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## In Defense of Hearth and [Foster] Home: Determining the Constitutionality of State Regulation of Firearm Storage in Foster Homes

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# In Defense of Hearth and [Foster] Home: Determining the Constitutionality of State Regulation of Firearm Storage in Foster Homes

Joseph G. DuChane\*

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### I. Introduction

Guns have been a major part of Bill Johnson's life ever since his grandfather taught him how to shoot as a child.<sup>1</sup> Bill Johnson was nine years old when he first learned how to shoot a gun.<sup>2</sup> At fourteen, his grandfather gave him his first shotgun.<sup>3</sup> Three years later, the Marine Corps issued him a rifle.<sup>4</sup> And for the past decade, Bill has carried a permitted concealed weapon.<sup>5</sup> Now, as a

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1. See Sheryl G. Stolberg, *Gun Rights and Foster Care Restrictions Collide in Michigan*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/us/michigan-gun-foster-care.html?mcubz=3> (last visited Sept. 24, 2018) (discussing Bill Johnson's history of firearm use) (on file with the Washington and Lee Law Review).

2. See *id.* (noting Bill Johnson's history with firearms).

3. See *id.* ("It's a tradition,' [Johnson] said. 'My grandfather taught me, and my grandfather's grandfather taught him.'").

4. See *id.* (addressing Bill Johnson's experience joining the military).

5. See *id.* (noting that Bill Johnson has a concealed carry permit issued by the state of Michigan).

grandfather himself, Bill's ability to carry his gun and use it in self-defense may be in jeopardy.<sup>6</sup>

In 2017, the Michigan Department of Health and Human Services (MDHHS) asked Bill Johnson and his wife, Jill, to become foster parents to their grandson.<sup>7</sup> However, they allege, MDHHS told them "if you want to care for your grandson you will have to give up some of your constitutional rights."<sup>8</sup> Specifically, to comply with the MDHHS firearm restrictions, the Johnsons would have to give up their Second Amendment right to possess a "readily-available firearm[] for self-defense and defense of family."<sup>9</sup>

In Illinois, Kenneth and Colleen Shults have been foster parents for over a decade.<sup>10</sup> They currently have a foster child in their home, along with their three biological children.<sup>11</sup> Kenneth has a long history with firearms and is an "instructor at a youth firearms safety camp . . . focusing on safely handling and using weapons for all manner of shooting sports."<sup>12</sup> Colleen works for the Illinois Department of Corrections (IDOC) as a nurse at Danville Correctional Center.<sup>13</sup> In March of 2016, the IDOC sent Colleen a letter warning her that prisoners were using a people-locator to discover the addresses of IDOC staff, including nurses.<sup>14</sup> The letter warned Colleen to "be careful and diligent for [her] safety."<sup>15</sup> Unfortunately, as foster parents Kenneth and Colleen are prohibited from keeping a loaded, functional firearm in their home.<sup>16</sup> They claim that they would "possess loaded and functional

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6. See Complaint for Declaratory and Injunctive Relief at 8, *Johnson v. Lyon*, No. 2:17-cv-00124 (W.D. Mich. July 17, 2017) (claiming that the MDHHS regulations on foster parents will impair Bill and Linda Johnson's Second Amendment rights).

7. See *id.* at 4 ("The Johnsons were asked by the State of Michigan to be foster parents to their grandchild.").

8. *Id.*

9. *Id.* at 8.

10. See Complaint for Declaratory and Injunctive Relief at 3, *Shults v. Sheldon*, No. 2:16-cv-02214 (C.D. Ill. July 12, 2016) (discussing the Shults' current fostering of a child they are in the process of adopting).

11. *Id.*

12. *Id.*

13. See *id.* (laying out the background of the plaintiff Colleen Shults).

14. See *id.* at 4 (describing the warning Colleen Shults received).

15. *Id.*

16. *Id.*; see also ILL. DEP'T OF CHILDREN & FAMILY SERVS., POL'Y GUIDE

firearms for self-defense” if not for the fear that they would lose their ability to foster children.<sup>17</sup>

Michigan and Illinois—like all states except one—directly regulate the way foster parents store and handle firearms in their home.<sup>18</sup> A vast majority place a burden on foster parents’ ability to access a functional firearm for the purpose of defending themselves in their home by requiring firearms to be stored in locked areas.<sup>19</sup>

The regulations in question are directed specifically at foster parents or the foster home and do not mirror the state’s general regulations on firearms.<sup>20</sup> Only one state, Massachusetts, has a generally applicable law that makes it unlawful to store a firearm unless that firearm is secured by a lock or in a locked container.<sup>21</sup> However, the statute allows the owner to carry a firearm on his person by explicitly declaring that action as outside of the

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2015.08, ENHANCED FIREARM SAFETY IN FOSTER FAMILY HOMES (2015) (requiring foster parents in Illinois to store firearms in a locked safe, disabled by a trigger lock, with ammunition stored in a separate, locked location). The policy guide cited in the complaint is no longer available on the department website. It is unclear whether they intended to do away with the policy by removing the guide. However, Illinois still requires that foster parents keep all firearms unloaded and locked up in a place inaccessible to children. ILL. ADMIN. CODE tit. 89, § 402.8 (2018).

17. See Complaint for Declaratory and Injunctive Relief at 4, *Shults v. Sheldon*, No. 2:16-cv-02214 (C.D. Ill. July 12, 2016) (stating that the Shults’ do not possess a functional firearm in their home because they fear the state will take away their foster children).

