

2009 California Report

Recent Developments in
Federal, State and Local Gun Laws



A Publication of

Legal Community Against Violence

expertise, information & advocacy to end gun violence

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June 12, 2009

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I. Introduction

A. About this Report

Each year, Legal Community Against Violence (LCAV) publishes the *California Report* to provide state and local legislators, government attorneys, police chiefs, sheriffs, public health officials and gun violence prevention advocates with the latest developments in federal, state and local gun laws and policies. The *Report* also provides updated statistics regarding gun deaths, injuries and crimes, together with a discussion of important firearm-related litigation.

As discussed in this year's *Report*, many significant developments have occurred over the past year. The U.S. Supreme Court issued its historic decision in *District of Columbia v. Heller*, finding for the first time that the Second Amendment confers an individual right to possess firearms unrelated to service in a well-regulated state militia. As expected, that decision has spawned a flood of lawsuits challenging our nation's gun laws.

In addition, notwithstanding the election of President Barack Obama – whom many had hoped would help bring much-needed reform to federal gun policy – Congress has continued to adopt laws which thwart efforts to reduce gun violence, including a dangerous law to allow guns in national parks. Fortunately, the State of California and its political subdivisions continue to lead the nation in the adoption of common sense laws to reduce gun-related deaths and injuries.

B. About LCAV

LCAV is a national law center formed in the wake of the July 1, 1993 assault weapon massacre at a law firm in downtown San Francisco. We provide free legal assistance to elected officials, government attorneys and activists working to promote laws and policies to reduce gun violence. LCAV is proud to provide the legal expertise, information and advocacy that help make it possible for community leaders to advance effective, legally defensible reforms. Specifically, we:

- Conduct legal and policy research and analysis;
- Assist in the drafting of firearms laws;
- Testify at public hearings regarding firearms laws;
- Arrange for *pro bono* litigation assistance, for example, when a local government is sued following the adoption of a violence prevention ordinance;
- File *amicus curiae* (“friend of the court”) briefs in support of governmental entities and individuals in firearm-related litigation;
- Develop model laws.

LCAV's web site, www.lcav.org, provides detailed summaries of federal and state gun laws and summaries of local firearms laws in selected states. The site also provides an in-depth discussion of the Second Amendment and more than 30 firearm-related policies. In addition, the site includes model laws, case studies and links to *amicus* briefs we have filed.

LCAV also publishes reports, such as the 2008 Edition of *Regulating Guns in America: An Evaluation and Comparative Analysis of Federal, State and Selected Local Gun Laws*, to educate

community leaders about the issue of gun violence prevention. LCAV's publications are available on our web site.

LCAV is grateful to the donors and foundations whose encouragement and financial support enabled us to produce this report, in particular, The California Wellness Foundation, David Bohnett Foundation, The Wallace Alexander Gerbode Foundation, The Joyce Foundation, the Five Bridges Foundation, and the van Löben Sels/RembeRock Foundation.

We hope you find the *2009 California Report* informative. We look forward to the opportunity to work with you to reduce our nation's epidemic of gun violence.

II. Gun Violence in America: Updated Statistics and Study Findings on the Epidemic

A. Firearm-Related Deaths and Injuries

Gun violence continues unabated in the United States. In fact, high-profile mass shooting incidents spiked at an alarming rate in early 2009.¹ Law enforcement also continues to fall victim to gun violence: on March 21, a parolee wielding assault weapons gunned down four Oakland, California police officers before being shot and killed by police, while on April 4 in Pittsburgh, Pennsylvania, a gunman ambushed and shot three police officers to death.²

Most shootings in this country, however, occur quietly, with little or no media attention. The numbers are staggering:

- In 2006, the most recent year for which statistics are available, more than 30,000 Americans died from firearm-related injuries – an average of 82 deaths each day³ – and more than 70,000 others were treated for non-fatal gunshot wounds in hospital emergency rooms.⁴
- In California, 3,253 people died from firearm-related injuries in 2006⁵ and 4,305 others were treated for non-fatal gunshot wounds that year.⁶
- Children and young people up to 24 years of age constituted over 42% of all firearm deaths and non-fatal injuries in 2006 nationwide.⁷ The number of children and teens in America killed by guns in 2006 would fill 128 public school classrooms of 25 students each.⁸ That year, more 10 to 19-year-olds died from guns than from any other cause except motor vehicle accidents.⁹

¹ March and April, 2009, were particularly violent months that saw shooting deaths: by a depressed gunman in Alabama who killed 10 people before taking his own life; by a gunman at a birthday party in Florida, who killed his estranged wife and three others before killing himself; by a gunman at a nursing home in Wilmington, North Carolina, who killed eight people; by a man in Santa Clara, California, who shot and killed five people, including his two children, and critically injured his wife before killing himself; by a gunman at an immigrant center in Binghamton, New York, who killed 13 people; by a man in Graham, Washington, who shot to death five of his children before committing suicide; and by a gunman in Middletown, Maryland, who killed his wife and their three children before fatally shooting himself. These are just some of the high-profile gun violence incidents so far this year.

² Richard Poplawski, the killer of the three Pittsburgh officers who was allegedly lying in wait to shoot them, had a history of violence and an irrational fear that the Obama administration was poised to ban all gun possession.

³ U.S. Dep't of Health & Human Servs., Centers for Disease Control & Prevention, Nat'l Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Injury Mortality Reports, 1999-2006* (2009), at http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (last visited Apr. 30, 2009).

⁴ U.S. Dep't of Health & Human Servs., Centers for Disease Control & Prevention, National Center for Injury Prevention & Control, Web-Based Injury Statistics Query & Reporting System (WISQARS), *WISQARS Nonfatal Injury Reports* (2009), at <http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html> (last visited Apr. 30, 2009).

⁵ California Dep't of Health Servs., Epidemiology & Prevention for Injury Control Branch (EPIC), EPICenter California Injury Data Online, *Fatal Injury Data Custom Data Tables* (2009), at http://www.applications.dhs.ca.gov/epicdata/content/TB_fatal.htm (last visited Apr. 30, 2009).

⁶ California Dep't of Health Servs., Epidemiology & Prevention for Injury Control Branch (EPIC), EPICenter California Injury Data Online, *Nonfatal Injury Data Custom Data Tables* (2009), at http://www.applications.dhs.ca.gov/epicdata/content/tb_nonfatal.htm (last visited Apr. 30, 2009).

⁷ *WISQARS Injury Mortality Reports, 1999-2006*, *supra* note 3; *WISQARS Nonfatal Injury Reports*, *supra* note 4.

⁸ *WISQARS Injury Mortality Reports, 1999-2006*, *supra* note 3.

⁹ Nat'l Center for Injury Prevention & Control, U.S. Centers for Disease Control & Prevention, *Web-based Injury Statistics Query and Reporting System (WISQARS) Leading Causes of Death Reports, 1999-2006* (2009), at <http://webappa.cdc.gov/sasweb/ncipc/leadcaus10.html>.

- On average, 46 gun suicides were committed each day for the years 1999-2006. During that time period, over 5,900 people in the United States died from unintentional shootings.¹⁰

B. Gun Crimes

Due to their ready availability and lethality, guns are a criminal's weapon of choice in the U.S. Guns were used to commit nearly 389,000 crimes in 2006, and nearly 70% of all murders that year were committed with a firearm.¹¹

Records kept by the Federal Bureau of Investigation show that 10,086 murders were committed with a firearm in 2007 – 68% of all murders nationwide.¹² In 2006, 188,804 robberies and 188,527 aggravated assaults were committed with firearms.¹³

In California, firearms were used in 72.4% of homicides in 2007 – 1,611 total homicides.¹⁴ Handguns were used in 61.7% of gun homicides.¹⁵ Firearms also were used in 64% of the robberies and 19.8% of the aggravated assaults committed in 2007.¹⁶

C. Gun Ownership

The United States is drowning in guns. We own an estimated 270 million firearms – approximately 90 guns for every 100 people.¹⁷ Gun ownership is becoming concentrated, however, in fewer hands: a survey of gun ownership levels in 1994 found that 25% of all adults (35% of U.S. households) owned a firearm of some kind, and only 16% of adults had one or more handguns.¹⁸ A more recent survey found even lower rates of gun ownership, concluding that in 2006 only 21% of individuals and 35% of households had at least one gun.¹⁹

Gun purchases spiked over the last year, purportedly because some Americans feared that President Obama's election would lead to strict new laws limiting access to guns. In November, 2008, a record 1,529,635 background checks were performed on firearms sales, up 42% from the

¹⁰ WISQARS Injury Mortality Reports, 1999-2006, *supra* note 3.

¹¹ U.S. Dep't of Justice, Bureau of Justice Statistics, *Key Facts at a Glance: Crimes Committed with Firearms, 1973-2006*, at <http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm> (last visited Apr. 20, 2009).

¹² Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States, 2007 Expanded Homicide Data Table 7, Murder Victims, by Weapon, 2003-2007*, available at http://www.fbi.gov/ucr/cius2007/offenses/expanded_information/data/shrtable_07.html (last visited Apr. 20, 2009).

¹³ U.S. Dep't of Justice, Bureau of Justice Statistics, *Key Facts at a Glance: Crimes Committed with Firearms, 1973-2006*, at <http://www.ojp.usdoj.gov/bjs/glance/tables/guncrimetab.htm> (last visited Apr. 20, 2009).

¹⁴ California Dep't of Justice, Criminal Justice Statistics Center, *Homicide in California 2007* (Dec. 2008) <http://ag.ca.gov/cjsc/publications/homicide/hm07/preface.pdf> (last visited Apr. 20, 2009).

¹⁵ *Id.*

¹⁶ California Dep't of Justice, Criminal Justice Statistics Center, *Crime in California 2007* (Dec. 2008), at <http://ag.ca.gov/cjsc/publications/candd/cd07/preface.pdf> (last visited Apr. 20, 2009).

¹⁷ Graduate Inst. of Int'l Studies, Geneva, *Small Arms Survey 2007: Guns and the City* at 39 (Aug. 2007).

¹⁸ Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, Nat'l Inst. of Justice, Research in Brief, May 1997, at 1-3, available at <http://www.ncjrs.gov/pdffiles/165476.pdf>.

