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State Legislatures Stand Up for Second Amendment Gun Rights While the U.S. Supreme Court Refuses to Order a Cease Fire on the Issue

Logan Forsey

Introduction

At a young age, we are taught that the Bill of Rights, specifically the Second Amendment, gives each American citizen the general right to bear arms. The Second Amendment to the United States Constitution states that "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."[1] Taking this at face value, most Americans never question exactly how far this right extends until they are forbidden from obtaining a license or persecuted for carrying a weapon in a prohibited area. In 2008, the United States Supreme Court, in *District of Columbia v. Heller*, acknowledged and confirmed this individual right to bear arms,[2] and further elaborated that statues banning handgun possession in one's home for immediate self-defense violate the Second Amendment. [3] In 2010, the Supreme Court once again rallied behind the right to bear arms, holding in *McDonald v. City of Chicago* that the Second Amendment is fully applicable to the states.[4] The *Heller* and *McDonald* decisions declined to expressly determine whether their holdings limited the Second Amendment solely to self-defense in the home or whether the right could be extended to other places.

As a result of the Court's refusal to establish a standard for addressing Second Amendment challenges, lower courts continue to struggle over how far to extend the individual's

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[1] Neil D. Perry, *Employer Firearm Policies: Parking Lots, State Laws, OSHA, and the Second Amendment*, 20 EMPLOYMENT LAW COMMENTARY (Morrison & Foerster LLP, San Francisco, CA), no. 7, July 18, 2008 at 5.
[2] District of Columbia v. Heller, 554 U.S. 570 (2008).
[3] *Id.* at 636.
[4] McDonald v. City of Chicago, *Ill.*, 130 S. Ct. 3020, 3025 (2010).

right to bear arms.[5] Proponents of gun rights have been challenging state and federal gun laws in state and federal courts since 2008 and cases continue to line up for the U.S. Supreme Court.[6] Although many gun rights activists believed that *Heller* and *McDonald* were tremendous victories for an individual's right to gun possession, later decisions have not clarified Second Amendment rights and gun activists have been on an overall losing streak in the lower courts.[7]

While the U.S. Supreme Court refuses to take on the issue of Second Amendment rights outside of the home, state legislatures have taken a different approach than lower courts by enacting laws that tackle this challenging issue. After *Heller*, gun rights advocates such as the National Rifle Association began lobbying state legislatures to establish laws that prohibit employers from maintaining gun-free workplace policies under the Federal Occupational Safety and Health Act of 1970 (OSH Act).[8] Since 2008, sixteen states have enacted these laws[9], commonly known as "Guns-at-Work" laws, which prohibit employers or business owners from forbidding the presence of otherwise legal guns in locked motor vehicles parked on business premises.[10]

This Note argues that, because of the overwhelming need for clarification and state legislatures' proactive stance, the U.S. Supreme Court needs to take an affirmative stance on the debate regarding how far the Second Amendment right to bear arms extends. The lobbying efforts of the National Rifle Association ("NRA") will continue to establish more laws such as this, as advocates continue to put pressure on state legislatures. Since *Heller* and *McDonald*

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[5] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 2.
[6] Robert Barnes, *Cases Lining Up to Ask Supreme Court to Clarify Second Amendment Rights*, THE WASHINGTON POST, Aug. 14, 2011, http://www.washingtonpost.com/politics/cases-lining-up-to-ask-supreme-court-to-clarify-second-amendment-rights/2011/08/11/gIQAioihFJ_story.html.
[7] Barnes, *supra* note _____.
[8] Perry, *supra* note _____ at 1.
[9] *"Bring Your Gun to Work" Laws & Their Effect on Employers* (HRM Partners), June 26, 2011, http://hrm-partners.com/hr-news/%e2%80%9cbring-your-gun-to-work%e2%80%9d-laws-their-effect-on-employers.
[10] Debra Witter, Individual Gun Rights, Gun Laws, and Franchising: Why Franchisors Cannot Ignore the Controversy, 29 Franchise L.J. 239, 240 (2010).

started the debate over Second Amendment rights, cases have been piling up in the lower courts and legislatures have stepped into the arena with their own interpretation of gun rights. With all of the disconnect between the new state enactments and the lower court rulings, the Supreme Court needs to affirmatively decide, once and for all, whether the Second Amendment extends beyond the home.

Part I of this Note discusses the U.S. Supreme Court decisions in *Heller* and *McDonald* by analyzing exactly what questions the Court answered and what standards they left open to interpretation. Part II examines the lower court challenges that have inevitably emerged since the Supreme Court handed down there decisions in *Heller* and *McDonald.* Part III evaluates the different approach that the state legislatures have taken to the issue of Second Amendment rights. Finally, Part IV analyzes the stance that the Supreme Court needs to take in this ongoing litigation in order to conserve judicial resources. Only three years have passed since the *Heller* decision in 2008 and already sixteen states have proactively modified their laws to increase gun rights. The Supreme Court gave a limited definition of Second Amendment rights that spawned the increased litigation that we see today. Since the Supreme Court opened the door for such controversy over the right to bear arms, it is their duty to determine how far these rights should extend.

Part I: United States Supreme Court Second Amendment Jurisprudence

The justices in *Heller* specifically stated that the Second Amendment does not allow an individual to carry a firearm for any reason and in any manner.[11] The Court determined that individuals have a right to carry an assembled weapon in their homes for self-defense; however, they noted that their opinion should not cast doubt on a specified group of gun prohibitions.[12] As

[11] *Heller*, 554 U.S. at 626.
[12] *Id.* at 626-627.

a follow up in *McDonald*, the Supreme Court concluded that the Second Amendment is fully applicable to the states by virtue of the Fourteenth Amendment.[13] Although the Court had taken a proactive step to answer one of the unanswered questions from *Heller*, they refused to resolve the dispute over the breadth of the Second Amendment and the standard that should apply to this litigation.

A. District of Columbia v. Heller: Does the Individual Have the Right to Bear Arms?

Since 1976, the District of Columbia had in place a gun control law that "banned the possession of handguns and required that all firearms kept in the home be trigger-locked or disassembled."[14] Initially, the Supreme Court in 2008 held that the Second Amendment gives an individual the right to keep and bear arms.[15] Furthermore, the Court concluded that statutes such as the one in the District of Columbia, which ban possession of a gun in the home, are in direct violation of the Second Amendment.[16] To that end, the Court ultimately established that statutes that do not allow for a lawful, operable firearm in the home for self-defense violate an individual's right to bear arms.[17] Although it seemed as if this would be an enormous victory for gun rights lobbyists, the Court did not conclude there.