18. See *infra* Figure 1 (showing that Pennsylvania is the only state without a regulation or policy specifically addressing firearms in foster homes).

19. See *infra* notes 33–35 and accompanying text (illustrating the number of states that require locked storage for firearms and separated ammunition); see also *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (determining that a trigger lock requirement rendered firearms inoperable in the home for self-defense, making it unconstitutional).

20. Compare MICH. ADMIN. CODE r. 400.9415(3) (2018) (placing restrictions on foster homes), with MICH. DEP’T OF ST. POLICE, MSP-203, USE AND STORAGE OF A FIREARM IN A HOME ENVIRONMENT 2, [https://www.michigan.gov/documents/msp/msp-203\\_-\\_PDF\\_286476\\_7.pdf](https://www.michigan.gov/documents/msp/msp-203_-_PDF_286476_7.pdf) (recommending that firearms be safely stored in the home but not requiring it).

21. See MASS. GEN. LAWS ch. 140, § 131I (2018) (criminalizing storage of firearms without securing them in a locked location or with a locking device); see also *Safe Storage*, GIFFORDS LAW CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/safe-storage/#state> (last visited Sept. 24, 2018) (“Massachusetts is the only state that generally requires that all firearms be stored with a lock in place.”) (on file with the Washington and Lee Law Review).

definition of stored.<sup>22</sup> There are some municipalities with similar requirements for locked storage, but each has an exception for firearms in the person's control or possession.<sup>23</sup> Only South Carolina explicitly allows for foster parents to carry a firearm on their person instead of keeping it in locked storage.<sup>24</sup> Another three states have generally applicable storage requirements for individuals who reside with others who are not lawfully allowed to possess firearms, but still allow the firearm to be kept in the owner's possession.<sup>25</sup> Finally, many states impose criminal penalties on people who negligently or recklessly store a firearm where a child could gain access to it.<sup>26</sup> However, none of these states impose these child access laws in a way that requires specific storage standards, allowing for sensible storage of operable firearms to use in self-defense.<sup>27</sup>

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22. See MASS. GEN. LAWS ch. 140, § 131I (2018) (“[S]uch weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user.”).

23. See, e.g., N.Y.C., N.Y., ADMIN. CODE § 10-312 (2018) (requiring firearms to be rendered inoperable with a safety locking device when not in the possession or control of the owner); OAKLAND, CAL. MUN. CODE § 9.39.040 (2018) (“Except when carried on his or her person, no person shall keep a firearm . . . in any residence unless the firearm is stored in a locked container, or . . . disabled with a trigger lock . . .”).

24. See S.C. CODE ANN. REGS. 114-550(H)(18) (2018) (“Firearms and any ammunition shall be kept in a locked storage container except when being legally carried upon the foster parent’s person; being used for educational, recreational, or defense of self or property purposes by the foster parent; or being cleaned by the foster parent.”); see also *infra* Figure 1 (compiling all of the state regulations and noting only one with an explicit exception for lawful uses of the firearm).

25. See N.Y. PENAL LAW § 265.45 (McKinney 2018) (“No person who owns . . . [a] firearm who resides with an individual who . . . is prohibited from possessing a firearm . . . shall store or otherwise leave such . . . firearm out of his or her immediate possession . . . without having first securely locked such rifle, shotgun or firearm . . .”); CAL. PENAL CODE § 25135 (West 2018) (requiring persons who own or reside in a residence with a person prohibited from owning, possessing, or receiving a firearm to keep any firearms in the residence in locked storage or on their person); CONN. GEN. STAT. § 29-37i (2018) (imposing similar restrictions on firearm storage in a residence with a prohibited person, but only for loaded firearms).

26. See *Child Access Prevention*, GIFFORDS LAW CTR., <http://lawcenter.giffords.org/gun-laws/policy-areas/child-consumer-safety/child-access-prevention/#state> (last visited Sept. 24, 2018) (describing all of the state laws related to prevention of child access to firearms) (on file with the Washington and Lee Law Review).

27. See *id.* (noting that the only state with a storage requirement is

This Note does not address the constitutionality of these other regulations. These examples simply show that the burden states place on their general population is not nearly as excessive as the burden the regulations in question place on foster parents.<sup>28</sup> Foster parents have been singled out as a group, and the regulations inhibit their ability to use their firearms in self-defense.<sup>29</sup> This Note attempts to resolve whether regulations requiring the storage of firearms in locked containers and the locking of ammunition in a separate location in all foster homes violates foster parents' Second Amendment right to "keep and bear arms,"<sup>30</sup> as defined in *District of Columbia v. Heller*.<sup>31</sup>

To address this issue, Part II lays out the extent of the constitutional question by determining how many states regulate firearm storage in foster homes. Because a current compilation that describes these restrictions does not exist, this Note provides a survey of the state's regulations to determine how many states may be affected by the answer to this question.<sup>32</sup> Then, Part II presents the Michigan regulations as a case study representing the way a majority of states have chosen to regulate firearms in foster homes. Part III discusses the current status of the Second

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Massachusetts, whose storage law is generally applicable rather than confined to child access).

28. Compare MASS. GEN. LAWS ch. 140, § 131I (2018) (requiring people to store firearms in a locked location or with a trigger lock when not carried on the person), with MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring firearms be kept in locked storage or trigger locked, with ammunition locked in separate storage at all times in the home).

