

GUNS, GUN SAFETY, AND THE CHANGING LANDSCAPE OF GUN RIGHTS IN AMERICA

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The United States has a gun problem. According to research by the non-profit organization Everytown for Gun Safety, the firearm homicide rate in the U.S. is “26 times higher than other high-income countries.”¹ There have been over 300 mass shootings during 2022 so far.² However, mass shootings are responsible for less than 1% of deaths caused by firearms—110 people are killed each day by gun violence in the U.S.³ In 2020, firearms surpassed motor vehicle accidents as the leading cause of death for children and teens.⁴ Even though the majority of Americans surveyed favor stricter gun safety laws,⁵ gun regulation remains controversial and politically divisive.

The Supreme Court’s landmark decisions in recent years on the Second Amendment have recognized a more expansive view of gun rights for private individuals, and states are grappling with the changing landscape in different ways. Legislatures are reacting to the new precedent with laws trying to protect their states from gun violence. As legislatures pass new laws aimed at gun violence prevention, new challenges arise from the gun lobby. To address the worsening gun violence in the U.S., we need creativity from legislators and support from citizens. And as states pass legislation allowing civil suits to be brought against the gun industry for its part in gun violence, we need lawyers who are willing to bring cases.

Heller and Bruen: SCOTUS Redefines the Scope of the Second Amendment

District of Columbia v. Heller in 2008 was the first time in almost seventy years that the United States Supreme Court ruled on the Second Amendment.⁶ In that case, the Court interpreted the

¹ *Twelve Years of Mass Shootings in the United States*, (June 4, 2021), <https://everytownresearch.org/maps/mass-shootings-in-america/>.

² See Christina Prignano and Ryan Huddle, “There have been at least 314 mass shootings so far in 2022. There have only been 186 days,” *Boston Globe*, July 5, 2022, <https://www.bostonglobe.com/2022/07/05/nation/there-have-been-least-314-mass-shootings-so-far-2022-there-have-only-been-186-days/>. “Mass shooting” – as defined by the Gun Violence Archive, is “any shooting in which four or more people are shot – excluding the shooter.” *Id.*

³ “Twelve Years of Mass Shootings in the United States,” June 4, 2021, <https://everytownresearch.org/maps/mass-shootings-in-america/>

⁴ NPR, “Firearms overtook auto accidents as the leading cause of death in children,” Apr. 22, 2022, <https://www.npr.org/2022/04/22/1094364930/firearms-leading-cause-of-death-in-children#:~:text=19%20in%202020,-.Until%20then%2C%20motor%20vehicle%20accidents%20had%20spent%20the%20last%2060,cause%20of%20death%20for%20kids.&text=For%20decades%2C%20auto%20accidents%20have,1%20cause%2C%20researchers%20say.>

⁵ Walter Shapiro, Brennan Center for Justice, “The Political Perception and Reality of the Gun Rights Issue,” Apr. 2, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/political-perception-and-reality-gun-rights-issue>.

⁶ “The Supreme Court & the Second Amendment,” Giffords Law Center, <https://giffords.org/lawcenter/gun-laws/second-amendment/the-supreme-court-the-second-amendment/>.

Second Amendment as protecting “an individual right to possess a firearm unconnected with service in a militia, and to use that arm for traditionally lawful purposes, such as self-defense within the home.”⁷ For the first time, SCOTUS established the Second Amendment as an individual right “to possess and carry weapons in case of confrontation.”⁸ The Court struck down D.C.’s ban on handgun possession in the home and “its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense” as violating the Second Amendment.⁹ The majority opinion, written by Justice Scalia, analyzed the Second Amendment in terms of its prefatory clause and operative clause and focused heavily on historical analysis of what the Second Amendment would have meant during the “founding period.”¹⁰ While explaining that the Second Amendment, like the First and the Fourth, codified a “pre-existing right”¹¹ already recognized by the Framers, the majority opinion also states that “the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.”¹²

In *McDonald v. City of Chicago* in 2010, SCOTUS held that the Second Amendment right applies to the States, as the Fourteenth Amendment’s Due Process Clause incorporates “the Second Amendment right recognized in *Heller*.”¹³ However, the Supreme Court’s extension of *Heller*’s newly developed right did not stop there.

