire, and most states do not regulate the carrying of exposed firearms at all.

Part I of this publication provides a summary of the provisions of the model law. The model law itself, which is presented in Part II, provides states with two alternative approaches for addressing this threat to public safety. Option 1 prohibits the carrying of exposed firearms, and limits the

carrying of concealed firearms to persons who have been issued a permit to carry a concealed firearm (“CCW permit”). Option 2 prohibits private citizens from carrying or possessing any firearms, hidden or exposed, in any public place, with appropriate exceptions. Both options are based on existing state laws.

The CCW permitting system presented in Option 1 of this model law grants broad discretion to the agency that issues or denies a permit, and only allows issuance of a permit where, in the judgment of the agency: (1) the applicant has demonstrated a particularized need for the permit; (2) the applicant is a responsible person; and (3) the issuance of the permit is in the public’s interest. CCW permit applicants must also undergo a thorough background check and safety training and testing. Permits must be renewed annually, and do not authorize the carrying of firearms in sensitive places such as schools, bars, places of worship, public parks, and government buildings.

Part III of this publication discusses opposition arguments and legal challenges to laws like those presented in the model law, including legal challenges involving the Second Amendment. For more information about the problems with firearms in public places and the inadequacies in current federal and state laws governing the carrying of concealed or exposed firearms, see LCAV’s reports, *America Caught in the Crossfire: How Concealed Carry Laws Threaten Public Safety* (2009), at [http://www.lcav.org/concealedcarry/LCAV\\_CCW.pdf](http://www.lcav.org/concealedcarry/LCAV_CCW.pdf), and *Open Carrying: Provocative Conduct, Dangerous Consequences* (2010), at [http://www.lcav.org/content/open\\_carrying.pdf](http://www.lcav.org/content/open_carrying.pdf).

For further information and assistance in drafting a law, please contact LCAV.

## **Part I: Summary of Provisions**

*LCAV's Model Law Regulating the Carrying and Possession of Firearms in Public Places* includes two options for states that wish to strengthen their laws in this area. The first option allows individuals to carry concealed firearms in public only if they have obtained a permit. The second option prohibits the carrying of all firearms in public. Both options include:

- **Findings**: The model law's findings describe, among other things, the gun violence epidemic in the U.S., the dangers of firearms in public places, existing laws on the topic, the inadequacies of those laws, and the opinion of the American public on this issue.
- **Definitions**: The model law defines the relevant terms, such as "firearm," "concealed," "unloaded," and "public place."
- **Prohibitions**: Option 1 requires a permit to carry a concealed firearm in a public place or in a motor vehicle, and generally prohibits the carrying of an exposed firearm in those locations. Option 2 generally prohibits the carrying or possession of a firearm, either exposed or hidden from view, in a public place or in a motor vehicle.
- **Exceptions**: Both options include appropriate exceptions, such as those for law enforcement officers and persons lawfully hunting or target shooting. These individuals are allowed to carry or possess firearms in specified public places without a permit, and may possess a firearm in a motor vehicle if it is properly stored.

Option 1 also includes:

- **Application form**: The model law describes the information to be included on the application for a permit. Most importantly, the application must describe the applicant's particularized need for and intended use of the firearm, demonstrating that the applicant has good reason to fear injury to his or her person.
- **Safety training and testing**: The applicant for a permit is required to complete a firearms safety training course, including classroom instruction and a written test on the safe storage and handling of firearms, existing laws regarding firearms, and ways to manage a violent confrontation. The model law also requires the applicant to participate in live firing exercises and sets a minimum standard for performance in a live firing test.
- **Department investigation**: The model law requires that the government agency charged with administering the permit process perform a thorough background check on the applicant. The agency may also interview the applicant's family and acquaintances and other members of the public, and conduct mental or other examinations or tests as appropriate.
- **Discretionary standard for agency approval**: The model law grants discretion to the administering agency to approve an application for a permit to carry a concealed firearm where: (1) the applicant has demonstrated a particularized need for the permit; (2) the applicant is a responsible person; and (3) the issuance of the permit is in the public's interest.

- Ineligible persons: The model law sets out a list of persons who are categorically ineligible to receive a permit, including individuals convicted of various offenses, individuals with an inappropriate history of drug or alcohol use, and the mentally unstable.
- Encounters with law enforcement: The model law addresses how a permit holder must respond to a law enforcement officer whom he or she encounters while carrying a firearm in public. It also authorizes the officer in this situation to conduct a pat down search and take possession of the firearm for the duration of the encounter.
- Location restrictions: The model law prohibits the carrying or possession of a firearm in a number of sensitive places, including schools, courthouses, places of religious worship, bars and restaurants that serve alcohol, parks, hospitals, and certain private property.
- Renewals and revocations: Permits must be renewed annually, and permit holders must complete the safety training and testing at least once every three years. The model law requires revocation of the permit if at any time the permit holder ceases to meet the law's requirements.

**Part II: Text of Model Law**

*Option 1 (requiring a permit to carry a firearm in a public place)*

**CHAPTER 1 THE ACT REGULATING THE CARRYING AND POSSESSION OF FIREARMS IN PUBLIC PLACES**

<b>Sec. 1</b>	<b>Title</b>
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<b>Sec. 10</b>	<b>Written safety testing requirement</b>
<b>Sec. 11</b>	<b>Judicial issuance or denial of a permit to carry a concealed firearm (optional)</b>
<b>Sec. 12</b>	<b>Appeals procedure</b>
<b>Sec. 13</b>	<b>Features and use of a permit to carry a concealed firearm</b>
<b>Sec. 14</b>	<b>Permittees' duties to report</b>
<b>Sec. 15</b>	<b>Carrying a firearm while under the influence of alcohol or a controlled substance</b>
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<b>Sec. 17</b>	<b>Permit suspension and revocation</b>
<b>Sec. 18</b>	<b>Duration and renewal</b>
<b>Sec. 19</b>	<b>Application and permit records</b>
<b>Sec. 20</b>	<b>Administrative rules and regulations</b>
<b>Sec. 21</b>	<b>Penalties</b>
<b>Sec. 22</b>	<b>Severability</b>

**Sec. 1 Title**

This Chapter may be cited as The Act Regulating the Carrying and Possession of Firearms in Public Places.

**Sec. 2 Legislative findings, purpose and intent**

*[General findings regarding gun violence and the need for and benefits of this law are provided below. However, findings in support of a law are most effective when they are specific and localized. Whenever possible, data from the jurisdiction adopting the law, including data from law enforcement, the public health community and descriptions of particularly relevant incidents, should be added.]*

The [Legislative Body] hereby finds and declares:

(a) In 2007, the most recent year for which statistics are available, over 31,000 Americans died from firearm-related injuries – an average of more than 85 deaths each day<sup>1</sup> – and nearly 70,000 others were treated for non-fatal gunshot wounds.<sup>2</sup>

(b) Guns were used to commit over 385,000 crimes in the U.S. in 2007, and nearly 70% of all murders that year were committed with a firearm.<sup>3</sup> Records kept by the Federal Bureau of Investigation (FBI) show that in 2007, 190,514 robberies and 183,153 aggravated assaults were committed with firearms.<sup>4</sup> That year, 12,632 people were victims of firearm homicide – 68.8% of all homicides nationwide.<sup>5</sup>

(c) The federal Brady Act requires individuals who are purchasing a firearm from a federally licensed firearms dealer to undergo a background check.<sup>6</sup> However, this law has proven insufficient to prevent dangerous individuals from obtaining firearms, and, furthermore, from carrying those firearms into, and using those firearms in, public places. Most recently, on January 8, 2011, a mentally unstable individual named Jared Lee Loughner approached a gathering led by U.S. Congresswomen Gabrielle Giffords outside a supermarket in Tucson, Arizona and shot 19 individuals, including Representative Giffords. Six people were killed. Despite the Brady Act, and other existing federal and state gun laws, Loughner’s possession of a firearm at that location violated no laws.<sup>7</sup>

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<sup>1</sup> U.S. Dep’t of Health & Human Servs., Centers for Disease Control & Prevention, Nat’l Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Injury Mortality Reports, 1999-2007* (2010), at [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html).

<sup>2</sup> U.S. Dep’t of Health & Human Servs., Centers for Disease Control & Prevention, National Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Nonfatal Injury Reports* (2010), at <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html>.

<sup>3</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Key Facts at a Glance: Crimes Committed with Firearms, 1973-2007*, at <http://bjs.ojp.usdoj.gov/content/glance/tables/guncrimetab.cfm>.

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

<sup>5</sup> U.S. Dep’t of Health & Human Servs., Centers for Disease Control & Prevention, Nat’l Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Injury Mortality Reports, 1999-2007* (2010), at [http://webappa.cdc.gov/sasweb/ncipc/mortrate10\\_sy.html](http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html).

<sup>6</sup> 18 U.S.C. § 922.

<sup>7</sup> Even if Loughner had failed a background check, he still could have purchased a gun from a private seller, however. Private sellers (individuals who are not licensed dealers) are not required to conduct background checks under federal law. This is known as the “private sale loophole.” Several states have closed this loophole by requiring all prospective firearm purchasers to undergo a background check. For more information, see *LCAV Model Law: Universal Background Checks for Firearms Sales* (Aug. 2010), at [http://www.lcav.org/publications-briefs/model\\_laws/LCAV\\_Model\\_Universal\\_Background\\_Checks\\_8.10.pdf](http://www.lcav.org/publications-briefs/model_laws/LCAV_Model_Universal_Background_Checks_8.10.pdf).

(d) No credible evidence exists to support the claim that firearms carried or possessed in public places increase public safety.<sup>8</sup> In fact, the best evidence is that lax laws regarding firearms in public have been associated with increases in violent crime.<sup>9</sup> One recent study suggests that carrying a firearm actually increases a victim's risk of firearm injury during the commission of a crime.<sup>10</sup>

(e) Firearms carried or possessed in public places increase the risk of deaths and injuries by increasing the chances that firearms will be used to settle disputes, and by increasing the risk of an accidental shooting at a place where large numbers of people are gathered.

(f) Firearms carried or possessed openly in public places can cause members of the public to be intimidated and can cause the wasteful diversion of law enforcement resources because officers are often called to a scene due to the presence of firearms. Law enforcement officers, like members of the public, cannot always tell whether an armed person is a danger to public safety. Openly carried firearms distract law enforcement officers tasked with maintaining public safety.

(g) Firearms carried openly at political rallies and in other public places have a chilling effect on free expression and the honest exchange of ideas.

(h) The carrying or possession of firearms in public places increases the risk that those firearms will be lost or stolen, and end up in the hands of criminals or other persons ineligible to possess firearms. The carrying of exposed firearms in public in particular increases the risk that those firearms will be targeted for theft.

(i) Current federal and state laws make it dangerously easy to carry or possess a hidden firearm in a public place. Federal law is nearly silent on the issue, and state laws vary tremendously. Two states (Illinois and Wisconsin) and the District of Columbia prohibit the carrying of concealed firearms,<sup>11</sup> while three states (Alaska, Arizona and Vermont) allow the carrying of concealed firearms even without a permit.<sup>12</sup> Thirty-four states are "shall issue" states, meaning that law enforcement officials are required to issue a permit to carry concealed weapons

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<sup>8</sup> The claims of John Lott, whose 1998 book *More Guns, Less Crime* purported to show that "shall issue" laws were associated with decreases in certain types of violent crime, have been widely discredited. For more information, see "Opposition Arguments" in Part III of this publication.

<sup>9</sup> John J. Donahue, "The Impact of Concealed-Carry Laws," in *Evaluating Gun Policy: Effects on Crime and Violence*, edited by Jens Ludwig and Philip J. Cook (Oxford 2003).

<sup>10</sup> Charles C. Branas et al., *Investigating the Link Between Gun Possession and Gun Assault*, 99 Am. J. Pub. Health 2034 (2009).

<sup>11</sup> 720 Ill. Comp. Stat. 5/24-1(a)(4); Wis. Stat. § 941.23; D.C. Code §§ 22-4504(a). D.C. Code § 22-4506, which had detailed the requirements for a license to carry a handgun, was repealed in 2009. Thus, the Chief of Police has no authority to issue a license carry. See D.C. Code § 22-4505 (listing limited exceptions).

<sup>12</sup> Alaska Stat. § 11.61.220. Vermont only prohibits carrying a concealed weapon in certain places or if it is carried "with the intent or avowed purpose of injuring a fellow man." Vt. Stat. Ann. tit. 13, § 4003. Although a permit is no longer required to carry a concealed weapon in Alaska, the state retains its "shall issue" permitting system. Alaska Stat. § 18.65.700. Similarly, on April 16, 2010, Arizona's governor signed into law a bill that allows any individual age 21 or over to carry a firearm concealed on his or her person in public without a license or permit. 2010 Ariz. ALS 59. Arizona's permitting system remains in place, and a permit is required to carry a firearm into a bar or restaurant that serves alcohol.

