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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

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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 A. Forsey*

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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 arms² and further elaborated that statutes 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 and concluded, 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 an individual’s right to bear arms.⁵ Proponents of gun rights have been challenging state and federal gun laws since 2008 and cases continue to line up for the U.S. Supreme Court.⁶ Although many gun rights activists believed that *Heller* and

¹ U.S. Const. amend. II.

² *District of Columbia v. Heller*, 554 U.S. 570 (2008).

³ *Id.* at 636.

⁴ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3025 (2010).

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.

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McDonald were tremendous victories for an individual's right to gun possession, later decisions have not clarified Second Amendment rights, keeping gun activists on an overall losing streak in the lower courts.⁷

While the U.S. Supreme Court refuses to confront 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. Beginning in 2004, gun rights advocates such as the National Rifle Association ("NRA") 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 2004, nineteen 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 NRA will continue to establish "Guns-at-Work" laws, as advocates continue to put pressure on state legislatures. Since *Heller* and *McDonald* sparked the debate over Second Amendment rights, cases have been piling up in the lower courts and legislatures have continued to step into the arena with their own interpretation of gun rights. With the disconnect between the state enactments and the lower court rulings, the Supreme Court must 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 which questions the Court answered and which standards they left open to interpretation. Part II

⁷ *Id.*

⁸ 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 1.

⁹ Joe Palazzolo, *Gun Showdown at Work*, WALL ST. J., Nov. 30, 2012, <http://professional.wsj.com/article/SB10001424127887324595904578123640080351414.html?mg=reno64-wsj>. In the article, the author states that "about 20 states have passed so-called parking-lot bills since 2004." By looking at the map that is included in the article, one can see that 19 states have passed the bills and the author was rounding up to 20.

¹⁰ Debra Witter, *Individual Gun Rights, Gun Laws, and Franchising: Why Franchisors Cannot Ignore the Controversy*, 29 FRANCHISE L.J. 239, 240 (2010).

examines the lower court challenges that have inevitably emerged since the Supreme Court handed down its decisions in *Heller* and *McDonald*. Part III evaluates the different approaches that 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. In the five years that have passed since the *Heller* decision in 2008, states have continued to proactively modify 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. The Supreme Court opened the door for such controversy over the right to bear arms, so it is the Court's duty to determine how far these rights should extend.

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;¹² however, they noted that their opinion should not cast doubt on a specified group of gun prohibitions.¹³ As 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.¹⁴ 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 Second Amendment 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."¹⁵ Initially, the Supreme Court in 2008 held that the Second Amendment gives an

¹¹ District of Columbia v. Heller, 554 U.S. 570, 626 (2008).

¹² *Id.* at 635.

¹³ *Id.* 626-27.

¹⁴ McDonald v. City of Chicago, 130 S. Ct. 3020, 3088 (2010).

¹⁵ Perry, *supra* note 8, at 5.

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individual the right to keep and bear arms.¹⁶ 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.¹⁷ To that end, the *Heller* Court ultimately established that statutes which prohibit an operable firearm in the home for self-defense violate an individual's right to bear arms.¹⁸ Although it appeared to be an enormous victory for gun rights lobbyists, the Court did not stop there.

In his majority opinion, Justice Antonin Scalia specified that the Second Amendment is “not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”¹⁹ In essence, the Court conferred a right to bear arms upon individuals and then limited that right. The majority 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 ill,”²⁰ or prohibit firearms in specific places such as “schools and government buildings,”²¹ or impose “conditions and qualifications on the commercial sale of arms.”²² Activists would have preferred that the Supreme Court did not include what they believe to be an unnecessary “laundry list of Second Amendment exceptions,” and, as an executive director with the Cato Institute explained, the opinion created “more confusion than light.”²³

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, intermediate scrutiny, or strict scrutiny standard.²⁴ Second, because the Court's decision in *Heller* was about the

¹⁶ *Heller*, 554 U.S. at 570.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 626.

²⁰ *Id.* at 626-27.

²¹ *Id.*

²² *Heller*, 554 U.S. at 626-27.

²³ 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.

²⁴ Perry, *supra* note 8, at 6.