Justice Scalia specified in his majority opinion that the Second Amendment "is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[18] In essence, the Court conferred a right to bear arms upon individuals, and then limited that right. The justices explained that their opinion should not cast doubt on laws that have been in effect for many years and ban possession of firearms "by felons and the mentally

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[13] *McDonald*, 130 S. Ct. 3020 at 3088.
[14] Perry, *supra* note _____ at 5.
[15] *Heller*, 554 U.S. at 570.
[16] *Heller*, 554 U.S. at 570.
[17] *Heller*, 554 U.S. at 570.
[18] Daniel Vice & Kelly Ward, *Hollow Victory? Gun Laws Survive Three Years After District of Columbia v. Heller, Yet Criminals and the Gun Lobby Continue Their Legal Assault* (Brady Center to Prevent Gun Violence), 2011, at 1.

ill,"[19] or prohibit firearms in specific places such as "schools and government buildings,"[20] or impose "conditions and qualifications on the commercial sale of arms."[21] Activists would have preferred that the Supreme Court did not include what they believe to be an unnecessary "laundry list of Second Amendment exceptions," as an executive director with the CATO institute explained that the opinion created "more confusion than light."[22]

More important than the answers that the *Heller* court attempted to establish are the ones that the case purposely left unanswered and open to interpretation. First, the Court specifically did not establish a standard that lower courts could use when interpreting gun control laws, as the Court would not definitively state whether gun control laws should be viewed under a rational basis test, intermediate scrutiny, or strict scrutiny standard.[23] Second, because the Court's decision in *Heller* was about the District of Columbia's federally controlled territory, there was no determination as to whether the Second Amendment should apply to the gun laws in each state.[24] Additionally, the Court would not address whether its holding limited the Second Amendment solely to self-defense inside of the home or whether it could be further extended to other places, such as public parks or employer parking lots.[25]

Consequently, the decision in *Heller* became the "green light" for gun rights activists to challenge gun restrictions in states throughout the country. Essentially, every person charged with a crime involving a gun "saw the Supreme Court's decision as a Get out of Jail Free Card."[26] These litigants assumed that the *Heller* decision gave them the opportunity to challenge

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[19] *Heller*, 554 U.S. at 626-627.
[20] *Heller*, 554 U.S. at 626-627.
[21] *Heller*, 554 U.S. at 626-627.
[22] Adam Winkler, *The New Second Amendment: A Bark Worse Than Its Right*, THE HUFFINGTON POST, Jan. 2, 2009, http://www.huffingtonpost.com/adam-winkler/the-new-second-amendment_b_154783.html.
[23] Perry, *supra* note _____ at 6.
[24] Perry, *supra* note _____ at 6.
[25] Perry, *supra* note _____ at 6.
[26] Winkler, *supra* note ___.

gun laws that they believed violated their right to bear arms. The litigants found support in gun rights activists such as the NRA, who began clogging the legal system with gun law challenges in an effort to expand the right to bear arms. Unfortunately, the *Heller* decision had not made any definite decision about gun rights outside the home and its inconclusiveness has forced the lower courts to interpret its holding in countless cases since 2008.

B. McDonald v. City of Chicago: The Second Amendment Applies to the States

In the midst of the lower court challenges following *Heller*, the Supreme Court granted certiorari in 2010 to a case involving a Chicago ban on handgun possession by almost all private citizens.[27] The *McDonald* suit was filed because the petitioners felt that the Chicago ban "left them vulnerable to criminals...and violated the Second and Fourteenth Amendments."[28] Since *Heller* had not reached the issue of whether the Second Amendment applies against the states, the Seventh Circuit originally upheld the ban as being constitutional.[29] In support of their position, the Seventh Circuit stated that *Heller* "explicitly refrained from opinion on whether the Second Amendment applied to the States."[30] The Supreme Court, however, took the discussion much further.

In its majority opinion, the Supreme Court reversed the decision of the Seventh Circuit and held that the Second Amendment right to keep and bear arms is fully applicable to the States by virtue of the Fourteenth Amendment.[31] The Court elaborated only slightly on the *Heller* decision, declaring that since *Heller* protected the right to have a gun for self-defense in your home, "a provision of the Bill of Rights that protects a right that is fundamental from an

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[27] *McDonald*, 130 S. Ct. at 3021.
[28] *McDonald*, 130 S. Ct. at 3021.
[29] *McDonald*, 130 S. Ct. at 3021.
[30] *McDonald*, 130 S. Ct. at 3021.
[31] *McDonald*, 130 S. Ct. at 3050.

American perspective applies equally to the Federal Government and to the States."[32] This decision was important because it extended *Heller* to apply to state and local laws nationwide, while again cautioning that there are necessary limits on the right to bear arms."[33] The key questions that had been left open in *Heller* were what level of scrutiny should be applied to Second Amendment challenges and "whether or to what extent the Second Amendment should apply outside of the home."[34]

In his concurring opinion, Justice Scalia noted that the majority's approach awards power to people and the democratic process because "the rights it fails to acknowledge are left to be democratically adopted or rejected by the people, with the assurance that their decision is not subject to judicial revision."[35] Justice Scalia was correct in his assertion that the breadth of the right to bear arms can be and has been decided by the legislature in many situations. However, only sixteen legislatures have given employees more gun rights on their commute to work and the lack of judicial affirmance of gun rights has left citizens without very much success when attempting to uphold their rights in judicial proceedings. When the *McDonald* Court acknowledged the role that the legislatures play in regulating gun possession, they were not making an exact determination of gun rights but rather they were avoiding the controversy altogether. The *McDonald* court, as they had done two years prior in *Heller*, refused to establish a standard for gun rights litigation or to determine how far gun rights extend, and their limited holding only furthered the lower court battles.

Part II: Lower Court Challenges

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[32] *McDonald*, 130 S. Ct. at 3050.
[33] Vice, *supra* note _____ at 1.
[34] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 9.
[35] *McDonald*, 130 S. Ct. at 3058.

The significant questions that were left unresolved have forced the post-*Heller* courts into more than 400 challenges to gun laws by gun lobbyists.[36] Although these challenges generally do not yield positive results for the lobbyists, they continue their assault on gun laws in the hopes of gaining more gun rights for individuals. Until the Supreme Court takes an affirmative stance on how far Second Amendment rights extend outside of the home, lobbyists will continue to use judicial resources to litigate gun rights cases. Proponents of gun rights feel as though the unanswered questions from the two Supreme Court decisions opened the door to challenging gun laws and they continue to assemble cases that ask the Supreme Court for further clarification.[37]

A. Introduction to Federal and State Challenges

In the post-*Heller* and *McDonald* months, federal and state courts struggled with the unresolved questions about the latitude and application of the Second Amendment.[38] Since the *Heller* ruling in 2008, criminal and gun lobbyists alike have joined together and "brought more than 400 challenges to gun laws, an average of more than two legal challenges every week over the last three years."[39] Yet, in a majority of instances, the lower courts have denied any request for relief in these cases.[40] Although these challenges in the lower courts have generally failed, the gun rights advocates continue to launch new challenges and do not appear to be giving up their fight anytime soon.[41]

B. Standards of Review: How Should the Lower Courts Evaluate Second Amendment Challenges?

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[36] Vice, *supra* note _____ at 1.
[37] Barnes, *supra* note ____.
[38] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 2.
[39] Vice, *supra* note _____ at 1.
[40] Vice, *supra* note _____ at 1.
[41] Vice, *supra* note _____ at 1.

