

The Legal Background

Litigation challenging firearms laws has become a routine strategy of the gun industry and the NRA. These challenges often raise the following issues: (1) the Second Amendment and state right to bear arms provisions; and (2) in the context of local gun regulations, preemption and local authority to regulate firearms. This section provides an overview of these issues.

The Second Amendment and State Right to Bear Arms Provisions

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

The Second Amendment

The Second Amendment to the U.S. Constitution states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”

The U.S. Supreme Court last addressed the scope of the Second Amendment in *United States v. Miller*, 307 U.S. 174 (1939). In that case, the Court rejected a Second Amendment challenge brought by two individuals charged with violating a federal law prohibiting the interstate transportation of sawed-off shotguns. The Court held that the “obvious purpose” of the Amendment is to “assure the continuation and render possible the effectiveness” of the state militia, and the Amendment “must be interpreted and applied with that end in view.”¹⁷

Since *Miller*, the scope of the Second Amendment has been addressed in more than 200 federal and state appellate cases. Until 2007, these decisions uniformly rejected Second Amendment challenges to firearms laws, including laws that ban certain types of weapons, require safety devices on others, mandate registration and licensing and otherwise impose regulatory oversight of the firearms industry.¹⁸

¹⁷ *Id.* at 178.

¹⁸ See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir. 2002) (the Second Amendment protects the people’s collective right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use), *cert. denied*, 540 U.S. 1046 (2003); *United States v. Haney*, 264 F.3d 1161 (10th Cir. 2001) (a federal criminal gun control law does not violate the Second Amendment unless it impairs a state’s ability to maintain a well-regulated militia; the term “militia” refers to a governmental organization or unit, and does not include private anti-government groups that sometimes refer to themselves as “militias”), *cert. denied*, 536 U.S. 907 (2002); *Peoples Rights Org. v. City of Columbus*, 152 F.3d 522 (6th Cir. 1998) (the Second Amendment guarantees a collective, rather than an individual right, and its restrictions operate only upon the federal government and have no application to a city ordinance); *State v. Mendoza*, 920 P.2d 357 (Haw. 1996) (the Second Amendment is a limitation upon Congress and not upon the states); *Brown v. City of Chicago*, 250 N.E.2d 129 (Ill. 1969) (the Second Amendment does not prohibit regulations that do not impair maintenance of a state militia). Note that the Fifth Circuit has stated support in *dicta* for the proposition that the Second Amendment guarantees an individual right, while upholding firearm laws against Second Amendment challenges. See *U.S. v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (rejecting a Second Amendment

In addition, lower courts considering challenges to state and local gun laws have held that the Second Amendment constrains only the federal government, and does not apply to firearm laws passed by state or local governments.¹⁹

In 2007 the U.S. Court of Appeals for the District of Columbia Circuit struck down the District of Columbia's strict laws banning most handgun possession in the District, and requiring lawfully owned firearms to be kept unloaded and disassembled or bound by a trigger lock or similar device. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). The court held that these laws violate the Second Amendment, interpreting the Amendment to protect an individual right to keep and bear firearms unrelated to service in the militia. On November 20, 2007, the U.S. Supreme Court granted *certiorari* on the following question: Whether the challenged provisions "violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?" *District of Columbia v. Heller*, 128 S. Ct. 645, 169 L. Ed. 2d 417 (2007). The Supreme Court is expected to issue its ruling in the case by June 2008.²⁰

State Right to Bear Arms Provisions

The constitutions of most states recognize a right to bear arms. Unlike the Second Amendment, many of these state provisions specifically recognize an individual right to bear arms or have been interpreted by the courts to protect an individual right. However, **every** state court that has considered a state right to bear arms challenge to a firearms law has determined that the right at issue is not absolute.²¹

Nearly every state with a right to bear arms clause in its constitution, or a similar statutory provision, uses a reasonableness test to determine whether a state or local law violates this right.²² When this test is applied, firearms regulations are generally upheld

challenge to a federal law prohibiting firearm possession by persons subject to a domestic violence restraining order, but stating in *dicta* that the Amendment protects an individual right to possess firearms apart from service in a well-regulated militia, subject only to limited government regulation); *U.S. v. Patterson*, 431 F.3d 832, 835 (5th Cir. 2005) (repeating *Emerson's dicta*, while holding that laws prohibiting felons from possessing firearms do not violate the Second Amendment); *U.S. v. Everist*, 368 F.3d 517, 519 (5th Cir. 2004) (same). These and other federal and state Second Amendment cases are summarized on LCAV's web site, www.lcav.org.