29. See MICH. ADMIN. CODE r. 400.9415(3) (2018) (placing restrictions on foster homes); see also *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (determining that requirements that render firearms inoperable for the purpose of self-defense in the home conflict with the Second Amendment).

30. U.S. CONST. amend. II.

31. 554 U.S. 570 (2008). In *Heller*, the Supreme Court's task was to determine the constitutionality of District of Columbia ordinances that resulted in a ban on handguns and a requirement that all other guns in the home be disabled with trigger locks or disassembled at all times. *Id.* at 574–75. The Supreme Court concluded that the Second Amendment conferred an individual right of the people to possess a firearm to use for lawful purposes, including self-defense in the home. *Id.* at 595, 635. Based on this interpretation, the Supreme Court held that both the handgun ban and trigger lock requirement violated the Second Amendment. *Id.* at 635.

32. See *infra* Figure 1 (compiling each state's regulations or policies regarding firearms in foster homes).

Amendment following the most recent Supreme Court decisions and states why the regulations at issue burden the Second Amendment right. Part IV analyzes the Supreme Court decisions further, as well as subsequent circuit court cases, to develop a test for determining the constitutionality of laws that impose a burden on the Second Amendment. Part V then applies that test to the storage requirements for foster homes and ultimately argues that requiring storage of firearms in a locked safe or cabinet is an unconstitutional burden on the rights of foster parents.

## *II. State Regulation of Foster Parents' Firearm Storage*

The current litigation in Illinois and Michigan could affect a substantial number of states.<sup>33</sup> Forty-nine states and the District of Columbia (D.C.) have regulations specifically addressing firearms in foster homes.<sup>34</sup> Forty-four states and D.C. require foster parents to store firearms in the home in locked cabinets or disable firearms with a trigger lock.<sup>35</sup> Thirty-seven of those states and D.C. additionally require that ammunition is stored away from the firearms, with thirty states and D.C. requiring foster parents to lock the ammunition storage location.<sup>36</sup> Finally, five states require disabling of firearms by a trigger lock in addition to keeping that firearm in locked storage.<sup>37</sup>

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33. See *supra* Part I (discussing the litigation taking place in Illinois and Michigan).

34. See *infra* Figure 1 (compiling the regulations of each state and D.C. and showing that all but Pennsylvania have specific regulations for firearms in foster homes).

35. See, e.g., 016.15.2 ARK. CODE R. § 208 (LexisNexis 2018) (“All firearms shall be maintained in a secure, locked location or secured by a trigger lock.”); see also *infra* Figure 1 (recognizing each state that requires firearms be kept in some kind of locked storage or disabled from use, and citing the regulation in which this restriction is contained).

36. See, e.g., FLA. ADMIN. CODE ANN. r. 65G-2.007(12)(c) (2018) (“All firearms must be stored unloaded. Firearms and ammunition shall be stored separately from each other within locked storage areas.”); see also *infra* Figure 1 (recognizing each state which requires that ammunition be stored separately from the firearms).

37. See, e.g., ARIZ. ADMIN. CODE § R21-8-106 (2018) (“Firearms are unloaded, trigger locked, and kept in a tamper-proof, locked storage container made of unbreakable material; and . . . [a]mmunition is maintained in locked storage that is separate from firearms.”); see also *infra* Figure 1 (marking the four states which



It is not possible to focus on each of these states, so this Note looks in-depth at a single state that represents these common restrictions.<sup>38</sup> The Michigan regulations currently being challenged under the Second Amendment<sup>39</sup> are representative of the more common restrictions used throughout the different states.<sup>40</sup> Therefore, this Note focuses on the Michigan regulations in its analysis but, due to the similarities with other regulations, comes to a more generally applicable conclusion.<sup>41</sup>

In 2001, the Michigan Department of Health and Human Services (MDHHS) amended the rules listed in the *Licensing Rules for Foster Family Homes and Foster Family Group Homes for Children*.<sup>42</sup> In the amendments, MDHHS created specific restrictions relating to the storage of firearms in foster homes.<sup>43</sup> The firearms must be “[s]tored in a locked metal or solid wood gun safe”<sup>44</sup> or “[t]rigger-locked and stored without ammunition in a locked area.”<sup>45</sup> Ammunition must be “stored in a separate locked location.”<sup>46</sup> Handguns must also be registered, with the registration documents available for review.<sup>47</sup>

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require firearms be disabled by a trigger lock while in locked storage).

38. See *infra* Figure 1 (showing the most common restrictions placed on the storage of firearms in foster homes).

39. See *supra* note 9 and accompanying text (describing the claim brought by the Johnson family in Michigan).

40. See MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring firearms be kept in locked storage or trigger locked, with ammunition locked in separate storage); *infra* Figure 1 (compiling regulations of which a majority require locked storage of firearms with the ammunition stored in a separate, locked container).

41. See *infra* Figure 1 (illustrating that most of the states regulate through two common requirements).

42. See *generally* MICH. DEP’T OF HEALTH & HUMAN SERVS., LICENSING RULES FOR FOSTER FAMILY HOMES AND FOSTER FAMILY GROUP HOMES FOR CHILDREN (2015), [https://www.michigan.gov/documents/mdhhs/CWL-PUB-10\\_502652\\_7.pdf](https://www.michigan.gov/documents/mdhhs/CWL-PUB-10_502652_7.pdf); see also Brief of Amicus Curiae Everytown for Gun Safety in Support of Defendant’s Motion to Dismiss or for Summary Judgment at 3, *Johnson v. Lyon*, No. 2:17-cv-00124 (W.D. Mich. Oct 6, 2017) [hereinafter *Everytown Brief*] (stating that MDHHS promulgated the firearm storage regulation at issue in 2001).