Since the Supreme Court in *Heller* and *McDonald* did not provide the lower courts with any guidance in how to evaluate Second Amendment challenges following their decisions,[42] the federal and state courts have been interpreting what they believe to be the standard of scrutiny on a case-by-case basis. Most of the courts that have accepted this task have explicitly adopted one of the levels of scrutiny and have generally "applied intermediate scrutiny to Second Amendment challenges, especially challenges to laws that restrict conduct beyond the right of a law-abiding, responsible citizen to possess a handgun in the home for self-defense."[43] At the same time, a few of the courts that have taken on the issue have determined that a higher level of scrutiny, strict scrutiny, should be used to review Second Amendment challenges.[44] It is clear that, without guidance from the Supreme Court, these lower courts are left with inconsistent rulings regarding what level of scrutiny should be applied in Second Amendment cases.

One example of the court holding that intermediate scrutiny is sufficient can be found in *Kachalsky v. Cacace*, decided by the United States District Court for the Southern District of New York.[45] The District Court rejected a "Second Amendment challenge to a New York law that requires applicants for concealed carry licenses to show 'proper cause.'"[46] Using a two-pronged test, the *Kachalsky* court first determined whether the law at issue burdened conduct that was protected by the Second Amendment and then applied intermediate scrutiny.[47] In applying the intermediate scrutiny standard, the justices concluded that the state's objective of "protecting the public and reducing crime is important and that the law is substantially related to that

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[42] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 8.
[43] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 8 (citing *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. Va. 2011).
[44] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 8.
[45] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 3 (citing *Kachalsky v. Cacace*, 2011 U.S. Dist. LEXIS 99837 (S.D.N.Y. Sept. 2, 2011).
[46] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 3 (citing *Kachalsky v. Cacace*, 2011 U.S. Dist. LEXIS 99837 (S.D.N.Y. Sept. 2, 2011).
[47] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 3 (citing *Kachalsky v. Cacace*, 2011 U.S. Dist. LEXIS 99837 (S.D.N.Y. Sept. 2, 2011).

objective because, instead of banning all concealed carry, the law provides for case specific assessments of each applicant's needs."[48] The court refused to apply a strict scrutiny standard instead because the justices interpreted strict scrutiny to only apply when laws burden what is considered a "core" Second Amendment right.[49] If the Supreme Court in *Heller* or *McDonald* had set a standard for the lower courts to apply, state and federal courts would not have to struggle on a case-by-case basis to determine which standard is appropriate. Instead, judicial resources would be conserved and holdings would be consistent throughout every level of the courts.

C. Is Conduct Outside of the Home Protected by the Second Amendment?

Since *Heller* and *McDonald* only addressed an individual's right to self-defense within the home, the lower courts have had to decide not just the standard to apply in these cases, but also the larger question of whether the Second Amendment protects conduct outside of one's home.[50] In evaluating this difficult question, a significant number of courts have generally concluded that the Second Amendment does not protect conduct outside of the home, but only protects conduct within the home.[51]

One such court, the Appellate Court of Illinois, decided in *People v. Dawson* that it would not expand the rights that the Supreme Court had announced in *Heller* and *McDonald*.[52] The plaintiff had been convicted of "three counts of aggravated discharge of a firearm and two counts of aggravated unlawful use of a weapon."[53] Plaintiff argued that the Supreme Court's decisions should extend to protect a citizen's ability to carry a handgun outside of their home in

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[48] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 3-4 (citing *Kachalsky v. Cacace*, 2011 U.S. Dist. LEXIS 99837 (S.D.N.Y. Sept. 2, 2011).
[49] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 4 (citing *Kachalsky v. Cacace*, 2011 U.S. Dist. LEXIS 99837 (S.D.N.Y. Sept. 2, 2011).
[50] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 9.
[51] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 9.
[52] People v. Dawson, 934 N.E.2d 598 (Ill. App. Ct. 2010).
[53] *Dawson*, 934 N.E.2d at 599.

case of confrontation.[54] The Appellate Court was left with the responsibility of determining the right to bear arms in this case and whether the statute at issue violated the Second Amendment.[55] Noting that the Supreme Court had "deliberately and expressly maintained a controlled pace of essentially beginning to define this constitutional right," the Appellate Court nevertheless created its own interpretation of the Second Amendment parameters and construed the statute to be constitutional.[56] The *Dawson* court acknowledged that the *Heller* court had "specifically limited its ruling to interpreting the amendment's protection of the right to possess handguns in the home, not the right to possess handguns outside of the home in case of confrontation"[57] and tried to use their own discretion to litigate the issue. Without assistance from the Supreme Court, the Appellate Court justices were left to "construe statutes to be constitutional when possible"[58] and did not evaluate the Plaintiff's right in the manner that it could have with guidance from the Supreme Court.

Other courts have similarly held off on deciding whether the Second Amendment applies outside the home and have found restrictions on firearm possession in public places to be valid.[59] On March 24, 2011, the Fourth Circuit rejected a claim that there is a constitutional right to possess a loaded handgun in a car in a national park in *United States v. Masciandaro*.[60] The majority opinion stated that the *Heller* court "did not define the outer limits of Second Amendment rights, and it also did not address the level of scrutiny that should be applied to laws that burden those rights."[61] The court further noted that a considerable degree of uncertainty remains "as to the scope of that right beyond the home and the standards for determining whether

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[54] *Dawson*, 934 N.E.2d at 604.
[55] *Dawson*, 934 N.E.2d at 605.
[56] *Dawson*, 934 N.E.2d at 605.
[57] *Dawson*, 934 N.E.2d at 605-606.
[58] *Dawson*, 934 N.E.2d at 605-606.
[59] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 9.
[60] Vice, *supra* note _____ at 3 (citing *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011).
[61] United States v. Masciandaro, 638 F.3d 458, 466-467 (4th Cir. 2011).

and how the right can be burdened by governmental regulation."[62] Absent a standard from the Supreme Court, the Court of Appeals applied an intermediate scrutiny standard and held that the government has a "substantial interest in providing for the safety of individuals who visit and make use of the national parks"[63] and that the statute's "narrow prohibition is reasonably adapted to that substantial governmental interest."[64]

Justice Paul V. Niemeyer wrote separately stating that although he did not believe that a car can constitute a "home," he felt there is a plausible reading of *Heller* that the Second Amendment nevertheless provides a right to possess a loaded handgun for self-defense outside the home.[65] His interpretation of *Heller* "found that the public right included the right to 'protect oneself against both public and private violence,' thus extending the right in some form to wherever a person could become exposed to public or private violence."[66] Even though he did not agree with Masciandaro's contention that a car which an individual frequently sleeps in can constitute a "home" under *Heller*, Justice Niemeyer nevertheless determined that "because 'self-defense has to take place wherever a person happens to be,' it follows that the right extends to public areas beyond the home."[67] Justice Niemeyer did not read *Heller* narrowly to only include self-defense in one's home, but instead argued that the right might extend beyond the home. The complex question of where the right actually applies was not necessarily being decided in this case, but Niemeyer at the very least believed that the right could extend to a "claim to self-defense asserted by *Masciandaro* as a law-abiding citizen sleeping in his automobile in a public parking area."[68] However, without any guidance from the Supreme Court, the Fourth Circuit