¹⁹ Prior to *Miller*, the Supreme Court held that the Second Amendment is a limitation upon the power of Congress and not upon that of the states. See *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). Federal appellate courts continue to reiterate this position. See, e.g., *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995), *cert. denied*, 516 U.S. 813 (1995); *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 729-31 (9th Cir. 1992); *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270-71 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

²⁰ Joined by eleven U.S. cities and the U.S. Conference of Mayors, LCAV filed an *amicus curiae* (friend of the court) brief in the case in support of the District. Brief of *Amici Curiae* Major American Cities, the United States Conference of Mayors, and Legal Community Against Violence in Support of Petitioners, *District of Columbia v. Heller*, No. 07-290 (U.S. Supreme Court, filed Jan. 11, 2008).

²¹ Sayre Weaver, Analysis of State Constitutional "Right to Keep and Bear Arms" Provisions (© 2004 by Sayre Weaver) (on file with author).

²² *Id.* Note that in Alaska and New Hampshire, state courts apply a higher standard than the reasonableness test to firearms laws challenged under the right to bear arms clauses in their state constitutions. *Id.* In

against state right to bear arms challenges.

For instance, Article I, section 4 of the Constitution of the State of Ohio provides in part: "The people have the right to bear arms for their defense and security...." However, Ohio courts have repeatedly rejected Article I, section 4 challenges to firearms regulations such as those banning assault weapons, semi-automatic firearms, and large capacity ammunition magazines, restricting certain classes of persons from possessing firearms, requiring firearms dealers to be licensed and keep certain records, and prohibiting the carrying of firearms in vehicles.²³ For example, in rejecting an Article I, section 4 challenge to a ban on carrying concealed weapons, the Ohio Supreme Court concluded that the goal of maintaining an "orderly and safe society" was reasonable, as was the means employed – banning concealed weapons – to obtain that goal.²⁴

States with no right to bear arms provision²⁵

California
Iowa
Maryland
Minnesota
New Jersey

The District of Columbia also has no right to bear arms provision²⁶

States with a right to bear arms only for militia service

Kansas
Massachusetts
New York²⁷

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).

²³*Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) (upholding Cleveland assault weapon ban); *City of Cincinnati v. Langan*, 640 N.E.2d 200, 206 (Ohio Ct. App. 1994) (upholding Cincinnati semi-automatic firearm and large capacity ammunition magazine ban); *City of Akron v. Williams*, 177 N.E.2d 802, 804 (Ohio Ct. App. 1960) (upholding Akron ban on firearm possession by convicted felons); *Photos v. City of Toledo*, 19 Ohio Misc. 147 (Ohio Ct. C.P. 1969) (upholding Toledo ordinance prohibiting certain classes of persons from possessing firearms, requiring identification cards to acquire or possess handguns, requiring firearms dealers to be licensed and keep certain records, and prohibiting the carrying of firearms in vehicles).

²⁴*Klein v. Leis*, 99 Ohio St. 3d 537; 2003-Ohio-4779, 795 N.E.2d 633, at ¶15 (Ohio 2003). Note that in 2004, Ohio passed a law allowing the carrying of concealed weapons.

²⁵ The following analysis of state right to bear arms provisions is based in part on Sayre Weaver, Analysis of State Constitutional "Right to Keep and Bear Arms" Provisions, *supra* note 21.

²⁶ The District of Columbia has no separate constitution and has not adopted any laws establishing a right to bear arms.

²⁷ 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.

Preemption and Local Authority to Regulate Firearms and Ammunition

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

Federal Preemption

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

Congress may make its intention to preempt an area of state law clear by expressly stating its intent in the language of a statute. Absent such a statement, when considering a challenge to a state or local law based on the claim that regulation of the subject has been preempted by Congress, courts presume that the federal government does not intend to preempt state and local authority.²⁸ When the challenged law is within an area of traditional state authority, the reviewing court will find preemption only when the court is “absolutely certain” that Congress intended to take away that authority.²⁹ Courts look for the existence of a pervasive scheme of federal legislation of the particular subject, or an irreconcilable conflict between the federal regulation and the challenged law, to determine congressional intent.³⁰

Congress has not expressly preempted the broad field of firearms or ammunition regulation. Furthermore, courts have held that congressional regulation of firearms does not create a scheme so pervasive that it leaves no room for state and local law.³¹ Thus, absent a specific, irreconcilable conflict between a challenged state or local firearms or ammunition law and a federal enactment, there is no federal preemption of that state or local law.