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.²⁵ 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.²⁶

Consequently, the decision in *Heller* was seen as a "green light" for gun rights activists to challenge gun restrictions in states throughout the country.²⁷ Essentially, every person charged with a crime involving a gun "saw the Supreme Court's decision as a Get out of Jail Free Card."²⁸ These litigants assumed that the *Heller* decision gave them the opportunity to challenge 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 determination 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.²⁹ 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."³⁰ Because *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.³¹ In support of their position, the Seventh Circuit stated that *Heller* "explicitly refrained from opinion on whether the Second Amendment applied to the

²⁵ *Id.*

²⁶ *Id.*

²⁷ Barnes, *supra* note 6.

²⁸ Winkler, *supra* note 23.

²⁹ *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3021 (2010).

³⁰ *Id.*

³¹ *Id.*

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States.”³² 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.³³ The Court elaborated only slightly on the *Heller* decision, declaring that because *Heller* protected the right to have a gun for self-defense in one’s home, “a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and to the States.”³⁴ 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.”³⁵ The key questions left open in *Heller* concerned the level of scrutiny that should be applied to Second Amendment challenges, and “whether or to what extent the Second Amendment should apply outside of the home.”³⁶

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.”³⁷ 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. Only nineteen legislatures, however, have given employees more gun rights on their commute to work. 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

³² *Id.*

³³ *Id.* at 3050.

³⁴ *Id.*

³⁵ 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.

³⁶ *Post-Heller Litigation Summary*, *supra* note 5, at 9.

³⁷ *McDonald*, 130 S. Ct. at 3058.

holding only furthered lower court battles.

II. Lower Court Challenges

The significant questions that were left unresolved have forced the post-*Heller* courts into more than 400 challenges to gun laws by gun lobbyists.³⁸ Although these challenges generally do not yield positive results for the lobbyists,³⁹ 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.⁴⁰

A. Introduction to Federal and State Challenges

In the months following the decisions in *Heller* and *McDonald*, federal and state courts struggled with the unresolved questions about the latitude and application of the Second Amendment.⁴¹ Since the *Heller* ruling in 2008, criminals 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.”⁴² Yet, in a majority of instances, the lower courts have denied any request for relief in these cases.⁴³ Although these challenges in the lower courts have generally failed, gun rights advocates continue to launch new challenges and do not appear to be giving up their fight anytime soon.⁴⁴

³⁸ Vice, *supra* note 35, at 1.

³⁹ *Id.*

⁴⁰ Barnes, *supra* note 6.

⁴¹ *Post-Heller Litigation Summary*, *supra* note 5, at 2.

⁴² Vice, *supra* note 35, at 1.

⁴³ *Id.*

⁴⁴ *Id.*

2013] *STATE LEGISLATURES AND THE SECOND AMENDMENT* 419*B. Standards of Review: How Should the Lower Courts Evaluate Second Amendment Challenges?*

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;⁴⁵ therefore, 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.”⁴⁶ 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.⁴⁷ It is clear that without guidance from the Supreme Court, lower courts are left with inconsistent rulings regarding what level of scrutiny should be applied in Second Amendment cases.

One example of a 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.⁴⁸ The District Court rejected a “Second Amendment challenge to a New York law that requires applicants for concealed carry licenses to show ‘proper cause.’”⁴⁹ 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.⁵⁰ In applying the intermediate scrutiny standard, the court concluded that the state’s objective of “protecting the public and reducing crime is important and that the law is substantially related to that objective because, instead of banning all concealed carry, the law provides for case specific assessments of each applicant’s needs.”⁵¹ The court refused to apply a strict scrutiny standard instead because it

⁴⁵ *Post-Heller Litigation Summary*, *supra* note 5, at 8.

⁴⁶ *Id.* (citing *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011)).

⁴⁷ *Post-Heller Litigation Summary*, *supra* note 5, at 8.

⁴⁸ *Id.* at 3 (citing *Kachalsky v. Cacace*, No. 10-CV-5413, 2011 U.S. Dist. LEXIS 99837 (S.D.N.Y. Sept. 2, 2011)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Post-Heller Litigation Summary*, *supra* note 5, at 3-4 (citing *Kachalsky*, 2011 U.S. Dist. LEXIS at 99837 (S.D.N.Y. Sept. 2, 2011)).

interpreted strict scrutiny to apply only when laws burden what is considered a “core” Second Amendment right.⁵² 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.⁵³ Instead, a set standard would conserve judicial resources and create consistent holdings throughout every level of the courts.