(“CCW permit”) to anyone who meets minimal statutory requirements (e.g., that the applicant is over the age of twenty-one, has not been convicted of a felony, and is a United States citizen). Eleven states are “may issue” states, and give discretion to the issuing official to grant or deny a permit application based on various statutory factors, such as whether the applicant has “good cause,” i.e., a justifiable need to carry a concealed firearm.<sup>13</sup>

(j) “May issue” states typically vest discretion to issue or deny permits to carry concealed firearms in the local law enforcement agency. Local law enforcement agencies are in the best position to make determinations regarding applications for permits, given their knowledge regarding the best interests of the community. Law enforcement officers have a unique interest in seeking to limit the carrying of loaded, hidden guns in public, since they are at particular risk for being victimized by concealed firearms. Local law enforcement is also the governmental agency most likely to be familiar with the applicant and the applicant’s history and reputation.

(k) According to the Violence Policy Center (VPC), between May 2007 and December 2010, CCW permit holders killed at least nine law enforcement officers and 273 private citizens (including 25 shooters who killed themselves after an attack).<sup>14</sup> *[A jurisdiction may refer to the database maintained by the Violence Policy Center at <http://www.vpc.org/ccwkillers.htm> for descriptions of particular shootings in that jurisdiction. Those descriptions may be included here.]*

(l) Flawed application processes in existing state CCW permitting systems have allowed numerous persons prohibited from possessing firearms to receive CCW permits. A Los Angeles Times analysis of Texas CCW holders, for example, found that between 1995 and 2000, more than 400 criminals – including rapists and armed robbers – had been issued CCW licenses under the state’s “shall issue” law.<sup>15</sup> A similar study by the South Florida Sun-Sentinel found that those licensed to carry guns in the first half of 2006 in Florida (another “shall issue” state) included more than 1,400 individuals who had pleaded guilty or no contest to felonies, 216 individuals with outstanding warrants, 128 people with active domestic violence injunctions against them, and six registered sex offenders.<sup>16</sup> An investigation by the Indianapolis Star regarding CCW permits in Indiana revealed similar problems with the state’s permitting system.<sup>17</sup>

(m) Research has also shown that individuals issued CCW permits include not only people who have committed violent crimes in the past, but also those who subsequently commit violent crimes. The Los Angeles Times analysis of Texas’s license holders found that the “largest category of

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<sup>13</sup> See Legal Community Against Violence, *Regulating Guns in America: Carrying Concealed Weapons*, 203-208 (Feb. 2008) at [http://www.lcav.org/content/carrying\\_concealed\\_weapons.pdf](http://www.lcav.org/content/carrying_concealed_weapons.pdf) (listing “shall issue” and “may issue” states); Legal Community Against Violence, *Recent Developments in Federal & State Law (by Firearms Policy)*, at [http://www.lcav.org/content/recent\\_developments\\_policies.asp#CarryingFirearms](http://www.lcav.org/content/recent_developments_policies.asp#CarryingFirearms) (updating this information).

<sup>14</sup> Violence Policy Center, *Concealed Carry Killers* (Dec. 2010), at <http://www.vpc.org/ccwkillers.htm>.

<sup>15</sup> William C. Rempel & Richard A. Serrano, *Felons Get Concealed Gun Licenses Under Bush’s ‘Tough’ Gun Law*, L.A. Times, Oct. 3, 2000, at A1.

<sup>16</sup> Megan O’Matz, *In Florida, It’s Easy to Get a License to Carry a Gun*, South Florida Sun-Sentinel, Jan. 28, 2007, at 1A.

<sup>17</sup> Mark Alesia et al., *Should these Hoosiers Have Been Allowed to Carry a Gun in Public?* Indianapolis Star, Oct. 11, 2009.

problem licensees involve[d] those who committed crimes after getting their state” licenses.<sup>18</sup> Thousands of the 215,000 license holders in Texas were arrested for criminal behavior or found to be mentally unstable during that time period.<sup>19</sup> Another study found that Texas CCW permit holders were arrested for weapons-related crimes at a rate 81% higher than that of the state’s general adult population.<sup>20</sup>

(n) “Shall issue” CCW laws are associated with an increase in gun trafficking. A September 2010 report by Mayors Against Illegal Guns (a coalition of over 500 mayors that targets illegal guns nationwide) presented data showing that states that grant no discretion to law enforcement to deny a private individual a CCW permit are the source of crime guns recovered in other states at more than twice the rate of states that do grant law enforcement this discretion.<sup>21</sup> The report noted that CCW permit holders in one state are often allowed, under reciprocity agreements with other states, to carry guns in those states, and are often exempt from laws designed to impede drug trafficking (such as one-gun-a-month laws, intended to prohibit individuals from buying guns in bulk and reselling them on the black market).<sup>22</sup>

(o) Most Americans feel less safe when their fellow citizens carry hidden firearms,<sup>23</sup> and do not want CCW permits to be easier to acquire. In fact, 73% oppose easing permit requirements.<sup>24</sup> Nine out of ten Americans do not want average citizens to be able to carry guns into places like restaurants, college campuses, sports stadiums, bars, hospitals, or government buildings.<sup>25</sup> According to one poll, 42% of Americans support a nationwide ban on the carrying of concealed

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<sup>18</sup> William C. Rempel & Richard A. Serrano, *Felons Get Concealed Gun Licenses Under Bush’s ‘Tough’ Gun Law*, L.A. Times, Oct. 3, 2000, at A1.

<sup>19</sup> *Id.*

<sup>20</sup> Violence Policy Center, *License to Kill IV: More Guns, More Crime* 5-6 (June 2002), at <http://www.vpc.org/graphics/ltk4.pdf>.

<sup>21</sup> Mayors Against Illegal Guns, *Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking* 18-19 (Sept. 2010), at <http://www.tracetheguns.org/report.pdf>.

<sup>22</sup> This model law does not allow the state to enter into reciprocity agreements with other states. Reciprocity agreements allow an individual issued a permit in one state to carry a firearm in public not only in his or her home state, but also in other states. Since CCW permitting laws vary greatly among the states, such agreements often result in individuals who would not otherwise be allowed to carry firearms in a state being allowed to do so. In addition, some states do not require applicants for permits from those states to reside in state. As a result, residents who do not meet their state’s requirement for a permit may be allowed to carry a firearm because they have obtained a permit from another state that has a reciprocity agreement with their state.

<sup>23</sup> Lake Research Partners for the Brady Center to Prevent Gun Violence, *Findings from a National Survey of 600 Registered Voters*, April 26-28, 2010, at [http://www.bradycampaign.org/xshare/bcam/legislation/open\\_carry/polling-overview-slides.ppt](http://www.bradycampaign.org/xshare/bcam/legislation/open_carry/polling-overview-slides.ppt); David Hemenway, Deborah Azrael, Matthew Miller, *National Attitudes Concerning Gun Carrying in the United States*, 7 *Inj. Prevention* 282, 283 (2001), at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=1730790&blobtype=pdf>.

<sup>24</sup> Peter Hart and Robert Teeter for NBC News/Wall Street Journal (Apr. 17-19, 1999), at <http://pollingreport.com/guns2.htm>.

<sup>25</sup> In a 1999 survey, respondents opposed individuals being allowed to carry in restaurants (88%), college campuses (94%), sports stadiums (94%), bars (93%), hospitals (91%), and government buildings (92%). David Hemenway et al., *supra* note 23, at 283.

firearms, and 28% express strong support for such a ban.<sup>26</sup> Similarly, 52% of Americans oppose allowing private individuals to carry loaded guns openly in public.<sup>27</sup>

(p) Under federal law, a CCW permittee is exempt from a background check if the permit was issued within the previous five years and the permit application included a background check using the National Instant Criminal Background Check System.<sup>28</sup> Without a background check with each firearm purchase, however, a firearms dealer is unable to confirm that a buyer has not been convicted of a crime or otherwise become ineligible to possess firearms since the date his or her CCW permit was issued.

(q) Current federal and state laws also make it dangerously easy to carry or possess an exposed firearm in a public place. Thirty-two states allow the open carrying of loaded handguns without a permit or license, and fifteen states allow the open carrying of loaded handguns with a permit or license. Three states, Florida, Illinois, and Texas, as well as the District of Columbia, prohibit the open carrying of handguns.<sup>29</sup> Illinois and D.C. prohibit both the open and the concealed carrying of all firearms.

(r) It is the purpose and intent of the [Legislative Body] in enacting this Chapter to regulate the carrying and possession of firearms in public places. The [Legislative Body] believes that the restrictions in this Chapter will enhance public safety.

### **Sec. 3 Definitions**

As used in this Chapter:

(a) “Ammunition” means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm, or cartridges, or projectiles capable of being fired from a firearm, but shall not include:

- (1) Ammunition that can be used solely in antique firearms; or
- (2) Blank cartridges.

(b) “Applicant” or “CCW applicant” means a person who is seeking a permit to carry a concealed firearm issued or renewed pursuant to this Chapter.

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<sup>26</sup> ABC News Poll, *Virginia Tech, Guns and Mental Illness*, April 23, 2007, at <http://abcnews.go.com/images/US/1037a1VaTechGuns.pdf>.

<sup>27</sup> Brady Center to Prevent Gun Violence, *Media Press Release: Americans Oppose and Feel Unsafe with Open Carry*, May 12, 2010, at <http://www.bradycampaign.org/media/press/view/1247/>.

<sup>28</sup> 18 U.S.C. § 922(t)(3); 27 C.F.R. § 478.102(d). Office of Enforcement Programs and Services, Bureau of Alcohol, Tobacco and Firearms, U.S. Dep’t of Justice, *Permanent Brady Permit Chart*, at <http://www.atf.gov/firearms/brady-law/permit-chart.html>. According to the chart, last updated on July 3, 2008, certain permits in nineteen states qualify the permittee for a background check exemption.

<sup>29</sup> Fla. Stat. §§ 790.01, 790.053(1), (3), 790.06; Tex. Penal Code §§ 46.02, 46.15(b)(6); D.C. Code §§ 22-4504(a); Legal Community Against Violence, *Open Carrying: Provocative Conduct, Dangerous Consequences* (July 20, 2010), at [http://www.lcav.org/content/open\\_carrying.pdf](http://www.lcav.org/content/open_carrying.pdf). See also *supra* note 11 (regarding D.C.’s law).

- (c) “Concealed” means entirely hidden from view.
- (d) “Department” means the [*The state should specify the particular law enforcement or administrative agency or official(s) within the jurisdiction that shall be responsible for administering and enforcing the law. A state may identify the Attorney General, State Police, Department of Public Safety, or other agency or official holding statewide authority to administer and enforce the jurisdiction’s weapons control laws. Alternatively, the state may delegate this responsibility to local police departments, Chiefs of Police, Sheriffs, or another local agency or official.*].
- (e) “Firearm” means any weapon or device designed to be used as a weapon, which will, is designed to, or may readily be converted to expel a projectile or projectiles by the action of an explosive, explosion, or other means of combustion, or the frame or receiver of such a device, provided that the term “firearm” shall not include an “antique firearm” as defined in 18 U.S.C. § 921(a)(16), or a weapon that has been rendered permanently inoperable (incapable of being readily restored to a firing condition).
- (f) “Licensed firearms dealer,” “licensed dealer,” or “dealer” means a person who has a valid federal firearms dealer license, and all additional licenses required by state or local law to engage in the business of selling or transferring firearms.
- (g) “Permittee” or “holder” means a person who has been issued a permit to carry a concealed firearm pursuant to this Chapter.
- (h) “Person” means any individual, corporation, company, association, firm, partnership, club, organization, society, joint stock company or other entity.
- (i) “Public place” means any location other than the residence of the lawful owner of the firearm.
- (j) “Unloaded” means there is no ammunition in the chamber or cylinder of the firearm, and there is no ammunition, or clip, tube, speed loader, or magazine that is compatible with the firearm and contains ammunition, on the person who is carrying the firearm. A muzzle-loading firearm is loaded for purposes of this Chapter if it is capped or primed and has a powder charge and ball, shot or projectile in the barrel or cylinder.

#### **Sec. 4           Restrictions on firearm possession in public places**

- (a) No person shall carry or possess a firearm in a public place unless the firearm is concealed and the person has obtained and is in compliance with all the terms and conditions of a valid permit to carry a concealed firearm issued to that person.
- (b) The following persons are not subject to this section:
- (1) A qualified law enforcement officer, or qualified retired law enforcement officer, as those terms are defined in 18 U.S.C. §§ 926B and 926C;

- (2) A United States Marshal, or member of the Armed Forces of the United States or the National Guard, provided that person is required to carry firearms at that time;
- (3) A properly licensed firearms dealer or employee of a dealer in his or her place of business, provided that the firearm is not carried on the person and remains unloaded except when the dealer or employee is demonstrating the proper method of loading the firearm to a potential customer;
- (4) A person lawfully engaged in hunting;
- (5) A security guard properly licensed under all applicable federal, state, and local laws carrying a firearm as authorized in the course and scope of his or her duties;
- (6) An agent or an employee of a common carrier who is engaged in the commercial transportation of the firearm as merchandise;
- (7) A gunsmith properly licensed under all applicable federal, state, and local laws, possessing a firearm for the purpose of repair;
- (8) A person possessing a firearm at a shooting range properly licensed under all applicable federal, state, and local laws, for the purpose of lawfully shooting at targets;
- (9) The lawful owner of a firearm carrying it between any of the places listed in section 5(a)(2), provided that the firearm remains unloaded and fully enclosed inside a secure container that is locked by a padlock, key lock, combination lock, or similar locking device at all times; or

*[Optional provision:*

- (10) The individual store owner or employee present in a place of business who has the authority to control activities in the place of business at that time, if that place of business is one that is generally open to the public.]