State Preemption

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

²⁸ *Richmond Boro Gun Club, Inc. v. City of New York*, 896 F. Supp. 276, 285 (E.D.N.Y. 1995), *aff'd*, 97 F.3d 681 (2d Cir. 1996) (upholding New York City's assault weapon ban against a federal preemption challenge).

²⁹ *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (rejecting a federal preemption challenge to a Missouri law setting mandatory retirement age for state judges).

³⁰ *Richmond*, 896 F. Supp. at 285.

³¹ *Id.*

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

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

No county may pass any ordinance that restricts possession, transportation, sale, transfer, ownership, manufacture or repair of firearms or ammunition or their components. Any ordinances prohibited by this section are null and void.³²

Absent an express statement, courts may infer an intent to take over a field of regulation, even though there is no express legislative statement to that effect. This is referred to as implied preemption. In general, courts may find that a local law is preempted if it conflicts directly with state law by requiring what the state law prohibits, or prohibiting what the state law requires. In addition, when a comprehensive scheme of state regulation exists on a particular subject matter, many state courts find that the state legislature thereby indicated an implied intent to assert exclusive authority over that subject matter.³³

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

The discussion below groups the states into three categories based on the extent of **express** preemption of local authority to regulate firearms and ammunition and then comments on issues of **implied** preemption where appropriate:

1. **States with no provision or statute expressly preempting local regulation of firearms or ammunition:**³⁴ *Connecticut, Hawaii, Illinois, Massachusetts, New Jersey, New York*

³² S.D. Codified Laws § 7-18A-36.

³³ See, e.g., *Cal. Rifle & Pistol Ass'n v. City of W. Hollywood*, 78 Cal. Rptr. 2d 591 (Cal. Ct. App. 1998) (discussing the doctrine of implied preemption in California and rejecting a preemption challenge to a local ban on Saturday Night Specials).

³⁴ The District of Columbia receives its legislative authority from Congress, which has expressly given the District broad regulatory power over all aspects of firearms. D.C. Code § 1-303.43. In recent years, NRA-backed proposals have been introduced in Congress to repeal and/or amend existing firearms laws in the District, and to remove its authority to regulate firearms in the future. The bill, known as the "District of Columbia Personal Protection Act," passed the House in September 2004. Similar bills were introduced in

In Connecticut, Hawaii, Illinois, Massachusetts, New Jersey and New York, there are no state laws expressly preempting local authority to regulate firearms or ammunition. In Connecticut, Illinois, Massachusetts, New Jersey and New York, courts have interpreted the degree to which local governments can regulate firearms in the absence of express preemption. Although each local law must be evaluated on a case-by-case basis, some general preemption principles for each state are outlined below.³⁵

Connecticut: In Connecticut, a local government is preempted from regulating a subject matter when the state has demonstrated an intent to occupy the entire field of regulation in that area or when the ordinance at issue irreconcilably conflicts with a state law.³⁶ Connecticut courts have not found that the legislature has demonstrated an intent to occupy the field of firearms and ammunition regulation.³⁷ Thus, absent a direct conflict with state law, broad local firearms and ammunition regulation appears to be possible.

Hawaii: Hawaii courts, like those in Connecticut, will generally find that a local ordinance is preempted when it addresses an area the state has intended to regulate exclusively and uniformly, and/or when it conflicts with state law.³⁸ LCAV is not aware of any published case interpreting the extent of local authority to regulate firearms and ammunition in Hawaii. In the absence of any contrary authority, it appears that local governments have broad authority to regulate firearms and ammunition unless there is a conflict with state law.

Illinois: Generally, local governments in Illinois, and “home rule units” in particular,³⁹ enjoy broad authority to regulate firearms and ammunition.⁴⁰ Illinois courts have rejected preemption challenges to local laws such as those banning handguns and requiring registration.⁴¹ In upholding a local handgun ban, the Illinois Supreme Court concluded that when the state enacted statutes relating to the ownership, possession and sale of firearms and ammunition, it did not preempt further regulation in this area.⁴²

both houses in 2005 and 2007. The 2005 bills were never heard and the 2007 bills have not come to the floor for a vote. A group of national organizations have teamed up with local District groups to form the “National Coalition for DC Democracy and Safety” to fight this effort.