Over a decade later, SCOTUS issued another landmark ruling on Second Amendment rights. *N.Y. State Rifle & Pistol Ass’n v. Bruen* extends the Second Amendment right established in *Heller* to apply outside of the home. In *Bruen*, the Court held that “the Second and Fourteenth Amendments protect an individual’s right to carry a handgun for self-defense outside the home.”¹⁴ SCOTUS struck down as unconstitutional the century old proper-cause requirement of New York’s concealed carry law.¹⁵ Justice Thomas’s majority opinion concluded that New York’s licensing regime violates the Constitution “[b]ecause the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense.”¹⁶ The Court concluded that “New York’s proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms.”¹⁷

⁷ *Id.* at 577.

⁸ *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

⁹ *Id.* at 635.

¹⁰ *Id.* at 582.

¹¹ *Id.* at 592.

¹² *Id.* at 582.

¹³ *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

¹⁴ *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S.Ct. 2111, 2122 (June 23, 2022).

¹⁵ *Id.*

¹⁶ *Id.* at 2122.

¹⁷ *Id.* at 2156.

Relying on *Heller* and *McDonald*, the Court rejected “means-end scrutiny” and described the standard for applying the Second Amendment as follows:

In keeping with *Heller*, we hold that when the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s “unqualified command.”¹⁸

This is a shift from the heightened scrutiny that courts had been using to decide Second Amendment cases. The Court concluded that the government did not meet its “burden to identify an American tradition justifying New York’s proper-cause requirement.”¹⁹

Legislative Response to *Bruen*

In the face of changing Supreme Court gun control jurisprudence, states are grappling with how to protect their residents. New York had a swift legislative response to the *Bruen* decision striking down the state’s concealed carry law: on July 1, 2022, Governor Hochul signed legislation (S.51001/A.41001) to strengthen the state’s gun laws and reinforce restrictions on concealed carry weapons.²⁰ The legislation bans concealed weapons from “sensitive locations,” including bars and restaurants that serve alcohol, health and medical facilities, and public transportation.²¹ It “makes ‘no carry’ the default for private property, unless deemed permissible by property owners.”²² Owners who choose to allow concealed carry must “disclose with signage saying concealed carry is allowed on the premises.”²³ The law expands eligibility requirements for concealed carry permits, which “include character references, firearms safety training courses, live fire testing, and background checks,”²⁴ and also expands disqualifying criteria. The law requires background checks for all ammunition purchases and requires handgun-permit applicants to provide the details of their social media accounts for the previous three years.²⁵ It remains to be seen whether the provisions of the new law will pass constitutional muster.²⁶

¹⁸ *Id.* at 2126.

¹⁹ *Id.* at 2138.

²⁰ Quoting Hochul. New York State, July 1, 2022, <https://www.governor.ny.gov/news/governor-hochul-signs-landmark-legislation-strengthen-gun-laws-and-bolster-restrictions>

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ <https://www.nysenate.gov/legislation/bills/2021/S51001>

²⁶ Lawsuits challenging New York’s newest gun control law are already in process. For example, Carl Paladino filed a suit in federal court challenging the provision that prohibits concealed handguns on private property without the owner’s permission as “unconstitutional under the First, Second, Fifth and Fourteenth Amendments.” *See* Complaint at 2, *Paladino v. Bruen*, 1:22-cv-00541 (W.D.N.Y. July 11, 2022). New York’s Republican and Conservative parties