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[62] United States v. Masciandaro, 638 F.3d 458, 466-467 (4th Cir. 2011).
[63] United States v. Masciandaro, 638 F.3d 458, 473 (4th Cir. 2011).
[64] United States v. Masciandaro, 638 F.3d 458, 473 (4th Cir. 2011).
[65] United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011).
[66] United States v. Masciandaro, 638 F.3d 458, 467 (4th Cir. 2011).
[67] United States v. Masciandaro, 638 F.3d 458, 468 (4th Cir. 2011).
[68] United States v. Masciandaro, 638 F.3d 458, 468 (4th Cir. 2011).

become yet another lower court that was confined to applying a lower standard of scrutiny instead of determining exactly how far the Second Amendment right to bear arms extends outside of one's home.

D. How Are State Courts Reacting to the Assault on Their Gun Restriction Statutes?

Ever since the assault on gun restrictions began, state courts have been forced into litigation to determine which gun statutes are constitutional. These state courts have handed down decisions that uphold laws that "prohibit the unlicensed carrying of handguns outside of the home, authorize the seizure of firearms in cases of domestic violence, prohibit the possession of assault weapons and 50-caliber rifles, and require that an individual possess a license to own a handgun."[69] In upholding these restrictions, the lower state courts have followed the lead of the federal courts and have been unable to resolve *Heller*'s unanswered questions.

In 2011, the Superior Court of New Jersey was handed a case that was similar to *United States v. Masciandaro* in that the defendant truck driver argued that his truck was his second home.[70] The defendant was convicted of possessing a handgun without a permit and the court rejected his Second Amendment challenge to this conviction.[71] Since the defendant was a truck driver who lived in his truck for many days due to the long-distance of his travels, he argued that his truck was a home and should be protected under the holdings in *Heller* and *McDonald*.[72] The justices were able to resolve the case without ever determining whether a truck can constitute a legal home.[73] They noted that *Heller* and *McDonald* dealt only with guns inside the home and that "accepting the defendant's view of his truck as his second home...requires acceptance of an

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[69] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 7.
[70] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 2.
[71] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 2 (citing *State v. Robinson*, 2011 N.J. Super. Unpub. LEXIS 2274 (App. Div. Aug. 23, 2011).
[72] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 2.
[73] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 2.

expansive definition of the word 'home.'"[74] In an effort to avoid deciding how far gun rights extend, the New Jersey Superior Court left the issue to be decided at a later time.

E. Civil Suits Against State and Local Governments

As of September 12, 2011, states faced forty-one pending civil lawsuits challenging different state gun laws under the Second Amendment.[75] Although Second Amendment challenges in civil suits have generally been unsuccessful, "several courts have cited *Heller* in expressing concern about state action that would limit an individual's right to possess a firearm where that person is not prohibited by law from doing so."[76] Three significant civil cases have acknowledged the individual right to possess a firearm where the individual is legally allowed to do so and have joined a minority of cases that have proactively litigated Second Amendment claims after *Heller*.

One such civil case is *Simmons v. Gillespie* in which a Plaintiff police officer sued a police chief after the chief issued a personnel memorandum "prohibiting the officer from possessing or carrying firearms off-duty without prior authorization from the chief."[77] In his complaint, the officer essentially alleged that the chief "had prohibited him, as a condition of his employment, from all private, lawful possession and use of firearms."[78] Even though the officer's complaint did not explicitly include a Second Amendment claim, the court "believed it was appropriate, in light of the U.S. Supreme Court's precedent in *Heller*, to construe the complaint as encompassing a Second Amendment claim instead of requiring the plaintiff to file an amended complaint."[79] The court determined that the plaintiff had a claim to injunctive relief

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[74] State v. Robinson, 2011 N.J. Super. Unpub. LEXIS 2274 (App. Div. Aug. 23, 2011).
[75] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 4.
[76] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 5.
[77] Simmons v. Gillespie, 2008 U.S. Dist. LEXIS 81424 (C.D. Ill. Aug. 1, 2008).
[78] Simmons v. Gillespie, 2008 U.S. Dist. LEXIS 81424 (C.D. Ill. Aug. 1, 2008).
[79] Simmons v. Gillespie, 2008 U.S. Dist. LEXIS 81424 (C.D. Ill. Aug. 1, 2008).

and denied the defendant's motion to dismiss as to the Second Amendment claim.[80] After settlement negotiations, the court in 2010 granted the Plaintiff's Petition for Voluntary Dismissal.[81] This case is important to note because the District Court found that where the individual was not otherwise prohibited from possessing a firearm, they therefore should not be forbidden to possess that firearm through state action. The police chief had tried to limit the employee police officer's possession of a firearm where he was lawfully allowed to have it, and the court found that this was a violation of the Second Amendment.

In another potential victory for gun rights lobbyists, the United States District Court for the Central District of Illinois in *Mischaga v. Monken* denied the dismissal of a plaintiff's suit alleging that an Illinois licensing law "violated the Second Amendment by preventing her from being able to possess a firearm for self-defense while she stayed in an Illinois friend's home."[82] In a complaint against the Director of the Illinois State Police, the plaintiff alleged that the Illinois Act prohibited her from possessing a weapon for her personal protection at her temporary residence in Illinois and that the act therefore violated her constitutional right to bear arms.[83] The court found that the plaintiff had stated a claim and therefore denied the defendant's motion to dismiss.[84] This case discusses the breadth of the word "home" that was left untouched in *Heller*. Since the Supreme Court did not specify how far the right to self-defense in the "home" extends, it is significant that the District Court did not dismiss a claim alleging that the right should also be applied in a temporary home when staying with a friend.

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[80] Simmons v. Gillespie, 2008 U.S. Dist. LEXIS 81424 (C.D. Ill. Aug. 1, 2008).
[81] Simmons v. Gillespie, 2010 U.S. Dist. LEXIS 75034 (C.D. Ill., July 23, 2010).
[82] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 5.
[83] Mishaga v. Monken, 2010 U.S. Dist. LEXIS 123491 (C.D. Ill. Nov. 22, 2010).
[84] Mishaga v. Monken, 2010 U.S. Dist. LEXIS 123491 (C.D. Ill. Nov. 22, 2010).