³⁵ Please note that the authority enjoyed by different types of local governmental entities varies from state to state. (For example, a county may have less authority to regulate than that enjoyed by a city.)

³⁶ *Dwyer v. Farrell*, 475 A.2d 257 (Conn. 1984) (holding that a New Haven law regulating handgun sales conflicted with an existing state law and thus was preempted).

³⁷ Note that Connecticut courts have found that the area of hunting regulation has been occupied by the state. See, e.g., *Kaluszka v. Town of East Hartford*, 760 A.2d 1282 (Conn. Super. Ct. 1999).

³⁸ *Richardson v. City and County of Honolulu*, 868 P.2d 1193 (Haw. 1994) (holding that a local ordinance providing a mechanism for transfer of property interests was not preempted by state law).

³⁹ A “home rule unit” is a county with an elected chief executive officer, any municipality which has a population of more than 25,000, or a municipality that has become a home rule unit by referendum. Ill. Const. art. VII, § 6(a).

⁴⁰ 430 Ill. Comp. Stat. 65/13.1; Ill. Const. art. VII, § 6(a).

⁴¹ *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266 (Ill. 1984) (upholding local handgun ban); *City of Chicago v. Taylor*, 774 N.E.2d 22 (Ill. App. Ct. 2002) (upholding local firearms registration ordinance).

⁴² *Kalodimos*, 470 N.E.2d at 276-77.

Massachusetts: When presented with a preemption challenge, Massachusetts courts consider whether an inference can be made that the legislature intended to preempt the subject matter addressed by the ordinance at issue. Courts may infer such intent when a local law frustrates the purpose of a state law either directly or due to a comprehensive scheme enacted by the legislature.⁴³ Courts also may find that local law is preempted if it conflicts with state law.⁴⁴ Thus, so long as there is no conflict with state law, it appears that local governments may regulate broadly in the area of firearms and ammunition. Furthermore, even when a state law and a local law address the same subject area, a stricter local law may be permissible. For example, the Supreme Judicial Court of Massachusetts upheld a local firearm discharge ban, finding that it did not frustrate the state's hunting license law even though it was more stringent than state law concerning the safe use of firearms.⁴⁵

New Jersey: New Jersey municipalities enjoy express authority to regulate and prohibit the sale and use of firearms.⁴⁶ However, local governments may not enact regulation that conflicts with any policy of the state.⁴⁷ In the absence of a conflict, local governments appear to have broad authority to regulate firearms and ammunition, and at least in one area of firearms regulation, are authorized to enact local laws that are stricter than state laws addressing the same subject.⁴⁸ In a case upholding a local firearms discharge ordinance, the New Jersey Supreme Court concluded that a state law regulating hunting was not intended to preempt a stricter local law.⁴⁹

New York: New York courts use a test to evaluate preemption challenges which is similar to many of those described above – a local law may not conflict with a state law or regulate in an area that is occupied by the state.⁵⁰ New York courts have not found that the state has preempted the broad field of firearms and ammunition regulation. Courts have upheld several local firearms laws against preemption challenges and have

⁴³ *Connors v. City of Boston*, 714 N.E.2d 335, 337-38 (Mass. 1999).

⁴⁴ *Id.*

⁴⁵ *Town of Amherst v. Att'y Gen.*, 502 N.E.2d 128 (Mass. 1986).

⁴⁶ N.J. Stat. Ann. § 40:48-1(18). "Municipalities" refers to cities, towns, townships, villages and boroughs, but not counties. N.J. Stat. Ann. § 40:42-1. For additional sources of authority for municipalities and for counties, see N.J. Stat. Ann. §§ 40:48-2, 40:41A-27; N.J. Const. art. IV, § VII, ¶ 11.

⁴⁷ N.J. Stat. Ann. § 2C:1-5(d). A local law may conflict with a state policy by "exclusion" or "inclusion." See, e.g., *State v. Crawley*, 447 A.2d 565 (N.J. 1982); *Mack Paramus Co. v. Mayor and Council of Borough of Paramus*, 511 A.2d 1179 (N.J. 1986). See also *Overlook Terrace Management Corp. v. West New York Rent Control Bd.*, 366 A.2d 321 (N.J. 1976), in which the Supreme Court of New Jersey developed a five-part test for determining whether a local law is preempted by state law.