43. See MICH. ADMIN. CODE r. 400.9415(3) (2018) (listing specific requirements relating to firearms in foster homes).

44. *Id.* r. 400.9415(3)(a).

45. *Id.* r. 400.9415(3)(b).

46. *Id.* r. 400.9415(3)(c).

47. See *id.* r. 400.9415(3)(d) (requiring registration documents be available

MDHHS had a significant interest it was trying to achieve when enacting these regulations. There is no collection of data describing the dangers of guns in foster homes specifically. However, Everytown for Gun Safety (Everytown), writing in support of a Motion to Dismiss filed by MDHHS, addressed the important interest in regulations such as those in Michigan by presenting statistics related to children and firearms in general.<sup>48</sup> In 2015, 565 children used a gun to commit suicide, the highest number since 1999.<sup>49</sup> Suicide attempts involving guns are fatal 90% of the time, resulting in guns accounting for 40% of adolescent suicides.<sup>50</sup> This is significant when compared to the most common method of attempted suicide—overdose—which is fatal in 2% of attempts.<sup>51</sup> The effectiveness of firearms over other methods of suicide is especially important because 90% of people who attempt suicide and survive will not attempt to commit suicide again.<sup>52</sup> This is important for gun storage laws because over 80% of child suicides by gun use a firearm from their own home.<sup>53</sup> This suggests that even if youths still attempt suicide by another method because they lack access to a firearm, they will be less likely to succeed, and unlikely to try again.

Firearms also pose a danger to children through both intentional and unintentional shootings.<sup>54</sup> Prior to the 2001 enactment of the MDHHS regulation, 22,661 children fourteen years old or younger suffered nonfatal injuries from firearms

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for inspection). The constitutionality of this requirement will not be analyzed in this Note.

48. See Everytown Brief, *supra* note 42, at 3–9 (laying out statistics to show the danger that firearms pose to children).

49. See *id.* at 7 (“In 2015, 565 children and adolescents died by firearm suicide—the highest number . . . going back to 1999.”).

50. See *id.* (discussing the statistics about the use of guns in youth suicides).

51. See Matthew Miller et al., *Suicide Mortality in the United States: The Importance of Attending to Method in Understanding Population-Level Disparities in the Burden of Suicide*, 33 AM. REV. OF PUB. HEALTH 393, 397 (2012) (discussing the rates of successful suicide versus unsuccessful attempts based on method).

52. See Everytown Brief, *supra* note 42, at 6 (“Ninety percent of people who survive a suicide attempt will not die as a result of suicide . . .”).

53. See *id.* at 7 (“[O]ver 80% of children who die by firearm suicide used a gun from their own home.”).

54. See *id.* at 3 (discussing statistics relating to child victims of shootings).

between 1993 and 2000.<sup>55</sup> Over 9,700 of those, or 43.1%, resulted from unintentional shootings.<sup>56</sup> During that time, 5,542 children were killed by guns, with 1,146 of them resulting from unintentional shootings.<sup>57</sup> This trend continues. In 2014, government statistics showed that sixty-nine children aged fourteen or younger were killed as a result of an unintentional discharge of a gun.<sup>58</sup> Everytown states that an independent review concluded that at least 100 children were killed in unintentional shootings in 2013.<sup>59</sup>

A study published in 2005 suggests that regulations such as those required by MDHHS reduce the risk of both suicides and unintentional injuries among adolescents and children younger than twenty.<sup>60</sup> The study, which looked at children who intentionally or unintentionally shot themselves or unintentionally shot another person, revealed that “practices of keeping the reference firearm unloaded, locked, and the ammunition locked were all associated with significantly decreased risks of a shooting event.”<sup>61</sup> In Michigan specifically, Everytown’s own study found forty-six cases of unintentional shootings committed by children under eighteen between the start of 2015 until the writing of the brief in October of 2017.<sup>62</sup> Everytown’s analysis concluded that forty-four of these could have been prevented by restrictions like those in the MDHHS

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55. *See id.* (noting the number of “nonfatal firearms injuries” suffered by “children aged fourteen or younger”).

56. *See id.* (stating that 9,775 children suffered nonfatal injuries as the result of an unintentional shooting).

57. *See id.* (providing the statistics of child deaths by shooting in the United States between 1993 and 2000).

58. *Id.* at 4.

59. *See id.* (discussing a review conducted by Everytown that contradicted the data reported by the government relating to children killed in unintentional shootings).

60. *See* David C. Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 JAMA 707, 708 (2005) (describing the method used to study the effects of gun storage on youth suicide and unintentional firearm injury rates).

61. *Id.* at 711.

62. *See* Everytown Brief, *supra* note 42, at 5 (discussing their own database tracking publicly reported shootings unintentionally committed by children aged seventeen and younger).

regulations.<sup>63</sup> These numbers reflect both a local concern for Michigan and a national concern that would likely interest each state that regulates in a similar fashion.