¹⁹ See Tom W. Smith, National Opinion Research Center at the University of Chicago, *Public Attitudes Towards the Regulation of Firearms*, at Figure 2 (Apr. 2007), available at <http://www-news.uchicago.edu/releases/07/pdf/070410.guns.norc.pdf>.

same period a year earlier, according to the Federal Bureau of Investigation.²⁰ A 24% year-over-year increase followed in December, with a similar increase in early 2009.²¹

D. Costs of Gun Violence

Gun violence imposes enormous costs – both direct and indirect – on our society. A 2007 study evaluated how violence-related injuries, including those inflicted by guns, adversely affect the health and welfare of all Americans through premature death, disability, medical costs, and lost productivity.²² The study found that costs associated with deaths and non-fatal injuries total over \$70 billion.²³ Slightly over 50% of the total costs of injuries due to violence (both assault and self-inflicted injury) are associated with fatalities among males ages 15 to 44 years, a majority of which are inflicted by firearms.²⁴ The study acknowledges that it provides an incomplete picture of the overall toll that violence inflicts on victims and society because victims of violence experience significant, lasting negative consequences that extend beyond their immediate physical injuries and occur in the absence of physical injury.²⁵

Earlier studies also demonstrate the enormous medical costs gun violence imposes on society. Medical costs related to gun violence have been estimated at \$2.3 billion annually, half of which are borne by American taxpayers.²⁶ Another study, using 1997 figures and factoring together all the direct and indirect medical, legal and societal costs, estimates that the annual cost of gun violence in our nation amounts to \$100 billion.²⁷

The total cost of firearm-related murders and hospital admitted-firearm assaults in California in 2005 was \$841,377,000 – including lost taxes, medical care, emergency transport, police services, and criminal justice costs.²⁸

²⁰ Alex Roth, Paulo Prada & Corey Dade, *New Calls for Assault-Gun Ban*, Wall St. J., Mar. 13, 2009 at A4.

²¹ *Id.*

²² Phaedra S. Corso et al., *Medical Costs and Productivity Losses Due to Interpersonal and Self-Directed Violence in the United States*, 32 Am. J. Prev. Med. 474, 474-75 (June 2007) at http://www.cdc.gov/ncipc/factsheets/images/Medical_Costs.pdf. The study reviewed the lifetime medical costs and productivity losses associated with medically treated injuries due to interpersonal (assaults/homicides) and self-directed (suicides) violence occurring in the United States in 2000.

²³ *Id.* at 476. Violence-related injuries cost the U.S. \$5.6 billion in medical costs and \$64.8 billion in productivity losses. *Id.* at 478. The study found that total costs for interpersonal violence against males were highest for assault-related gunshot injuries, accounting for 52% of the total costs for males. *Id.* at 476. For overall self-inflicted injuries, total costs were highest for males with a self-inflicted gun injury, accounting for 54% of the total costs for males. *Id.* at 478.

²⁴ *Id.* at 479.

²⁵ *Id.* at 480.

²⁶ Philip Cook et al., *The Medical Costs of Gunshot Injuries in the United States*, 282 JAMA 447 (Aug. 4, 1999).

²⁷ Philip J. Cook and Jens Ludwig, *Gun Violence: The Real Costs* 115 (2000).

²⁸ These figures denote the total costs to federal, state and local government for assaults with a firearm where the victim was admitted to the hospital, as well as murders committed with a firearm and do not take into consideration costs related to firearm suicides or unintentional shootings. *WISQARS Injury Mortality Reports, 1999-2006*, *supra* note 3; Public Services Research Institute, *National Crime Firearm Violence Costs and Costs for Illinois, Oregon, Utah, and California (Year 2005 Dollars)*, Calverton, MD: Pacific Institute for Research and Evaluation (2008), personal communication to Elliot Fineman (on file with the Brady Center to Prevent Gun Violence). According to this source, firearm murders in California incurred a total cost of \$819,513,000, while hospital-admitted firearm assaults accounted for \$21,864,000.

III. Featured Topic: Effectiveness of Firearm-Related Laws

Contrary to the claims of the gun lobby, laws and policies designed to reduce gun deaths and injuries have been shown to be effective. For example, a 2009 review of U.S. gun death data by the Violence Policy Center found that states with high rates of gun ownership and weak firearm laws have the highest rates of gun death.²⁹ Conversely, the study found that states with strong gun laws and low rates of gun ownership had significantly lower rates of firearm-related death.³⁰

Although additional research is needed to fully evaluate the efficacy of our gun laws, several other studies have found that common sense gun laws do work:³¹

Brady Act/Background Checks – Between March 1, 1994, and December 31, 2007, the Brady law³² prevented more than 1.6 million prohibited persons (e.g., felons, juveniles, mentally ill persons) from acquiring guns.³³ In 2007, 136,000 prohibited persons were denied a gun transfer or permit, including 49,000 felons.³⁴ On average, 134 felons a day are turned away at gun stores because of this law.³⁵

Domestic Violence Gun Prohibitions – Laws that prohibit the purchase of a firearm by a person subject to a domestic violence restraining order are associated with a reduction in the number of intimate partner homicides.³⁶

Laws Restricting Multiple Sales/Purchases – Virginia’s law restricting multiple sales of handguns within a 30-day period was found to significantly reduce the number of crime guns traced to Virginia dealers.³⁷

²⁹ Press Release, Violence Policy Center, *States with Higher Gun Ownership and Weak Gun Laws Lead Nation in Gun Death* (May 6, 2009), at <http://www.vpc.org/press/0905gundeath.htm>. VPC defines states with “weak” gun laws as those that add little or nothing to federal restrictions and have permissive concealed carry laws allowing civilians to carry concealed handguns. States with “strong” gun laws were defined as those that add significant state regulation in addition to federal law, such as restricting access to particularly hazardous types of firearms (for example, assault weapons), setting minimum safety standards for firearms and/or requiring a permit to purchase a firearm, and have restrictive concealed carry laws.

³⁰ *Id.*

³¹ Ammunition sales recordkeeping and reporting laws are also effective gun violence prevention tools. See our feature on ammunition sales recordkeeping in the California Local Governments Update, below.

³² The Brady law (or “Brady Act”) requires federally licensed firearms dealers (FFLs) to perform background checks on prospective firearms purchasers to ensure that the firearm transfer would not violate federal, state or local law. See 18 U.S.C. § 922(s).

³³ Bureau of Justice Statistics, U.S. Dep’t of Justice, *Background Checks for Firearm Transfers, 2007 - Statistical Tables*, at <http://ojp.usdoj.gov/bjs/pub/html/bcft/2007/bcft07st.pdf> (last visited Apr. 21, 2009).

³⁴ Bureau of Justice Statistics, U.S. Dep’t of Justice, *Background Checks for Firearm Transfers, 2007 - Statistical Tables, Table 5 – Number of applications, denials, and reasons for denials among all agencies conducting background checks during the permanent Brady period, 1999-2007*, at <http://ojp.usdoj.gov/bjs/pub/html/bcft/2007/bcft07st.pdf>.

³⁵ *Id.*

³⁶ Elizabeth R. Vigdor et al., *Do Laws Restricting Access to Firearms by Domestic Violence Offenders Prevent Intimate Partner Homicide?*, 30 *Evaluation Rev.* 313, 332 (June 2006).

³⁷ Douglas S. Weil & Rebecca Knox, *Evaluating the Impact of Virginia's One-Gun-A-Month Law*, *The Center to Prevent Handgun Violence* 1, 4-6 (Aug. 1995). The study found that the odds of tracing a gun originally acquired in the Southeast to a Virginia gun dealer (as opposed to a dealer in a different southeastern state) dropped by 71% for guns recovered in New York, 72% for guns recovered in Massachusetts, and 66% for guns recovered in New Jersey, New York, Connecticut, Rhode Island and Massachusetts combined. (In 2004, the Virginia legislature adopted National Rifle Association-backed amendments that significantly weakened this law by allowing concealed handgun permit holders and persons who purchase handguns through private sales to purchase more than one handgun per month. See Va. Code Ann. § 18.2-308.2:2(P)(2)).

Licensing & Registration – States with some form of both registration and licensing have greater success keeping firearms initially sold by dealers in the state from being recovered in crimes than states without such laws.³⁸

Child Access Prevention Laws – In 12 states where child access prevention laws had been in effect for at least one year, unintentional firearm deaths fell by 23% from 1990-94 among children under 15 years of age.³⁹ In addition:

- The practices of keeping firearms locked, unloaded, and storing ammunition in a locked location separate from the firearms serve as protective measures that reduce youth suicide and unintentional injury in homes with children and teenagers where guns are stored.⁴⁰
- A study evaluating the association between youth-focused gun laws and suicides among youth found that child access prevention laws were associated with an 8.3% decrease in suicides among 14-17 year olds.⁴¹

Junk Gun Regulation – Following Maryland’s adoption of a ban on “junk guns,”⁴² firearm homicides dropped by 8.6% in the state – an average of 40 lives saved per year – between 1990 and 1998.⁴³

Illegal Gun Trafficking – Mayors Against Illegal Guns (MAIG)⁴⁴ released a comprehensive study on illegal firearms trafficking in December 2008. That study focused on the relationship between a state’s gun laws and the likelihood that the state would be a source of guns recovered in out-of-state crimes.⁴⁵ Among the study’s findings:

³⁸ Daniel W. Webster et al., *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 *Inj. Prevention* 184, 188-89 (2001). The study included jurisdictions with concealed carry permits and dealer sales reporting, which have elements of licensing or registration but are not comprehensive licensing or registration systems.

³⁹ Peter Cummings et al., *State Gun Safe Storage Laws and Child Mortality Due to Firearms*, 278 *JAMA* 1084, 1084 (Oct. 1997).

⁴⁰ David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 *JAMA* 707, 711-13 (Feb. 2005).

⁴¹ Daniel W. Webster et al., *Association Between Youth-Focused Firearm Laws & Youth Suicides*, 292 *JAMA* 594, 596-98 (Aug. 2004).

⁴² “Junk guns,” also known as “Saturday Night Specials,” are low-quality, easily concealable handguns made of inferior materials that are more likely to misfire or malfunction than other firearms. Many types of junk guns are disproportionately associated with criminal misuse. See, e.g., Garen Wintemute, *California’s Guns and Crime: New Evidence* 7-8, Violence Prevention Research Program, University of California, Davis (May 1997).

⁴³ Daniel W. Webster et al., *Effects of Maryland’s Law Banning “Saturday Night Special” Handguns on Homicides*, 155 *Am. J. Epidemiology* 406, 409-411 (Mar. 2002). Another study on Maryland’s ban showed that the law reduced the use of prohibited junk guns by criminals in Baltimore, finding that a junk gun prohibited in Maryland was more than twice as likely to be the subject of a law enforcement crime gun trace request in 15 other major U.S. cities combined than in Baltimore. Jon S. Vernick et al., *Effects of Maryland’s Law Banning Saturday Night Special Handguns on Crime Guns*, 5 *Inj. Prevention* 259, 261-263 (Dec. 1999).

⁴⁴ Mayors Against Illegal Guns is a national effort launched by New York Mayor Michael Bloomberg and Boston Mayor Thomas Menino in 2006, dedicated to making America’s cities safer by cracking down on illegal guns. In addition to supporting local, state and federal legislative efforts to target these firearms, the coalition opposes federal efforts to restrict cities’ access to gun trace data and restrict ATF’s efforts to combat illegal gun trafficking. The coalition also seeks to hold accountable irresponsible gun dealers who knowingly sell guns to straw purchasers, and supports the development and use of technologies that aid in the detection and tracing of illegal guns. Currently, over 340 mayors from more than 40 states are members of the coalition.