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

Heller and *McDonald* only addressed an individual’s right to self-defense within the home, so the lower courts have had to decide not only the standard to apply, but also the larger question of whether the Second Amendment protects conduct outside of one’s home.⁵⁴ In evaluating this difficult question, a significant number of courts have generally concluded that the Second Amendment only protects conduct within the home.⁵⁵

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*.⁵⁶ The plaintiff had been convicted of “three counts of aggravated discharge of a firearm and two counts of aggravated unlawful use of a weapon.”⁵⁷ 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 case of confrontation.⁵⁸ 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.⁵⁹ Noting that the Supreme Court “deliberately and expressly maintained a controlled pace of essentially

⁵² *Id.* at 4.

⁵³ See e.g. *United States v. Yanez-Vasquez*, 2010 WL 411112, at *5 (D. Kan. Jan. 28, 2010) (“The court declines to apply strict scrutiny, since ... *Heller* did not expressly find firearm possession to be a fundamental right.” (internal citations omitted)). See also Eugene Volokh, *McDonald v. City of Chicago and the Standard of Review for Gun Control Laws*, SCOTUSBLOG (June 29, 2010, 3:48 PM), <http://www.scotusblog.com/2010/06/mcdonald-v-city-of-chicago-and-the-standard-of-review-for-gun-control-laws/>.

⁵⁴ *Post-Heller Litigation Summary*, *supra* note 5, at 9.

⁵⁵ *Id.*

⁵⁶ *People v. Dawson*, 934 N.E.2d 598 (Ill. App. Ct. 2010).

⁵⁷ *Id.* at 599 (internal citations omitted).

⁵⁸ *Id.* at 604.

⁵⁹ *Id.* at 605.

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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.⁶⁰ 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”⁶¹ and tried to use their own discretion to litigate the issue. Without assistance from the Supreme Court, the Appellate Court judges were left to “construe statutes to be constitutional when possible”⁶² 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.⁶³ 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*.⁶⁴ 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.”⁶⁵ 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 and how the right can be burdened by governmental regulation.”⁶⁶ Absent a standard from the Supreme Court, the Fourth Circuit applied intermediate scrutiny 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”⁶⁷ and that the statute’s “narrow prohibition is reasonably adapted to that substantial governmental interest.”⁶⁸

⁶⁰ *Id.* at 605, 607.

⁶¹ *Id.* at 605-06.

⁶² *Dawson*, 934 N.E.2d at 605.

⁶³ *Post-Heller Litigation Summary*, *supra* note 5, at 9.

⁶⁴ *Vice*, *supra* note 35, at 3 (citing *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011)).

⁶⁵ *Masciandaro*, 638 F.3d at 466-67.

⁶⁶ *Id.*

⁶⁷ *Id.* at 473.

⁶⁸ *Id.*

Judge Paul V. Niemeyer wrote separately stating that although he did not believe that a car can constitute a “home,” he felt that a plausible reading of *Heller* could be that the Second Amendment nevertheless provides a right to possess a loaded handgun for self-defense outside the home.⁶⁹ His interpretation of *Heller* “found that the 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.”⁷⁰ Even though he did not agree with Masciandaro’s contention that a car in which an individual frequently sleeps can constitute a “home” under *Heller*, Judge 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.”⁷¹ Judge 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 Judge Niemeyer at the very least believed that the right could extend to “Masciandaro’s claim to self-defense—asserted by him as a law-abiding citizen sleeping in his automobile in a public parking area”⁷² However, without any guidance from the Supreme Court, the Fourth Circuit became 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 “prohibiting the unlicensed carrying of handguns outside of the home, authorizing the seizure of firearms in cases of domestic violence, prohibiting the possession of assault weapons and 50-caliber rifles, and requiring that an individual possess a license to own a

⁶⁹ *Id.* at 467.

⁷⁰ *Id.* (emphasis omitted) (alteration in original).

⁷¹ *Masciandaro*, 638 F.3d at 468 (alteration in original).