### *III. The Conflict Between State Regulations and the Second Amendment*

The numbers above do not specifically reflect the impact on foster homes, and the data on whether foster children are at a higher risk of suicide in America is shaky at best.<sup>64</sup> Also, looking at past injuries does not guarantee that restrictions could have prevented them. However, the numbers show that a problem exists with child injuries and death from firearms. In 2017, a child died every week on average from an accidental shooting.<sup>65</sup> Additionally, Michigan has an increased interest in safety for foster children because they remain the responsibility of the state despite living in a private foster home.<sup>66</sup> Nonetheless, having an interest in the safety of children does not necessarily allow the state to burden the rights of foster parents.<sup>67</sup> The potential infringement of a constitutional right may outweigh the state's interest, so an analysis of the Second Amendment right is required before the validity of the regulations can be assessed.<sup>68</sup>

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63. See *id.* (stating that 96% of the shootings could have been prevented by safe storage laws).

64. See *infra* notes 425–426 and accompanying text (discussing the issues with studies claiming higher suicide rates among foster children versus children in traditional homes).

65. See Nick Penzenstadler et al., *Added Agony: Justice is Haphazard After Kids' Gun Deaths*, USA TODAY (May 24, 2017, 3:04 AM), <https://www.usatoday.com/story/news/2017/05/24/justice-haphazard-when-kids-die-in-gun-accidents/101568654/> (last visited Sept. 24, 2018) (“Children under age 12 die from gun accidents in the United States about once a week, on average.”) (on file with the Washington and Lee Law Review).

66. See MICH. ADMIN. CODE r. 400.10(1)(c) (2018) (defining “foster care” as “24-hour substitute care for children placed away from their parents or guardians and for whom the *state agency has placement and care responsibility*” (emphasis added)).

67. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) (noting that the existence of a constitutional right precludes consideration of certain options for combatting a problem).

68. See *infra* Parts III–IV (determining the proper test for whether the state's interest may overcome the protection of the Second Amendment).

## A. District of Columbia v. Heller

Prior to 2008, the Supreme Court had never invalidated a regulation under the Second Amendment.<sup>69</sup> In fact, the Supreme Court had not interpreted the Second Amendment since 1939, when the Court, in *United States v. Miller*,<sup>70</sup> upheld a federal ban on transporting shotguns with shortened barrels in interstate commerce.<sup>71</sup> In *District of Columbia v. Heller*, the Court did not overturn *Miller*, but it limited the prior decision to the specific restriction on short-barreled shotguns.<sup>72</sup> The Court determined that *Miller* had not interpreted the meaning of the Second Amendment, thereby making *Heller* the main precedent.<sup>73</sup>

*Heller* addressed two heavily debated issues regarding the Second Amendment that are relevant to the current inquiry.<sup>74</sup> First, the Court had to determine who the Second Amendment applied to.<sup>75</sup> Prior to *Heller*, much of the debate over the meaning of the Amendment questioned whether the right to bear arms existed as an individual right unrelated to service in the militia.<sup>76</sup> The majority in *Heller* concluded that the Second Amendment's invocation of a "right of the people" conveyed an individual right to each person, not a collective right attached to membership in a

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69. See Robert J. Spitzer, *Gun Law, Policy, and Politics*, 84 N.Y. ST. B.J., July–Aug. 2012, at 35, 37 (“[F]or the first time in history, a federal court overturned a gun regulation as a violation of the Second Amendment.”).

70. 307 U.S. 174 (1939).

71. See *id.* at 178 (“[W]e cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”).

72. See *Heller*, 554 U.S. at 622 (“Beyond [the type of weapon at issue], the opinion provided no explanation of the content of the right.”).

73. *Id.*; see also Spitzer, *supra* note 69, at 37 (“The decision did not overturn *United States v. Miller* . . .”).

74. See *Heller*, 554 U.S. at 577 (“Petitioners . . . believe that [the Second Amendment] protects only the right to possess . . . a firearm in connection with militia service. Respondent argues that it protects an individual right to possess a firearm unconnected with service in a militia, and to use that arm for . . . self-defense within the home.” (internal citations omitted)).

75. See *id.* (describing the debate over whether the Second Amendment established an individual right).

76. See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 399 (2009) (claiming that the debate about the Second Amendment pre-*Heller* focused almost exclusively on the question of whether the right was an “individual” right).

militia.<sup>77</sup> Second, the Court needed to determine the purpose behind the Second Amendment right to bear arms.<sup>78</sup> The majority extensively analyzed the text and history of the Second Amendment to try to determine its purpose.<sup>79</sup> The Court reasoned that the preservation of the militia was a plausible purpose for codifying the right.<sup>80</sup> However, the court divided the Amendment into two distinct clauses, the prefatory and operative clauses.<sup>81</sup> The majority did not interpret the prefatory clause language about the necessity of an armed militia as limiting the Amendment to the sole purpose of participation in the militia.<sup>82</sup> The Court also identified self-defense as a primary purpose of the Second Amendment.<sup>83</sup>

### B. *McDonald v. City of Chicago*

Because *Heller* addressed a law within a federal territory, the Court did not address the issue of whether the Second Amendment applies to the states.<sup>84</sup> This question did not take long to come before the Court and was answered affirmatively two years later.<sup>85</sup>

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77. See *Heller*, 554 U.S. at 595 (“There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms.”).

78. See *id.* at 581–91 (analyzing the substance of the right to determine the reason for its protection).

79. See *id.* at 599–600 (discussing the purpose of the Amendment and whether the prefatory clause limits it).

80. See *id.* at 599 (“It is therefore entirely sensible that the Second Amendment’s prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia.”).