With Justice Thomas having named, in *Bruen*, California, the District of Columbia, Hawaii, Maryland, Massachusetts, and New Jersey as having “analogues” to New York’s proper-cause standard that was struck down,²⁷ we can expect to see legislative changes from these states. In response to the *Bruen* decision, Maryland Governor Larry Hogan directed the state police to suspend the state’s “good and substantial reason” standard for permits to carry handguns, which was very similar to New York’s law that was struck down.²⁸ Additionally, it was announced that Maryland’s “General Assembly will pass legislation in its next session ‘that adheres to the new precedent set by this Supreme Court while ensuring reasonable restrictions to keep our families and communities safe.’”²⁹ Similarly, the Massachusetts Attorney General’s Office issued an advisory that “licensing authorities can no longer enforce the ‘good reason’ provision of the Massachusetts law, which allowed license restrictions or denials if an applicant lacked a sufficiently good reason to fear injury to person or property.”³⁰

In the wake of the *Bruen* decision and amidst frequent mass shootings and other gun violence, federal lawmakers are finally responding to the nation’s gun crisis. The Bipartisan Safer Communities Act was enacted June 25, 2022.³¹ The legislation “is the first major federal gun safety law to pass Congress in nearly 26 years.”³² The Act will “invest \$250 million in community violence intervention and prevention initiatives and \$100 million to help the National Criminal

also plan to file a joint suit. See Keshia Clukey, “New York’s Gun Law Challenged by Trump-Allied Politician,” July 11, 2022, <https://news.bloomberglaw.com/us-law-week/new-yorks-new-gun-law-challenged-by-trump-allied-politician>. Additionally, New York State Rifle and Pistol Association plans to file a suit. See Ryan Whalen, “NYSERPA planning to challenge New York’s new concealed carry laws,” Spectrum News, (July 13, 2022), <https://spectrumlocalnews.com/nys/buffalo/politics/2022/07/13/nysrpa-planning-to-challenge-new-ny-concealed-carry-laws>.

Also worth noting: some critics of the new law have raised concerns that continuing to focus on an arrest-based approach to gun regulation disproportionately affects people of color who live in the most heavily-policed neighborhoods and will continue to fuel mass incarceration. See Peter Sterne, “Critics say New York’s new gun control law will fuel mass incarceration,” cityandstateny.com, July 21, 2022, <https://www.cityandstateny.com/policy/2022/07/critics-say-new-yorks-new-gun-control-law-will-fuel-mass-incarceration/374742/>.

²⁷ *Bruen*, at 2124.

²⁸ Brian Witte, “Hogan directs police to suspend Maryland gun carry standard” The Washington Post, (July 5, 2022) https://www.washingtonpost.com/local/hogan-directs-police-to-suspend-maryland-gun-carry-standard/2022/07/05/93c7b7de-fc78-11ec-b39d-71309168014b_story.html.

²⁹ *Id.*

³⁰ Office of Attorney General Maura Healey, “AG’s Office, EOPSS Advise Law Enforcement Officials About Application of SCOTUS Gun Licensing Case to Massachusetts Law,” (July 1, 2022) <https://www.mass.gov/news/ags-office-eopss-advise-law-enforcement-officials-about-application-of-scotus-gun-licensing-case-to-massachusetts-law#:~:text=Following%20the%20Bruen%20decision%2C%20licensing,injury%20to%20person%20or%20property>

³¹ S.2938 – Bipartisan Safer Communities Act, <https://www.congress.gov/bill/117th-congress/senate-bill/2938/text>.

³² June 25, 2022, <https://www.everytown.org/press/monumental-victory-for-gun-safety-everytown-moms-demand-action-students-demand-action-celebrate-gun-sense-champion-president-joe-biden-signing-bipartisan-safer-communities-act-into-law/>.

Instant Background Check System continue the work of keeping guns out of dangerous hands.”³³ It “establishes an enhanced background check process for gun buyers under age 21, provides federal funding to implement state Red Flag laws, disarms domestic abusers by addressing the dating partner loophole, and funds community violence intervention programs, among other items.”³⁴ While the Act is “an important step towards addressing the years of inaction and indifference in response to heartbreaking gun violence in our schools and communities,”³⁵ much more is needed from federal lawmakers to address the public health crisis that is gun violence in America.