## **Sec. 5           Restrictions on firearms in vehicles**

(a) No person shall carry or possess a firearm in a motor vehicle unless the person has obtained and is in compliance with all the terms and conditions of a valid permit to carry a concealed firearm, except that the following persons may transport a firearm in a motor vehicle if the firearm is unloaded and wrapped so as to remain hidden from view, and the firearm and all ammunition are fully enclosed inside a locked trunk:

- (1) A security guard properly licensed under all applicable federal, state, and local laws and properly authorized to carry firearms in the course and scope of his or her duties, while traveling to or from his or her place of employment with the firearms he or she is authorized to carry in the performance of his or her duties; or
- (2) The lawful owner of a firearm transporting it between any of the following places:

- (A) The lawful owner's residence;
- (B) The residence of the prior lawful owner of the firearm, or, if the prior owner was a licensed dealer, the place of business of the prior owner;
- (C) The residence of a potential transferee of the firearm, or, if the potential transferee is a licensed dealer, the place of business of the potential transferee, provided that the lawful owner intends to transfer the firearm to the transferee in compliance with all federal, state, or local laws;
- (D) The place of business of a gunsmith properly licensed under all applicable federal, state, and local laws, for the purpose of repair;
- (E) A shooting range properly licensed under all applicable federal, state, and local laws, for the purpose of lawfully shooting at targets;
- (F) A place where the lawful owner intends to lawfully hunt; or

*[Optional provision: (to be used if paragraph (b)(10) is included in section 4 above)*

- (G) His or her place of business if he or she is the store owner or employee who has the authority to control activities in the place of business at that time, he or she is authorized by the store owner to possess a firearm there at that time, and that place of business is one that is generally open to the public.]

(b) If a person listed in subsection (a) is transporting a firearm in a motor vehicle that does not have a locked trunk, the firearm must be unloaded, the firearm and all ammunition must be enclosed in a secure container, other than a utility or glove compartment, and the secure container must be locked by a padlock, key lock, combination lock, or similar locking device.

(c) This section shall not apply to any of the following:

1. A qualified law enforcement officer, or qualified retired law enforcement officer, as those terms are defined in 18 U.S.C. §§ 926B and 926C;
2. A United States Marshal, or member of the Armed Forces of the United States or the National Guard, provided that person is required to carry firearms at the time;
- (3) Armored vehicle personnel properly licensed under all applicable laws, provided that person is required to carry firearms at the time;
- (4) A security guard properly licensed under all applicable federal, state, and local laws, provided that person is required to carry firearms at the time;
- (5) An agent or an employee of a common carrier who is engaged in the commercial transportation of the firearm as merchandise; or

- (6) A person lawfully transporting a firearm interstate in accordance with 18 U.S.C. § 926A.

## **Sec. 6 Application for a permit to carry a concealed firearm**

(a) An applicant for a permit to carry a concealed firearm shall complete an application in writing on a form prescribed by the Department, and shall submit the completed application to the Department. *[If the Department has been identified in section 3(d) to mean a local agency, the following provision should be included:* The application shall be submitted to the [Department] in the [city/county] where the applicant resides.] The applicant shall verify the contents of the application by oath or affirmation in writing before an officer authorized by the Department. The application form shall require the applicant to provide all relevant information requested to demonstrate compliance with this Chapter, including:

- (1) The applicant's full name and any other name by which the applicant has ever been known;
- (2) The present address and each home address where the applicant has resided during the 5-year period immediately preceding the application;
- (3) The home telephone number, and cell phone number, if any, of the applicant;
- (4) The present business or occupation and any business or occupation in which the applicant has engaged during the 5-year period immediately preceding the application and the addresses of such businesses or places of employment;
- (5) The business telephone number of the applicant;
- (6) The applicant's gender, race, height, weight, hair and eye color, date of birth, place of birth, country of citizenship, social security number, and, if the applicant is not a U.S. citizen, alien or admission number;
- (7) The marital status of the applicant;
- (8) Names and last known addresses of all of the following persons:
  - (A) The applicant's spouse and all former spouses of the applicant;
  - (B) All children, stepchildren and foster children of the applicant; and
  - (C) All of the applicant's current household members and household members during the preceding five years;
- (9) A copy of the applicant's current driver's license or other government-issued identification card containing a photograph of the applicant;

- (10) The make, model, caliber or gauge, and serial number of each firearm to be carried or possessed in public;
- (11) A full set of the applicant's fingerprints;
- (12) The type and identifying number of any license, permit, registration, or certificate that the applicant has obtained pertaining to any firearm, and the jurisdiction from which it was obtained;
- (13) Whether the federal government or a governmental entity in any state or subdivision of any state has denied or revoked the applicant's license, permit, registration, or certificate pertaining to any firearm (and if so, the reasons, the jurisdiction(s), and the date(s));
- (14) Whether the applicant has failed a drug test within the preceding five years (and if so, the provider(s) of the test(s), the specific substance(s) involved, and date(s) of the test(s));
- (15) Whether the applicant has ever been prohibited by law from purchasing, possessing, or carrying a firearm (and if so, the jurisdiction(s), the date(s), and the reason(s) for the prohibition(s));
- (16) Whether the applicant has been suspended or expelled from a postsecondary educational institution, such as a college or university, because of suspected mental illness (and if so, the name(s) of the school(s), the date(s), and the reason(s) for the suspension(s) or expulsion(s));
- (17) A description of any incident in which the applicant threatened, injured or killed any person, if a firearm was involved or the incident occurred during the preceding five years and the police were involved, including, for each incident, the date, place, time, circumstances, and the names of the persons and police agencies involved, if any;
- (18) An explanation of the applicant's particularized need for and intended use of the firearm, demonstrating that either:
  - (A) The applicant is exposed to extraordinary personal danger, documented by copies of police reports and restraining orders, if applicable, and descriptions of, and dates, times, and locations of, any incident in which the applicant has been threatened or injured, and the names of the police agencies involved in such incidents; or
  - (B) The applicant is a professional employed to protect another individual who meets the requirements of subparagraph (A), and will carry the firearm only when the terms of that employment require him or her to do so;
- (19) An affidavit signed by a certified firearms safety course instructor or authorized law enforcement officer stating that the applicant successfully completed a firearms safety

training course and that the course fulfills the requirements of section 9, and including the name, address, and telephone number of the instructor or officer, the name of the person taking the course, and the date(s) and place(s) of the course;

(20) Proof that the applicant has successfully completed the written test described in section 10;

(21) Proof that the applicant possesses the same powers of eyesight as required for a driver's license in [State]. If an applicant does not possess a current [State] driver's license, the applicant may present a current optometrist's or ophthalmologist's statement certifying the vision reading obtained from the applicant;

(22) Letters of reference from three respectable citizens of the county in which the applicant resides, or a county in which the applicant has previously resided who have each known the applicant for at least one year. The letters shall describe the applicant's character and reputation in the community. The letters shall be signed with the proper signatures of each such respectable citizen, and shall be notarized;

(23) Two frontal view color photographs of the applicant's full head taken within the 30 days immediately preceding the application, as specified in rules or regulations of the Department;

(24) Responses to questions specifically asking whether the applicant falls within each of the categories of persons identified as ineligible for a permit in section 8;

(25) An authorization and release to obtain pertinent information about the person from any relevant sources, in which the applicant waives any right to confidentiality and requests the disclosure of such information to the Department for the sole purpose of determining whether a permit should be issued or renewed pursuant to this Chapter;

(26) Written agreement that, if the person is approached by a law enforcement officer while carrying or possessing a firearm in a public place pursuant to the permit or is stopped and approached by an officer while the person is carrying or possessing a firearm in a motor vehicle, the person will immediately inform the law enforcement officer that he or she is in possession of a firearm and a permit to carry a concealed firearm, and will submit to a pat down search and allow the officer to take possession of the firearm for the duration of the encounter;

(27) Written consent to submit to one or more field sobriety or breathalyzer tests to determine the presence of alcohol or drugs, at any point when the person is carrying or possessing a firearm in a public place or in a motor vehicle and the person is approached by a law enforcement officer who has a reasonable suspicion that the person is under the influence of alcohol or a controlled substance; and

(28) Any other information that the Department finds necessary to process an application.

(b) The Department may charge the applicant a fee to cover the administrative costs of processing the application and issuing or renewing the permit.

## **Sec. 7 Investigation by Department**

(a) The Department shall complete a background check on an applicant for a permit to carry a concealed firearm to ensure compliance with the requirements of this Chapter and all federal, state, and local laws. The background check shall include a search of all of the following:

- (1) The National Instant Criminal Background Check System of the Federal Bureau of Investigation;
- (2) State and local criminal history record information files, including records of juvenile adjudications;
- (3) Federal, state, and local records regarding wanted persons;
- (4) Federal, state, and local records of domestic violence restraining and protective orders;
- (5) Federal, state, and local records identifying persons who are unlawful users of or addicted to any controlled substance (as defined in section 802 of Title 21 of the United States Code);
- (6) The files of [the jurisdiction's agency that maintains information relating to mental health and developmental disabilities]; and
- (7) Any other available files of any federal, state, and local agency and other entity (private or public) in any jurisdiction likely to contain information relevant to whether the applicant is prohibited from purchasing or possessing a firearm under federal, state, or local law.

(b) As part of its investigation, the Department may, at its discretion, conduct interviews of the applicant, any of the applicant's current or former family or household members, co-workers, employers, neighbors, the character references as listed on the application, and any other member of the public who may have information relevant to the application.

(c) In addition to the above, the Department may, at its discretion, require the applicant, at the applicant's expense, to undergo a mental examination by a licensed psychiatrist or psychologist or any other tests, interviews, or examinations that the Department believes appropriate.

## **Sec. 8 Department approval or disapproval**

(a) The Department may approve the application if the applicant has fulfilled all the requirements of this Chapter and if, in the judgment of the Department:

- (1) The applicant has sufficiently demonstrated a particularized need for the permit;

- (2) The applicant is a responsible person; and
  - (3) The issuance or renewal of a permit to the applicant is in the public's interest.
- (b) In addition to the requirements of subsection (a), no application for a permit to carry a concealed firearm may be approved and no permit may be renewed unless the applicant demonstrates that he or she:
- (1) Is at least [twenty-three] years of age, and either:
    - (A) Has resided in the [state/local jurisdiction] for at least [six] months, or demonstrates exigent circumstances necessitating issuance of a permit earlier; or
    - (B) Is a member of the armed forces stationed in the state, or the spouse of such member of the military;
  - (2) Is not prohibited from purchasing or possessing a firearm under federal, state, or local law;
  - (3) Has never been convicted of, pled guilty to, or entered a plea of nolo contendere (no contest) for:
    - (A) An offense punishable by imprisonment for a term exceeding one year under the laws of any state or of the United States;
    - (B) An offense relating to the manufacture, sale, carrying, possession or use of a firearm or dangerous or deadly weapon or ammunition therefor;
    - (C) An offense involving the use of force or violence upon the person of another;
    - (D) A violation of a protective order; or
    - (E) Harassment or stalking;
  - (4) Has not twice within his or her lifetime, or once within the preceding [five] years, been convicted of, pled guilty to, or entered a plea of nolo contendere (no contest) for:
    - (A) An offense involving the manufacture, sale, possession or use of a controlled substance; or
    - (B) An offense involving the use of alcohol as an element of the offense;
  - (5) Was not adjudicated delinquent as a juvenile for an offense which, if committed by an adult, would disqualify the adult for a permit under this section;

- (6) Is not currently charged with or under indictment for an offense that would disqualify him or her for a permit under this section;
- (7) Is not currently, and has not been within the past [five] years, “an unlawful user of or addicted to a controlled substance,” as that term is defined in 27 C.F.R. § 478.11;
- (8) Does not chronically or habitually use alcohol to the extent that his or her normal faculties are impaired,
- (9) Has not been voluntarily or involuntarily committed as an alcoholic or drug user to a treatment facility within the preceding [five] years;
- (10) Has not been involuntarily committed to a mental health facility;
- (11) Has not been voluntarily committed to a mental health facility within the past [ten] years;
- (12) Is not currently, and has not been within the preceding [five] years, subject to a permanent protective order, or two or more temporary protective orders, restricting the person from the use of force, or threatened use of force against any other person;
- (13) Has completed a firearms safety training course in compliance with section 9; and
- (14) Has completed the written test in compliance with section 10.

(c) The Department shall inform an applicant for a permit to carry a concealed firearm of the approval or disapproval of the application within [60] days of its receipt, unless good cause exists to extend this time period.