⁴⁸ *Township of Chester v. Panicucci*, 299 A.2d 385, 389 (N.J. 1973) ("[T]he prohibition against possession of a loaded gun, for the purpose of hunting, within a prescribed distance of an occupied dwelling or school playground simply represents a declaration of statewide policy of minimum regulation."). Despite this statutory and case law supporting municipal authority to regulate firearms, a recent superior court case invalidated a local firearms ordinance limiting handgun sales and purchases to one per person per 30-day period, on preemption grounds. *Ass'n of N.J. Rifle & Pistol Clubs v. City of Jersey City*, Docket No. HUD-L-3600-06 (N.J. Super. Ct. Law Div., Dec. 13, 2006), *appeal docketed*, No. A-004443-06T2 (N.J. Super. Ct. App. Div. 2007). The decision was rendered without a written opinion. The City's appeal is pending.

⁴⁹ *Id.*

⁵⁰ *DJL Restaurant Corp. v. City of New York*, 749 N.E.2d 186, 190 (N.Y. 2001).

found that the state has intended to occupy only limited areas of firearms regulation.⁵¹ Thus, local governments in New York appear to have broad authority to regulate firearms and ammunition absent conflict with state law.

2. States with provisions expressly preempting local regulation of one or more aspects of firearms or ammunition but otherwise permitting broad regulation of firearms and ammunition at the local level:
California, Nebraska

In California and Nebraska, local governments retain authority to regulate firearms and ammunition, but the state legislature has expressly removed this authority in certain areas.

California: California expressly preempts local governments from regulating in the areas of registration or licensing of firearms; manufacture, sale or possession of imitation firearms; and licensing or permitting with respect to the purchase, ownership, possession or carrying of a concealable firearm in the home or place of business.⁵² In other areas, courts have found that local governments have a great deal of authority to regulate firearms and ammunition in their communities.⁵³ For example, courts have rejected preemption challenges to many local firearms and ammunition laws, including ordinances regulating junk guns, the location and operation of firearms dealers, and the sale and possession of firearms and ammunition on county-owned property.⁵⁴

⁵¹ See, e.g., *People v. Stagnitto*, 691 N.Y.S.2d 223 (N.Y. App. Div. 1999) (rejecting preemption challenge to city ordinance regulating assault weapons); *Citizens for a Safer Community v. City of Rochester*, 627 N.Y.S.2d 193 (N.Y. Sup. Ct. 1994) (rejecting preemption challenge to ordinance banning assault weapons but finding regulation of manufacture, sale, and possession of air guns preempted by state law); *Grimm v. City of New York*, 289 N.Y.S.2d 358 (N.Y. Sup. Ct. 1968) (rejecting preemption challenge to ordinance requiring licensing and registration of rifles and shotguns); *People v. Del Gardo*, 146 N.Y.S.2d 350 (City Magis. Ct. 1955) (finding ordinance banning imitation handguns preempted by state law).

⁵² California Gov't Code § 53071 (preempting registration or licensing of commercially manufactured firearms); Cal. Gov't Code § 53071.5 (preempting regulation of the manufacture, sale or possession of imitation firearms); Cal. Penal Code § 12026(b) (prohibiting permit or license with respect to the purchase, ownership, possession or carrying of a handgun in a residence or place of business).

⁵³ See, e.g., *Suter v. City of Lafayette*, 67 Cal. Rptr. 2d 420, 425 (Cal. Ct. App. 1997) (“That state law tends to concentrate on specific areas, leaving unregulated other substantial areas relating to the control of firearms, indicates an intent to permit local governments to tailor firearms legislation to the particular needs of their communities.” Note however, that while the *Suter* court upheld an ordinance regulating the location and operation of firearms dealers, it struck down the portion of the ordinance regulating firearm storage).

⁵⁴ *Cal. Rifle and Pistol Ass'n, Inc. v. City of W. Hollywood*, 78 Cal. Rptr. 2d 591 (Cal. Ct. App. 1998) (upholding ordinance banning junk guns); *Suter*, 67 Cal. Rptr. 2d at 425 (upholding ordinance regulating the location and operation of firearms dealers); *Great Western Shows, Inc. v. County of Los Angeles*, 44 P.3d 120 (Cal. 2002) (upholding ordinance banning the sale of firearms and ammunition on county-owned property); *Nordyke v. King*, 44 P.3d 133 (Cal. 2002) (upholding ordinance banning possession of firearms and ammunition on county-owned property). In contrast, in *Doe v. City and County of San Francisco*, 186 Cal. Rptr. 380 (Cal. Ct. App. 1982), the court held that California Gov't Code § 53071 and Cal. Penal Code § 12026 preempted a San Francisco ordinance banning handgun possession. Because the ordinance contained an exception for concealed weapons licensees, the court found the measure had the effect of creating a new class of persons who would be required to obtain a license in order to possess a handgun in their home or place of business.