⁴⁵ Mayors Against Illegal Guns, *The Movement of Illegal Guns in America – The Link Between Gun Laws and Interstate Gun Trafficking* (Dec. 2008), at http://www.mayorsagainstillegalguns.org/downloads/pdf/trace_report_final.pdf. The report looked at five key gun laws: 1) background checks on all handgun sales at gun shows; 2) purchase permits for all handgun sales; 3) mandatory reporting of lost or stolen firearms; 4) local control of firearms regulations; and 5) state inspections of gun dealers. *Id.* at 9-19.

- States that export crime guns at a high rate have a significantly higher rate of gun murders than states with low export rates.⁴⁶ Crime gun export rates measure the total number of traced guns that are purchased from gun dealers in one state but recovered in another, controlling for the population of the state where the gun was purchased. The crime gun export rate identifies which states are the largest per capita suppliers of guns recovered in out-of-state crimes;⁴⁷
- States that export crime guns at a high rate have a significantly higher rate of fatal police shootings than states with low export rates;⁴⁸
- States that supply crime guns at the highest rates have comparatively weak gun regulations, strongly suggesting that gun traffickers favor these states as sources for crime guns;⁴⁹
- States that do not have a background check requirement for all handgun sales at gun shows have an average crime gun export rate that is more than two times the rate of states that require background checks for all handgun sales at such shows;⁵⁰
- States that require purchase permits for all handgun sales export crime guns at less than one-third the rate of states that do not require permits;⁵¹
- States that require gun owners to report the loss or theft of their guns to law enforcement export crime guns at less than one-third the rate of states that do not require reporting;⁵²
- States that do not require or permit inspections of gun dealers export crime guns at a rate that is 50% greater than the average export rate of states with these regulations;⁵³ and
- States that allow cities to adopt gun laws export guns that are used in out-of-state crimes at roughly one-fifth the rate of states that preempt local regulation of firearms.⁵⁴

⁴⁶ *Id.* at 25.

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 26.

⁴⁹ *Id.* at 2-3.

⁵⁰ *Id.* at 10.

⁵¹ *Id.* at 12-13.

⁵² *Id.* at 14-15.

⁵³ *Id.* at 18-19.

⁵⁴ *Id.* at 16-17.

IV. Federal Update

A. Federal Gun Laws: The Weakest of All Industrialized Nations

Although some states have actively pursued common sense policies to reduce gun violence, most have not, leaving them subject to federal gun laws. Those laws, however, are incredibly weak. In fact, U.S. gun laws remain the weakest of all industrialized nations.⁵⁵ Not surprisingly, the U.S. has the highest rate of firearm deaths among 25 high-income nations,⁵⁶ and the overall firearm-related death rate among U.S. children under the age of 15 is nearly 12 times higher than that among children in 25 other industrialized nations *combined*.⁵⁷

Our federal gun laws are completely inadequate. They do not, for example:

- Require background checks on all gun purchasers. The Brady Act only requires federally licensed gun dealers to conduct background checks, exempting private sellers (responsible for an estimated 40% of all gun sales).⁵⁸ Because of this “private sale” loophole, criminals and other prohibited persons can easily buy guns in most states.
- Regulate guns as a consumer product. Guns and ammunition are exempt from the Consumer Product Safety Act.⁵⁹ As a result, the federal government has authority to adopt health and safety standards for toy guns, but not for real guns.
- Require that handgun owners be licensed or that handguns be registered. Licensing laws help ensure that gun owners know how to safely use a firearm and are familiar with firearms laws; registration laws help law enforcement officials trace crime guns and return lost or stolen firearms to their lawful owners.
- Ban assault weapons or 50 caliber rifles (military-style firearms that combine long range, accuracy and massive power, and are readily available on the civilian market).⁶⁰ Congress allowed a ban on assault weapons to expire in 2004.
- Permit law enforcement to retain approved firearm purchaser records, instead of requiring these records to be destroyed within 24 hours.⁶¹ Purchaser records are invaluable tools law enforcement can use to efficiently trace crime guns, quickly retrieve guns mistakenly sold to prohibited persons, and protect police responding to incidents where a firearm may be present.
- Limit the number of handguns that may be purchased at any one time, to prevent gun traffickers from buying guns in bulk and reselling them to prohibited purchasers.

⁵⁵ Wendy Cukier & Victor Sidel, *The Global Gun Epidemic: From Saturday Night Specials to AK-47s* 131 (2006).

⁵⁶ *Id.* at 17.

⁵⁷ U.S. Dep’t of Health & Human Services, Centers for Disease Control & Prevention, Morbidity & Mortality Weekly Report, *Rates of Homicide, Suicide, and Firearm-Related Death Among Children – 26 Industrialized Countries* (Feb. 7, 1997).

⁵⁸ 18 U.S.C. § 922(s); Philip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms*, U.S. Dep’t of Justice, National Institute of Justice Research in Brief 6-7 (May 1997).

⁵⁹ 15 U.S.C. §§ 2051, 2052(a)(1)(ii)(E).

⁶⁰ Fifty caliber rifles are treated as ordinary long guns under federal law and thus can be purchased by persons over age 18. Moreover, because of the private sale loophole, 50 caliber rifles can be easily purchased in most states by criminals and would-be terrorists.

⁶¹ As discussed below, the 24-hour record destruction and crime gun trace data disclosure rules have been included in appropriations bills funding the Department of Justice every year since 2004. Prior to 2004, approved gun purchaser records were retained for 90 days, allowing ATF time to inspect dealer records to determine whether the dealer submitted accurate information about the purchaser. Disclosure of crime gun trace data is discussed further below in the Federal Update, beginning on page 13.

- Impose a waiting period, to allow sufficient time for the completion of a background check and provide a “cooling off” period to help prevent impulsive acts of violence.⁶²
- Provide access to redress in the courts for victims of gun violence. In 2005, Congress granted unprecedented legal immunity to the gun industry, generally prohibiting civil lawsuits and administrative proceedings against manufacturers and sellers of firearms and ammunition, and requiring dismissal of most pending lawsuits against the industry.⁶³

B. The Second Amendment: The *District of Columbia v. Heller* Decision and its Implications for U.S. Gun Policy

1. *District of Columbia v. Heller*

"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."

On June 26, 2008, the U.S. Supreme Court issued its historic opinion in *District of Columbia v. Heller*,⁶⁴ ruling on the meaning and scope of the Second Amendment to the U.S. Constitution for the first time since 1939. In a narrow 5-4 ruling, the Court held that the Second Amendment confers an individual right to possess firearms unrelated to service in a well-regulated state militia. The Court struck down the District’s ban on handgun possession, finding that “the inherent right of self-defense has been central to the Second Amendment” and that handguns are “overwhelmingly chosen by American society” for self-defense in the home.⁶⁵ The Court also struck down the District’s requirement that firearms in the home be stored unloaded and disassembled or bound by a trigger lock or similar device, because the law contained no exception for self-defense.

The Supreme Court’s ruling in *Heller* represents a radical departure from the Court’s principal Second Amendment precedent, *United States v. Miller*.⁶⁶ In *Miller*, the Court stated in a unanimous decision that the “obvious purpose” of the Amendment was to “assure the continuation and render possible the effectiveness of” the state militia, and the Amendment “must be interpreted and applied with that end in view.”⁶⁷ Relying on *Miller*, hundreds of lower federal and state appellate courts had rejected Second Amendment challenges to U.S. gun laws over the last seven decades.⁶⁸

Although the *Heller* decision established a new individual right to “keep and bear arms,” the opinion clearly found that the right is not unlimited, and should not be understood as “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”⁶⁹

⁶² Under existing federal law, most guns are immediately transferred to the purchaser after the completion of an instant background check. Moreover, if the background check has not been completed within three days, the dealer may transfer the gun by default without knowing whether the transfer is lawful. 18 U.S.C. § 922(t)(1).

⁶³ 15 U.S.C. §§ 7901-7903. Cases interpreting the federal immunity law are discussed at page 17, *infra*.

⁶⁴ *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

⁶⁵ *Id.* at 2817.

⁶⁶ 307 U.S. 174 (1939).

⁶⁷ *Id.* at 178.

⁶⁸ The *Heller* Court dismissed the *Miller* case as not “a thorough examination” of the Second Amendment, and limited *Miller* to the proposition that “the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.” *Heller*, *supra* note 64, at 2814.

⁶⁹ *Id.* at 2816.

The Court provided examples of gun laws that it deems “presumptively lawful” under the Second Amendment, including those which: 1) prohibit the possession of firearms by felons and the mentally ill; 2) forbid firearm possession in sensitive places such as schools and government buildings; and 3) impose conditions on the commercial sale of firearms.⁷⁰

The Court also concluded that the Second Amendment is consistent with laws banning “dangerous and unusual weapons” not “in common use at the time,” such as M-16 rifles and other firearms that are most useful in military service.⁷¹ Finally, the Court declared that its analysis should not be read to suggest “the invalidity of laws regulating the storage of firearms to prevent accidents.”⁷²

Unfortunately, *Heller* provided no standard of review or test for legislators and lower courts to apply to determine whether a gun law violates the Second Amendment. The case also leaves unanswered whether the Second Amendment applies to the states, since Washington, D.C. is a federal enclave.⁷³ Subsequent litigation, discussed below, focuses on these unresolved issues.⁷⁴

2. Post-*Heller* Litigation⁷⁵

As expected, the Supreme Court’s decision in *District of Columbia v. Heller* has resulted in a flood of lawsuits. To date, at least 129 federal appellate and district court opinions have discussed the meaning of the Second Amendment under *Heller*. Numerous criminal defendants have challenged their indictments and convictions for violating federal and state firearms laws following *Heller*, alleging that the criminal statutes violate the Second Amendment. In all but a few cases, these challenges have failed.

Some courts have cited *Heller* in finding impermissible state action that would limit an individual’s right to possess firearms where that person is otherwise lawfully able to possess them. One federal district court, for example, struck down a statute that required the imposition of a pretrial bail condition prohibiting the defendant from possessing any firearms because the law did not require a particularized finding that the prohibition was reasonably necessary to secure the safety of the community.⁷⁶ Additionally, a Massachusetts state court found a state law that

⁷⁰ *Id.* at 2816-17, 2817 n. 26. The Court makes clear that this list is not exhaustive.

⁷¹ *Id.* at 2817.

⁷² *Id.* at 2820.

⁷³ While the Court did not rule on whether the Second Amendment applies to state or local governments, the Court did note its earlier decisions holding that “the Second Amendment applies only to the Federal Government.” *Heller, supra* note 64, at 2813 n.23, citing *Miller v. Texas*, 153 U.S. 535, 538 (1894); *Presser v. Illinois*, 116 U.S. 252, 265 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1876).

⁷⁴ For more information about the *Heller* decision, please visit LCAV’s web site at

<http://www.lcav.org/content/dc-vs-heller.asp>. LCAV was pleased to have had the opportunity to assist the District of Columbia in the *Heller* case by coordinating the filing of *amicus curiae* briefs. Nineteen *amicus* briefs, written on behalf of 188 *amici*, were filed in support of the District. Those briefs represent a wide variety of important voices, including law enforcement groups, public health advocates, law professors, historians, linguists, the American Bar Association, former U.S. Department of Justice officials and members of Congress. LCAV also filed its own *amicus* brief in *Heller*, joined by The United States Conference of Mayors and several major U.S. cities: Baltimore, Cleveland, Los Angeles, Milwaukee, New York City, Oakland, Philadelphia, Sacramento, San Francisco, Seattle and Trenton.