⁷² *Id.*

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handgun.”⁷³ 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 presented with a case similar to *United States v. Masciandaro*.⁷⁴ In *State v. Robinson*, the defendant was convicted of possessing a handgun without a permit and the court rejected his Second Amendment challenge to this conviction.⁷⁵ The defendant was a truck driver who lived in his truck for many days due to the distance of his travels; therefore, he argued that his truck was a home and should be protected under the holdings in *Heller* and *McDonald*.⁷⁶ The judges were able to resolve the case without determining whether a truck can constitute a legal home.⁷⁷ They noted that *Heller* and *McDonald* dealt only with guns inside the home and that “accept[ing] the defendant’s view of his truck as his second home . . . requires acceptance of an expansive definition of the word ‘home . . .’”⁷⁸ 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 1, 2012, states faced fifty significant civil lawsuits challenging different state gun laws under the Second Amendment.⁷⁹ 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.”⁸⁰ 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

⁷³ *Post-Heller Litigation Summary*, *supra* note 5, at 7.

⁷⁴ *Id.* at 2.

⁷⁵ *State v. Robinson*, No. A-0280-09T3, 2011 N.J. Super. Unpub. LEXIS 2274 (App. Div. Aug. 23, 2011).

⁷⁶ *Post-Heller Litigation Summary*, *supra* note 5, at 2.

⁷⁷ *Id.* “Even if we were to accept defendant’s view of his truck as his second home, which requires acceptance of an expansive definition of the word home, defendant acknowledges that he had the handgun and clip in his waistband on his person outside of the truck on warehouse property.” *Robinson*, 2011 N.J. Super. Unpub. LEXIS 2274 at *10.

⁷⁸ *Robinson*, 2011 N.J. Super. Unpub. LEXIS 2274 at *10.

⁷⁹ *Post-Heller Litigation Summary*, LAW CENTER TO PREVENT GUN VIOLENCE, Sept. 1, 2012, at 5.

⁸⁰ *Id.* at 5-6.

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 without prior authorization from the Chief of Police.”⁸¹ 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.”⁸² Even though the officer’s complaint did not explicitly include a Second Amendment claim, the court believed “it [was] appropriate, in light of *Heller*’s recent ruling, to construe the Complaint as encompassing a Second Amendment claim instead of requiring Plaintiff to file an amended Complaint.”⁸³ The court determined that the plaintiff had a claim to injunctive relief and denied the defendant’s motion to dismiss as to the Second Amendment claim.⁸⁴ After settlement negotiations, the court in 2010 granted the plaintiff’s Petition for Voluntary Dismissal.⁸⁵ The *Simmons* court, along with several others, was “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.”⁸⁶ 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.”⁸⁷ 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

⁸¹ *Simmons v. Gillespie*, No. 08-CV-1068, 2008 U.S. Dist. LEXIS 81424 (C.D. Ill. Aug. 1, 2008).

⁸² *Id.* at *4.

⁸³ *Id.* at *5 (emphasis omitted).

⁸⁴ *Id.* at *14.

⁸⁵ *Simmons v. Gillespie*, No. 08-CV-1068, 2010 U.S. Dist. LEXIS 75034 (C.D. Ill., July 23, 2010).

⁸⁶ *Post-Heller Litigation Summary*, *supra* note 5, at 5.

⁸⁷ *Id.*

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constitutional right to bear arms.⁸⁸ The court found that the plaintiff had stated a claim and denied the defendant's motion to dismiss.⁸⁹ 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.

Finally, the Seventh Circuit in *Ezell v. City of Chicago* examined a Chicago ordinance to determine whether it violated the plaintiff's Second Amendment rights.⁹⁰ Immediately following the decision in *McDonald*, Chicago's City Council Committee on Police and Fire held a hearing to explore what possible legislative responses were needed following *McDonald*.⁹¹ 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."⁹² This ordinance mandates a one-hour range training requirement for anyone who wants to own a gun, yet at the same time, it prohibits any firing ranges from being within city limits.⁹³ The ordinance further prohibits any handgun possession "outside the home"⁹⁴ and specifies that a gun owner may have "no more than one firearm in his home assembled and operable."⁹⁵

The Seventh Circuit found *Heller* to be instructive⁹⁶ and held that although the Supreme Court had not specified the appropriate level of scrutiny to apply to Second Amendment litigation, its interpretation was that *Heller* required "any heightened standard of scrutiny."⁹⁷ Because the ordinance "prohibits the 'law-abiding, responsible citizens' of Chicago from engaging in target practice in the controlled environment

⁸⁸ *Mishaga v. Monken*, No. 10-3187, 2010 U.S. Dist. LEXIS 123491 (C.D. Ill. Nov. 22, 2010).

