

The Second Amendment Battleground: Victories in the Courts and Why They Matter



LAW CENTER TO
PREVENT GUN VIOLENCE

BECAUSE SMART GUN LAWS SAVE LIVES

Heller and the Explosion of Second Amendment Litigation

Four years ago, the U.S. Supreme Court singlehandedly inserted the judicial system into the ongoing national debate over gun laws in America. In a 5-4 decision in 2008's *District of Columbia v. Heller*,¹ the Court invalidated the District of Columbia's handgun ban and firearm storage law, stating for the first time that the Second Amendment protects a responsible, law-abiding citizen's

In fact, new litigation started almost immediately. The day that *Heller* was announced, plaintiffs filed a lawsuit challenging the City of Chicago's handgun ban, with a second suit filed the next day. Other suits emerged soon after, escalating once the Supreme Court confirmed that the Second Amendment also applied to state and local laws in 2010's *McDonald v. City of Chicago*

Seventh Circuit Judge Richard Posner criticized Justice Scalia's majority opinion in *Heller* as giving "short shrift to the values of federalism, and to the related values of cultural diversity, local preference, and social experimentation."⁵

right to possess an operable handgun in the home for self-defense.

Heller was unquestionably a radical decision, overturning the Court's previous ruling that the Second Amendment was tied to state militia service.² For almost seventy years, lower federal and state courts nationwide had relied on that pronouncement to reject hundreds of Second Amendment challenges.

The *Heller* decision immediately drew strong criticism from a wide array of legal scholars, historians, advocates, and legislators, including a particularly scathing rebuke from respected conservative judge Richard Posner, who noted that, "The only certain effect of the *Heller* decision...will be to increase litigation over gun ownership."³

decision.⁴ After that case, the number of lawsuits challenging gun laws nationwide skyrocketed.

Thankfully, despite the explosion of litigation, courts across the country have rejected the overwhelming majority of Second Amendment challenges initiated since *Heller*. As discussed inside, gun rights advocates and criminal defendants across the country have sought to expand the Second Amendment to invalidate almost every gun law on the books today. In siding with us and the majority of Americans who support sensible gun laws, courts are finding that smart laws aren't just constitutional – they're also critical to keeping our communities safe from gun violence.

The Outbreak of Second Amendment Lawsuits since *Heller*

Since the U.S. Supreme Court's 2008 decision in *District of Columbia v. Heller*, courts across the country have been confronted with an onslaught of costly, time-consuming Second Amendment litigation. In addition to the hundreds of legal challenges raised by indicted and convicted criminals, the gun lobby has also initiated dozens of lawsuits against federal, state, and local governments.

Significant Second Amendment Challenges Have Been Filed Nationwide⁶



Key

- Challenges to Laws of States & the District of Columbia
- Challenges to Local Laws & Policies
- Challenges to Federal Laws

The Volume of Second Amendment Litigation Clogging America's Courts⁷

Since *Heller*, federal and state courts have issued over 600 decisions on Second Amendment challenges nationwide. This onslaught of litigation shows no signs of ending soon.



Extreme Second Amendment Lawsuits are Failing in the Courts

The Supreme Court may have opened the floodgates to Second Amendment litigation with the *Heller* decision, but the majority's opinion also made clear that the Amendment protects only a limited right. The Court directly stated that the Second Amendment does not protect a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,"⁸ and listed several examples of presumptively constitutional regulations.⁹

Given the Court's clear instruction that the right to possess a handgun in the home for self-defense is consistent with a variety of gun laws, it's not surprising that lower courts have almost uniformly rejected Second Amendment arguments in hundreds of decisions in federal and state courts nationwide over the past four years.

What have been shocking are the extreme claims that gun lobby lawyers and criminal defendants are raising in their Second Amendment challenges.

Courts have been confronted with challenges to a variety of critical public safety measures, including laws preventing dangerous persons from possessing guns, laws prohibiting military-style firearms, and laws limiting guns in public places.

Despite the gun lobby's rhetoric about "individual rights," the breadth and scale of Second Amendment lawsuits filed over the past four years reveal the lobby's true intent: to overturn all reasonable laws intended to prevent gun violence. So far, thankfully, most of the courts confronted with these important challenges since *Heller* have affirmed the continued vitality of smart gun laws. Still, the courts remain an active battleground over the meaning of the Second Amendment and the future of sensible gun laws in America.

In *Heller*, the Supreme Court identified several examples of presumptively constitutional regulations, including laws prohibiting firearm possession by felons and the mentally ill, forbidding guns in sensitive places such as schools and government buildings, and regulating the commercial sale of firearms.¹⁰ The Court also noted that the Second Amendment is consistent with laws banning "dangerous and unusual weapons" and laws "regulating the storage of firearms to prevent accidents."¹¹

Significant Issues Before the Courts

Should convicted domestic abusers be able to possess firearms?