Other Developments

Beyond regulation and enforcement at the individual gun owner/user level, states have begun implementing other strategies to fight gun violence, including through civil lawsuits.

The gun industry has been largely immune to civil liability because the federal Protection of Lawful Commerce in Arms Act (“PLCAA”) of 2005 “prohibits most lawsuits against firearms manufacturers over violence by people who use their products.”³⁶ “PLCAA expressly preempts ‘qualified civil liability action[s]’”³⁷; however, it has a predicate exception excluding “an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought.”³⁸ With that exception in mind, New York enacted first-of-its-kind legislation to hold the gun industry accountable.³⁹

³³ Statement of Administration Policy, June 23, 2022, Executive Office of the President, <https://www.whitehouse.gov/wp-content/uploads/2022/06/Bipartisan-Safer-Communities-Act-SAP-1.pdf>.

³⁴ Everytown, Monumental Victory for Gun Safety, 6/25/22 <https://www.everytown.org/press/monumental-victory-for-gun-safety-everytown-moms-demand-action-students-demand-action-celebrate-gun-sense-champion-president-joe-biden-signing-bipartisan-safer-communities-act-into-law/>

³⁵ U.S. Department of Education, “Statement from U.S. Secretary of Education Miguel Cardona on the Bipartisan Safer Communities Act,” July 11, 2022 <https://www.ed.gov/news/press-releases/statement-us-secretary-education-miguel-cardona-bipartisan-safer-communities-act>.

³⁶ Bloomberg Law, “Glock, Smith & Wesson Sue N.Y. AG James Over Gun Liability Law” (Dec. 16, 2021), <https://news.bloomberglaw.com/product-liability-and-toxics-law/glock-smith-wesson-sue-n-y-ag-james-over-gun-liability-law>.

³⁷ *Nat’l Shooting Sports Found. Inc. v. James*, 2022 WL 1659192 at *2 (N.D.N.Y. May 25, 2022).

³⁸ 15 U.S.C. § 7903(5)(A)(iii).

³⁹ From the bill sponsor’s memo (S7196/A6762-B) (2021):

Virtually every illegal firearm was once legal. Our country is awash with legal and illegal firearms and the People are paying the price in money and misery wrought by the illegal use of legal firearms. This unacceptable situation poses specific harm to New Yorkers based largely on their zip code and certain immutable characteristics such as race and ethnicity. Given the ease with which legal firearms flow into the illegal market -- in spite of stringent state and local restrictions -- and given the specific harm illegal firearm violence causes certain New Yorkers, those responsible for the sale, manufacture, importing, or

On July 6, 2021, New York enacted General Business Law Section 898, which creates a private right of action against gun industry members.⁴⁰ It allows civil suits against gun industry members for maintaining or contributing “to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.”⁴¹ The law requires “gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state” to “establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.”⁴² The statute defines “reasonable controls and procedures” as “policies that include, but are not limited to: (a) instituting screening, security, inventory and other business practices to prevent . . . sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others.”⁴³

The statute states that a violation that results in public harm will be considered a “public nuisance.”⁴⁴ This public nuisance statute provides a predicate exception to PLCAA that opens the door for plaintiffs to bring suits to hold the gun industry accountable for its role in gun violence. So far, the New York law has survived judicial scrutiny.⁴⁵ On May 25, 2022, the District Court dismissed a suit brought by gun industry members and a trade association alleging that section 898 is unconstitutional because it is preempted by PLCAA, violates the dormant Commerce Clause, and is void for vagueness.⁴⁶ The Court held that section 898 is a statute included in PLCAA’s “applicable to” definition because it expressly regulates firearms. Therefore, PLCAA does not preempt New York’s law, and the Court dismissed the other challenges as well.⁴⁷