Nebraska: A 1991 Nebraska statute requiring the licensing of handgun purchasers provides that “the state has a valid interest in the regulation of the purchase, lease, rental, and transfer of handguns,”⁵⁵ and that “[a]ny city or village ordinance existing on September 6, 1991, shall not be preempted” by state laws requiring handgun licensing.⁵⁶ Other state laws grant Nebraska cities (to varying degrees depending on their size) express statutory authority to regulate several aspects of firearms, including use, discharge and carrying concealed weapons.⁵⁷ There are no published cases addressing preemption of local firearms laws in Nebraska, nor are there any published opinions discussing the relationship between the statutes granting express authority to regulate firearms and the handgun licensing law.⁵⁸

3. States that have enacted broad preemption statutes

In the remaining 42 states, local governments possess limited authority to regulate firearms and ammunition. The preemption statutes in these states vary, but each one expressly preempts all, or substantially all, aspects of local firearms and/or ammunition regulation. In many of these states there are statutory exceptions that may permit some local firearms and/or ammunition regulation. LCAV is available to assist public officials and activists in evaluating potential local strategies to prevent gun violence.

Home Rule Provisions⁵⁹

“Home rule” generally refers to local governments’ authority to regulate, usually within limitations set out by the state constitution or legislation, and is closely tied to the issue of preemption. Local governments in most states enjoy home rule power to varying degrees. In some jurisdictions, home rule power may supersede a state’s authority to preempt local law in a given area.⁶⁰

⁵⁵ Neb. Rev. Stat. Ann. § 69-2401.

⁵⁶ Neb. Rev. Stat. Ann. § 69-2425 (quoted as amended).

⁵⁷ Neb. Rev. Stat. Ann. §§ 14-102, 15-255, 16-227, 17-556.

⁵⁸ In a 1992 Nebraska Attorney General opinion upholding Omaha’s registration ordinance, the Attorney General opined, “by providing that state law shall not preempt ordinances existing before September 6, 1991, the statute contains a negative inference that state law does preempt or ‘occupy the field’ as against all future municipal legislation.” Att’y Gen. Op. No. 92079 (June 11, 1992), 1992 Neb. AG LEXIS 69. As noted above, there is no published Nebraska case law on this issue.

⁵⁹ LCAV has not yet conducted a comprehensive 50-state analysis of home rule authority to evaluate the extent to which home rule jurisdictions have the authority to regulate firearms notwithstanding preemption of firearms regulation under their respective state laws.

⁶⁰ In a recent 3-3 decision, the Colorado Supreme Court affirmed a trial court decision which found state laws expressly preempting firearms regulation unconstitutionally infringed on Denver’s home rule authority with respect to Denver’s ordinances addressing the open carrying of firearms and banning assault weapons and Saturday night specials. *State v. City and County of Denver*, 139 P.3d 635 (Colo. 2006). Ordinances and portions of ordinances addressing juvenile possession of firearms, carrying concealed firearms with a permit in a public park, and concealed weapon permitting were determined to involve matters of mixed local and state concern and were found invalid where they conflicted with state law.

In 2006, the Ohio Legislature passed House Bill 347 (overriding the Governor’s veto), which created Ohio Rev. Code Ann. § 9.68(A), a provision that purports to preempt all local authority to regulate firearms with few, limited exceptions. The City of Cleveland has challenged the law as a violation of the Ohio Constitution’s Home Rule Amendment. Complaint for Declaratory Judgment, *City of Cleveland v. Ohio*, No. CV 07 618492 (Ct. of C.P. Cuyahoga County, filed March 14, 2007). The Ohio Supreme Court recently accepted an appeal from the City of Clyde, Ohio, from a decision finding that an ordinance

prohibiting carrying firearms in a city park was preempted by section 9.68. *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 2007-Ohio-1733, 2007 Ohio App. LEXIS 1600 (Ohio Ct. App. 2007), *appeal accepted for review*, 115 Ohio St. 3d 1408, 2007 Ohio 4884, 873 N.E.2d 1314 (Ohio 2007).