Finally, the Seventh Circuit in *Ezell v. City of Chicago* examined a Chicago ordinance to determine whether or not it violated the plaintiff's Second Amendment rights.[85] Immediately following the decision in *McDonald*, Chicago's City Council Committee on Police and Fire had held a hearing to explore what possible legislative responses were needed following *McDonald*.[86] The Committee made recommendations to the City Council and just four days after *McDonald* was handed down, Chicago's City Council "repealed the City's laws banning handgun possession and unanimously adopted the Responsible Gun Owners Ordinance."[87] This ordinance mandates that anyone who wants to own a gun must complete one hour of range training, yet at the same time it prohibits any firing ranges from being within city limits.[88] The ordinance further prohibits any handgun possession "outside the home"[89] and specifies that any gun owner may have "no more than one firearm in his home assembled and operable."[90]

The Seventh Circuit held that *Heller* was instructive,[91] and, although the Supreme Court had not specified what level of scrutiny to evaluate this type of litigation at, their interpretation was that *Heller* required "any heightened standard of scrutiny."[92] Since the ordinance "prohibits the 'law-abiding, responsible citizens' of Chicago from engaging in target practice in the controlled environment of a firing range,"[93] the court concluded that the City bears the burden, under this heightened level of scrutiny, of "establishing a strong public-interest justification for its ban on range training."[94] The City was required to "establish a close fit between the range ban

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[85] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[86] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[87] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[88] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[89] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[90] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[91] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[92] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[93] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[94] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).

and the actual public interest it serves"[95] and also had to prove that the "public interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights."[96] When the City failed to meet this standard, the Seventh Circuit remanded the case for further proceedings consistent with their findings. This case recognized the Second Amendment rights of law-abiding citizens and did not allow yet another Chicago ban to be upheld.

F. Going Forward: Further Challenges in Lower Courts

In the future, gun lobbyists will likely continue to threaten the courts with more litigation in an effort to keep state and local governments across the country from enacting more statutes that restrict gun rights.[97] Proponents of increased gun rights have been lining up cases to go to the Supreme Court that will force the Court to clarify whether the Second Amendment applies outside the context of the home.[98]

One such case that will be coming up before the Supreme Court is the appeal of the Fourth Circuit's decision in *United States v. Masciandaro*.[99] In his petition to the Supreme Court, Masciandaro argues that "if there is a Second Amendment right outside of the home, it surely applies to law-abiding citizens carrying handguns for self-defense while traveling on public highways."[100] Masciandaro pled his case in the Court of Appeals for the Fourth Circuit in front of Judge J. Harvey Wilkinson III, who stated that "any expansion of the right in *Heller* would have to come from the Supreme Court."[101] Alan Gura, the litigator who argued the *Heller* case, wrote a brief supporting Masciandaro's appeal and stated that Masciandaro's case "provides the perfect chance to 'clarify' for recalcitrant lower courts that the Second Amendment 'applies

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[95] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[96] Ezell v. City of Chicago, 2011 U.S. App. LEXIS 14108 (7th Cir. July 6, 2011).
[97] *Post*-Heller *Litigation Summary*, LEGAL COMMUNITY AGAINST VIOLENCE, Sept. 12, 2011, at 9.
[98] Barnes, *supra* note ____ at 2-3.
[99] Barnes, *supra* note ____ at 2.
[100] Barnes, *supra* note ____ at 2.
[101] Barnes, *supra* note ____ at 2.

beyond the threshold of one's home."[102] If the Supreme Court does not take this opportunity to clarify its *Heller* decision, Mr. Gura believes that there will surely be more cases like it on their way.[103]

III. Legislation Response: "Guns-at-Work" State Laws Expand Gun Rights for Employees

Rather than bringing cases before the lower courts in the hopes of reaching the Supreme Court, lobbyists for the legislatures responded to the *Heller* decision by enacting state "Guns-at-Work" laws. These state laws prohibit employers or business owners from forbidding the presence of otherwise lawful guns in locked cars located on business property.[104] Since these laws are not preempted by the federal OSH Act, the sixteen states that have enacted the "Guns-at-Work" laws have essentially expanded gun rights through legislative enactment rather than judicial ruling. While the Supreme Court has declined to reach the issue of individual gun rights outside of the home, the state legislatures have tackled the issue head on and have given individuals the right to carry an otherwise lawful weapon for self-defense outside of the home.

A. Occupational Safety and Health Act of 1970 Proves Inadequate and Ambiguous

When looking at state legislatures' reactions to *Heller* and the subsequent "Guns-at-Work" laws, we must also look at the federal regulations that these laws were meant to clarify, most notably the Federal Occupational Safety and Health Act of 1970 (OSH Act). When the OSH Act was enacted in 1970, its restrictions brought the federal government into an area that generally was controlled by the states.[105] Congress enacted the law because it wanted to ensure

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[102] Barnes, *supra* note ____ at 2.
[103] Barnes, *supra* note ____ at 2-3.
[104] Witter, *supra* note ____ at 240.
[105] Dayna B. Royal, Take Your Gun to Work and Leave It in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-at-Work Laws, 61 Fla. L. Rev. 475, 486 (2009) (quoting Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 96 (1992)).

that employees were in safe and healthy working conditions.[106] Therefore, the Act imposed on employers an obligation to maintain workplace safety.[107] The two main obligations that the Act enacted against employers were compliance with health and safety standards and compliance with the Act's "general duty clause".[108] This "general duty clause" imposes on every employer a duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[109] The "general duty clause" creates a mandatory requirement for employers and is a sort of "catch all" for any workplace hazards that are not covered by a specific Occupational Safety and Health Administration (OSHA) regulation.[110]

In the context of gun rights, the main speculation about this "general duty clause" is whether or not workplace violence prevention is required under the clause. Some courts, such as the Federal District Court in *ConocoPhillips Co. v. Henry*, have found that "gun-related workplace violence and the presence of unauthorized firearms on company property" qualify as recognized hazards that come under the employer's general duty.[111] The District Court ruled that the employer had a general duty because if guns are not banned from the premises, including the parking lots, disgruntled employees can easily retrieve firearms.[112] However, in *Ramsey Winch Inc. v. Henry*, the Court of Appeals for the Tenth Circuit reversed the *ConocoPhillips* holding and ruled that the OSHA "has not indicated in any way that employers should prohibit firearms

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[106] Royal, *supra* note _____ at 486.
[107] Royal, *supra* note _____ at 486.
[108] Royal, *supra* note _____ at 487.
[109] Royal, *supra* note _____ at 487 (quoting 29 U.S.C. §654(a)(1)).
[110] Perry, *supra* note _____ at 3.
[111] Perry, *supra* note _____ at 4 (quoting ConocoPhillips Co. v. Henry, 520 F.Supp. 2d 1282, 1328 (N.D. Okla. Oct. 4, 2007)).
[112] Perry, *supra* note _____ at 4 (quoting ConocoPhillips Co. v. Henry, 520 F.Supp. 2d 1282, 1329 (N.D. Okla. Oct. 4, 2007)).

from company parking lots."[113] The court held that the OSHA had "declined a request to promulgate a standard banning firearms from the workplace"[114] and although the OSHA is aware of the controversy surrounding firearms in the workplace, they have "consciously decided not to adopt a standard."[115]