81. See *id.* at 577 (splitting the Amendment into a prefatory clause, stating a purpose of the right, and an operative clause, establishing the right that is not limited by the prefatory clause).

82. See *id.* at 599 (“The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right . . .”).

83. See *id.* at 630 (determining that the District’s restrictions stopped citizens from using firearms for “the core lawful purpose of self-defense”).

84. See Allen Rostron, *Justice Breyer’s Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 722 (2012) (discussing *Heller*’s focus on laws within the District of Columbia, a federal territory, leaving incorporation through the Fourteenth Amendment outside of the issues before the Court).

85. See *id.* at 722 (stating that a challenge to Chicago’s handgun ban was filed within fifteen minutes of the *Heller* decision’s announcement, which

In *McDonald v. City of Chicago*,<sup>86</sup> the Court held that the Second Amendment was incorporated to the states through the Fourteenth Amendment.<sup>87</sup> Also, the Court decided that the right of the people to possess firearms for the purpose of self-defense in the home, as established in *Heller*, applies equally when incorporated through the Fourteenth Amendment.<sup>88</sup> Consequently, state regulations will be held to the same standard as federal regulations when they touch on the fundamental right to bear arms.<sup>89</sup> This is important for the central analysis of this Note because the regulations in question were all passed at the state level,<sup>90</sup> and because the regulations mainly burden the ability of foster parents to use their firearms for self-defense.<sup>91</sup> However, the Court did not make it clear how future courts should assess the validity of regulations that are potentially in conflict with the Second Amendment.<sup>92</sup> The Court simply relied on the holding in *Heller* to invalidate the restriction once it determined that the Second Amendment applied to the states.<sup>93</sup>

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eventually found its way before the Supreme Court in *McDonald*).

86. 561 U.S. 742 (2010). *McDonald* involved a challenge to Chicago laws that amounted to a ban on handguns within the city. *See id.* at 750. The city municipal code required all handguns be registered, and also prohibited the registration of most handguns. *Id.* Petitioners challenged the ban under the Second and Fourteenth Amendments. *Id.* at 752. The Court spent very little time on the question of the ban's constitutionality. *See id.* at 791. The majority of the Court's focus was on whether the Second Amendment is incorporated to the state's under the Fourteenth Amendment. *See id.* at 767–91.

87. *See id.* at 791 (“[T]he Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*.”).

88. *See id.* at 787–88 (rejecting the dissent's assertion that the Fourteenth Amendment stands on its own and requiring that the States be governed by a “single, neutral principle”).

89. *See id.* at 791 (determining that the Second Amendment “applies equally to the Federal Government and the States”).

90. *See infra* Figure 1 (citing each of the state regulations that may be at issue with the Second Amendment).

91. *See supra* note 9 and accompanying text (noting the Johnson's allegations that their Second Amendment rights are severely burdened by the Michigan regulations).

92. *See* Rostron, *supra* note 84, at 724 (“[T]he Court shed no new light on exactly how judges should go about sorting valid gun laws from invalid ones.”).

93. *See McDonald*, 561 U.S. at 791 (striking down the handgun ban based on the holding of *Heller*).

*C. The Conflict Between Heller, McDonald, and the  
Michigan Regulation*

Michigan—like forty-three other states and the District of Columbia<sup>94</sup>—requires that firearms in the home be stored with a trigger lock or in a locked container.<sup>95</sup> These regulations alone seem to neglect the Court’s ruling in *Heller*, in which the Court determined that requiring firearms to be trigger locked or rendered inoperable was an unconstitutional burden on the right to use firearms for self-defense.<sup>96</sup> Regulations requiring trigger locks directly violate this ruling, and requiring the placement of firearms in a locked safe or container seems to place the same burden on accessing them for self-defense.<sup>97</sup> On top of this, Michigan and thirty-six other states require that ammunition be kept separately, with thirty-one requiring ammunition be kept in a separate locked container.<sup>98</sup> Some states even require that the separate containers have different keys.<sup>99</sup> Finally, a couple states add a trigger lock requirement on top of the separate locked storage requirements.<sup>100</sup>

Each of these regulations creates an added restriction on the ability of a foster parent to access their firearms in the case that they need to use them for the purpose of self-defense. However,

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94. See *supra* note 35 and accompanying text (noting the number of states that require firearms to be kept in locked storage).

95. See, e.g., MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring that firearms either be kept in locked storage or equipped with a trigger lock).

96. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (concluding that a trigger lock requirement is unconstitutional under the Second Amendment).

97. See *id.* at 635 (determining that a restriction which renders a firearm inoperable for the purpose of self-defense is unconstitutional).

98. See *supra* note 36 and accompanying text (discussing the widespread requirement that ammunition be stored separately); MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring that foster parents store ammunition in a separate, locked container from any firearms).

99. See, e.g., UTAH ADMIN. CODE r. 501-12-7(6)(c)(i) (2018) (“The locked storage for firearms and ammunition shall not be accessible through the same keys or combinations.”).

100. See, e.g., ARIZ. ADMIN. CODE § R21-8-106(A)(2)(a) (2018) (“Firearms are unloaded, trigger locked, and kept in a tamper-proof, locked storage container . . .”).