marketing of firearms should be held liable for the public nuisance caused by such activities. This bill has been drafted to comport with the Protection of Lawful Commerce in Arms Act (18 USC 5 921) as construed by the United States Court of Appeals for the Second Circuit in *City of New York v Beretta USA Corp.*, 524 F3d 384 (2d Cir 2008). Through the PLCAA, the firearms industry is shielded from civil liability except when the basis for that liability is a “predicate statute” that is applicable to the sale or marketing of firearms. With the passage of this bill, it is our hope that the right of the People to hold the firearms industry accountable will be restored.

⁴⁰ N.Y. Gen. Bus. Law § 898.

⁴¹ § 898-b(1). Effective July 6, 2021.

⁴² 898-b(2)

⁴³ 898-a(2)

⁴⁴ 898-c(1)

⁴⁵ *Nat’l Shooting Sports Found. Inc. v. James*, 2022 WL 1659192 (N.D.N.Y. May 25, 2022).

⁴⁶ *Id.* at *1.

⁴⁷ *Id.* at *5.

After New York passed its industry accountability statute, California, Delaware, and New Jersey passed similar laws.⁴⁸ In July, 2022, California Governor Newsom signed into law AB 1594, which “requires manufacturers, distributors and dealers of guns and ammunition to abide by new state standards for the safety, marketing and sale of their products” and “empowers the state, local governments and individuals harmed by gun violence to sue companies that violate those standards.”⁴⁹ By imposing tort liability on the gun industry, the bill may force gun manufacturers and dealers to conduct business in a more responsible manner.

California’s state legislature also passed California Senate Bill 1327, which will allow private citizens to sue “gun manufacturers and gun dealers who make or sell firearms that are illegal under California law.”⁵⁰ The bill is “sponsored by Governor Newsom to limit the spread of assault weapons and ghost guns,” and is “modeled on the structure of Texas’s abortion law”⁵¹ that was upheld by the U.S. Supreme Court and which allows any private citizen to bring a lawsuit even if they were not personally affected or harmed by the conduct at issue. Proponents of the bill view it as utilizing the Supreme Court’s “flawed logic to protect all Californians and save lives.”⁵² However, the American Civil Liberties Union (ACLU) opposes the bill and believes it to be “a serious misstep to further entrench [the] flawed logic” of Texas’ abortion ban, which “creates a bounty-hunting scheme that encourages the general public to bring costly and harassing lawsuits.”⁵³ The ACLU views the bill as a “legal end-run” that will encourage other states to use the same legal structure for other controversial issues. And critics question whether legislation should go in this direction, as deputizing private citizens (who might otherwise lack standing to sue) and empowering them to enforce the law can create a culture of mistrust.

Where Do We Go From Here?

As the U.S. Supreme Court continues to expand its interpretation of the Second Amendment, we may need to rely increasingly on our state and federal legislatures to formulate sound policy to keep the public safe from the proliferation and misuse of guns, something the majority of Americans want them to do. Legislatures must act quickly and decisively, as more than 110

⁴⁸ Everytown Law Fund Inaugural Summer 2022 Conference (July 21, 2022).

⁴⁹ Jon Healey, “California opens the door to suing gun makers. Here’s what the new law does,” Los Angeles Times, July 13, 2022, <https://www.latimes.com/california/story/2022-07-13/california-law-allows-lawsuits-against-gun-makers-and-dealers>.

⁵⁰ Kevin Winter, *Raft of gun control bills on fast track to passage in California*, Courthouse News Service (June 22, 2022), <https://www.courthousenews.com/raft-of-gun-control-bills-on-fast-track-to-passage-in-california/>.

⁵¹ Office of Governor Gavin Newsom, *Legislation Sponsored by Governor Newsom to Hold the Gun Industry Accountable and Strengthen Protections Moves Forward* (Apr. 5, 2022), <https://www.gov.ca.gov/2022/04/05/legislation-sponsored-by-governor-newsom-to-hold-the-gun-industry-accountable-and-strengthen-protections-moves-forward/>.