⁸⁹ *Id.*

⁹⁰ *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011).

⁹¹ *Id.* at 690.

⁹² *Id.*

⁹³ *Id.* at 691.

⁹⁴ *Id.* at 690.

⁹⁵ *Id.* at 690-691.

⁹⁶ *Ezell*, 651 F.3d at 700.

⁹⁷ *Id.* at 701.

of a firing range,”⁹⁸ 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.”⁹⁹ The city was required to “establish a close fit between the range ban and the actual public interest it serves”¹⁰⁰ and also had to prove that the “public interests are strong enough to justify so substantial an encumbrance on individual Second Amendment rights.”¹⁰¹ When the city failed to meet this standard, the Seventh Circuit remanded the case for further proceedings consistent with its 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 courts with more litigation in an effort to keep state and local governments across the country from enacting more statutes that restrict gun rights.¹⁰² 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.¹⁰³

One such case that recently came up before the Supreme Court is the appeal of the Fourth Circuit’s decision in *United States v. Masciandaro*.¹⁰⁴ In his petition to the Supreme Court, Sean Masciandaro argued that “[i]f 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.”¹⁰⁵ Masciandaro originally 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.”¹⁰⁶ Alan Gura, the litigator who argued the *Heller* case, wrote an amicus brief supporting Masciandaro’s appeal and stated that Masciandaro’s

⁹⁸ *Id.* at 708.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 708-709.

¹⁰¹ *Id.* at 709.

¹⁰² *Post-Heller Litigation Summary*, *supra* note 5, at 9.

¹⁰³ Barnes, *supra* note 6, at 2-3.

¹⁰⁴ *United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3317 (U.S. Nov. 28, 2011) (No. 10-11212).

¹⁰⁵ Barnes, *supra* note 6, at 2 (internal quotations omitted).

¹⁰⁶ *Id.*

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case “provides the perfect chance to ‘clarify’ for recalcitrant lower courts that the Second Amendment ‘applies beyond the threshold of one’s home.’”¹⁰⁷ Although the Supreme Court did not take this opportunity to clarify its *Heller* decision, Mr. Gura believes that there will surely be more cases like it forthcoming.¹⁰⁸

III. Legislative 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 legal guns in locked motor vehicles parked on business premises.”¹⁰⁹ Since these laws are not preempted by the federal OSH Act, the nineteen 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 “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 Congress enacted the OSH Act in 1970, its restrictions brought the federal government into an area that generally was controlled by the states.¹¹⁰ Congress enacted the law because it wanted to ensure that employees experienced safe and healthy working conditions.¹¹¹ Consequently, the Act imposed

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 2-3.

¹⁰⁹ Witter, *supra* note 10, at 240.

¹¹⁰ 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)).

¹¹¹ *Id.* at 486.

on employers an obligation to maintain workplace safety.¹¹² The two main obligations that the Act imposed on employers were compliance with health and safety standards and compliance with the Act's "general duty clause."¹¹³ 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."¹¹⁴ The "general duty clause" creates a mandatory requirement for employers and functions as a "catch all" for any workplace hazards that are not covered by a specific Occupational Safety and Health Administration ("OSHA") regulation.¹¹⁵

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 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.¹¹⁶ The District Court ruled that the employer's general duty applied because if guns are not banned from the premises, including parking lots, disgruntled employees can easily retrieve firearms.¹¹⁷ 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 from company parking lots."¹¹⁸ The court held that the OSHA had "declined a request to promulgate a standard banning firearms from the workplace"¹¹⁹ and although the OSHA is aware of the controversy surrounding firearms in the workplace, they have "consciously decided not to adopt a standard."¹²⁰

Though it would appear that the state "Guns-at-Work" laws

¹¹² *Id.* at 487.

¹¹³ *Id.*

¹¹⁴ *Id.* (quoting 29 U.S.C. § 654(a)(1)).