*Heller* dealt with a generally applicable regulation.<sup>101</sup> The regulations in question apply to a single class of people—foster parents<sup>102</sup>—which could potentially take them out of the protection of the Second Amendment.<sup>103</sup> This question is addressed below.<sup>104</sup> Also, the state has an added interest in the protection of youth in foster care because they remain the responsibility of the state despite living in a private residence.<sup>105</sup> Part V addresses these issues to determine if the regulations can be reconciled with *Heller*'s interpretation of the Second Amendment.

#### *IV. The Current Standard for Analyzing Second Amendment Restrictions*

Now that the issue is defined, it is necessary to determine the proper way to resolve the problem. To do so, this Part analyzes the Supreme Court and circuit courts' Second Amendment decisions.<sup>106</sup>

##### *A. The Lack of Guidance in Heller and McDonald*

With its recent decisions, the Supreme Court created more questions than it answered. *Heller* made clear that the Court intended “law-abiding, responsible citizens” to be within the protected sphere of the Second Amendment, and that right applies to the purpose of self-defense in the home.<sup>107</sup> However, the Court

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101. See *Heller*, 554 U.S. at 573 (describing the District of Columbia statute generally prohibiting the registration of handguns and requiring all residents keep their firearms rendered inoperable in the home).

102. See, e.g., MICH. ADMIN. CODE r. 400.9415(3) (2018) (regulating firearm storage in foster homes specifically).

103. See *Heller*, 554 U.S. at 626–27 (discussing the possibility of allowing for restrictions on firearms relating to certain classes of people).

104. See *infra* Part V.A (determining whether foster parents can be excluded under the Second Amendment).

105. See MICH. ADMIN. CODE r. 400.10(1)(c) (2018) (defining foster care as “substitute care” of children for whom the state has “placement and care responsibility”).

106. See *infra* Part IV.A–B (discussing the categorical and balancing approaches, and then discussing the approach used by the circuit courts).

107. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (concluding that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home”).

left room for certain longstanding restrictions to be presumed constitutional.<sup>108</sup> The Court gave a non-exhaustive list of examples that would fall within that presumption.<sup>109</sup> The examples can be sorted into five potential categories that may be restricted without offending the Second Amendment.<sup>110</sup> These include: (1) possession by certain classes of people, such as felons;<sup>111</sup> (2) possession in certain places, such as government buildings;<sup>112</sup> (3) imposition of restrictions on the sale of firearms;<sup>113</sup> (4) possession of certain types of firearms;<sup>114</sup> and (5) storage of firearms for the prevention of accidents.<sup>115</sup> Rather than expounding on what might fit into these categories, the Court left the exact interpretation of these permissible restrictions to future decisions as they come before the Court.<sup>116</sup>

Also, the Court rejected rational basis review.<sup>117</sup> The Court asserted that rational basis is the general standard set forth by the

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108. See *id.* at 626 (noting that the opinion should not “cast doubt” on certain prohibitions that had been in existence long before the opinion).

109. See *id.* at 626–27 (mentioning restrictions on possession by felons and the mentally ill, possession on school or government property, and conditions on sales); *id.* at 627 n.26 (“[O]ur list does not purport to be exhaustive.”).

110. See *id.* at 626–27 (giving examples of potentially valid restrictions).

111. See *id.* (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . .”).

112. See *id.* (“[N]othing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places . . .”).

113. See *id.* (“[N]othing in our opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms.”).

114. See *id.* at 627 (“[T]he sorts of weapons protected were those ‘in common use at the time.’”).

115. See *id.* at 632 (“Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”).

116. See *id.* at 635 (responding to the dissent’s argument that the majority left so many applications in doubt without justification by stating the Court will expound upon those issues “if and when those exceptions come before us”); see also Blocher, *supra* note 76, at 433 (“But *Heller* failed to identify its underlying values, making it difficult for future courts to recognize any lineal descendants of the original categories ascertained by the Court in *Heller*.”).

117. See *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) (rejecting rational basis review as the proper standard of analysis). Under rational basis review, a state action does not violate the Fourteenth Amendment’s Equal Protection Clause if it “rationally furthers the purpose identified by the State.” *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976).

Constitution to protect the people from “irrational laws.”<sup>118</sup> It would be redundant to enumerate a right which is given the same standard of review that all laws must pass under the Constitution.<sup>119</sup> This would give the enumeration of the right “no effect” because the laws against it would be subject to the same test if the right were not enumerated.<sup>120</sup> Therefore, the Second Amendment’s existence implies that it deserves a higher standard of review.<sup>121</sup> However, the Court failed to define the proper level of scrutiny that the Second Amendment should be afforded.<sup>122</sup>

Some experts suggest that the Court hoped to pull the Second Amendment out of the normal scrutiny analysis.<sup>123</sup> This conclusion is supported by the Court’s refusal to choose a level of scrutiny to apply to the analysis.<sup>124</sup> Justice Scalia’s majority opinion rejected Justice Breyer’s attempt to establish an interest-balancing approach that does not specifically propose any of the traditional levels of scrutiny.<sup>125</sup> Scalia wrote that he “[knew] of no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”<sup>126</sup> While this statement was not in response to the proposal of a traditional scrutiny analysis, each level of scrutiny applies its own test that

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118. See *Heller*, 554 U.S. at 628 n.27 (“[R]ational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws.”).

119. See *id.* (“If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws.”).

120. See *id.* (stating that rational basis would give the Second Amendment “no effect”).

121. See *id.* (stating that the use of rational basis review would mean that the Second Amendment has no effect).

122. See Rostron, *supra* note 84, at 716 (addressing the failure of the Court to provide a proper standard for analyzing the Second Amendment).