⁷⁵ This section provides a brief summary of post-*Heller* litigation. Please contact LCAV for more in-depth information about these cases.

⁷⁶ *United States v. Arzberger*, 592 F. Supp. 2d 590 (S.D.N.Y. 2008) (holding that because the Second Amendment protected an individual right to possess a firearm, it established a liberty interest protected by Fourteenth Amendment due process).

required all stored firearms to be secured by a trigger lock or kept in a locked container unconstitutional per *Heller*.⁷⁷

The National Rifle Association and the Second Amendment Foundation have filed suits against a number of state and local jurisdictions, alleging that laws prohibiting the possession of handguns or otherwise regulating firearm ownership are unconstitutional. While several jurisdictions repealed handgun possession bans following the *Heller* decision, a number of states and municipalities continue to fight these suits.

On April 20, 2009, in one of the most significant post-*Heller* rulings, the Ninth Circuit Court of Appeals issued its much-anticipated decision in *Nordyke v. King*,⁷⁸ long-running litigation brought by a gun show promoter to challenge an Alameda County ordinance prohibiting the possession of firearms or ammunition on County-owned property. The court upheld the county ordinance, rejecting the Nordykes' Second Amendment claim on the grounds that an ordinance banning gun possession on County property does not meaningfully burden the right to possess a firearm in the home for self-defense. However, the Ninth Circuit became the first federal court to hold that the Second Amendment is incorporated through the Fourteenth Amendment to apply against state and local governments. Without incorporation – an issue left unresolved by *Heller* – the Second Amendment only limits the power of the federal government.

On June 2, 2009, in another significant post-*Heller* case, *NRA v. Chicago and Oak Park*,⁷⁹ the Seventh Circuit Court of Appeals held that the Second Amendment does *not* apply to state or local governments. In doing so, the Seventh Circuit affirmed the district court's dismissal of complaints filed by the National Rifle Association and Second Amendment Foundation alleging that the prohibitions on the possession of handguns adopted by these two Illinois cities violated the Second Amendment.

The Seventh Circuit determined that it was bound by a series of U.S. Supreme Court cases that uniformly held that the Second Amendment only applies to the federal government. The *Chicago and Oak Park* court emphasized that Supreme Court decisions may only be overruled by the Supreme Court itself, criticizing the Ninth Circuit's decision in *Nordyke v. King*, which held that the Second Amendment applies to state and local governments despite Ninth Circuit and Supreme Court rulings to the contrary. The day after the *Chicago and Oak Park* ruling, the National Rifle Association filed a petition for certiorari requesting that the U.S. Supreme Court review the decision.⁸⁰

Finally, the Second Circuit Court of Appeals also addressed the issue of incorporation in a case involving a challenge to a state statute prohibiting the possession of a weapon called a nunchaku.⁸¹ In upholding the statute, the Second Circuit stated it was “settled law” that the Second

⁷⁷ *Commonwealth v. Bolduc*, No. 0825 CR 2026 (Mass. Dist. Ct. Feb. 19, 2009). It does not appear that the incorporation issue – whether the Second Amendment only applied against action by the federal government – was raised in this case.

⁷⁸ 563 F.3d 439 (9th Cir. 2009).

⁷⁹ Nos. 08-4241, 08-4243 & 08-4244, 2009 U.S. App. LEXIS 11721 (7th Cir. decided June 2, 2009).

⁸⁰ LCAV's *amicus curiae* brief in support of Chicago and Oak Park in the 7th Circuit can be viewed at http://www.lcav.org/library/amicus_briefs/NRA_v_Chicago_Amicus_Brief.pdf.

⁸¹ A nunchaku, commonly called “nunchucks,” is a weapon of Southeast Asian origin consisting of two sticks connected at their ends with a short chain or rope.

Amendment only applies to limit actions by the federal government, and that *Heller* “does not invalidate this longstanding principle.”⁸²

For more in-depth information about post-*Heller* litigation, please visit LCAV’s website, www.lcav.org.

C. 2008 Legislation

1. Tiahrt Amendments

The Tiahrt Amendments⁸³ are annual riders attached to U.S. Department of Justice appropriations bills since 2003 that significantly restrict law enforcement’s ability to investigate gun crimes and prosecute unscrupulous gun dealers. The amendments currently:

- Prohibit the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) from fully releasing firearm trace data for use by cities, states, law enforcement, researchers, litigants and members of the public;
- Require the FBI to destroy all approved gun purchaser records within 24 hours;
- Prohibit ATF from requiring gun dealers to submit inventories to law enforcement.⁸⁴

Restrictions on Crime Gun Trace Data – The Tiahrt Amendments prohibit ATF from disclosing firearm trace data except to law enforcement in connection with and for use in a criminal investigation or prosecution, or to a federal agency for national security or intelligence purposes. As a result, law enforcement agencies are unable to access aggregated data to examine patterns of gun trafficking or identify gun dealers linked to large numbers of crime guns. In addition, the provision renders all gun trace data immune from legal process and inadmissible in non-ATF administrative proceedings or civil actions. ATF may, however, publish statistical information regarding firearms trafficking in aggregate form.

Tiahrt trace data restrictions bind the hands of law enforcement across the country investigating illegal firearms trafficking. For example, due to the Tiahrt restrictions, ATF refused a request by the California Department of Justice (CA DOJ) for data related to crime guns recovered in Mexico and traced back to firearms dealers in California, significantly hindering CA DOJ’s efforts to identify and investigate those dealers. Ironically, while federal law permits law enforcement agencies in Mexico to access ATF trace data, it currently does not allow law enforcement agencies in this country to do so.

The ATF restrictions on trace data are not limited to law enforcement: the Tiahrt Amendments also preclude disclosure of gun trace data to members of the public, including researchers and litigants in lawsuits against the gun industry. Prior to Tiahrt, these individuals were able to use

⁸² *Maloney v. Cuomo*, 554 F.3d 56, 58-59 (2d. Cir. 2009).

⁸³ The amendments are named for their original sponsor, U.S. Representative Todd Tiahrt (R-KS).

⁸⁴ Omnibus Appropriations Act 2009, Pub. L. No. 111–8, 123 Stat. 524 (2009). For detailed information on the issues posed by the Tiahrt Amendments, see the Tiahrt Amendments page of the Mayors Against Illegal Guns website, at <http://www.mayorsagainstillegalsguns.org/html/federal/tiahrt.shtml>.

gun trace data in important analyses of the sources of crime guns. Because of Tiahrt, however, this critical source of information has evaporated.⁸⁵

Mandatory 24-Hour Destruction of Gun Purchaser Records – The Tiahrt Amendments also require the FBI to destroy all approved gun purchaser records within 24 hours of approval. Records of completed firearm sales are invaluable tools for law enforcement, and are most useful when they are collected in a central database and retained permanently. In California, for example, handgun sales records are permanently retained in a CA DOJ database. As a result, law enforcement agencies in the state are able to quickly trace the ownership of handguns recovered in crime. Records regarding firearm ownership are also used to protect officers responding to incidents and to facilitate the relinquishment of firearms by persons who are convicted of a felony or otherwise become ineligible to possess guns.

Prohibition on Gun Dealer Inventories – In addition, the Tiahrt Amendments prohibit ATF from requiring gun dealers to submit inventories. Gun dealer inventories facilitate enforcement of the federal law requiring dealers to report the loss or theft of firearms and help law enforcement oversee the more than 50,000 firearms dealers nationwide. According to a 2008 analysis by the Brady Center to Prevent Gun Violence, more than 30,000 guns were “missing” from gun dealers in 2007.⁸⁶ Gun dealer inventories force gun dealers to keep control of their inventories and help prevent corrupt gun dealers from supplying the illegal market and then claiming that their firearms have simply disappeared.

The Firearms Information Use Act of 2008⁸⁷ was introduced on March 13, 2008, to repeal the crime gun trace data provisions of the Tiahrt Amendments, but no action was taken on the bill. On September 30, 2008, Congress adopted a continuing resolution for Fiscal Year 2009, which left in place the Tiahrt restrictions from the 2008 budget.⁸⁸

2. Other Legislation

Several measures to reduce gun violence were introduced in 2008, but did not gain traction in Congress. Among these bills was legislation to prohibit federal firearms licensees from manufacturing, importing or transferring semiautomatic handguns manufactured or imported on or after January 1, 2010 unless they are capable of “microstamping.”⁸⁹ In addition, the Preserving Records of Terrorist & Criminal Transactions Act of 2008⁹⁰ would have required the retention of background check information for 180 days for approved purchasers and 10 years for approved purchasers whose names appear on terror watch lists.

⁸⁵ Law enforcement organizations have expressed overwhelming opposition to these trace data restrictions: over 200 state and local law enforcement executives, 23 state/regional law enforcement associations, and 11 national law enforcement associations oppose the Tiahrt restrictions.

⁸⁶ Press Release, Brady Center to Prevent Gun Violence, *U.S. Gun Shops “Lost” More Than 30,000 Firearms Last Year* (June 17, 2008), at <http://www.bradycampaign.org/media/release.php?release=988>.

⁸⁷ S. 2769, 110th Cong. (2008).

⁸⁸ Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329 (2008).

⁸⁹ National Crime Gun Identification Act, H.R. 5266, 110th Cong. (2008). Microstamping technology involves the use of lasers to engrave microscopic markings of the make, model and serial number of a semiautomatic handgun on the firing pin and breech face through alphanumeric and geometric codes. When the handgun is discharged, these engravings are then stamped on a cartridge casing before the casing is ejected from the gun. Law enforcement can then use the cartridge casings recovered at crime scenes to identify the guns and the persons who fired them. California adopted a microstamping law in 2007.

⁹⁰ Preserving Records of Terrorist and Criminal Transactions Act of 2008, S. 2935, 110th Cong. (2008).

D. 2009 Legislation

1. Allowing Loaded Guns in National Parks and Wildlife Refuges

In a concerted action that will significantly undermine public safety in this nation's national parks and wildlife refuges, in May 2009, Congress passed, and President Obama signed into law, the Credit Card Accountability, Responsibility and Disclosure Act of 2009. Unfortunately, this important consumer-related legislation contained a dangerous, completely non-germane amendment. The amendment, effective February 2010, will allow any person to possess any loaded, functional firearm in any unit of the National Park System or the National Wildlife Refuge System, provided the person is not otherwise prohibited by law from possessing the firearm, and the possession is in compliance with the law of the state in which the unit of the National Park System or the National Wildlife Refuge System is located.⁹¹ This law addresses no identifiable public safety problem. Indeed, national parks and wildlife refuges have an extremely low crime rate relative to non-park/non-refuge areas across the country.