¹¹⁵ Perry, *supra* note 8, at 3.

¹¹⁶ *Id.* at 4 (quoting *ConocoPhillips Co. v. Henry*, 520 F.Supp. 2d 1282, 1328 (N.D. Okla. 2007)).

¹¹⁷ *Id.*

¹¹⁸ *Ramsey Winch Inc. v. Henry*, 555 F.3d 1199, 1206 (10th Cir. 2009) (emphasis omitted).

¹¹⁹ *Id.* (emphasis omitted).

¹²⁰ *Id.* (emphasis omitted).

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conflict with the 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.¹²¹ 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."¹²² The letter 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.¹²³ On the other hand, the random occurrences 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.¹²⁴ 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 places where workplace violence is reasonably foreseeable.¹²⁵ 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 vehicles, but also that the state "Guns-at-Work" laws are not preempted by the "general duty clause" of the OSH Act.

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

1. "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.¹²⁶ 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

¹²¹ Royal, *supra* note 110, at 520-21.

¹²² *Id.* at 521.

¹²³ *Id.* (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).

¹²⁴ *Id.*

¹²⁵ Royal, *supra* note 110, at 522.

¹²⁶ Stephanie Armour, *A 'Bring Your Gun to Work' Movement Builds*, BUSINESSWEEK, Mar. 31, 2011, http://www.businessweek.com/magazine/content/11_15/b4223038869200.htm.

Amendment.”¹²⁷ 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.¹²⁸ In spite of this uncertainty, some state legislatures took a stand for gun rights and passed “Guns-at-Work” laws.¹²⁹ These laws have been divided into two categories: the laws with more severe restrictions and the laws with weaker exceptions.¹³⁰ The states with the most severe restrictions include Florida, Indiana, Kentucky, Louisiana, Minnesota, and Oklahoma.¹³¹ 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 store a firearm in their locked vehicle.¹³² At the other end of the spectrum, ten states have exceptions to the “Guns-at-Work” laws and give employers more leeway in their restrictions on employees.¹³³ These states include Alaska, Arizona, Georgia, Idaho, Kansas, Michigan, Mississippi, Nebraska, Ohio, and Utah.¹³⁴

2. Oklahoma’s “Guns-at-Work” Law

Oklahoma’s strict “Guns-at-Work” restrictions have 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.¹³⁵ A principle author of the gun-rights law, Senator Jerry Ellis, stated that angry workers who shoot people in the workplace

¹²⁷ *Id.*

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 *Id.*

¹³⁰ *Id.* When this publication was written, Maine had not yet joined the other sixteen legislatures in passing the “Guns-at-work” law.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ HRM Partners, *supra* note 128.

¹³⁵ Robert Boczkiewicz, *Gun Law Gets its Day in Court*, TULSA WORLD, Nov. 20, 2008, http://www.tulsaworld.com/news/article.aspx?articleID20081120_11_A1_DENVER94063.

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“are going to do so no matter what laws are enacted.”¹³⁶

Oklahoma’s “Guns-at-Work” law has sparked 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 on their employers’ parking lots.”¹³⁷ 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 workplace violence in at-risk industries.”¹³⁸ 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.¹³⁹ 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.”¹⁴⁰ 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.

3. Florida’s Legislation

Akin to Oklahoma, Florida adopted “Guns-at-Work” legislation that severely limits the restrictions employers can place on employees regarding guns in locked vehicles in company parking lots. Prior to adopting this legislation,¹⁴¹ the bill’s sponsor, Rep. Dennis Baxley, argued that the bill was simply “an extension of the Second Amendment rights” and was “meant to protect employees during their commute to

¹³⁶ *Id.*

¹³⁷ 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>.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ H.B. 129, 108th Reg. Sess. (Fla. 2006).

and from their place of business.”¹⁴² Baxley, the owner of a company with close to seventy employees, further explained that although he understood the concerns business owners had, he didn’t believe that the employer’s property rights could trump the individual’s Second Amendment rights to self-protection.¹⁴³ In 2008, the Florida “Guns-at-Work” statute was enacted.¹⁴⁴ 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.”¹⁴⁵ 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.¹⁴⁶

In *Fla. Retail Fed’n, Inc. v. Attorney Gen.*,¹⁴⁷ 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.¹⁴⁸ Finding that the statute was not preempted, the district court concluded that the OSH Act applies to permit the states to regulate¹⁴⁹ and generally acknowledged that state laws can be used to decide any occupational safety or health issue when there is no controlling federal standard.¹⁵⁰ This is extremely important because the court essentially ruled that the OSH Act left the task of governing the possession of guns in the workplace to the states. Because 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.¹⁵¹

¹⁴² 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>.