Though it would appear that the sixteen state "Guns-at-Work" laws would be in conflict with OSH Act's "general duty clause," that is not the case. Employers cannot prevent the random, intentional acts of employees and although the OSHA is concerned with increasing workplace safety, random acts of violence are not workplace specific.[116] In an attempt to clarify any discrepancies regarding workplace violence, the OSHA advised in a letter of interpretation exactly what it meant by the "general duty clause."[117] The note stated that where the risk of violence is a "recognized hazard," the employer should take reasonable steps to minimize such foreseen risks and would be in violation of the OSH Act if he or she did not.[118] On the other hand, the random occurrence of violent acts that are not seen as a characteristic of the type of employment do not subject an employer to an OSH Act violation.[119] This letter suggests that employers would not face liability if they had taken reasonable steps of abatement, such as installing metal detectors in their buildings to prevent guns from coming in where workplace violence is reasonably foreseeable.[120] Gun activists believe that interpreting the OSH Act this way proves not only that the "general duty clause" does not require banning guns from employee

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[113] Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1206 (10th Cir. 2009).
[114] Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1206 (10th Cir. 2009).
[115] Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1206 (10th Cir. 2009).
[116] Royal, *supra* note ____ at 520-521.
[117] Royal, *supra* note ____ at 521.
[118] Royal, *supra* note ____ at 521 (quoting Letter from Roger A. Clark, Dir., Directorate of Enforcement Programs, Occupational Safety and Health Admin., to John R. Schuller (Dec. 10, 1992), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951.)
[119] Royal, *supra* note ____ at 521 (quoting Letter from Roger A. Clark, Dir., Directorate of Enforcement Programs, Occupational Safety and Health Admin., to John R. Schuller (Dec. 10, 1992), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20951.)
[120] Royal, *supra* note ____ at 522.

vehicles, but also that the state "Guns-at-Work" laws at not preempted by the "general duty clause" of the OSH Act.

B. State Legislatures Take a Stand: State "Guns-at-Work" Laws

i. "Guns-at-Work" Laws in General

The spread of "parking lot" or "bring your gun to work" laws stems in part from the landmark *Heller* decision that struck down Washington, D.C.'s handgun ban.[121] Some businesses and employers remain unsure about the future of their potential liability, as the "policies designed to ensure safe workplaces clash with the Second Amendment."[122] Employers continue to raise concerns both with their duties under the broad "general duty clause" of the OSH Act and also with their potential civil liability exposure if an employee is involved in workplace violence.[123] In spite of this uncertainty, sixteen state legislatures took a stand for gun rights and passed "Guns-at-Work" laws.[124] These laws have been divided into two categories: the more severe restrictions and the laws with weaker exceptions.[125] The states with the most severe restrictions include Florida, Indiana, Kentucky, Louisiana, Minnesota, and Oklahoma.[126] These states generally forbid employers from asking employees whether or not they have a gun inside their car, from prohibiting a person that is legally entitled to possess a firearm locked in their vehicle from doing so, and from implementing a policy that would limit an employee's ability to

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[121] Stephanie Armour, *A 'Bring Your Gun to Work' Movement Builds*, BUSINESSWEEK, Mar. 31, 2011, http://www.businessweek.com/magazine/content/11_15/b4223038869200.htm.
[122] Stephanie Armour, *A 'Bring Your Gun to Work' Movement Builds*, BUSINESSWEEK, Mar. 31, 2011, http://www.businessweek.com/magazine/content/11_15/b4223038869200.htm.
[123] *"Bring Your Gun to Work" Laws & Their Effect on Employers* (HRM Partners), June 26, 2011, http://hrm-partners.com/hr-news/%e2%80%9cbring-your-gun-to-work%e2%80%9d-laws-their-effect-on-employers.
[124] *"Bring Your Gun to Work" Laws & Their Effect on Employers* (HRM Partners), June 26, 2011, http://hrm-partners.com/hr-news/%e2%80%9cbring-your-gun-to-work%e2%80%9d-laws-their-effect-on-employers.
[125] *"Bring Your Gun to Work" Laws & Their Effect on Employers* (HRM Partners), June 26, 2011, http://hrm-partners.com/hr-news/%e2%80%9cbring-your-gun-to-work%e2%80%9d-laws-their-effect-on-employers.
[126] *"Bring Your Gun to Work" Laws & Their Effect on Employers* (HRM Partners), June 26, 2011, http://hrm-partners.com/hr-news/%e2%80%9cbring-your-gun-to-work%e2%80%9d-laws-their-effect-on-employers.

store a firearm in their locked vehicle.[127] The remaining ten states have exceptions to the "Guns-at-Work" laws and give employers more leeway in their restrictions on employees.[128] These states include Alaska, Arizona, Georgia, Idaho, Kansas, Michigan, Mississippi, Nebraska, Ohio, and Utah.[129]

ii. Oklahoma's "Guns-at-Work" Law

Oklahoma is a state with severe "Guns-at-Work" restrictions and has been in the spotlight during much of the controversy over these state enactments. Oklahoma originally enacted its "Guns-at-Work" statute in response to a corporation that fired "eight workers at a timber mill in southeastern Oklahoma [who] had guns in their vehicles at the mill in violation of [company] policy."[130] A principle author of the gun-rights law, Rep. Jerry Ellis, stated that angry workers who shoot people in the workplace "are going to do so no matter what laws are enacted."[131]

Oklahoma's "Guns-at-Work" law has brought much controversy and litigation. In the case of *Ramsey Winch, Inc. v. Henry*, the U.S. Court of Appeals for the Tenth Circuit unanimously ruled that workers in Oklahoma have the constitutional right to keep guns in their vehicles parked in their employer's parking lots.[132] Originally, a group of employers had filed a lawsuit arguing that the state laws violated the regulations of the OSH Act and although the District Court in 2007 agreed, the Tenth Circuit held that the "OSHA regulations are just voluntary guidelines and recommendations for employers seeking to reduce the risk of

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[127] *"Bring Your Gun to Work" Laws & Their Effect on Employers* (HRM Partners), June 26, 2011, http://hrm-partners.com/hr-news/%e2%80%9cbring-your-gun-to-work%e2%80%9d-laws-their-effect-on-employers.
[128] *"Bring Your Gun to Work" Laws & Their Effect on Employers* (HRM Partners), June 26, 2011, http://hrm-partners.com/hr-news/%e2%80%9cbring-your-gun-to-work%e2%80%9d-laws-their-effect-on-employers.
[129] *"Bring Your Gun to Work" Laws & Their Effect on Employers* (HRM Partners), June 26, 2011, http://hrm-partners.com/hr-news/%e2%80%9cbring-your-gun-to-work%e2%80%9d-laws-their-effect-on-employers.
[130] Robert Boczkiewicz, *Gun Law Gets its Day in Court*, TULSA WORLD, Nov. 20, 2008, http://www.tulsaworld.com/news/article.aspx?articleID=20081120_11_A1_DENVER940663.
[131] Robert Boczkiewicz, *Gun Law Gets its Day in Court*, TULSA WORLD, Nov. 20, 2008, http://www.tulsaworld.com/news/article.aspx?articleID=20081120_11_A1_DENVER940663.
[132] Lydell C. Bridgeford, *Court Rejects Ban on Guns in Workplace Parking Lots*, EMPLOYEE BENEFIT NEWS, June 15, 2009, http://ebn.benefitnews.com/news/court-reject-bans-on-guns-in-workplace-parking-lots-2681024-1.html.