The impetus behind permitting loaded, accessible firearms in our nation's parks began in 2008 when the U.S. Department of the Interior (DOI) under the Bush Administration promulgated National Rifle Association (NRA)-backed regulations to permit the carrying of loaded, concealed firearms in national parks and wildlife refuges, reversing Reagan-era regulations that banned the carrying of loaded, accessible firearms in these federally-protected areas.⁹² A broad coalition of knowledgeable public interest groups and park service officials – including active and retired park rangers and law enforcement and former National Park Service directors – vocally led the opposition against allowing loaded firearms of any kind within national parks. Despite significant public opposition to the rule changes, they briefly went into effect on January 9, 2009.⁹³

A lawsuit challenging DOI's new regulations as violative of several federal laws was filed by the Brady Campaign to Prevent Gun Violence and the National Parks Conservation Association, among others,⁹⁴ leading the U.S. District Court for the District of Columbia to enjoin enforcement of the regulations and restore the prior rules applicable to national parks and wildlife refuges, again requiring that firearms be unloaded and secured when carried on federal lands.⁹⁵

The new statute, regrettably, goes well beyond DOI's rule changes and permits possession of any lawful firearm, not just concealed guns. Furthermore, this new law raises troubling legal issues, e.g., what state law governs possession of a gun in a national park that straddles state boundaries.⁹⁶

⁹¹ Credit Card Accountability, Responsibility and Disclosure Act of 2009, H.R. 627, 111th Cong. (2009).

⁹² 48 Fed. Reg. 30,252 (June 30, 1983); 49 Fed. Reg. 18,444 (April 30, 1984).

⁹³ 36 C.F.R. § 2.4(h); 50 C.F.R. § 27.42(e). The final regulation is at 73 Fed. Reg. 74,966, 74,967 (Dec. 10, 2008). The revised regulations were designed to allow persons to possess and transport concealed, loaded firearms within a national park or wildlife refuge if the law in the state in which the national park or wildlife refuge is located allows the carrying of concealed firearms by persons properly licensed.

⁹⁴ *Brady Campaign to Prevent Gun Violence v. Salazar*, No. 08-2243 (CKK) & No. 09-013 (CKK), 2009 U.S. Dist. LEXIS 22077, (D.D.C. Mar. 19, 2009) at *7-*8, available at http://www.npca.org/keep_parks_safe/pdf/memorandum_opinion_loaded_concealed_guns.pdf.

⁹⁵ *Id.*

⁹⁶ LCAV submitted public comment to U.S. Department of the Interior on June 30, 2008, strongly opposing the rule changes. LCAV's comments are available at http://www.lcav.org/library/reports_analyses/LCAV_Comment.Loaded_Guns_in_National_Parks.06.30.08.pdf.

2. Closing the Gun Show Loophole

On April 21, 2009, Senator Frank Lautenberg (D-NJ) introduced S. 843, the Gun Show Background Check Act of 2009, legislation designed to close the “gun show loophole,” a gap in federal law which allows unlicensed individuals to sell firearms at gun shows and other venues without conducting a background check on prospective purchasers.

S. 843 would require background checks on gun purchasers at events where 50 or more firearms are offered for sale. Gun show promoters would be required to register with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and all transactions would have to go through a federally-licensed firearms dealer at the show or event.

The gun show loophole is a serious public safety issue. ATF has found that 25% to 50% of gun show vendors are unlicensed.⁹⁷ ATF also reviewed over 1,500 of its investigations and concluded that gun shows are a “major trafficking channel,” associated with approximately 26,000 firearms diverted from legal to illegal commerce. Gun shows rank second to corrupt dealers as a source for illegally trafficked firearms.⁹⁸ From 2004 – 2006, ATF conducted 202 investigative operations at 195 gun shows, or roughly 3% of the gun shows held nationwide during this period. These operations resulted in 121 arrests and the seizure of 5,345 firearms.⁹⁹ More recent studies confirm that illegal gun trafficking occurs in states with little or no regulation of gun shows or gun transactions generally.¹⁰⁰

A recent poll issued by Mayors Against Illegal Guns found that 87% of Americans – and 83% of gun owners – support requiring background checks for all firearm transfers at gun shows.¹⁰¹

3. The Ensign Amendment – Gutting Washington, D.C.’s Gun Laws

Washington, D.C. has some of the strongest gun violence prevention laws in the nation. Following the Supreme Court’s decision in *District of Columbia v. Heller*, which struck down on Second Amendment grounds the District’s ban on handgun possession and its requirement that firearms in the home be stored unloaded and disassembled or bound by a trigger lock or similar device,¹⁰² the District repealed these laws to comply with the *Heller* decision. The District subsequently enacted a comprehensive series of gun laws to fill the gap left by the repealed provisions.

⁹⁷ U.S. Dep’t of Justice & Bureau of Alcohol, Tobacco and Firearms, U.S. Dep’t of the Treasury, *Gun Shows: Brady Checks and Crime Gun Traces* 4 (Jan. 1999).

⁹⁸ Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury, *Following the Gun: Enforcing Federal Laws Against Firearms Traffickers* xi, 1, 12 (June 2000).

⁹⁹ Office of the Inspector General, U.S. Dep’t of Justice, *The Bureau of Alcohol, Tobacco, Firearms and Explosives’ Investigative Operations at Gun Shows* i, iv-v (June 2007).

¹⁰⁰ See, e.g., Garen J. Wintemute, *Gun Shows Across a Multistate American Gun Market: Observational Evidence of the Effects of Regulatory Policies*, 13 *Inj. Prevention* 150, 154-55 (2007); Mayors Against Illegal Guns, *The Movement of Illegal Guns in America – The Link Between Gun Laws and Interstate Gun Trafficking* 7, 10 (Dec. 2008), at http://www.mayorsagainstillegalguns.org/downloads/pdf/trace_report_final.pdf. These studies are discussed in greater detail under the Effectiveness of Firearm-Related laws section, *supra*.

¹⁰¹ Greenberg Quinlan Rosner Research and the Tarrance Group, *Americans Support Common Sense Measures to Cut Down on Illegal Guns* 3-4, Apr. 10, 2008, available at http://www.mayorsagainstillegalguns.org/downloads/pdf/polling_memo.pdf.

¹⁰² *Heller*, *supra* note 64, at 2817.

On February 26, 2009, the U.S. Senate passed the “District of Columbia House Voting Rights Act,” S. 160, which would grant the District a long-sought voting representative in Congress.¹⁰³ Unfortunately, senators vociferously opposed to the District’s strong gun laws added a detailed, National Rifle Association-backed amendment to S.160 (named for its sponsor, Senator John Ensign (R-NV)) in an attempt to repeal D.C. gun laws. The amended bill, if passed, would seriously threaten public safety and homeland security.

The amendment, entitled the “Second Amendment Enforcement Act,” would, *inter alia*: 1) legalize the possession of assault weapons and high-capacity ammunition magazines in the District; 2) completely repeal the District’s firearm registration system; 3) allow potentially dangerous individuals to purchase and own firearms, including any person who has been: a) convicted of a crime of violence within the last five years; b) convicted of multiple drug or alcohol-related offenses within last five years; or c) been voluntarily committed to a mental institution within the last five years; and 4) prevent the D.C. Council from enacting firearm-related legislation in the future. S. 160 is currently being considered in the House of Representatives.

4. Tiahrt Amendments

During his campaign for President, Barack Obama had promised to remove the trace data restrictions of the Tiahrt Amendments from federal appropriations legislation. In 2009, the Obama Administration’s proposed budget for the Justice Department for Fiscal Year 2010 did eliminate the current provision prohibiting ATF from providing gun trace data to law enforcement except in connection with individual criminal investigations or prosecutions. However, new language in the proposed budget expressly prohibits any person from “knowingly and publicly” disclosing ATF gun trace data in his or her possession. Moreover, the President’s proposed budget leaves intact the remainder of the Tiahrt Amendments: 1) banning the dissemination of gun trace data beyond law enforcement; 2) banning ATF from requiring that gun dealers perform annual inventory audits; and 3) requiring that ATF destroy background check records for approved transfers within 24 hours of approval.

E. Federal Immunity Law Challenges

The Protection of Lawful Commerce in Arms Act (PLCAA),¹⁰⁴ adopted by Congress in 2005, immunizes firearms manufacturers and sellers from civil lawsuits that seek injunctive or other relief arising from the unlawful misuse of firearms distributed in interstate commerce. The PLCAA mandates dismissal of lawsuits against the gun industry unless the claim falls within one of the statute’s narrow exceptions. Courts analyzing the PLCAA have focused on the applicability of the exception for lawsuits based on a “knowing violation of a state or federal statute applicable to the sale or marketing of firearms,” as well as the law’s constitutionality. The PLCAA does not protect gun manufacturers and sellers from liability in cases in which they “knowingly” violated state or federal laws concerning the marketing and sale of their products.¹⁰⁵

The key rulings over the past year include:

¹⁰³ District of Columbia House Voting Rights Act of 2009, S. 160, 111th Cong. (2009).

¹⁰⁴ 15 U.S.C. §§ 7901 - 7903.

¹⁰⁵ The PLCAA also provides an exception for certain product liability claims. 15 U.S.C. § 7903(5)(A)(v).

- *City of Gary v. Smith & Wesson Corp.*¹⁰⁶ In a landmark ruling on January 12, 2009, the Indiana Supreme Court allowed Gary, Indiana’s lawsuit against 16 gun manufacturers and six Indiana gun dealers to proceed to trial, denying a petition to transfer the case to the Indiana Supreme Court. The court affirmed the appeals court ruling that the case is not barred by the PLCAA. The gun industry defendants had claimed that the PLCAA shields them from liability for sales practices in violation of Indiana’s public nuisance statute that resulted in the funneling of guns into the criminal market.
- *Adames v. Sheahan.*¹⁰⁷ On March 13, 2009, the Illinois Supreme Court rejected plaintiffs’ claims alleging design defect, failure to warn and breach of the implied warranty of merchantability against firearm manufacturers for the unintentional shooting death of a boy, finding that the lawsuit was a “qualified civil liability action” under the PLCAA and did not fall within an exception that would save plaintiffs’ claims.¹⁰⁸
- *City of New York v. Bob Moates' Sport Shop, Inc.*¹⁰⁹ On September 29, 2008, New York City’s settlement agreement for a public nuisance suit against an out-of-state firearm retailer for illegal trafficking was found not barred by the PLCAA, because the retailers’ knowing participation in the straw purchases violated federal and state laws involving the sale and marketing of guns.¹¹⁰
- *City of New York v. Beretta U.S.A. Corp.*¹¹¹ On March 9, 2009, in a decision effectively ending New York City’s nine-year lawsuit against the gun industry for diverting lawfully purchased firearms into illegal gun markets, the U.S. Supreme Court refused to consider the Second Circuit’s dismissal of this case on PLCAA grounds. The Second Circuit found that the PLCAA required dismissal because the statute upon which the city had predicated its claims, N.Y. Penal Law § 240.45, does not fall within the exception in the PLCAA that saves claims involving the sale or marketing of guns. The court found that Penal Law § 240.45 is a statute of general applicability that does not fall within the PLCAA’s predicate exception because it does not clearly regulate the firearms industry.¹¹²
- *Ileto v. Glock, Inc.*¹¹³ On May 11, 2009, the Ninth Circuit held that the PLCAA requires dismissal of public nuisance and negligence claims by family members of shooting victims against firearms manufacturers, dealers and distributors of the guns used in the shootings. The Ninth Circuit concluded that, in adopting the PLCAA, Congress clearly intended to preempt common-law claims such as general tort theories of liability. The tort theories

¹⁰⁶ *Smith & Wesson Corp. v. City of Gary*, No. 45A05-0612-CV-754, 2008 Ind. App. LEXIS 8 (Ind. Ct. App. Jan. 9, 2008).