¹⁴³ *Id.*

¹⁴⁴ Fla. Stat. §790.251(4)(a) (2010).

¹⁴⁵ Royal, *supra* note 110, at 496 (quoting Fla. Stat. §790.251(4)(a) (2010)).

¹⁴⁶ *Id.* (quoting Fla. Stat. §790.251(4)(a) (2010)).

¹⁴⁷ 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

¹⁴⁸ Royal, *supra* note 110, at 505.

¹⁴⁹ *Id.* at 506 (quoting *Fla. Retail Fed.*, 576 F. Supp. 2d at 1298-99).

¹⁵⁰ *Id.* 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)).

¹⁵¹ *Id.*

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4. Indiana: Parking Lot 2.0

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.¹⁵² 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."¹⁵³ He did, however, add that the General Assembly "might consider ironing out ambiguities to prevent unnecessary litigation."¹⁵⁴ 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 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."¹⁵⁵ The bill was authored by State Senator Johnny Nugent and labeled "the Parking Lot 2.0 bill" by the NRA.¹⁵⁶ Senator Nugent explained his support of the bill by stating that although he understands why employers feel the way they do, there are "things that trump property rights, and one of them is the defense of [my] life."¹⁵⁷ The 2010 bill failed to specifically address 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 legally permitted."¹⁵⁸ 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.¹⁵⁹ The NRA lobbyists argued that citizens "have a constitutional right to self-protection that doesn't stop when

¹⁵² Norm Heikens, *What's next for guns at work*, INDIANAPOLIS BUS. J., Mar. 19, 2010, <http://www.ibj.com/newstalk/2010/03/19/newstalk-template/PARAMS/post/18801>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ 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/indianalegislatore/x135630126/Challenges-arise-to-Indiana-s-parking-lot-gun-law>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

they drive onto their employer's property"¹⁶⁰ 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).¹⁶¹

Indiana's new employee protection legislation "prevents workplace discrimination for those employees who exercise their Second Amendment rights before and after work."¹⁶² With this new statute, businesses and employers can no longer ask their employees about "private firearm ownership habits or what firearms or ammunition they own or transport in their vehicle" and cannot force "vehicle searches and the registration of employee firearm serial numbers."¹⁶³ There was no serious opposition for the new bill in the state Senate or House, and it went into effect on July 1, 2011.¹⁶⁴ By enacting this statute, the state legislature stood up for 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 "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."¹⁶⁵ There are two different 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.¹⁶⁶ 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 giving employees the right to store otherwise legal

¹⁶⁰ *Id.*

¹⁶¹ *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.nraia.org/legislation/state-legislation/2011/4/indiana-governor-mitch-daniels-signs-%E2%80%9C.aspx?s=%22Parking+Lot%2FEmployee+Protection%22&st=&ps=>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ U.S. Const. amend. II.

¹⁶⁶ Perry, *supra* note 8, at 5.

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handguns in their vehicles when parked in their employer's private lots. Gun-rights lobbyists believe that *Heller* supports an expansive reading of the Second Amendment, and have been attempting to convince judges and state legislatures to read the decision expansively as well.¹⁶⁷ 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 legislative enactments expanding gun rights at the workplace, the Supreme Court needs to better define Second Amendment rights in order to put an end to the costly litigation created by *Heller*'s unanswered questions. If the Supreme Court meant its two holdings to apply beyond possession of a firearm in one's home, it will need to state that outright rather than avoid the subject.¹⁶⁸ 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*."¹⁶⁹ 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 fourteen 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, nineteen 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 legislatures' approaches, it is important that the Supreme

¹⁶⁷ Witter, *supra* note 10, at 240.

¹⁶⁸ Barnes, *supra* note 6.

¹⁶⁹ *Id.*

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.