## **Sec. 9 Safety training and testing requirements**

Any applicant for a permit to carry a concealed firearm, as a condition for issuance of a permit, must complete a firearms safety training course that fulfills the following requirements:

- (a) The firearm safety training course must be approved by the Department, and:
  - (1) Conducted by a firearms instructor certified pursuant to rules and regulations prescribed by the Department; or
  - (2) Offered by a state, county or municipal law enforcement agency and available to the general public.
- (b) The firearms safety training course must require, at a minimum, [ten] hours of classroom instruction on:

- (1) The safe handling and storage of firearms, including the proper loading and unloading of each particular type of firearm to be carried or possessed by the applicant, and the proper engaging and disengaging of common firearm safety mechanisms;
  - (2) Methods for safely storing and securing firearms and ammunition and preventing access by children and other unauthorized persons;
  - (3) Applicable federal, state, and local laws relating to the purchase, sale, possession, transportation, carrying, and storage of firearms;
  - (4) Ways to safely develop and maintain firearm shooting skills and marksmanship;
  - (5) The proper care and cleaning of the particular type of firearm to be carried or possessed by the applicant;
  - (6) The laws of [state] pertaining to the use of deadly force for self-defense; and
  - (7) Techniques for avoiding a criminal attack and how to manage a violent confrontation, including conflict resolution.
- (c) The applicant must fulfill the following requirements for each particular type of firearm to be carried or possessed by the applicant:
- (1) During the firearms safety training course, the applicant must satisfactorily demonstrate to the course instructor the safe-handling of the firearm. This demonstration must include the proper loading and unloading of the firearm, the proper engaging and disengaging of common firearm safety mechanisms, and the proper firing of the firearm. If the firearm has a detachable magazine, the demonstration must also include the proper removal and reattachment of the magazine; and
  - (2) The firearms safety training course must require, at a minimum, [two] sessions of range instruction, lasting at least [two] hours each, and conducted at a firing range, for each firearm. The range instruction must include live firing exercises and testing in the presence of the course instructor in which the applicant uses the firearm, and fires from a standing position or its equivalent, a minimum of 100 rounds at a distance of seven yards from a target approved by the Department.
- (d) A law enforcement agency or firearms instructor conducting a firearm safety training course intending to fulfill the requirements of this section shall:
- (1) Make the course records for each applicant available upon request to law enforcement;
  - (2) Maintain all course records on students for a period of no less than [four] years from course completion date; and

- (3) Have no more than [forty] students in the classroom portion of the course and no more than [five] students in the range instruction portion of the course at one time.
- (e) A law enforcement agency or firearms instructor conducting a firearm safety training course shall not give a grade of passing to an applicant who:
- (1) Refuses to follow the directions of the firearms instructor or agency representative;
  - (2) Despite appropriate instruction, handles a firearm in a manner that, in the judgment of the firearms instructor or agency representative, poses a danger to the applicant or to others; or
  - (3) During the live fire testing portion of the course, fails to hit the silhouette portion of the targets with at least [30] out of [50] rounds for each particular kind of firearm to be carried or possessed by the applicant, as observed by the instructor.
- (f) The permit applicant must receive from the instructor who conducted the course a signed affidavit providing the name, address, and telephone number of the instructor, the name of the person taking the course, the date(s) and place(s) of the course, and each particular type of firearm to be carried or possessed by the applicant, and attesting to the successful completion of the course by the applicant. The applicant must present this affidavit to the Department as proof of completion of each program requirement.

## **Sec. 10 Written safety testing requirement**

- (a) Following the safety training course, the applicant must successfully complete a written test, created and administered by the Department, demonstrating knowledge of firearm safety and applicable firearms laws before a permit to carry a concealed firearm will be issued.
- (b) The applicant must pass the written test with a passing grade of at least [75 percent].
- (c) If an applicant fails the objective test on the first attempt, he or she may retake the test. However, the applicant may not take a written test more than once during a 24-hour period and may not take the same version of the test on any two consecutive attempts. In the event that an applicant fails the written test on the third consecutive attempt, he or she may not take the written test again until he or she has re-taken the firearm safety course required in section 9.
- (d) The Department may charge applicants a fee to cover the administrative costs of issuing the test.

[Optional]:<sup>30</sup>

## **Sec. 11            Judicial issuance or denial of permit to carry a concealed firearm**

If an application to grant or renew a permit to carry a concealed firearm has been approved by the Department, the Department shall present it to the [Court – *specify the level within the court system that will be responsible for issuing and renewing permits*]. The Court may receive testimony and hear evidence and arguments for and against the issuance or renewal, and establish general rules for that purpose. Within [60] days of receipt of an application, the Court may, in its discretion, issue or renew a permit if it finds that the requirements of this Chapter are met, and in the judgment of the Court, the applicant meets the standards set forth in section 8.]<sup>31</sup>

## **Sec. 12            Appeals procedure**

*[The following section allows a person whose application for a permit to carry a concealed firearm has been disapproved by the Department or denied by the Court to appeal the decision to a higher authority. A jurisdiction may, at its option, choose to omit this section, in which case the decisions of the Department and Court under sections 8 and 11 would be subject to the jurisdiction's general rules regarding administrative procedure. In some jurisdictions, these decisions would be treated as final.]*

- (a) In the event an application to grant or renew a permit to carry a concealed firearm is disapproved by the Department, the Department shall inform the applicant or permittee in writing of the reasons for the disapproval.
- (b) Any applicant who believes that his or her application was wrongfully disapproved by the Department may, within [30] days after receiving notice of the disapproval, file an appeal of the disapproval with the Department. The appeal must be made in writing, setting forth the specific grounds for the appeal. If the applicant or permittee fails to appeal the disapproval within [30] days, the decision shall become final.
- (c) If the Department disapproves an application to grant or renew a permit to carry a concealed firearm, and the applicant or permittee submits a timely appeal, the [Head of the Department] shall set a time and place for the hearing within [30] days and, based upon the evidence contained in the record of such hearing, either affirm or reverse the decision of the Department. The [Head of the Department] shall provide a written decision regarding the appeal within [14] calendar days of the hearing.

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<sup>30</sup> In New Jersey, a person seeking a permit to carry a handgun must first obtain the approval of the State Police or local law enforcement before presenting his or her application to the local superior court. N.J. Rev. Stat. § 2C:58-4. The superior court must be equally satisfied the applicant meets the requirements to carry a handgun before it will issue a permit. *Id.* Three other states (Delaware, Georgia, and Virginia) also make a court the issuing authority. *See* Del. Code tit. 11, § 1441; Ga. Code § 16-11-129; Va. Code § 18.2-308.

<sup>31</sup> A jurisdiction that chooses to include a judicial approval requirement should modify the references to “the Department” in sections 12, 13(a) and (b), 16 and 17(d) to refer to “the Court” or “the Department and the Court,” where appropriate.

[(d) *(A jurisdiction should include this provision if the jurisdiction requires approval by a Court, and also wishes to include a right of appeal from the Court's decision.)*

If the Court exercises its discretion to deny or refuses to renew a permit to carry a concealed firearm under section 11, the applicant may appeal the decision in accordance with [the Jurisdiction's laws regarding appellate review.]

### **Sec. 13           Features and use of a permit to carry a concealed firearm**

(a) In the event the application is approved, the Department shall issue to the applicant a permit to carry a concealed firearm on a form prescribed by the Department which contains the applicant's name, photograph, residence address, date of birth, a unique permit number, the make, model, caliber or gauge, and serial number of the firearm or firearms to be carried, such other personal information as may be required by the Department, the date the permit expires, and any additional restrictions or conditions the Department may impose on the applicant's carrying or possession of a firearm.

(b) Any permit to carry a concealed firearm issued or renewed under this Chapter may include any reasonable restrictions or conditions which the Department deems warranted, including restrictions as to the time, place, manner, and circumstances under which the person may carry a firearm. In the case of a permit issued to a professional under section 6(a)(18)(B), the permit shall only allow the person to carry a firearm in a public place when the terms of his or her employment require it.

(c) The permit to carry a concealed firearm shall not be transferable or assignable. The permit shall be carried with the firearm whenever the permittee carries or possesses a firearm in a public place.

(d) A permittee shall exhibit the permit to any law enforcement officer at any time upon his or her demand for inspection. If, at any point, the permittee is approached by a law enforcement officer while the permittee is carrying or possessing a firearm in a public place, or is stopped and approached by a law enforcement officer while the permittee is carrying or possessing a firearm in a motor vehicle, the permittee must immediately inform the officer that he or she is in possession of a firearm and a permit to carry a concealed firearm. The permittee shall comply with all lawful orders and directions from the officer. For the safety of the officer and the public, the officer may conduct a pat down of the permittee and take possession of the firearm for the duration of the encounter.

(e) Notwithstanding the provisions of federal law, 18 U.S.C. § 922(t)(3), a permit to carry a concealed firearm issued by [State] shall not exempt the permittee from the requirements of a background check, including a check of the National Instant Criminal Background Check System, upon purchase or transfer of a firearm.

### **Sec. 14           Permittees' duties to report**

A permittee shall report to the Department:

(a) Within [48] hours of the time he or she discovered or should have discovered:

- (1) The loss or theft of a firearm listed on the permit; or
- (2) Any change in his or her status that would affect his or her eligibility for a permit, including:
  - (A) An arrest, indictment, or conviction in any jurisdiction for an offense listed in section 8(b);
  - (B) Issuance of a protective order in any jurisdiction restricting the person from the use of force, or threatened use of force against any other person;
  - (C) Commitment to a mental health facility;
  - (D) Commitment as an alcoholic or drug user to a treatment facility; or
  - (E) The presence or occurrence of any physical or mental condition or disability that would affect the permittee's ability to safely possess or use a firearm; and
- (b) Within [14] days of the occurrence of:
  - (1) Any change in the information appearing on the permit that would not affect his or her eligibility for the permit;
  - (2) The loss, theft, destruction, or alteration, or mutilation of the permit; or
  - (3) The sale or transfer of a firearm listed on the permit.

**Sec. 15 Carrying a firearm while under the influence of alcohol or a controlled substance**

- (a) No person shall carry or possess a firearm in a public place or while driving a motor vehicle when the person is under the influence of alcohol or a controlled substance.
- (b) No permittee shall carry or possess a firearm in a motor vehicle while under the influence of alcohol or a controlled substance.
- (c) If a permittee is approached by a law enforcement officer while carrying or possessing a firearm in a public place or in a motor vehicle and the officer has a reasonable suspicion that the permittee is under the influence of alcohol or a controlled substance, the officer may require the permittee to submit to one or more field sobriety or breathalyzer tests to determine the presence of alcohol or drugs.

**Sec. 16      Location restrictions**

(a) No person may carry or possess any firearm in any of the following locations, regardless of whether he or she has been granted a permit to carry a concealed firearm under this Chapter:

- (1) Within 1,000 feet of the grounds of any public or private elementary or secondary school, including any parking space within that area;
- (2) On the campus of any public or private college, university or post-secondary, technical, or vocational school;
- (3) In any portion of a building used as a child-care facility or preschool;
- (4) In a courthouse or other non-residential building owned or occupied by, or at any meeting of, a federal, state, or local governmental body;
- (5) In any restaurant, bar, liquor store, or other place where alcohol is served or may be purchased;
- (6) In any church, mosque, synagogue, or other place where people regularly assemble for religious worship;
- (7) In any sports arena, athletic stadium, or amusement park;
- (8) In any public park;
- (9) In any hospital or other building where medical or mental health services are the primary services provided;
- (10) In any adult or juvenile correctional institution, prison or jail;
- (11) At any site where gambling is lawful;
- (12) Within twenty-five feet of any polling place on any election day; or
- (13) On any privately owned property that has posted a sign or otherwise reasonably attempted to make it known that firearms are not permitted. If the property is a private residence, no person shall carry or possess a firearm in the residence without first obtaining the express permission of an adult resident.

(b) The following persons are exempt from this section:

- (1) A qualified law enforcement officer, or qualified retired law enforcement officer, as those terms are defined in 18 U.S.C. §§ 926B and 926C;

- (2) A United States Marshal, or member of the Armed Forces of the United States or the National Guard, provided that person is required to carry firearms at the time;
- (3) A security guard properly licensed under all applicable federal, state, and local laws carrying a firearm as required by his or her employment and as authorized by the owner or proprietor of the property; and
- (4) Any lawful owner of a firearm inside his or her own residence.

## **Sec. 17 Permit suspension and revocation**

(a) If a permittee is arrested for or formally charged with a crime that would disqualify the permittee from possessing a permit under section 8(b), the permittee shall immediately surrender the permit to the Department. Whenever the Department becomes aware that the permittee has been arrested for or formally charged with a crime that would disqualify the permittee from possessing a permit under section 8(b), the Department shall immediately suspend the permit, formally notify the permittee that the permit has been suspended, and seize the permit if the permittee has failed to surrender it. The Department shall restore the permit only if the permittee is released without the filing of charges, or if all charges against the permittee have been dropped or dismissed.