workplace violence in at-risk industries.[133] Because of the number of cases that have already surrounded the "Guns-at-Work" laws, it is no surprise that labor and employment attorney James P. Anelli predicts that, even though this decision was a victory for employees in the Tenth Circuit, there will be even more cases down the road where employees will fight for their constitutional right.[134] Anelli proposes that in states without the "Guns-at-Work" laws, employees may argue "that he or she has a constitutional right to carry a firearm in a vehicle [in an employer parking lot], particularly in a state where it's legal to carry a firearm in one's vehicle."[135] In order to avoid the continued litigation on the subject, the Supreme Court needs to make a ruling that either affirms or denies an individual's right to bear arms not only locked in their vehicle at work, but also outside of the home in general.

iii. Florida's Legislation

Akin to Oklahoma, Florida adopted severe "Guns-at-Work" legislation that limits the restrictions employers can place on employees regarding guns in locked vehicles in company parking lots. Prior to even adopting this legislation,[136] the bill's sponsor, Rep. Dennis Baxley, argued that the bill was simply an extension of the Second Amendment right to bear arms and was meant to protect employees during their commute to and from their place of business.[137] Baxley, the owner of a company with close to 70 employees, further explained prior to the adoption of the legislation that although he understands the concerns business owners have, he doesn't believe that the employer's property rights can trump the individual's Second

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[133] Lydell C. Bridgeford, *Court Rejects Ban on Guns in Workplace Parking Lots*, EMPLOYEE BENEFIT NEWS, June 15, 2009, http://ebn.benefitnews.com/news/court-reject-bans-on-guns-in-workplace-parking-lots-2681024-1.html.
[134] Lydell C. Bridgeford, *Court Rejects Ban on Guns in Workplace Parking Lots*, EMPLOYEE BENEFIT NEWS, June 15, 2009, http://ebn.benefitnews.com/news/court-reject-bans-on-guns-in-workplace-parking-lots-2681024-1.html.
[135] Lydell C. Bridgeford, *Court Rejects Ban on Guns in Workplace Parking Lots*, EMPLOYEE BENEFIT NEWS, June 15, 2009, http://ebn.benefitnews.com/news/court-reject-bans-on-guns-in-workplace-parking-lots-2681024-1.html.
[136] H.B. 129, 108th Reg. Sess. (Fla. 2006).
[137] Kasey Wehrum, *Debate Rages Over Guns at Work: A New Bill That Would Forbid Employers From Banning Guns is Drawing Fire*, INC., Feb. 10, 2006, http://www.inc.com/news/articles/200602/guns.html.

Amendment rights to self-protection.[138] In 2008, the Florida "Guns-at-Work" statute was enacted.[139] It specifically prohibits employers from preventing customers, employees, or invitees from possessing legally owned firearms locked in vehicles in parking lots when lawfully in the area.[140] Under the statute, employers cannot take action against employees based on statements about firearms they may have in their vehicles, and employers cannot condition employment on an agreement not to maintain such firearms.[141]

In *Fla. Retail Fed'n, Inc. v. Attorney Gen.*, the U.S. District Court for the Northern District of Florida was asked to determine whether Florida's "Guns-at-Work" statute was preempted by the OSH Act.[142] The Florida District Court found that the statute is not preempted by the OSH Act by concluding that the OSH Act applies to permit the states to regulate[143] and generally acknowledged that state laws can be used to decide any occupational safety or heath issue when there is not a controlling federal standard.[144] This is extremely important because the court essentially ruled that the OSH Act left to the states the task of governing the possession of guns in the workplace. Since there is not a federal standard "governing the prevention of workplace violence relevant to 'Guns-at-Work' laws," the statute as enacted in Florida is permitted.[145]

iv. Indiana: Parking Lot 2.0

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[138] Kasey Wehrum, *Debate Rages Over Guns at Work: A New Bill That Would Forbid Employers From Banning Guns is Drawing Fire*, INC., Feb. 10, 2006, http://www.inc.com/news/articles/200602/guns.html.
[139] Fla. State. §790.251(4)(a).
[140] Royal, *supra* note ____ at 496 (quoting Fla. State. §790.251(4)(a)).
[141] Royal, *supra* note ____ at 496 (quoting Fla. State. §790.251(4)(a)).
[142] Royal, *supra* note ____ at 505.
[143] Royal, *supra* note ____ at 506 (quoting Fla. Retain, 576 F. Supp. 2d at 1298-99).
[144] Royal, *supra* note ____ at 508 (See 29 U.S.C. §667 (a) and Occupational and Safety and Health Act of 1970, Pub. L. No. 91-596, §18(a)).
[145] Royal, *supra* note ____ at 508.

Despite criticism from businesses and major employers, Indiana's "Guns-at-Work" statute went into effect on July 1, 2010 after sailing through both legislative chambers.[146] Indiana Governor Mitchel Daniels stated that he signed the legislation because of the "clear gun-rights language in federal and state constitutions and the 'overwhelming consensus' in the House and Senate."[147] He did, however, add that the General Assembly "might consider ironing out ambiguities to prevent unnecessary litigation."[148] Unlike the Supreme Court, Daniels wanted to clarify any unanswered questions that the legislation would bring about in order to save judicial resources.

In 2011, the NRA pushed for a new legislation that would allow employers "to be sued if they require applicants to disclose information about gun ownership or require employees to reveal if they have weapons or ammunition in their cars."[149] The bill was authored by State Senator Johnny Nugent and labeled "the Parking Lot 2.0 bill" by the NRA.[150] Nugent explained his support of the bill by stating that although he understands how employers feel the way that they do, there are "things that trump property rights, and one of them is the defense of (my) life."[151] The 2010 bill had failed to address specifically what employers could do "to find out if their workers had guns in their cars, or what action they could take to verify those guns were

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[146] *Florida Federal Court Rules Employees May Leave Guns in Cars While at Work*, JACKSON LEWIS LLP, Aug. 8, 2008, http://www.jacksonlewis.com/resources.php?NewsID=1457.
[147] *Florida Federal Court Rules Employees May Leave Guns in Cars While at Work*, JACKSON LEWIS LLP, Aug. 8, 2008, http://www.jacksonlewis.com/resources.php?NewsID=1457.
[148] *Florida Federal Court Rules Employees May Leave Guns in Cars While at Work*, JACKSON LEWIS LLP, Aug. 8, 2008, http://www.jacksonlewis.com/resources.php?NewsID=1457.
[149] Maureen Hayden, *Challenges Arise to Indiana's 'Parking Lot' Gun Law: Bill Targets Employers Who Demand Info From Employees*, TRIBSTAR, Jan. 28, 2011, http://tribstar.com/indianalegislature/x135630126/Challenges-arise-to-Indiana-s-parking-lot-gun-law.
[150] Maureen Hayden, *Challenges Arise to Indiana's 'Parking Lot' Gun Law: Bill Targets Employers Who Demand Info From Employees*, TRIBSTAR, Jan. 28, 2011, http://tribstar.com/indianalegislature/x135630126/Challenges-arise-to-Indiana-s-parking-lot-gun-law.
[151] Maureen Hayden, *Challenges Arise to Indiana's 'Parking Lot' Gun Law: Bill Targets Employers Who Demand Info From Employees*, TRIBSTAR, Jan. 28, 2011, http://tribstar.com/indianalegislature/x135630126/Challenges-arise-to-Indiana-s-parking-lot-gun-law.