¹⁰⁷ *Adames v. Sheahan*, Docket Nos. 105789 & 105851 cons., 2009 Ill. LEXIS 310 (Ill. Mar. 19, 2009).

¹⁰⁸ The court also rejected plaintiffs’ claim that the PLCAA is unconstitutional under the Tenth Amendment to the United States Constitution, which reserved to the states or to the people those “powers not delegated to the United States by the Constitution, nor prohibited by it to the States.” U.S. Const., amend. X. *Id.* at *56.

¹⁰⁹ 253 F.R.D. 237 (E.D.N.Y. Sept. 29, 2008).

¹¹⁰ *Id.* at 243. See 15 U.S.C. § 7903(5)(A)(iii).

¹¹¹ 524 F.3d 384 (2d Cir. 2008).

¹¹² *Id.* at 404. The Second Circuit also affirmed the district court ruling that the PLCAA is a constitutional, permissible exercise of Congress’ commerce power, and does not violate the principles of separation of powers or the Tenth or First Amendments. *Id.* at 392-93.

¹¹³ *Ileto v. Glock, Inc.*, No. 06-56872, No. 07-15403, No. 07-15404, 2009 U.S. App. LEXIS 10945 (9th Cir. May 11, 2009).

raised by plaintiffs, the court found, did not fall within the exception in the PLCAA because they do not specifically relate to firearms.¹¹⁴

F. 2008 Elections and the Obama Administration

The 2008 elections contained positive developments for gun safety. Candidates that strongly support gun violence prevention won handily, while NRA-supported candidates opposed to violence prevention largely lost.¹¹⁵ A report issued by the Brady Campaign to Prevent Gun Violence following the elections found “no evidence that any candidate, at any level, lost because of support for sensible gun laws. Supporters of common sense gun laws won in Senate, House and state races across the country,” demonstrating that “politicians do not risk electoral defeat if they cross the gun lobby.”¹¹⁶

Although the election of Barack Obama as President of the United States inspired hope of federal gun policy reform in those who support common sense gun laws, unfortunately those hopes have not yet been realized. In fact, the President has backed off of his previously expressed support for a federal assault weapon ban, and signed into law the Credit Card Accountability, Responsibility and Disclosure Act of 2009 which, as discussed above, contains a dangerous amendment that allows the possession of loaded, operable firearms in national parks and wildlife refuges. LCAV hopes that President Obama will reverse course and actively support federal gun policies that promote public safety in the coming years.

¹¹⁴ *Id.* at *26. The court did not dismiss plaintiffs’ claims against defendant China North. Since the PLCAA preempts only actions brought against *federally licensed* manufacturers and sellers of firearms, and China North is not a federally licensed manufacturer or seller of firearms, the PLCAA does not preempt plaintiffs’ claims against the company. *Id.* at *50. LCAV filed *amicus curiae* (“friend of the court”) briefs in the *Adames, New York v. Beretta* and *Ileto* cases. These *amicus* briefs are available to view on LCAV’s website, at www.lcav.org.

¹¹⁵ Brady Campaign to Prevent Gun Violence, *Guns & the 2008 Elections – Common Sense Gun Laws Won, the NRA Lost, & What it Means* (Nov. 6, 2008), at <http://www.bradycenter.org/xshare/pdf/reports/guns-2008election.pdf>.

¹¹⁶ *Id.* at 3-4.

V. California Update

A. California's Gun Violence Prevention Laws: Leading the Nation

California is consistently at the forefront of gun policy reform and has enacted some of the strongest gun laws in the nation. Unlike most states, for example, California:

- Has closed the federal private sale loophole and requires background checks on all prospective gun purchasers.¹¹⁷
- Prohibits the manufacture and sale of handguns that have not passed certain safety tests.¹¹⁸
- Maintains handgun purchaser records.¹¹⁹
- Requires handgun purchasers to obtain a safety certificate after passing a written test and performing a safe handling demonstration.¹²⁰
- Limits handgun sales to one per person per month.¹²¹
- Imposes a 10-day waiting period.¹²²
- Requires that all firearms manufactured or sold in the state be accompanied by a trigger lock or other firearm safety device approved by the California Department of Justice.¹²³
- Bans assault weapons and 50 caliber rifles.¹²⁴
- Prohibits the sale of large capacity ammunition magazines (i.e., those capable of holding more than 10 rounds of ammunition).¹²⁵

B. 2008 Legislation

In 2008, California was poised to strengthen its gun laws by adopting several new, common sense bills. While two modest firearm-related bills were enacted in 2008, other important gun legislation passed by both houses of the California Legislature was, unfortunately, vetoed by Governor Schwarzenegger.

1. Bills Signed Into Law

AB 837 (Feuer) – Firearms: Prohibited Persons. AB 837 (amending several sections of the California Business and Professions, Government, Health and Safety and Penal Codes) clarifies that whenever the California Department of Justice (DOJ) is authorized to conduct a background check on an individual to determine his or her eligibility to possess a firearm, DOJ must make that determination based on the eligibility requirements of state and federal law. This law will prevent

¹¹⁷ All gun sales must be processed by a licensed dealer. Cal. Penal Code § 12072(d).

¹¹⁸ Cal. Penal Code § 12125 *et seq.*

¹¹⁹ Cal. Penal Code § 11106(c)(1).

¹²⁰ Cal. Penal Code §§ 12071(b)(8)(B), 12800 *et seq.*

¹²¹ Cal. Penal Code §§ 12072(a)(9)(A), 12072(c)(6).

¹²² Cal. Penal Code §§ 12071(b)(3)(A), 12072(c)(1).

¹²³ Cal. Penal Code § 12088.1.

¹²⁴ Cal. Penal Code § 12280(a)(1).

¹²⁵ Cal. Penal Code § 12020(a)(2), (b). For a complete summary of California's firearm laws, visit the LCAV web site, <http://www.lcav.org/states/california.asp>.

DOJ from declaring a person eligible to possess a gun even though he or she would be disqualified under federal law.

AB 352 (Solorio) – Display of Imitation Firearms in Public Schools. AB 352 (amending Cal. Penal Code § 12556) includes public schools and public and private colleges and universities within the definition of “public place” for the offense of openly displaying or exposing an imitation firearm in a public place.

2. Vetoed Bills

AB 2696 (Krekorian) – Background Check Records. AB 2696 would have required the electronic transmission of mental health records to DOJ for use in background checks on prospective gun purchasers. These records are currently sent by mail, often in batches over a several month period, allowing certain mentally ill people to purchase firearms in the interim. Despite passage in both the Assembly and Senate, the Governor vetoed the bill, which was sponsored by LCAV.

SB 1171 (Scott) – Carrying Loaded Firearms in Vehicles. Under existing law, carrying a loaded firearm in a vehicle in an unincorporated area is only prohibited if the county bans the discharge of firearms. SB 1171 would have expanded the prohibition so that no loaded firearm could be carried in a vehicle in any public place, street or highway, regardless of a local discharge ban. SB 1171 was also vetoed by the Governor.

3. Other Proposed Legislation

AB 2062 (De Leon) – Ammunition Sales. AB 2062, co-sponsored by LCAV, would have established a comprehensive regulatory scheme for handgun ammunition sales. AB 2062 passed the Assembly, but stalled in the Senate. The bill was reintroduced in 2009 as AB 962. For a detailed description of AB 962, see the 2009 Legislation section, below.

AB 334 (Levine) – Reporting Lost or Stolen Firearms. AB 334 would have required new handgun owners to report the loss or theft of their handguns. The bill passed the Assembly, but was amended in the Senate to address a subject unrelated to firearms.

AB 2235 (DeSaulnier) – “Owner-Authorized Handguns.” AB 2235 would have required all newly manufactured or imported handguns in California to be “owner-authorized,” *i.e.*, designed to be fired only by the lawful owner or other authorized user, 18 months after DOJ determined that such handguns were available for retail sale. AB 2235 passed the Assembly, but was stymied in the Senate. This legislation was reintroduced in 2009 as SB 697, but will not be considered until early 2010. LCAV is a co-sponsor of the bill.

C. 2009 Legislation

Several important gun violence prevention bills were introduced in 2009 and are currently progressing through the California Legislature. LCAV supports the following firearm-related legislation:

AB 814 (Krekorian) – Firearm Relinquishment. AB 814, sponsored by LCAV, would help get guns out of the hands of convicted criminals. Under existing law, persons who become prohibited from possessing firearms are advised, through a notice and form created by the California Department of Justice (DOJ), to transfer their firearms through a third party designee within 30 days. Existing law provides no mechanism, however, to ensure that these firearms are actually relinquished.

AB 814 would require a prohibited person to transfer his or her firearms to a designee who must sell the guns to a dealer, transfer them to a third party through a dealer, or relinquish them to local law enforcement. If the prohibited person is not in custody following conviction, the relinquishment process must be completed within five days of the date of conviction. If the person remains in custody, the process must be completed within 14 days. Furthermore, such persons must, within the relinquishment period, submit a form to local law enforcement stating: 1) whether or not they own any firearms to relinquish; and 2) if so, to whom any firearms were relinquished. AB 814 would help enforce state law prohibiting gun possession by certain convicted criminals and provide clear guidance to prohibited persons regarding their obligation to sell or surrender their guns. On June 3, 2009, AB 814 was approved by the Assembly in a 72-3 vote.

AB 962 (De Leon) – Handgun Ammunition Sales. Ammunition sales are almost completely unregulated under existing federal and state law, allowing convicted felons and other prohibited persons to easily buy and sell ammunition. AB 962, co-sponsored by LCAV, would establish a comprehensive regulatory scheme for handgun ammunition sales. Under the bill, any person who sells more than 50 rounds of handgun ammunition a month would be required to: 1) obtain a state license; 2) maintain ammunition purchaser records; and 3) store ammunition in a manner inaccessible to the public. AB 962 would also mandate that all sales be processed in face-to-face transactions with the purchaser providing “bona fide evidence” of his or her identity. In addition, the bill would prohibit persons subject to gang injunctions from possessing ammunition, and prohibit ammunition sales to any person the seller knows or has cause to believe is prohibited from possessing ammunition. AB 962 was approved by the Assembly on June 3, 2009.