(b) If at any time a permittee becomes ineligible to possess a permit under any of the provisions of this Chapter other than section 8(b)(6), the permit to carry a concealed firearm shall immediately become void and revoked, and the permittee shall immediately surrender the permit to the Department. Whenever the Department becomes aware that a permittee has become ineligible to possess a permit, the Department shall immediately revoke the permit, formally notify the permittee that the permit has been revoked, and seize the permit if the permittee has failed to surrender it. A permittee who believes his or her permit was wrongfully revoked may, within [30] days of receiving notice of the revocation, request a hearing before the Department. [*Optional:* The Department's decision may be appealed in accordance with [the Jurisdiction's laws regarding administrative review].]

## **Sec. 18 Duration and renewal**

(a) A permit to carry a concealed firearm shall expire automatically one year from the date of issuance. Except as stated in subsection (b), the permittee shall renew his or her permit once every year through completion of the application requirements in section 6, including a background check.

(b) A permittee must repeat the safety training requirement in section 9 and the written test required in section 10 at least once every [three] years, and more frequently at the discretion of the Department.

(c) Applications for renewal shall be received by the Department [60] days prior to the expiration of the current permit. The Department shall mail renewal notices to each permittee at least [90] days prior to expiration of the permit. The renewal notice shall state whether the person must complete the safety training requirement pursuant to subsection (b) for renewal of the permit.

(d) The Department shall follow the procedures of section 8 in approving or disapproving the application for renewal of a permit.

### **Sec. 19 Application and permit records**

For all permits to carry a concealed firearm, the Department shall keep an accurate record of every application received and acted upon, together with all other information and data pertaining thereto on all applications for permits issued, renewed, denied, or revoked under the provisions of this Chapter. This information shall be maintained in a systematic and accessible manner and available to law enforcement and the public at any time immediately upon request. *[Note that such records should be maintained at the state level. If “Department” is defined in section 3 as a local agency or official, the Department should maintain its own original copies of these records, but should also be required to forward copies of these records to a state agency or official required to maintain a statewide database containing this information and to make all the information in that database immediately available to law enforcement and the public.]*

### **Sec. 20 Administrative rules and regulations**

The Department shall have the authority to promulgate rules and regulations for the implementation of this Chapter and to prescribe all forms and the information required thereon.

### **Sec. 21 Penalties**

*[Penalties for a violation of these provisions may vary based on the law enforcement and policy needs of each state. States typically impose a penalty of up to one year per violation. A fine of up to several thousand dollars is sometimes an additional penalty, depending on the circumstances. Jurisdictions are encouraged to consult with law enforcement to develop appropriate penalties.]*

### **Sec. 22 Severability**

If any section, subsection, sentence or clause of this Chapter is for any reason declared unconstitutional or invalid or unenforceable by any court of competent jurisdiction, such decision shall not affect the constitutionality, validity or enforceability of the remaining portions of this Chapter or any part thereof. The [Legislative Body] hereby declares that it would have adopted this Chapter notwithstanding the unconstitutionality, invalidity or unenforceability of any one or more of its sections, subsections, sentences or clauses.

*Option 2 (prohibiting firearms in public places)*

**CHAPTER 1            THE ACT PROHIBITING FIREARM POSSESSION IN PUBLIC PLACES**

<b>Sec. 1</b>	<b>Title</b>
<b>Sec. 2</b>	<b>Legislative findings, purpose and intent</b>
<b>Sec. 3</b>	<b>Definitions</b>
<b>Sec. 4</b>	<b>Restrictions on firearm possession in public places</b>
<b>Sec. 5</b>	<b>Restrictions on firearms in vehicles</b>
<b>Sec. 6</b>	<b>Carrying a firearm while under the influence of alcohol or a controlled substance</b>
<b>Sec. 7</b>	<b>Penalties</b>
<b>Sec. 8</b>	<b>Severability</b>

**Sec. 1            Title**

This Chapter may be cited as The Act Prohibiting Firearm Possession in Public Places.

**Sec. 2            Legislative findings, purpose and intent**

*[Findings regarding the need for and benefits of this law should be included. See the legislative findings above in Option 1, Section 2 for suggested language for this section.]*

**Sec. 3            Definitions**

As used in this Chapter:

- (a) “Concealed” means entirely hidden from view.
- (b) “Firearm” means any weapon or device designed to be used as a weapon, which will, is designed to, or may readily be converted to expel a projectile or projectiles by the action of an explosive, explosion, or other means of combustion, or the frame or receiver of such a device, provided that the term “firearm” shall not include an “antique firearm” as defined in 18 U.S.C. § 921(a)(16), or a weapon that has been rendered permanently inoperable (incapable of being readily restored to a firing condition).
- (c) “Licensed firearms dealer,” “licensed dealer,” or “dealer” means a person who has a valid federal firearms dealer license, and all additional licenses required by state or local law, to engage in the business of selling or transferring firearms.
- (d) “Person” means any individual, corporation, company, association, firm, partnership, club, organization, society, joint stock company or other entity.
- (e) “Public place” means any location other than the residence of the lawful owner of the firearm.

(f) “Unloaded” means there is no ammunition in the chamber or cylinder of the firearm, and there is no ammunition, or clip, tube, speed loader, or magazine that is compatible with the firearm and contains ammunition, on the person who is carrying the firearm. A muzzle-loading firearm is loaded for purposes of this Chapter if it is capped or primed and has a powder charge and ball, shot or projectile in the barrel or cylinder.

#### **Sec. 4           Restrictions on firearm possession in public places**

No person shall carry or possess a firearm in a public place, unless he or she is one of the following:

- (a) A qualified law enforcement officer, or qualified retired law enforcement officer, as those terms are defined in 18 U.S.C. §§ 926B and 926C;
- (b) A United States Marshal, or member of the Armed Forces of the United States or the National Guard, provided that person is required to carry firearms at that time;
- (c) A properly licensed firearms dealer or employee of a dealer in his or her place of business, provided that the firearm is not carried on the person and remains unloaded except when the dealer or employee is demonstrating the proper method of loading a firearm to a potential customer;
- (d) A person lawfully engaged in hunting;
- (e) A security guard properly licensed under all applicable federal, state, and local laws carrying a firearm as authorized in the course and scope of his or her duties;
- (f) An agent or an employee of a common carrier who is engaged in the commercial transportation of the firearm as merchandise;
- (g) A gunsmith properly licensed under all applicable federal, state, and local laws, possessing a firearm for the purpose of repair;
- (h) A person possessing a firearm at a shooting range properly licensed under all applicable federal, state, and local laws, for the purpose of lawfully shooting at targets;
- (i) The lawful owner of a firearm carrying it unloaded and fully enclosed inside a secure container that is locked by a padlock, key lock, combination lock, or similar locking device, between any of the places listed in section 5(a)(2); or

*[Optional provision:*

- (j) The individual store owner or employee present in a place of business who has the authority to control activities in the place of business at that time, if that place of business is one that is generally open to the public.]

## Sec. 5            Restrictions on firearms in vehicles

(a)    No person shall carry or possess a firearm in a motor vehicle, except that the following persons may transport a firearm in a motor vehicle if the firearm is unloaded and wrapped so as to remain hidden from view, and the firearm and all ammunition are fully enclosed inside a locked trunk:

- (1)    A security guard properly licensed under all applicable federal, state, and local laws and properly authorized to carry firearms in the course and scope of his or her duties, while traveling to or from his or her place of employment; or
  - (2)    The lawful owner of a firearm transporting it between any of the following places:
    - (A)    The lawful owner's residence;
    - (B)    The residence of the prior lawful owner of the firearm, or, if the prior owner was a licensed dealer, the place of business of the prior owner;
    - (C)    The residence of a potential transferee of the firearm, or, if the potential transferee is a licensed dealer, the place of business of the potential transferee, provided that the lawful owner intends to transfer the firearm to the transferee in compliance with all federal, state, or local laws;
    - (D)    The place of business of a gunsmith properly licensed under all applicable federal, state, and local laws, for the purpose of repair;
    - (E)    A shooting range properly licensed under all applicable federal, state, and local laws, for the purpose of lawfully shooting at targets;
    - (F)    A place where the lawful owner intends to lawfully hunt; or
- [*Optional provision: (to be used if subsection (j) is included in section 4 above)*
- (G)    His or her place of business if he or she is the store owner or employee who has the authority to control activities in the place of business at that time, he or she is authorized by the store owner to possess a firearm there at that time, and that place of business is one that is generally open to the public.]

(b)    If a person listed in subsection (a) is transporting a firearm in a motor vehicle that does not have a locked trunk, the firearm must be unloaded, the firearm and all ammunition must be enclosed in a secure container, other than a utility or glove compartment, and the secure container must be locked by a padlock, key lock, combination lock, or similar locking device.

(c) This section shall not apply to any of the following:

- (1) A qualified law enforcement officer, or qualified retired law enforcement officer, as those terms are defined in 18 U.S.C. §§ 926B and 926C;
- (2) A United States Marshal, or member of the Armed Forces of the United States or the National Guard, provided that person is required to carry firearms at the time;
- (3) Armored vehicle personnel properly licensed under all applicable laws, provided that person is required to carry firearms at the time;
- (4) A security guard properly licensed under all applicable federal, state, and local laws, provided that person is required to carry firearms at the time;
- (5) An agent or an employee of a common carrier who is engaged in the commercial transportation of the firearm as merchandise; or
- (6) A person lawfully transporting a firearm interstate in accordance with 18 U.S.C. § 926A.

**Sec. 6 Carrying a firearm while under the influence of alcohol or a controlled substance**

No person shall carry or possess a firearm in a public place or while driving a motor vehicle when the person is under the influence of alcohol or a controlled substance.

**Sec. 7 Penalties**

*[Penalties for a violation of these provisions may vary based on the law enforcement and policy needs of each state. States typically impose a penalty of up to one year per violation. A fine of up to several thousand dollars is sometimes an additional penalty, depending on the circumstances. Jurisdictions are encouraged to consult with law enforcement to develop appropriate penalties.]*

**Sec. 8 Severability**

If any section, subsection, sentence or clause of this Chapter is for any reason declared unconstitutional or invalid or unenforceable by any court of competent jurisdiction, such decision shall not affect the constitutionality, validity or enforceability of the remaining portions of this Chapter or any part thereof. The [Legislative Body] hereby declares that it would have adopted this Chapter notwithstanding the unconstitutionality, invalidity or unenforceability of any one or more of its sections, subsections, sentences or clauses.

## Part II: Opposition Arguments and Legal Challenges to Laws Regulating Firearms in Public Places

### A. Opposition Arguments

#### 1. Laws Governing Concealed Firearms: The Research of John Lott

Opponents of strong regulations governing the carrying and possession of firearms in public places often argue that permissive carrying laws decrease crime. These opponents typically cite the widely-criticized research of economist John Lott, summarized in Lott's 1998 book *More Guns, Less Crime*, which compared crime rates in 10 states that had adopted "shall issue" laws with those that had not. A "shall issue" law is a law that requires law enforcement to issue a license or permit to carry a concealed firearm (a "CCW" license or permit) to any person who meets certain basic qualifications.<sup>32</sup> Lott claimed, and many opponents of strong regulation continue to claim, that "shall issue" laws are associated with a substantial decrease in certain types of violent crime.

Lott's work has been widely discredited. While additional research is needed, other studies examining the effects of "shall issue" laws in more states than examined by Lott, and over more years, have found that such laws are associated with increases, rather than decreases, in crime.<sup>33</sup>

Subsequent researchers have also pointed out serious methodological flaws in Lott's statistical models. These researchers have observed that, even if Lott's study found that the enactment of permissive carrying laws coincided with downward trends in crime, the study failed to show that these laws actually *caused* decreases in crime. Among other problems, Lott's research failed to take into account numerous other variables that could impact a state's crime rate, such as drug and alcohol use, gang activity, law enforcement resources, and poverty.

The National Research Council of the National Academies undertook an in-depth analysis of Lott's claims, and of subsequent research refuting those claims, in *Firearms and Violence: A Critical Review* (2005). That report concluded:

[Lott's] initial model specification, when extended to new data, does not show evidence that passage of right-to-carry laws reduce crime... While the trend models show a reduction in the crime growth rate following the adoption of right-to-carry laws, those trend reductions occur long after law adoption, casting serious doubt on the proposition that the trend models estimated in the literature reflect effects of the law change. Finally, some of the point estimates are imprecise. Thus, the committee concludes that with the current

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<sup>32</sup> "Shall issue" laws differ from "may issue" laws, which give discretion to the issuing official to grant or deny a permit application based on various statutory factors, such as whether the applicant has "good cause," i.e., a justifiable need to carry a concealed firearm.

<sup>33</sup> John J. Donohue, "The Impact of Concealed-Carry Laws," in *Evaluating Gun Policy: Effects on Crime and Violence*, edited by Jens Ludwig and Philip J. Cook (Oxford 2003) ("...shall-issue laws are associated with uniform increases in crime"); Ian Ayres and John J. Donohue, *More Guns, Less Crime Fails Again: The Latest Evidence from 1977-2006*, 6 *Econ Journal Watch* 218 (May 2009) ("...the evidence is most supportive of the claim that RTC [right to carry] laws increase aggravated assault.").

evidence it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates.<sup>34</sup>

Lott's conclusions are also contradictory. Lott admitted that "shall issue" laws led to no decrease in robberies, and actually led to an *increase* in property crimes such as auto theft and larceny. Nevertheless, Lott claimed that these same laws were also responsible for a decrease in homicides, rapes and aggravated assaults. Robbery, however (and not homicide, rape, or aggravated assault), is the crime most likely to occur in public between strangers. If widespread carrying of guns really deterred crime, robberies should have decreased as well. Lott's unlikely explanation for this contradiction was that criminals who are faced with "shall issue" laws (and the prospect that a potential victim could be armed), substitute property crimes for crimes like rape that involve physical contact with the victim.