Federal law prohibits anyone convicted of a misdemeanor crime of domestic violence from possessing a firearm. In *United States v. Skoien*, an individual who had been twice convicted of domestic violence was found in possession of three firearms.¹² He challenged the law prohibiting domestic abusers from possessing guns as a violation of the Second Amendment.

“No matter how you slice [the] numbers,” the Seventh Circuit observed, “people convicted of domestic violence remain dangerous to their spouses and partners.”¹³ The court upheld the law at issue, noting the volume of data showing the role of guns in domestic violence and the “substantial benefits in keeping the most deadly weapons out of the hands of domestic abusers.”¹⁴

40%

Laws preventing convicted abusers from accessing guns are critical because many domestic abusers continue to harm their victims. One study found that, within 5 years after receiving treatment for domestic violence, **40% of studied abusers** were convicted or suspected of domestic assault or made subject to an order of protection.¹⁵ Researchers suspect that repeat offense rates are likely much higher, because many victims do not report instances of abuse.¹⁶

12^x

Domestic violence assaults involving a firearm are **twelve times** more likely to result in death than assaults involving other weapons or bodily force.¹⁷

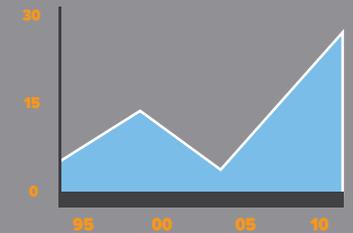
Should military-style assault weapons and large capacity ammunition magazines be available on the consumer market?

After the *Heller* decision, the District of Columbia adopted a set of strong new gun laws, including a measure prohibiting the possession of dangerous assault weapons and large capacity ammunition magazines – military-style devices commonly employed in mass shootings. In *Heller II*, plaintiffs argued that these laws were unconstitutional restrictions on their Second Amendment rights.¹⁸

The D.C. Circuit Court of Appeals rejected the plaintiffs’ argument, citing the District’s careful review of the evidence showing the dangers posed by assault weapons and large capacity magazines. The court found that the District had sufficiently established a “substantial relationship between the prohibition of both...and the objectives of protecting police officers and controlling crime.”¹⁹



The federal assault weapons ban, which was enacted in 1994 and expired in 2004, resulted in a marked decrease in the use of assault weapons and large capacity ammunition magazines in crime. For example, one study found that, in Baltimore, Miami, St. Louis, and Boston, the share of recovered crime guns that were assault weapons **declined by at least 32%** after the federal ban was adopted.²⁰



During the federal assault weapons ban, the Virginia State Police saw a clear decline in the percentage of crime guns with large capacity magazines, reaching a low of 10% in 2004.²¹ After Congress failed to renew the ban, that percentage steadily climbed; by 2010, nearly 22% of crime guns in Virginia had large capacity magazines.²²

Should an individual be able to carry a hidden, loaded handgun in public without showing any compelling reason to carry a weapon?

Given the inherent dangers posed by guns in public, ten states, including New Jersey, grant law enforcement discretion in issuing permits to carry concealed handguns in public places.²³ In *Piszczak-toski v. Filko*, five plaintiffs who had been denied permits argued that the New Jersey law requiring an applicant to show a justifiable need to get a permit violated the Second Amendment.²⁴

Like several other courts across the country, the federal district court upheld the New Jersey law, citing the state legislature’s “reasonable inference that given the obviously dangerous and deadly nature of handguns, requiring a showing of particularized need for a permit to carry one publicly serves the State’s interests in public safety.”²⁵

440 KILLED

According to an analysis of news reports by the Violence Policy Center, individuals with concealed carry permits have killed at least **440 people** nationwide – including 12 members of law enforcement – since May 2007.²⁶

39 STATES

Thirty-five states require law enforcement to issue concealed carry permits to anyone who meets minimal requirements, and **another four** allow a person to carry a concealed weapon without even getting a permit.²⁷ These weak laws enable convicted criminals and other dangerous people to legally carry hidden, loaded handguns in public places.

Why Success in the Courts Matters

If the gun lobby expected to get rid of smart gun laws through an aggressive Second Amendment litigation campaign, it seriously miscalculated. Through their decisions, courts have repeatedly proven that laws to keep our communities safe from gun violence are consistent with the Second Amendment because they don't prevent law-abiding people from possessing guns in the home for self-defense.

All too often, the Second Amendment is cited as a reason why our gun laws remain far too weak. If the Second Amendment is an obstacle, it's a rhetorical impediment, not a legal one. As four years of post-*Heller* decisions show, legislators and activists should feel confident that a variety of smart laws, supported by a significant majority of the American public, are both constitutional and desperately needed.

Strong gun laws aren't just constitutional. They're also critical to reducing America's gun violence epidemic.



Laws requiring background checks with every firearm purchase help ensure that guns don't end up in the wrong hands.



Laws limiting the carrying of concealed weapons reflect our shared desire to have public places free from guns and gun violence.



Laws restricting dangerous military-style firepower seek to prevent tragic mass shootings and protect members of law enforcement.