legally permitted."[152] Employers were taking advantage of the vague statute and creating separate parking areas for employers who carried guns to work in their cars and even began asking employees for more information about the guns that they were bringing.[153] The NRA lobbyists argued that citizens "have a constitutional right to self-protection that doesn't stop when they drive onto their employer's property"[154] and subsequently pushed for the more restrictive "Parking Lot 2.0" bill. On April 15, 2011, Governor Daniels signed into law the Senate Enrolled Act 411 (known as the "Parking Lot 2.0" bill).[155]

Indiana's new employee protection legislation "prevents workplace discrimination for those employees who exercise their Second Amendment rights before and after work."[156] With this new statute, businesses and employers can no longer ask their employees about private firearm ownership habits, what firearms are in their vehicle, or what the serial number is of their firearm.[157] There was no serious opposition for the new bill in the state Senate or House, and it went into effect on July 1, 2011.[158] By enacting this statute, the state legislature stood up for

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[152] Maureen Hayden, *Challenges Arise to Indiana's 'Parking Lot' Gun Law: Bill Targets Employers Who Demand Info From Employees*, TRIBSTAR, Jan. 28, 2011, http://tribstar.com/indianalegislature/x135630126/Challenges-arise-to-Indiana-s-parking-lot-gun-law.

[153] Maureen Hayden, *Challenges Arise to Indiana's 'Parking Lot' Gun Law: Bill Targets Employers Who Demand Info From Employees*, TRIBSTAR, Jan. 28, 2011, http://tribstar.com/indianalegislature/x135630126/Challenges-arise-to-Indiana-s-parking-lot-gun-law.

[154] Maureen Hayden, *Challenges Arise to Indiana's 'Parking Lot' Gun Law: Bill Targets Employers Who Demand Info From Employees*, TRIBSTAR, Jan. 28, 2011, http://tribstar.com/indianalegislature/x135630126/Challenges-arise-to-Indiana-s-parking-lot-gun-law.

[155] *Indiana: Governor Mitch Daniels Signs "Parking Lot 2.0" Bill Into Law!*, NATIONAL RIFLE ASSOCIATION OF AMERICA, INSTITUTE FOR LEGISLATIVE ACTION, Apr. 19, 2011, http://www.nraila.org/Legislation/Read.aspx?id=6645.

[156] *Indiana: Governor Mitch Daniels Signs "Parking Lot 2.0" Bill Into Law!*, NATIONAL RIFLE ASSOCIATION OF AMERICA, INSTITUTE FOR LEGISLATIVE ACTION, Apr. 19, 2011, http://www.nraila.org/Legislation/Read.aspx?id=6645.

[157] *Indiana: Governor Mitch Daniels Signs "Parking Lot 2.0" Bill Into Law!*, NATIONAL RIFLE ASSOCIATION OF AMERICA, INSTITUTE FOR LEGISLATIVE ACTION, Apr. 19, 2011, http://www.nraila.org/Legislation/Read.aspx?id=6645.

[158] *Indiana: Governor Mitch Daniels Signs "Parking Lot 2.0" Bill Into Law!*, NATIONAL RIFLE ASSOCIATION OF AMERICA, INSTITUTE FOR LEGISLATIVE ACTION, Apr. 19, 2011, http://www.nraila.org/Legislation/Read.aspx?id=6645.

Second Amendment rights of employees to protect themselves on their commute to and from work.

IV. Conclusion: The Supreme Court Needs to Take an Affirmative Stance

The Second Amendment to the United States Constitution states that "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."[159] There are two ways that citizens have interpreted these words: (1) that individuals have an unfettered right to own firearms; or (2) that states are merely able to maintain militias in order to protect against a tyrannical federal government.[160] Until 2008, the Supreme Court had not ruled on this controversy. However, in *Heller*, the Court held that the Second Amendment protects an individual's right to bear arms. This brought about not only increasing gun rights litigation, but also numerous state laws that gave employees the right to store otherwise legal handguns in their vehicles in their employer's private parking lot. Gun-rights lobbyists support an expansive reading of the Second Amendment that they say was signaled by *Heller* and have been convincing judges and state legislatures to read the decision expansively as well.[161] The *Heller* and *McDonald* decisions have played key roles in both the state "Guns-at-Work" statutes and the recent litigation that continues to challenge gun restrictions nationwide. If not for both of these decisions, advocates of the "Guns-at-Work" laws would not have much of a leg to stand on when arguing their rights under the Second Amendment.

Even with the legislative enactments expanding gun rights at the workplace, the Supreme Court needs to define Second Amendment rights and put an end to the costly litigation that has been trying to answer *Heller*'s unanswered questions for years. If the Supreme Court meant its

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[159] Perry, *supra* note _____ at 5.
[160] Perry, *supra* note _____ at 5.
[161] Witter, *supra* note ____ at 240.

two holdings to apply beyond possession of a firearm in one's home, it will need to state that outright rather than avoiding the subject.[162] It was clear from the moment the decision was handed down that "much litigation would be needed to define the contours of Justice Antonin Scalia's majority opinion in *Heller*."[163] The Supreme Court cannot simply give a limited definition to Second Amendment rights and then wait while the lower courts argue back and forth, draining judicial resources and providing inconsistent holdings. After taking a stance in both *Heller* and *McDonald*, the Supreme Court needs to take their holding a step further and define how far the right to bear arms extends outside of the home.

During the ongoing litigation stemming from *Heller* and *McDonald*, state legislatures in Indiana, Florida, Oklahoma, and thirteen other states have chosen not to rely on previous federal enactments such as the OSH Act and instead have created their own statutes that protect gun rights for self-defense outside of the home. They have chosen to take the power that the Supreme Court has so far refused to exercise and have expanded Second Amendment rights to include self-defense outside of the home by permitting employees to possess guns in their car during their commute to the workplace. Currently, sixteen states have "Guns-at-Work" statutes and there is no telling what other legislation will come into effect due to pressures from gun rights activists. With this type of disconnect between judicial rulings and the legislature's approach, it is important that the Supreme Court accept one of the many cases being petitioned before it and take the opportunity to define exactly how far the individual's right to bear arms extends. Due to the overwhelming need for clarification in the judicial branch, the Supreme Court needs to follow the state legislatures' example and take an affirmative position on this significant Second Amendment issue.

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[162] Barnes, *supra* note ____.
[163] Barnes, *supra* note ____.