While more research is needed regarding the impact of laws allowing the widespread concealed carrying of firearms, it is clear that existing "shall issue" laws are currently failing to prevent criminals from obtaining permits to carry firearms in public. A Los Angeles Times analysis of Texas CCW holders, for example, found that between 1995 and 2000, more than 400 criminals – including rapists and armed robbers – had been issued CCW licenses under the state's "shall issue" law.<sup>35</sup>

A similar study by the South Florida Sun-Sentinel found that those licensed to carry guns in the first half of 2006 in Florida (another "shall issue" state) included more than 1,400 individuals who had pleaded guilty or no contest to felonies, 216 individuals with outstanding warrants, 128 people with active domestic violence injunctions against them, and six registered sex offenders.<sup>36</sup> An investigation by the Indianapolis Star regarding CCW permits in Indiana revealed similar problems with the state's permitting system.<sup>37</sup>

Research has also shown that individuals issued CCW permits include not only people who have committed violent crimes in the past, but also those who subsequently commit violent crimes. The Los Angeles Times analysis of Texas's license holders found that the "largest category of problem licensees involve[d] those who committed crimes after getting their state" licenses.<sup>38</sup> Thousands of the 215,000 license holders in Texas were arrested for criminal behavior or found to be mentally unstable during that time period.<sup>39</sup> Another study found that Texas CCW permit holders were arrested for weapons-related crimes at a rate 81% higher than that of the state's general adult

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<sup>34</sup> National Research Council of the National Academies, *Firearms and Violence: A Critical Review* 150 (2005).

<sup>35</sup> William C. Rempel & Richard A. Serrano, *Felons Get Concealed Gun Licenses Under Bush's 'Tough' Gun Law*, L.A. Times, Oct. 3, 2000, at A1.

<sup>36</sup> Megan O'Matz, *In Florida, It's Easy to Get a License to Carry a Gun*, South Florida Sun-Sentinel, Jan. 28, 2007, at 1A.

<sup>37</sup> Mark Alesia et al., *Should these Hoosiers Have Been Allowed to Carry a Gun in Public?* Indianapolis Star, Oct. 11, 2009.

<sup>38</sup> William C. Rempel & Richard A. Serrano, *Felons Get Concealed Gun Licenses Under Bush's 'Tough' Gun Law*, L.A. Times, Oct. 3, 2000, at A1.

<sup>39</sup> *Id.*

population.<sup>40</sup> According to the Violence Policy Center, between May 2007 and November 2010, CCW permit holders were responsible for the deaths of at least 267 private citizens and nine members of law enforcement.<sup>41</sup>

Finally, “shall issue” CCW laws are associated with an increase in gun trafficking. A September 2010 report by Mayors Against Illegal Guns (a coalition of over 500 mayors that targets illegal gun trafficking nationwide) analyzed the impact of a variety of state laws on gun trafficking, concluding that criminals tend to buy guns in states with weak gun laws, and then transport them to states with stronger laws, where the firearms are then used in crimes. With respect to concealed carry laws, the report presented data showing that states with laws that deprive law enforcement of discretion regarding the issuance of CCW permits are the source of crime guns recovered in other states at more than twice the rate of states that do grant law enforcement such discretion.<sup>42</sup>

## 2. Guns Carried Openly

Opponents of laws regulating the carrying and possession of firearms in public places often claim that firearms carried or possessed openly in public deter crime by raising the possibility that armed citizens will respond in defense of themselves or others. However, firearms carried or possessed openly in public places can cause innocent members of the public to be intimidated. More notably, exposed firearms can cause the wasteful diversion of law enforcement resources because officers are often called to a scene due to the presence of firearms. Law enforcement officers, like members of the public, cannot always tell whether an armed person is a danger to public safety. Openly carried firearms distract law enforcement officers tasked with maintaining safety in public places.

As stated by the San Mateo County, California, Sheriff’s Office:

Open carry advocates create a potentially very dangerous situation. When police are called to a “man with a gun” call they typically are responding to a situation about which they have few details other than that one or more people are present at a location and are armed. Officers may have no idea that these people are simply “exercising their rights.” Consequently, the law enforcement response is one of “hypervigilant urgency” in order to protect the public from an armed threat. Should the gun carrying person fail to comply with a law enforcement instruction or move in a way that could be construed as threatening, the police are forced to respond in kind for their own protection. It’s well and good in hindsight to say the gun carrier was simply “exercising their rights” but the result could be deadly. Simply put, it is not recommended to openly carry firearms.<sup>43</sup>

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<sup>40</sup> Violence Policy Center, *License to Kill IV: More Guns, More Crime* 5-6 (June 2002), at <http://www.vpc.org/graphics/ltk4.pdf>.

<sup>41</sup> Violence Policy Center, *Concealed Carry Killers* (Dec. 2010), at <http://www.vpc.org/ccwkillers.htm>.

<sup>42</sup> Mayors Against Illegal Guns, *Trace the Guns: The Link Between Gun Laws and Interstate Gun Trafficking* 18-19 (Sept. 2010), at <http://www.tracetheguns.org/report.pdf>.

<sup>43</sup> San Mateo County Sheriff’s Office, “Unloaded Open Carry,” January 14, 2010, at [http://www.co.sanmateo.ca.us/Attachments/sheriffs/pdfs/Press%20Releases/20100114\\_opencarry.pdf](http://www.co.sanmateo.ca.us/Attachments/sheriffs/pdfs/Press%20Releases/20100114_opencarry.pdf).

In addition, the carrying of firearms openly at political rallies and in other public places has a chilling effect on free expression and the honest exchange of ideas, and increases the risk that those firearms will be targeted for theft.

## **B. Legal Challenges**

Litigation challenging firearms laws has become a routine strategy of the National Rifle Association and other “gun rights” groups. These challenges often raise the following issues: (1) the Second Amendment to the U.S. Constitution and state right to bear arms provisions; (2) the First Amendment right to freedom of expression; (3) equal protection; and (4) due process. This section provides an overview of these issues.

### **1. The Second Amendment and State Right to Bear Arms**

#### **(a) The Second Amendment to the U.S. Constitution**

*“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.”*

-Second Amendment to the U.S. Constitution

#### **(i) *District of Columbia v. Heller***

In June 2008, in *District of Columbia v. Heller*,<sup>44</sup> the U.S. Supreme Court held for the first time that the Second Amendment to the U.S. Constitution protects the right of responsible, law-abiding individuals to possess a handgun in the home for purposes of 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 and bound by a locking device (a requirement which had no exception for self-defense).

The Supreme Court explicitly found, however, that the right conferred by the Second Amendment is not unlimited, and should not be understood as “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>45</sup> The Court noted that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” The Court then identified a “non-exhaustive” list of regulatory measures that it deemed “presumptively lawful” under the Second Amendment, including “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.”<sup>46</sup>

Unfortunately, *Heller* did not determine the test or level of scrutiny that lower courts must use to determine whether a gun law violates the Second Amendment. Courts use varying levels of scrutiny to determine whether a particular law violates a constitutional right. The specific level of scrutiny that applies depends on the right that is allegedly infringed, and the type of law. So, for

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<sup>44</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>45</sup> *Id.* at 626.

<sup>46</sup> *Id.* at 626-627 n. 26.

example, most laws are subject to a “rational basis” test, meaning that they are constitutional so long as they are rationally related to a legitimate government interest.<sup>47</sup> The courts have, however, identified other tests as appropriate in specific cases. Some laws are subject to “intermediate scrutiny,” which has been articulated in a number of different ways by different courts. Generally, however, intermediate scrutiny requires: (1) that the asserted governmental interest be “important or substantial” or “significant”; and (2) that the fit between the challenged regulation and the proffered objective be reasonable, not perfect.<sup>48</sup> A law that faces “strict scrutiny,” which is the harshest of the traditional tests, is unconstitutional unless it is “narrowly tailored” to serve a “compelling” government interest.<sup>49</sup> Other tests also exist.

The Court in *Heller* suggested that the rational basis test is not appropriate for reviewing firearms regulation under the Second Amendment.<sup>50</sup> The Court also rejected the “interest-balancing inquiry” proposed by Justice Breyer in his dissent. On the other hand, commentators and the dissenting opinion in *Heller* have noted that the Court’s delineation of certain “presumptively lawful” regulations is inconsistent with the use of a “strict scrutiny” test for Second Amendment regulations.<sup>51</sup> Most courts that have addressed the issue have identified intermediate scrutiny as the appropriate test.<sup>52</sup>

## (ii) *McDonald v. City of Chicago*

In June 2010, the U.S. Supreme Court announced its decision in *McDonald v. City of Chicago*, 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 had affirmed the dismissal of Second Amendment challenges to handgun bans in Chicago and Oak Park, Illinois.<sup>53</sup>

The Supreme Court in *McDonald* reiterated that the Second Amendment protects the right to possess a handgun in the home for purposes of self-defense, and that a wide variety of gun laws are constitutionally permissible. The Court repeated that “the right to keep and bear arms is not ‘a

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<sup>47</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (discussing the rational basis test).

<sup>48</sup> See *United States v. Marzzarella*, 614 F.3d 85, 97-98 (3d Cir. 2010) (collecting various articulations of the test from First Amendment cases); *United States v. Skoien*, 614 F.3d 638, 641-42 (7th Cir. 2010) (en banc) (describing the test as whether the law is “substantially related to an important governmental objective,” based on cases addressing First Amendment, marriage, and child bearing rights).

<sup>49</sup> See *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (racial classifications are subject to strict scrutiny); *Bush v. Gore*, 531 U.S. 98 (2000) (laws that impact the right to vote are subject to strict scrutiny).

<sup>50</sup> *District of Columbia v. Heller*, 554 U.S. at 628 n.27.

<sup>51</sup> See, e.g., *id.* at 688 (Breyer, J., dissenting); Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: District of Columbia v. Heller and Judicial Ipse Dixit, 60 Hastings L.J. 1371 (June 2009).

<sup>52</sup> See, e.g., *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010); *United States v. Pettengill*, 682 F. Supp. 2d 49 (D. Me. 2010); *United States v. Tooley*, 717 F. Supp. 2d 580 (S.D. W.Va. 2010); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *Heller v. District of Columbia*, 698 F. Supp. 2d 179 (D.D.C. 2010), on appeal as No. 10-7036 (D.C. Cir. Filed April 2, 2010); *United States v. Bledsoe*, 2008 U.S. LEXIS 60522 (W.D. Tex. Aug. 8, 2008), affirmed by *United States v. Bledsoe*, 334 Fed. Appx. 711 (5th Cir. 2009).

<sup>53</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010).

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*.<sup>54</sup> Although the Court in *McDonald* used the term “fundamental” to describe the right to bear arms under the Second Amendment,<sup>55</sup> it again did not determine the level of scrutiny to be used to determine whether a gun law violates the Second Amendment.

### (iii) Post-*Heller* Litigation

As expected, the Supreme Court’s decisions in *Heller* and *McDonald* have resulted in a flood of lawsuits. Many of these suits seek to extend the Second Amendment right beyond the home. Numerous criminal defendants have challenged their indictments and convictions for carrying firearms in public, alleging that the criminal statutes violate the Second Amendment. A number of plaintiffs have also filed civil lawsuits challenging state or local governments’ refusals to grant licenses or permits to carry concealed firearms in public. With few exceptions, courts have held that existing state and local firearms laws similar to the model law in this publication do not violate the Second Amendment.

In addition to the cases discussed below, Second Amendment cases are pending in various lower courts throughout the country. For more in-depth information about post-*Heller* litigation, please visit LCAV’s *Post-Heller Litigation Summary*, available at: [http://www.lcav.org/content/post-heller\\_summary.pdf](http://www.lcav.org/content/post-heller_summary.pdf).

### (iv) Challenges to Convictions for Unlawfully Carrying a Firearm in Public

Courts have consistently rejected the Second Amendment claims made by criminal defendants convicted of unlawfully possessing a firearm in public. For example, in *People v. Dawson*, an Illinois appellate court addressed the constitutionality of an Illinois law prohibiting carrying a loaded firearm in public. Illinois law, like Option 2 in this model, does not enable private individuals to obtain a license or permit to carry a concealed firearm in public. The court upheld the defendant’s conviction, noting that the Illinois statute exempts possession of a firearm in the home, and stating that “*Heller* and *McDonald* do not define the fundamental right to bear arms to include activity barred by” the Illinois statute.<sup>56</sup>

State courts have also upheld convictions for carrying firearms in public in states that limit the carrying of firearms to license or permit holders, as presented in Option 1 of this model. In *Swait v. University of Nebraska at Omaha*, for example, the plaintiff had alleged, in part, that the

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<sup>54</sup> *Id.* at 3047.