Laws requiring the safe storage of firearms help prevent children from accessing guns in the home, reducing the risks of firearm accidents, school shootings, and youth suicides.

Take Action Today!

Together, we can prevent the loss of countless lives to gun violence. Stand up for our right to live in safe communities.

There are many ways to be involved:

Become a Member

Your support is critical to our efforts. Your membership helps our legal team promote smart laws that keep guns out of the wrong hands. Plus, you will receive a range of benefits to keep you on the forefront of the gun violence prevention movement.

Spread the Word

You know that smart gun laws can make you and your family safer, but does your neighbor? Help us by spreading the word to your friends and family. Join us on Facebook and share our news, host a house party to help others understand the importance of our work, or ask your employer to sponsor one of our events.

Volunteer

The Law Center to Prevent Gun Violence needs a strong group of volunteers to assist us with our gun violence prevention projects. Volunteer assignments may involve pro bono legal research and analysis, drafting amicus curiae briefs, authoring op-eds and letters, assisting with educational publications and mailings, and speaking at public meetings and hearings. Your skills are vital to changing the state of gun laws in this country. Volunteer with us today!

About Us

Law Center to Prevent Gun Violence is a non-profit organization focused on ending the epidemic of gun violence in America. Formed in the wake of the July 1, 1993 assault weapon massacre at a law firm in San Francisco, the Law Center to Prevent Gun Violence is now the premier clearinghouse for information about federal and state firearms laws and Second Amendment litigation nationwide.

Our trusted and in-depth legal expertise, analysis, and comprehensive data tracking are relied upon by legislators seeking to enact smart gun laws, advocates working to educate others on how to make communities safer, and journalists seeking to uncover the truth about America's gun laws.

For more information or an annotated copy of this publication, please visit smartgunlaws.org.

We can be free from the epidemic of gun violence in America.

June 14, 2012

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Against Violence

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Endnotes

¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

² *United States v. Miller*, 307 U.S. 174 (1939).

³ Richard A. Posner, *In Defense of Looseness*, *The New Republic*, Aug. 27, 2008, at <http://www.tnr.com/print/article/books/defense-looseness>.

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

⁵ Posner, *supra* note 3.

⁶ For more information about significant ongoing lawsuits nationwide, please read our *Post-Heller Litigation Summary* at <http://smartgunlaws.org/post-heller-litigation-summary/>.

⁷ For more information about significant Second Amendment decisions since *Heller*, please read our *Post-Heller Litigation Summary* at <http://smartgunlaws.org/post-heller-litigation-summary/>.

⁸ *Heller*, 554 U.S. at 626.

⁹ *Id.* at 626-27.

¹⁰ *Id.*

¹¹ *Id.* at 627, 632.

¹² *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010).

¹³ *Id.* at 644.

¹⁴ *Id.*

¹⁵ Melanie Shepard, *Predicting Batterer Recidivism Five Years After Community Intervention*, 7 *J. Family Violence* 3:167 (1992).

¹⁶ Carla Smith Stover, *Domestic Violence Research*, 20 *J. Interpersonal Violence* 448, 451 (2005).

¹⁷ Linda E. Saltzman, et al., *Weapon Involvement and Injury Outcomes in Family and Intimate Assaults*, 267 *JAMA*, 3043-3047 (1992).

¹⁸ *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011).

¹⁹ *Id.* at 1263.

²⁰ Christopher S. Koper, *An Updated Assessment of the Federal Assault Weapons Ban: Impacts on Gun Markets and Gun Violence, 1994-2003*, Report to the National Institute of Justice, U.S. Department of Justice (June 2004) 49, at http://www.sas.upenn.edu/jerrylee/research/aw_final2004.pdf.

²¹ *About the Project: The Hidden Life of Guns*, *Wash. Post*, Jan. 22, 2011, at <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204243.html>; David S. Fallis & James V. Grimaldi, *Virginia data show drop in criminal firepower during assault gun ban*, *Wash. Post*, Jan. 23, 2011, at <http://www.washingtonpost.com/wp-dyn/content/story/2010/12/14/ST2010121406431.html>.

²² *Id.*

²³ For more information on these issues, see our publication *Guns in Public Places*, at <http://smartgunlaws.org/guns-in-public-places-the-increasing-threat-of-hidden-guns-in-america/>.

²⁴ *Piszczatoski v. Filko*, 2012 U.S. Dist. LEXIS 4293 (D.N.J. Jan. 12, 2012).

²⁵ *Id.* at *62. The court also observed that the Second Amendment “is unique among all other constitutional rights...because it permits the user of a firearm to cause serious personal injury – including the ultimate injury, death – to other individuals, rightly or wrongly.” *Id.* at *3.

²⁶ Violence Policy Center, *Concealed Carry Killers*, at <http://www.vpc.org/ccwkillers.htm>.

²⁷ For more information, see *Guns in Public Places*, at <http://smartgunlaws.org/guns-in-public-places-the-increasing-threat-of-hidden-guns-in-america/>.