⁵² “Governor Newsom Takes Action to Hold the Gun Industry Accountable and Advance California’s Nation-Leading Protections,” Feb. 18, 2022, <https://www.gov.ca.gov/2022/02/18/governor-newsom-takes-action-to-hold-the-gun-industry-accountable-and-advance-californias-nation-leading-protections/>.

⁵³ Shilpi Agarwal, *Constitutional Rights for All* ACLU California Action (May 2, 2022), <https://aclucalaction.org/2022/05/how-californias-proposed-gun-safety-law-threatens-to-erode-constitutional-rights-for-all/>.

Americans are killed by guns every day.⁵⁴ And they must pass effective laws that have the best chance of withstanding judicial scrutiny, while also legislating aggressively to move the needle on this intractable problem.

We also need ways to combat gun violence beyond enforcement at the individual gun owner/user level. More state laws imposing accountability on the gun industry may be an effective avenue; and more lawyers are needed to bring cases against gun manufacturers and sellers. For example, experienced products liability lawyers can help bring suits based on gun safety features.

Political polarization has kept federal and state governments from being able to address the scourge of gun violence in America in a meaningful way; in the meantime, guns continue to be bought, sold, trafficked, and misused all across the country, costing us our safety, our freedom from fear, and our lives. We need to raise the discourse beyond ideology, political party, campaign donors, and the next election: bipartisanship is necessary for lasting change. And on a social level, we need to increase education on gun violence to help loosen the gun industry's grip on our national identity and imagination. Despite the mantra, "Guns don't kill people, people kill people," espoused by the National Rifle Association and other proponents of gun rights, among weapons used in homicides, guns are the deadliest,⁵⁵ and more people in the U.S. die from gun violence than in any other developed country in the world.⁵⁶ And the fact remains: states with strong gun laws have fewer firearm deaths.⁵⁷ For our very survival, American society needs to rethink its love affair with guns.

⁵⁴ Everytown. February 3, 2022, <https://www.everytown.org/>.

⁵⁵ See F.E. Zimring and G. Hawkins, "Firearms and Assault: 'Guns Don't Kill People, People Kill People' (From Gun Control Debate, P 170-176, 1990, Lee Nisbet, ed. – See NCJ-127634)," U.S. Department of Justice, Office of Justice Programs, <https://www.ojp.gov/ncjrs/virtual-library/abstracts/firearms-and-assault-guns-dont-kill-people-people-kill-people-gun> ("although other weapons are involved in homicide, firearms are not only the most deadly instrument of attack but also the most versatile. Firearms make some attacks possible that simply would not occur without firearms. They permit attacks at greater range and from positions of better concealment than other weapons. They also permit attacks by persons physically or psychologically unable to overpower their victim through violent physical contact. It is because of their capacity to kill instantly and from a distance that firearms are virtually the only weapon used in killing police officers").

⁵⁶ See Kara Fox, Krystina Shveda, Natalie Croker and Marco Chacon, "How US gun culture stacks up with the world," *cnn.com*, May 26, 2022, <https://www.cnn.com/2021/11/26/world/us-gun-culture-world-comparison-intl-cmd/index.html> ("[T]he US has more deaths from gun violence than any other developed country per capita. The rate in the US is eight times greater than in Canada, which has the seventh highest rate of gun ownership in the world; 22 times higher than in the European Union and 23 times greater than in Australia, according to Institute for Health Metrics and Evaluation (IHME) data from 2019. The gun-related homicide rate in Washington, DC -- the highest of any US state or district -- is close to levels in Brazil, which ranks sixth highest in the world for gun-related homicides, according to the IHME figures").

⁵⁷ Everytown Research and Policy, *2022 Everytown Gun Law Rankings*, <https://everytownresearch.org/rankings/>.