<sup>55</sup> *Id.* at 3036-3037, 3040-3042.

<sup>56</sup> *People v. Dawson*, 934 N.E. 2d 598, 607 (Ill. App. 2010). Note, however, that a Wisconsin trial court, in *Wisconsin v. Schultz*, Case No. 10-CM-138, Decision Granting Motion to Dismiss (Wisc. Circuit Court, Clark County, Oct. 12, 2010), dismissed a criminal complaint against a defendant who was carrying a concealed firearm. It appears from the opinion that the defendant was carrying the firearm in his home. However, the defendant in this case failed to invoke the judicially-created exception to the Wisconsin statute for firearms in the home, instead challenging the entire statute as unconstitutional. In a broadly worded opinion, the trial court agreed, holding that the statute violates the Second Amendment. That decision has not been appealed.

university's decision to expel him for carrying a concealed weapon on campus violated his Second Amendment right. The court found that "states can prohibit the carrying of a concealed weapon without violating the Second Amendment."<sup>57</sup>

Also, in *People v. Flores*, a California appellate court denied defendant's appeal of his convictions for carrying a concealed firearm and carrying a loaded firearm in a public place. The court found that *Heller's* discussion of historical concealed weapon decisions implicitly supported the constitutionality of the state's concealed firearm laws. The court further found that the statute prohibiting possession of a loaded firearm in a public place was "so far removed from the blanket restrictions at issue in *Heller* that its constitutional validity remains undisturbed by the Supreme Court's opinion."<sup>58</sup>

The *Flores* decision is in keeping with other California decisions following *Heller*, including the California Supreme Court's decision in *People v. Dykes*.<sup>59</sup> There, the court rejected a defendant's challenge to the introduction of evidence of his previous illegal possession of a concealed weapon during the penalty phase of sentencing to indicate defendant's history of threats of violence. Although the defendant objected that, following *Heller*, the possession of a firearm did not indicate a threat of violence, the court distinguished *Heller* as relating to possession in the home (not on the street, where defendant was found) and noted that *Heller* recognized limits to the right to bear arms, including historical concealed weapons laws. The court stated that, "The high court's decision in *Heller* does not require us to conclude that possession in a public place of a loaded, cocked, semiautomatic weapon with a chambered round, concealed in a large glove and ready to fire, cannot be defined as a crime under state law."<sup>60</sup>

Similarly, in *Brown v. United States*, the District of Columbia Court of Appeals affirmed defendant's conviction for carrying a pistol without a license. The court noted that *Heller* "neither held nor implied that a law requiring a license to carry a pistol on its face violates the Second Amendment." The court rejected the defendant's challenges, finding that "the licensure

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<sup>57</sup> 2008 U.S. Dist. LEXIS 96665 (D. Neb. Nov. 25, 2008).

<sup>58</sup> 169 Cal. App. 4th 568 (Cal. App. 4<sup>th</sup> Dist. Dec. 19, 2008), review denied by *People v. Flores (Miguel)*, 2009 Cal. LEXIS 2979 (Cal., Mar. 18, 2009). Similarly, in *People v. Yarbrough*, 169 Cal. App. 4th 303 (Cal. App. 4<sup>th</sup> Dist. Dec. 17, 2008), review denied by *People v. Yarbrough (Ronnie)*, 2009 Cal. LEXIS 2948 (Cal., Mar. 18, 2009), the court found that the California statute regulating the possession of concealed weapons did not violate the Second Amendment because it did not prohibit or even regulate the limited right to possess a firearm for self-defense in the home. Instead, it addressed concealed firearm carrying in public, conduct that raised a threat to public safety and that, in the context of defendant's possession in a location populated by other persons, could be regulated as a sensitive public place.

<sup>59</sup> 46 Cal. 4th 731 (Cal. June 15, 2009).

<sup>60</sup> *Id.* Similarly, in *United States v. Hart*, 726 F. Supp. 2d 56 (D. Mass. July 30, 2010), the court denied defendant's motion to suppress evidence regarding the use of a gun and ammunition retrieved during a traffic stop. The defendant argued that the Second Amendment prevented the suspicion of a concealed weapon from being an appropriate basis for such a stop. The court stated that, "*Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional," noting the Supreme Court's reference to Nineteenth Century concealed weapons cases. *Id.* at 60. The Court noted that *McDonald* confirmed that the Second Amendment protects a right to possess a handgun in the home for self-defense. See also *United States v. Hall*, 2008 U.S. Dist. LEXIS 59641 (S.D. W. Va. Aug. 4, 2008), *aff'd* 337 Fed. Appx. 340 (4th Cir. 2009) (denying defendant's motion to suppress, and concluding that the West Virginia concealed weapons permitting statute continues to be a lawful exercise by the state of its regulatory authority).

requirement...does not appear as a substantial obstacle to the exercise of Second Amendment rights.”<sup>61</sup>

Finally, in *Williams v. State*, the Maryland Court of Appeals affirmed defendant’s conviction for possession of a handgun in public, stating that Maryland’s law prohibiting the carrying a handgun outside the home, but permitting it inside the home, is “outside the scope of the Second Amendment.” According to the court, “the prohibition of firearms in the home was the gravamen ... in both *Heller* and *McDonald*.”<sup>62</sup>

#### (v) Challenges to Denials of Concealed Weapons Permits

Since *Heller*, both federal and state courts have faced lawsuits claiming the Second Amendment was violated when the plaintiff’s application for a permit to carry firearms in public was denied. These challenges have been overwhelmingly unsuccessful.

In *Dorr v. Weber*, for example, plaintiffs challenged the denial of their applications for concealed weapons permits under Iowa law. At that time, Iowa was a “may issue” state, where discretion to issue or deny concealed weapons permits was vested in the county sheriff. The federal district court granted defendants’ motion for summary judgment, holding that “there was no violation of the Second Amendment.”<sup>63</sup> The court stated that *Heller* did not establish a right to carry a concealed weapon, but recognized instead that prohibitions on concealed carrying were lawful.<sup>64</sup>

Similarly, in *Young v. State*, a federal district court dismissed plaintiff’s claim regarding the denial of his application for a permit to carry a concealed firearm. The plaintiff argued that Hawaii’s concealed carry permitting statute gave local chiefs of police unfettered discretionary power to grant or deny licenses in violation of the Second Amendment. The court, which was ruling before the Supreme Court’s decision in *McDonald*, stated that the Second Amendment did not apply to the states, but also that *Heller* was inapplicable because the Hawaii statute “pertains only to the carrying of weapons on one’s person and does not constitute a complete ban to the carrying of weapons or pertain to possessing weapons in one’s home.”<sup>65</sup>

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<sup>61</sup> 979 A.2d 630 (D.C. Aug. 27, 2009). See also *Howerton v. United States*, 964 A.2d 1282 (D.C. Feb. 19, 2009) (statute prohibiting carrying a pistol without a license is not unconstitutional, describing the Second Amendment as “forbid[ding] any ‘absolute prohibition of handguns held and used for self-defense in the home’”). Similarly, in *Sims v. United States*, 963 A.2d 147 (D.C. Dec. 31, 2008), the court rejected the defendant’s Second Amendment challenge to his conviction, noting that there was no evidence that the defendant was “within the boundary lines (or curtilage) of his home” and no evidence indicating that his possession outside was for self-defense. The court stated that, “Important questions about the reach of *Heller* remain to be answered, but what assuredly is not ‘clear’ and ‘obvious’ from the decision is that it dictates an understanding of the Second Amendment which would compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined.” Also, in *Little v. United States*, 989 A.2d 1096 (D.C. 2010), the court affirmed defendant’s convictions for carrying a pistol without a license because the appellant’s conduct was “outside of the bounds identified in *Heller*, i.e., the possession of a firearm in one’s private residence for self-defense purposes.”

<sup>62</sup> 2011 Md. LEXIS 1, \*2, 30 (Jan. 5, 2011).

<sup>63</sup> 2010 U.S. Dist. LEXIS 48950 (N.D. Iowa May 18, 2010).

<sup>64</sup> *Id.*

<sup>65</sup> 2009 U.S. Dist. LEXIS 28387 (D. Haw. Apr. 1, 2009), reconsideration denied by *Young v. State*, 2009 U.S. Dist. LEXIS 62707 (D. Haw. July 2, 2009). See also *Teng v. Town of Kensington*, 2010 U.S. Dist. LEXIS 13785 (D.N.H.

An unpublished decision from an appellate state court in New Jersey came to a parallel conclusion in *In re Factor* (also decided prior to *McDonald*). The court there held that, “[e]ven if the Second Amendment applies to the States...the United States Supreme Court has not held or even implied that the Second Amendment prohibits laws that restrict carrying of concealed weapons.”<sup>66</sup> The court stated that *Heller* deemed prohibitions on carrying concealed weapons to be presumptively lawful against Second Amendment challenges.<sup>67</sup>

Using slightly different reasoning, in *Peruta v. County of San Diego*, the federal district court granted the County of San Diego’s motion for summary judgment, rejecting plaintiff’s argument that the County’s denial of plaintiff’s permit under California law violated the Second Amendment. While the court declined to address the plaintiff’s asserted right to carry a gun in public, the court nevertheless upheld the County’s decision because “the government has an important interest in reducing the number of concealed weapons in public in order to reduce the risks to other members of the public who use the streets and go to public accommodations.”<sup>68</sup>

#### (vi) Challenges to Prohibitions Against the Carrying of Firearms in Specified Places

Since *Heller*, courts have consistently rejected Second Amendment challenges to laws prohibiting the carrying of firearms in sensitive locations. For example, in *United States v. Masciandaro*, the court affirmed defendant’s conviction for possession of a loaded weapon in a motor vehicle in a national park. The court rejected defendant’s Second Amendment challenges, concluding that the regulation did not “have the purpose or effect of placing a substantial obstacle in the path of [the defendant’s] exercise of his Second Amendment right, as announced in *Heller*, ‘to use arms in defense of hearth and home.’” Moreover, the court argued, national park parking lots are sensitive places akin to the places *Heller* identified where carrying prohibitions would be permissible. The court also found that even if there were situations where a person would need a loaded firearm in a motor vehicle for immediate self-defense, the law could be read to include a common law self-defense exception to avoid constitutional problems.<sup>69</sup>

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Feb. 17, 2010) (designated not for publication) (granting defendants’ summary judgment motion in plaintiff’s civil rights suit alleging that the town’s refusal to issue her a concealed firearms license until she provided more background information violated the Second Amendment, and stating that, “Given that *Heller* refers to outright ‘prohibitions on carrying concealed weapons’ as ‘presumptively lawful,’ far lesser restrictions of the sort imposed here...clearly do not violate the Second Amendment”).

<sup>66</sup> 2010 N.J. Super. Unpub. LEXIS 865 (N.J. Sup. Ct. App. Div. Apr. 21, 2010) (Unpublished).

<sup>67</sup> In *Matter of Bastiani*, 881 N.Y.S.2d 591 (N.Y. Cty. Ct. Dec. 15, 2008), a New York State trial court denied petitioner’s request to expand her permit to allow carrying beyond possession for sporting purposes and in petitioner’s home. The court dismissed the petitioner’s Second Amendment challenge, finding that “[n]othing in *Heller* grants the applicant more than what she already has.” The court continued that, “In New York State the burden of establishing proper cause for the issuance of a full carry permit, as noted above, is upon the applicant to establish ‘a special need for self protection distinguishable from that of the general community or persons engaged in the same profession.’ Such is not inconsistent with the holding of *Heller*.”

<sup>68</sup> *Peruta v. County of San Diego*, No. 09CV2371-IEG (BGS), 2010 U.S. Dist. LEXIS 130878, at \*26-27 (S.D. Cal. 2010), *appeal docketed*, No. 10-56971 (9th Cir. Dec. 16, 2010). The district court had previously refused to dismiss the case. See 678 F. Supp. 2d 1046 (S.D. Cal. 2010).

<sup>69</sup> 648 F. Supp. 2d 779 (E.D. Va. Aug. 26, 2009).

Courts have also rejected Second Amendment challenges to laws prohibiting firearm possession near school zones,<sup>70</sup> in public libraries,<sup>71</sup> in airplanes,<sup>72</sup> in places of worship,<sup>73</sup> and in post office parking lots.<sup>74</sup>

## (b) State Right to Bear Arms

The constitutions of most states recognize a right to bear arms. 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, challenges to firearms laws based on state right to bear arms provisions have almost universally been rejected.<sup>75</sup>

Five states (California, Iowa, Maryland, Minnesota and New Jersey) and the District of Columbia have no right to bear arms provision.<sup>76</sup> Three additional states (Kansas, Massachusetts and New York<sup>77</sup>) have a right to bear arms only for militia service.