SB 697 (DeSaulnier) – Owner-Authorized Handguns. SB 697, co-sponsored by LCAV, would require all newly manufactured or imported handguns in California to be “owner-authorized,” *i.e.*, designed to be fired only by the lawful owner or other authorized user, 18 months after DOJ determines that such handguns are available for retail sale. SB 697 will be considered in early 2010.

LCAV also supports the following 2009 bills:

- **AB 530 (Krekorian) – Unlawful Detainer (Controlled Substances and Firearms).** Would extend deadlines on pilot programs to enable cities to pursue unlawful detainer actions against persons arrested for illegal use or possession of firearms or controlled substances. AB 530 passed the Assembly by a 77-0 vote on May 18, 2009.
- **AB 532 (Lieu) – Search Warrants.** Would authorize a court to issue a search warrant to seize a firearm from a person detained for examination of his or her mental condition or arrested in connection with a domestic violence incident. AB 532 was approved by the Assembly 75-0 on May 18, 2009.

- **AB 668 (Lieu) – Gun-Free School Zones.** Would extend the limits of a school zone and clarify exceptions to prohibition on firearm possession on school property. On June 2, 2009, AB 668 was approved by the Assembly 76-0.
- **AB 789 (De Leon) – Search Warrants.** Would authorize a court to issue a search warrant to seize a firearm from a person subject to a domestic violence protective order. AB 789 was approved by the Assembly in a 78-0 vote on May 28, 2009.
- **AB 1498 (De Leon) – Prohibited Persons.** Would add additional misdemeanors to the list of crimes disqualifying a person from possessing firearms for ten years following conviction. AB 1498 has been held under submission in the Assembly appropriations committee.
- **SB 41 (Lowenthal) – Firearm Transfer Reporting.** Would require a dealer to provide a copy of the record of sale to every purchaser of a firearm and require both dealer and purchaser to sign to acknowledge delivery of a purchased handgun. Would also clarify law related to law enforcement custody of firearms and DOJ purchaser recordkeeping. SB 41 passed the Senate on June 1, 2009.
- **SB 449 (Padilla) – Secondhand Dealer Reporting.** Would require secondhand dealers (*e.g.*, pawnbrokers) to daily report each firearm he or she received to DOJ instead of reporting to local law enforcement and enable DOJ to use the reports to identify lost or stolen firearms. On May 14, 2009, SB 449 was approved by the Senate in a 38-0 vote.
- **SB 585 (Leno) – Cow Palace Firearm Sales.** Would allow no more than five events per year on Cow Palace property (a facility used for gun shows near San Francisco) at which guns or ammunition are sold, beginning January 1, 2010, and prohibit the holding of more events in any year than the previous year. The Senate approved SB 585 on June 3, 2009.
- **SB 746 (DeSaulnier) – Gun Safety Board.** Would impose a \$25 fee on the sale or transfer of firearms to fund the creation of a Gun Safety Board to develop strategies to reduce gun violence. SB 746 will be considered in early 2010.

LCAV has opposed the following firearm-related bills:

AB 357 (Knight) – License to Carry Concealed Firearm. AB 357 would amend state concealed handgun licensing laws to remove the requirement that an applicant establish “good cause” to receive a license and would require a county sheriff or municipal police chief to issue a license to any individual who meets the other license requirements. By converting California from a “may issue” state into a “shall issue” state, AB 357 would eliminate the important discretion that local law enforcement agencies have in the issuance of concealed handgun licenses, and increase the chances that everyday disputes would escalate into public shootouts. AB 357 failed passage in the Assembly Public Safety Committee on April 21, 2009, but may be reconsidered in early 2010.

AB 1167 (Nielsen) – Concealed Firearm Licenses: Reciprocity. AB 1167 would amend state law to provide that a valid permit or license to carry a concealed handgun issued in another state or

political subdivision would be recognized as valid in California. The bill would require DOJ to enter into reciprocity agreements with all other states and maintain a list of states with which it has established reciprocity. Unlike California, many states do not require licensees to undergo additional background checks in order to renew their licenses. By forcing California to open the floodgates to the carrying of concealed firearms by licensees from other states, AB 1167 would place public safety in serious jeopardy. While an April 21 hearing on the bill in the Assembly Public Safety Committee was cancelled at the request of the author, the legislation may be reheard in early 2010.

AB 979 (Berryhill) – Hunting or Fishing (Local Regulation). AB 979 would preempt local regulation of hunting and fishing and could, therefore, interfere with existing and future local bans on the discharge of guns and other reasonable local public safety measures. On June 2, 2009, AB 979 was approved by the Assembly.

VI. California Local Governments Update

California cities and counties have pioneered legislative efforts to reduce gun violence. Since the mid-1990s, local governments in California have adopted over 300 innovative firearm ordinances.¹²⁶ Significantly, this local regulatory activity has provided a catalyst for the enactment of several new state laws, including those to: 1) prohibit the manufacture and sale of “junk guns;” 2) require firearms dealers to equip all firearms with child-safety locks; 3) prohibit the sale of large-capacity ammunition magazines; 4) limit handgun purchases to one per person per month; and 5) prohibit the manufacture and sale of 50 caliber rifles. Each of these laws was modeled after local ordinances adopted since 1995.

A. Local Authority to Regulate Firearms

Opponents of local gun laws often argue that cities and counties have no authority to regulate firearms or ammunition, *i.e.*, that state law preempts such regulations. The courts generally have been hesitant, however, to strike down local gun laws in California on this basis.

The California Legislature has expressed an explicit intent to preempt local firearms regulations in three discrete areas: 1) licensing or registration of commercially manufactured firearms;¹²⁷ 2) licensing or permitting with respect to the purchase, ownership, possession or carrying of a concealable firearm in the home or place of business;¹²⁸ and 3) the manufacture, sale or possession of “imitation firearms.”¹²⁹

The courts have held that local governments have a great deal of authority to regulate firearms outside of these preempted areas. *See, e.g., California Rifle and Pistol Association, Inc. v. City of West Hollywood* (1998) 66 Cal. App. 4th 1302 (upholding a ban on the sale of “junk guns”),¹³⁰ *Suter v. City of Lafayette* (1997) 57 Cal. App. 4th 1109 (upholding an ordinance regulating firearms dealers),¹³¹ *Great Western Shows, Inc. v. County of Los Angeles* (2002) 27 Cal. 4th 853 (upholding a ban on the sale of firearms and ammunition on county-owned property), and *Nordyke v. King* (2002) 27 Cal. 4th 875 (upholding a ban on the possession of firearms and ammunition on county-owned property).

In *Doe v. City and County of San Francisco* (1982) 136 Cal. App. 3d 509, in contrast, the Court of Appeal held that Government Code Section 53071 and Penal Code Section 12026 expressly preempted a local ordinance banning the possession of handguns in San Francisco. Because the ordinance contained an exception for concealed weapons licensees, the court found that it had the effect of creating a new class of persons who would be required to obtain a license in order to

¹²⁶ See Prevent Handgun Violence Against Kids & Legal Community Against Violence, *Communities on the Move 2000: How California Communities are Addressing the Epidemic of Handgun Violence* (2000) at:

http://www.lcav.org/library/surveys_local_orads/com2000_pdf.pdf.

¹²⁷ Cal. Gov't Code § 53071.

¹²⁸ Cal. Penal Code § 12026.

¹²⁹ Cal. Gov't Code § 53071.5.

¹³⁰ West Hollywood was the first California city to ban the sale of these dangerous firearms. LCAV's survey of local gun laws indicates that as of May 31, 2000, 55 cities and counties had followed West Hollywood's lead.

¹³¹ The Lafayette ordinance required dealers to sell trigger locks and obtain liability insurance and prohibited dealers from operating in residential areas and admitting minors unless accompanied by an adult. The court held that one ordinance provision – which imposed security requirements for firearms dealer premises – was preempted by a state statute which imposed similar, yet less stringent requirements. State law now allows local governments to impose security requirements that are more strict than state law. See Cal. Penal Code § 12071(b)(15).

possess a handgun in their home or place of business. The court also stated that even if it were to find no “licensing” requirement in the ordinance, it would still conclude that Penal Code Section 12026 impliedly preempted the ordinance on the ground that the statute occupies the field of residential handgun possession. The court found nothing in state law to suggest, however, that the Legislature intended to prevent local governments from regulating all aspects of gun possession.

In 2008, the Court of Appeal followed the reasoning of *Doe in Fiscal v. City and County of San Francisco* (2008) 158 Cal. App. 4th 895, holding that state law preempted Proposition H, a voter-approved ordinance to ban handgun possession by San Francisco residents and prohibit the sale of all firearms and ammunition in the city.

B. Validating the Constitutionality of Local Gun Laws Under the Second Amendment: *Nordyke v. King*

As noted in the discussion of the *Nordyke v. King* litigation in the Federal Update, on April 20, 2009, the Ninth Circuit Court of Appeals held that Alameda County’s ban on the possession of firearms or ammunition on county-owned property passes muster under the Second Amendment.¹³² The ordinance, adopted in 1999, has been the subject of years of litigation, every ruling favoring the county’s ability to regulate its property to promote public health and safety by contributing to the reduction of gunshot fatalities and injuries in the county.¹³³

The Ninth Circuit decision, discussed below, is of national importance because it is one of the first circuit court decisions to interpret the U.S. Supreme Court’s ruling in *District of Columbia v. Heller*.

1. Alameda County’s Ordinance Does Not Meaningfully Burden the Right to Possess Firearms in the Home for Self-Defense

The *Nordyke* plaintiffs argued that the County’s ordinance indirectly burdened the right to bear arms for self-defense purposes by effectively eliminating gun shows and making it “more difficult to purchase guns.”¹³⁴ Noting that *Heller* had not outlined a standard of review for laws implicating the Second Amendment, the court stated that “*Heller* tells us that the Second Amendment’s guarantee revolves around armed self-defense. If laws make such self-defense impossible in the most crucial place — the home — by rendering firearms useless, then they violate the Constitution.”¹³⁵ The court found that “although the Second Amendment...protects a right to keep and bear arms for individual self-defense, it does not contain an entitlement to bring guns onto government property.”¹³⁶ As a result, the court concluded that “the Ordinance does not meaningfully impede the ability of individuals to defend themselves in their homes with usable firearms.”¹³⁷

¹³² *Nordyke v. King*, 563 F.3d 439, 460 (9th Cir. 2009) (interpreting the Second Amendment pursuant to *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008)).

¹³³ Alameda County, Cal. Code § 9.12.120(A).

¹³⁴ *Nordyke*, *supra* note 132, at 458.

¹³⁵ *Id.*

¹³⁶ *Id.* at 459.

¹³⁷ *Id.* at 460.

2. Alameda County's Ordinance Regulates Possession in Sensitive Places

The Ninth Circuit agreed with the County that *Heller* gave particular approval to laws prohibiting the possession of firearms in sensitive places such as schools and government buildings. Although *Heller* did not articulate a definition of a “sensitive place,” the *Nordyke* court observed that both schools and government buildings shared the common characteristics of being “important to government functioning” and being places where possession of firearms could harm “great numbers of defenseless people.”¹³⁸ Therefore, although the County’s ordinance prohibited possession in parks, recreational areas, historic sites, parking lots and the County fairground, it was not overbroad. Rather, these locations were “gathering places where high numbers of people might congregate.”¹³⁹

C. Types of Local Ordinances to Reduce Gun Violence

1. A History of Cutting-Edge Regulations

Recognizing that they bear primary responsibility for public health and safety, elected officials in communities throughout California continue to enact a variety of progressive ordinances to fill gaps in state and federal law, including those which:

- Require firearms dealers to:
 - Obtain a local license
 - Operate away from residential neighborhoods and other “sensitive” areas, e.g., schools, playgrounds and places of worship
 - Conduct employee background checks
 - Obtain liability insurance
 - Prohibit unaccompanied minors from entering the dealers’ premises where firearm sales is the primary business performed
 - Provide the results of twice-yearly inventory inspections to local law enforcement;
- Prohibit the sale or possession of firearms on publicly-owned property (this type of ordinance has had the effect of ending gun shows at some public facilities, such as county fairgrounds);
- Require gun owners to notify law enforcement when their weapons are lost or stolen;
- Require ammunition vendors to obtain a local license and maintain ammunition purchaser records (discussed in greater detail below);
- Prohibit the possession of high capacity ammunition magazines, and the sale and possession of 50 caliber cartridges;
- Write letters to gun purchasers during the 10-day waiting period, advising them of their obligations as gun owners.

LCAV is pleased to provide *pro bono* assistance to local governments seeking to adopt or defend ordinances to reduce gun violence statewide. For more information about the types of ordinances currently in effect in California’s cities and counties, see the California Local Ordinance Summary page of LCAV’s web site at www.lcav.org/states/calocalord.asp.

¹³⁸ *Id.* at 459.

¹³⁹ *Id.* at 460. The Ninth Circuit also sided with the County on plaintiffs’ other claims, holding that the ordinance does not violate the First Amendment as applied to plaintiffs (*Id.* at 463), and dismissing plaintiffs’ claim that the ordinance’s exceptions for firearm possession in theatrical productions violated equal protection (*Id.* at 464).

2. Featured Local Regulation: Ammunition Sales Recordkeeping

Ammunition sales recordkeeping and reporting laws provide valuable information to law enforcement. Law enforcement agencies in jurisdictions that require ammunition sellers to keep records of their sales have been able to detect illegal possessors of firearms and ammunition by cross-referencing the information in these records with California Department of Justice-maintained information regarding persons prohibited from such possession. Local jurisdictions in California that have adopted ammunition sales recordkeeping and reporting laws – most notably Los Angeles and Sacramento – have had demonstrated success in using such records to identify and prosecute illegal gun and ammunition purchasers. More than a dozen local jurisdictions across the state currently require sellers to maintain records of ammunition sales.¹⁴⁰

a. The Los Angeles Experience

In May, 1995, Los Angeles adopted an ammunition sales recordkeeping and reporting ordinance.¹⁴¹ That ordinance requires any person engaged in the retail sale of ammunition to: 1) record the identity and other pertinent information of an ammunition purchaser, including the purchaser's signature and right thumbprint;¹⁴² and 2) retain such records for a minimum period of two years.

A two-month study of the Los Angeles ordinance found that prohibited purchasers accounted for nearly 3% of all ammunition purchasers over the study period, acquiring roughly 10,000 rounds of ammunition illegally.¹⁴³

The Los Angeles ordinance has helped law enforcement prosecute persons who illegally possess firearms and ammunition. The ordinance has led to 30 investigations, 15 search warrants, nine arrests, and the confiscation of 24 handguns, 12 shotguns, and nine rifles that were illegally possessed between 2004 and the first half of 2006, as well as 39 investigations in 2007, and at least 24 investigations in 2008.¹⁴⁴

b. The Sacramento Experience

In 2007, Sacramento adopted its own ammunition sales recordkeeping and reporting ordinance. Its provisions are substantially similar to those in the Los Angeles ordinance, except the Sacramento law also requires electronic transmission of records from ammunition sellers to the Sacramento Police Department (“SPD”) within five calendar days of an ammunition transfer.¹⁴⁵ In Sacramento, as in Los Angeles, sellers of firearm ammunition also must be licensed.¹⁴⁶

¹⁴⁰ Beverly Hills, Contra Costa County, Hayward, Inglewood, Los Angeles, Marin County, Oakland, Pomona, Sacramento, San Anselmo, San Francisco, Santa Ana, Santa Monica, Tiburon and West Hollywood are jurisdictions that require firearms dealers and other ammunition sellers to record ammunition sales.

¹⁴¹ Los Angeles, Cal. Code, Chap. V, Art. 5, § 55.11.

¹⁴² The thumbprint provision was added in June, 1998.

¹⁴³ George E. Tita et al., *The Criminal Purchase of Firearm Ammunition*, 12 *Inj. Prevention* 308, 308 (2006).

¹⁴⁴ LCAV obtained these numbers from Lieutenant Steve Nielsen of the Los Angeles Police Department's Gun Unit in May 2007 and May 2008.

¹⁴⁵ Sacramento, Cal. Code Chapter 5.66.

¹⁴⁶ Sacramento, Cal. Code § 5.64.020. Los Angeles adopted its vendor licensing provision in 2008. Los Angeles, Cal. Code, Chap. X, Art. 3, Div. 9, § 103.314.1.

Sacramento's Chief of Police reported to the City Council on August 12, 2008, regarding the outcomes of the ordinance one year after its passage. The Chief's report concluded that the ammunition sales recordkeeping and reporting system has been a resounding success. Specifically, the Chief's report found that:

- The SPD and allied agencies use the information gathered as a result of the ordinance in criminal investigations regularly;
- These requirements have allowed the SPD to electronically check the legal firearms rights status of transferees; and
- The electronic system for transfer of purchaser information has proven to be secure, effective and reliable.¹⁴⁷

The report found that between January 16 and December 31, 2008, the Sacramento ordinance led to the identification of 156 prohibited persons who had purchased ammunition, 124 of whom had prior felony convictions, 48 search warrants and 26 additional probation or parole searches. The ordinance led to 109 felony charges, 10 federal court indictments, 37 felony convictions and 17 misdemeanor convictions. Based on the information gathered under the ordinance, law enforcement seized a total of 84 firearms, including seven assault weapons, and thousands of rounds of ammunition.¹⁴⁸

Importantly, the Chief's report specifically found that the ordinance does not prevent nor delay the transfer of ammunition at the point of sale, and that the cooperation and compliance of ammunition vendors in Sacramento has been very strong.¹⁴⁹ The SPD estimates that the recordkeeping requirement only adds two minutes to a transaction, significantly less time than if the customers traveled outside of the jurisdiction to purchase ammunition.

Ammunition purchaser recordkeeping is a key component of state bill AB 962, discussed above under 2009 Legislation.

D. Regional Regulatory Approaches: Association of Bay Area Governments

Regional partnerships among cities and counties to adopt uniform regulatory policies to reduce gun violence are particularly effective. The Association of Bay Area Governments (ABAG), a comprehensive planning agency of local governments in the San Francisco Bay Area composed of nine counties and 101 cities, is now focusing on the issue of gun violence.

LCAV is assisting ABAG in its regional efforts, and has prepared model laws for ABAG's Youth Gun Violence Task Force. Those model laws:

- Regulate Firearms Dealers and Ammunition Sellers;

¹⁴⁷ Sacramento, Cal., Code, Chapters 5.64, 5.66; Sacramento Chief of Police Rick Braziel *et al.*, *Report to Council, Ammunition Sales Records Study* (Aug. 12, 2008), available at:

http://sacramento.granicus.com/MetaViewer.php?view_id=8&clip_id=1590&meta_id=155275.

¹⁴⁸ These statistics were obtained from Captain Jim Maccoun, Office of Technical Services, Sacramento Police Department on January 27, 2009. For the statistics for the period between January 16 and June 29, 2008, see *id.*

¹⁴⁹ *Id.*

- Require the Reporting of Lost or Stolen Firearms;
- Prohibit the Possession of Large Capacity Ammunition Magazines;
- Urge Law Enforcement to Send Letters to Prospective Handgun Purchasers;
- Urge Law Enforcement to Obtain and Utilize DOJ Information Regarding Prohibited Armed Persons.

VII. Other State Legislation

This year, LCAV began tracking legislation in all fifty states and the District of Columbia. This project provides national, state and local gun violence prevention groups, researchers and elected officials with a comprehensive overview of legislative trends as well as in-depth information regarding over 1,000 specific bills. LCAV regularly prepares bill charts and summaries of all bills currently pending at a given time. The summaries describe trends and highlight particular bills of interest, while the charts contain detailed bill information.

As of May 14, 2009, state legislation had been enacted strengthening firearms regulation in several policy areas. Laws aimed at keeping firearms out of the hands of domestic violence perpetrators were enacted in Arkansas and North Dakota. Moreover, Virginia enacted a law strengthening regulation of ammunition purchasers, and Washington adopted a law broadening restrictions on firearms purchases by the mentally ill and requires that relevant mental health records be forwarded to the National Instant Criminal Background Check System.¹⁵⁰ In addition, Arkansas enacted a law imposing standards for imitation firearms, and Kansas and Utah laws add to the list of individuals prohibited from purchasing firearms.

On the defensive front, six states have rejected dangerous “Guns on Campus” legislation, while another two states have rejected “Guns in the Workplace” legislation (three states have recently passed these types of laws, however). The gun lobby still has not achieved adoption of any “Guns on Campus” legislation in any state. Many bills strengthening regulation of firearms have passed one or both legislative houses and many more have been introduced and are awaiting action.

For more information about LCAV’s state legislative tracking, contact Senior Staff Attorney Laura Cutilletta at (415) 433-2062, ext. 307, or at lcutilletta@lcav.org.

¹⁵⁰ The National Instant Criminal Background Check System, or NICS, implemented as part of the federal Brady Act, is used to check the backgrounds of prospective purchasers of both handguns and long guns, and for persons who redeem a pawned firearm. 18 U.S.C. § 922(t).

Join LCAV's Membership Program Today

Legal Community Against Violence is only as strong as the people who stand behind the LCAV mission. Four years ago, we launched a national membership program to unite the gun violence prevention community and broaden our base of support, in both financial and human terms. Since then, more than 700 people have joined LCAV. And while most of our members are attorneys, a growing number are professionals from a wide range of industries.

LCAV welcomes all who support our work to prevent gun violence. Members receive a range of benefits including: regular LCAV communications; invitations to educational events on critical issues in the gun violence prevention movement; participation in forming regional LCAV chapters to connect locally with LCAV members; and more. Members who wish to become more involved in LCAV's work may inquire with us about opportunities for pro bono work or participating in member committees.

Membership dollars are now a sustaining force behind LCAV's ambitious agenda. Please help make an immediate difference by joining or renewing your membership for the 2009 year.

**Legal Community Against Violence
encourages your interest and support.**

**To request assistance, become a member,
or for more information,
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A Publication of

Legal Community Against Violence

expertise, information & advocacy to end gun violence