Nearly every state with an individual 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>78</sup> When this test is applied, firearms regulations are generally upheld against state right

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<sup>70</sup> *United States v. Lewis*, 2008 U.S. Dist. LEXIS 103631 (D.V.I. Dec. 24, 2008) (upholding federal prohibition on possession of guns near school zones as within the “sensitive places” exception); *United States v. Walters*, 2008 U.S. Dist. LEXIS 53455 (D.V.I. July 15, 2008) (similar). See also *Digiacinto v. Rector & Visitors of George Mason Univ.*, 2011 Va. LEXIS (Va. January 13, 2011) (upholding a state university’s regulation of firearms on campus).

<sup>71</sup> *Aderinto v. Sessions*, 2009 U.S. Dist. LEXIS 76379 (D.S.C. July 30, 2009), adopted by *Aderinto v. Sessions*, 2009 U.S. Dist. LEXIS 76304 (D.S.C. Aug. 26, 2009) (upholding conviction for carrying a weapon in a public library and deeming public library a “sensitive place”).

<sup>72</sup> *United States v. Davis*, 304 Fed. Appx. 473, 2008 U.S. App. LEXIS 26934 (9th Cir. Nov. 21, 2008) (Unpublished) (affirming defendant’s conviction for carrying a concealed weapon on an airplane with reference to constitutionality on prohibitions in “sensitive places”).

<sup>73</sup> *GeorgiaCarry.Org, Inc. v. Georgia*, 2011 U.S. Dist. LEXIS 6370 (M.D. Ga. Jan. 24, 2011) (holding that the Georgia law prohibiting carrying a firearm in a place of worship does not violate the Second Amendment).

<sup>74</sup> *United States v. Dorosan*, 350 Fed. Appx. 874 (5th Cir. 2009) (Unpublished) (affirming defendant’s conviction for possessing a handgun on postal property in violation of federal regulations because postal parking lot was a “sensitive place”).

<sup>75</sup> See Legal Community Against Violence, *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws* 8-9 (Feb. 2008).

<sup>76</sup> The District of Columbia has no separate constitution and has not adopted any laws establishing a right to bear arms.

<sup>77</sup> In New York, the state right to bear arms is conferred by statute, not by the state’s constitution. See N.Y. Civ. Rights Law art. 2, § 4.

<sup>78</sup> 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 firearm 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).

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 firearms regulations such as those restricting certain classes of persons from possessing firearms, and requiring firearms dealers to be licensed and keep certain records.<sup>79</sup> In *Mosher v. Dayton*, the Ohio Supreme Court held that Dayton's requirement that owners and purchasers of handguns obtain identification cards prior to purchase was constitutional under the state's right to bear arms.<sup>80</sup> The court remarked that, "[t]he Dayton ordinance...does not limit the bearing of arms, but only requires that anyone who wishes to acquire a weapon first obtain an identification card in order to demonstrate that he is entitled to possess such a weapon. This is a reasonable police regulation which finds ample justification in the public interest."<sup>81</sup>

Similarly, in *State v. Mendoza*, the Supreme Court of Hawaii rejected a challenge to Hawaii's statute requiring a person to obtain a permit before acquiring a firearm under the state's right to bear arms.<sup>82</sup> The court found that the state's police power allows it to regulate the right in a reasonable manner, and that the permitting requirement was "rationally related to the legitimate government interest of ensuring that only those who are mature, law abiding, competent citizens possess firearms."<sup>83</sup>

For more information about how courts have interpreted a particular state's right to bear arms provision, see LCAV's Summary of State Right to Bear Arms Provisions, at [http://www.lcav.org/states/state\\_right\\_to\\_bear\\_arms.asp](http://www.lcav.org/states/state_right_to_bear_arms.asp).

## 2. The First Amendment Freedom of Expression

Proponents of the carrying and possession of firearms in public places, particularly the carrying and possession of exposed firearms, sometimes claim that laws regulating firearms in public places impinge on their First Amendment right to express themselves. Courts have generally rejected such claims. For example, in *Nordyke v. King*, the Ninth Circuit Court of Appeals rejected the plaintiffs' First Amendment challenge to an ordinance prohibiting possession of firearms on county property. The court held that gun possession is not generally expressive conduct protected by the First Amendment.<sup>84</sup> In a vacated opinion, the court also subsequently rejected a First Amendment challenge to the way the ordinance applied to gun rights activists, stating that the ordinance's restriction on the First Amendment right to free expression is no greater than necessary to achieve the County's interest in promoting safety and discouraging violence.<sup>85</sup> (The

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<sup>79</sup> *City of Akron v. Williams*, 177 N.E.2d 802, 804 (Ohio Ct. App. 1960) (upholding Akron ban on firearm possession by convicted felons).

<sup>80</sup> 358 N.E.2d 540 (Ohio 1976).

<sup>81</sup> *Id.* at 543. See also *Photos v. Toledo*, 19 Ohio Misc. 147 (Ct. Com. Pl. 1969) (upholding Toledo's extensive firearms ordinance which required identification cards to acquire or possess handguns).

<sup>82</sup> 920 P.2d 357 (Haw. 1996).

<sup>83</sup> *Id.* at 368.

<sup>84</sup> 319 F.3d 1185 (9th Cir. 2003).

<sup>85</sup> *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009) (vacated for reconsideration).

court vacated the opinion, which considered both First and Second Amendment claims, for further consideration in light of *McDonald v. City of Chicago*.<sup>86</sup> Oral argument took place on October 19, 2010. As of December 2010, the court has not yet issued a new opinion.)

### 3. Equal Protection

The Fourteenth Amendment provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”

To prove an equal protection claim, a plaintiff must show: (1) that he or she was singled out or treated differently from “similarly situated” persons on the basis of a prohibited characteristic, such as race or gender, or because the plaintiff was exercising one of a limited number of constitutional rights; and (2) the law fails to meet the appropriate level of scrutiny. The level of scrutiny that a court must use to evaluate whether a classification violates the equal protection clause depends on what prohibited characteristic or constitutional right was involved, and (in the latter case) how the law affects that constitutional right, i.e., whether the law directly, indirectly, or significantly burdens exercise of the right. For example, a law that categorizes people on the basis of race or national origin or directly burdens the right to vote is subject to strict scrutiny.<sup>87</sup> As discussed on pages 31 and 32 above with respect to the Second Amendment, however, most laws are subject to weaker tests. Laws that do not discriminate on the basis of a prohibited characteristic, and which do not affect “fundamental” rights are subject to a rational basis test.<sup>88</sup>

A governmental agency that enforces its laws regulating firearms in public places in a manner that discriminates on the basis of a prohibited characteristic may violate the equal protection clause. For example, in *Say v. Adams*, a lawful permanent resident of the United States was denied a license to carry a concealed weapon on the grounds that he lacked U.S. citizenship. Classifications that discriminate against lawful permanent residents are subject to strict scrutiny, and the court found that Kentucky’s citizenship requirement was not narrowly tailored to the asserted governmental interest. As a result, the court granted a preliminary injunction preventing the state from enforcing the statutory provision making citizenship a prerequisite for a license.<sup>89</sup>

The government has a significant public safety interest, however, in regulating the carrying or possession of firearms in public places. As a result, many strong regulations are permissible. In *March v. Ruff*, the plaintiff challenged the local sheriff’s method for determining whether an applicant for a permit to carry a concealed firearm has demonstrated “good cause” for the permit, as required by the California statute. The federal district court held that a rational basis exists for the sheriff’s actions, citing the county’s “legitimate interest in controlling access to concealed weapons.”<sup>90</sup>

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<sup>86</sup> 611 F.3d 1015 (9th Cir. 2010).

<sup>87</sup> See *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (racial classifications are subject to strict scrutiny); *Bush v. Gore*, 531 U.S. 98 (2000) (laws that impact the right to vote are subject to strict scrutiny).

<sup>88</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985) (discussing the rational basis test).

<sup>89</sup> 2008 U.S. Dist. LEXIS 20183 (W.D. Ky. 2008).

<sup>90</sup> 2001 U.S. Dist. LEXIS 14708 (N.D. Cal. 2001).

The decisions in *District of Columbia v. Heller* and *McDonald v. City of Chicago* did not address an equal protection claim, but may impact the level of scrutiny a court must use in evaluating equal protection challenges based on the exercise of Second Amendment rights.<sup>91</sup> The Court in *McDonald* labeled the Second Amendment right to keep and bear arms *in the home* for purposes of self-defense a “fundamental” right.<sup>92</sup> As a result, equal protection claims have been raised in a number of post-*Heller* lawsuits.<sup>93</sup>

#### 4. Due Process

The due process clause of the Fourteenth Amendment to the U.S. Constitution provides that no person shall be deprived of “life, liberty, or property, without due process of law....” Courts have held that the due process clause includes both substantive and procedural guarantees.

Substantively, 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>94</sup> Note, however, that clearly written laws can also violate due process when they are overbroad, impinging on constitutionally-protected conduct.<sup>95</sup>

The concept of procedural due process limits the way a government may deprive an individual of a “liberty” or “property” interest within the meaning of the due process clause of the Fifth or Fourteenth Amendment.<sup>96</sup> Courts have held that the due process clause generally requires the government to provide the affected person with the opportunity to be heard at a meaningful time and in a meaningful manner, before the deprivation of the liberty or property interest.<sup>97</sup>

In *Erdelyi v. O'Brien*, the Ninth Circuit Court of Appeals considered whether the denial of plaintiff’s application for a license to carry a concealed weapon constituted a denial of her right to due process. The court rejected plaintiff’s constitutional challenge, holding that plaintiff had no property interest in carrying a concealed weapon. The court reasoned:

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<sup>91</sup> *Heller*, 554 U.S. at 628 n.27.

<sup>92</sup> Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 697-698 (2007).

<sup>93</sup> See, e.g., *Peruta v. County of San Diego*, No. 09CV2371-IEG (BGS), 2010 U.S. Dist. LEXIS 130878 (S.D. Cal. 2010), *appeal docketed*, No. 10-56971 (9th Cir. Dec. 16, 2010). In *Peruta v. County of San Diego*, the federal district court granted the County of San Diego’s motion for summary judgment, rejecting plaintiff’s argument that the County’s denial of plaintiff’s permit under California law violated equal protection. Having rejected the plaintiffs’ Second Amendment claim, the court relied on *March v. Ruff*, *supra* note 90, and reasoned that applicants who can demonstrate “good cause” for the issuance of a permit (a requirement of California law) are situated differently than those who cannot.

<sup>94</sup> *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

<sup>95</sup> *Id.* at 114-15.

<sup>96</sup> *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

<sup>97</sup> *Id.*

Concealed weapons are closely regulated by the State of California. . . . Whether the statute creates a property interest in concealed weapons licenses depends 'largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [issuing authority] to deny licenses to applicants who claim to meet the minimum eligibility requirements.' Section 12050 explicitly grants discretion to the issuing officer to issue or not issue a license to applicants meeting the minimum statutory requirements. Where state law gives the issuing authority broad discretion to grant or deny license applications in a closely regulated field, initial applicants do not have a property right in such licenses protected by the Fourteenth Amendment.<sup>98</sup>

Other federal courts have reached the same conclusion regarding permits to carry weapons.<sup>99</sup>

The Supreme Court's decision in *District of Columbia v. Heller*, discussed above, may impact the way a court evaluates a substantive due process challenge to the regulation of firearms. The *Heller* opinion focused on the possession of a handgun in the home for self-defense, and did not recognize a liberty interest to carry or possess a gun outside the home. Nevertheless, due process claims have been raised in a number of post-*Heller* lawsuits.<sup>100</sup>

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<sup>98</sup> 680 F.2d 61, 63 (9th Cir. 1982).

<sup>99</sup> See *Gross v. Norton*, 120 F.3d 877, 878 (8th Cir. 1997) (holding plaintiff had no property interest in gun permit "because local authorities have broad discretion [under Minnesota law] to withhold a permit to carry a pistol"); *Guillory v. Orange County*, 731 F.2d 1379, 1382-1383 (9th Cir. 1984) (holding that a licensed private investigator does not have a property interest in receiving a concealed weapon permit under California law); *Fullman v. Graddick*, 739 F.2d 553, 561 (11th Cir. 1984) (holding that plaintiff had no property right in a pistol permit under Alabama law); *Association of Orange County Deputy Sheriffs v. Gates*, 716 F.2d 733, 734 (9th Cir. 1983) (holding that California statute which provided for issuance of certificate allowing retired law enforcement officers to carry concealed and loaded weapons did not create "a constitutionally protected interest"); *Conway v. King*, 718 F. Supp. 1059, 1061 (D.N.H. 1989) (holding that in light of broad discretion granted licensing authority plaintiff did not have a property interest in a license to carry a concealed weapon).

<sup>100</sup> See, e.g., *Peruta v. County of San Diego*, No. 09CV2371-IEG (BGS), 2010 U.S. Dist. LEXIS 130878 (S.D. Cal. 2010), *appeal docketed*, No. 10-56971 (9th Cir. Dec. 16, 2010). In *Peruta*, the federal district court granted the County of San Diego's motion for summary judgment, rejecting plaintiffs' argument that the County's denial of plaintiff's permit under California law violated due process. Having rejected the plaintiffs' Second Amendment claim, the court relied on *Erdelyi v. O'Brien*, *supra* note 98, and concluded that the plaintiffs had no property or liberty interest in a concealed weapons permit.