123. See *id.* (discussing Chief Justice Roberts’ questioning of the need to apply the conventional tiers of analysis to the Second Amendment); Blocher, *supra* note 76, at 405 (noting that the *Heller* majority used an approach that was categorical in nature).

124. See *Heller*, 554 U.S. at 634 (noting that the dissent criticizes the majority for failing to establish a proper level of scrutiny to apply to regulations that implicate the Second Amendment).

125. See *id.* at 634–35 (justifying the majority’s refusal to adopt an interest-balancing approach in their analysis in response to the dissent’s criticism).

126. *Id.* at 634.

pins the interests of the right against the purpose behind the regulation.<sup>127</sup>

The Court justified its denial of the interest-balancing approach with the argument that longstanding regulations—those restrictions on firearms in place when the Second Amendment was ratified—were the product of interest-balancing by the Founders who wrote the Amendment.<sup>128</sup> The balancing has already been done, and it is not the job of future legislatures and courts to redo it based on their own personal interests.<sup>129</sup> This reasoning supports a pure category-based approach—only withholding Second Amendment protection from the categories that were determined to be justified at the time of solidifying the right in the Constitution.<sup>130</sup> A scrutiny approach would still allow for a revisiting of those interests later, just with a pre-established threshold that must be met to justify a regulation. Either way, the Court felt that the question was meaningless in *Heller* because the restrictions in question were unconstitutional under any possible scrutiny analysis.<sup>131</sup> Because of this, *Heller* did not establish a proper test to employ in the future, and left room for further analysis.

Additionally, during oral arguments in *Heller*, Chief Justice Roberts specifically questioned the need to subject the regulations at hand to a standard of review.<sup>132</sup> Specifically, he stated that

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127. See 16B AM. JUR. 2D *Constitutional Law* § 857 (2009) (describing the different levels of scrutiny applied in cases involving potential violations of equal protection or fundamental rights). Each standard of scrutiny involves some level of weighing the government's interest in the law versus a standard set by the court. See *id.* This test is seemingly its own form of balancing the government's interest against the interest in the fundamental right.

128. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“Like the First, [the Second Amendment] is the very *product* of an interest balancing by the people.”).

129. See *id.* at 634–35 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”).

130. See *id.* at 626–27 (giving examples of potentially valid restrictions based on their status as “longstanding prohibitions”).

131. See *id.* at 628 (stating that the restrictions would not survive “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights”).

132. See Rostron, *supra* note 84, at 716 (noting that Chief Justice Roberts' questioning at oral arguments in *Heller* explains the failure to identify a test).

“these various phrases under the different standards that are proposed, ‘compelling interest,’ ‘significant interest,’ ‘narrowly tailored,’ none of them appear in the Constitution; and [he] wonder[s] why in this case [the Court] ha[s] to articulate an all-encompassing standard.”<sup>133</sup> This, in itself, is not dispositive of a desire to completely abandon any scrutiny analysis, because it referred only to establishing an “all-encompassing standard” in an analysis of a single regulation and not to establishing a standard in any Second Amendment review.<sup>134</sup> The Chief Justice’s statement left room for adoption of scrutiny standards in future cases without establishing one that must be used in every Second Amendment analysis, because *Heller* merely declined to choose rather than explicitly abandoning the possibility.<sup>135</sup> Therefore, a scrutiny analysis may still be within the reading of the Second Amendment employed by *Heller*.

*McDonald* was the Supreme Court’s next chance to clear up the confusion in the aftermath of *Heller*.<sup>136</sup> The Court was faced with determining the constitutionality of a Chicago ordinance that made it illegal to possess a firearm in the home without a valid registration.<sup>137</sup> Coupled with another ordinance prohibiting the registration of most handguns, the practical effect is essentially a ban on handguns.<sup>138</sup> This restriction is almost identical to the D.C. restriction analyzed in *Heller*.<sup>139</sup> While Justice Alito took the time

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133. *Id.* (quoting Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290)).

134. *See id.* (quoting Transcript of Oral Argument at 44, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290)) (questioning the need “in *this case*” to establish an “all-encompassing standard”) (emphasis added).

135. *See id.* (stating that the court “declined to specify exactly whether strict scrutiny, intermediate scrutiny, or some other standard should be used”).

136. *See id.* at 707 (describing *McDonald* as the Supreme Court’s “second skirmish” in the Second Amendment conflict).

137. *See McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010) (“A City ordinance provides that ‘[n]o person shall . . . possess . . . any firearm unless such person is the holder of a valid registration certificate for such firearm.’” (quoting CHI., ILL., MUN. CODE § 8-20-040(a) (2009))).

138. *See id.* (“The Code then prohibits registration of most handguns, thus effectively banning handgun possession by almost all private citizens who reside in the City.”).

139. *See District of Columbia v. Heller*, 554 U.S. 570, 574–75 (2008) (“The District of Columbia generally prohibits the possession of handguns. It is a crime to carry an unregistered firearm, and the registration of handguns is

to write an incredibly in-depth and well researched argument spanning over forty pages, the opinion focuses purely on the issue of incorporation to the states under the Fourteenth Amendment.<sup>140</sup> The question of the ordinance's constitutionality is given one paragraph of consideration.<sup>141</sup> Concluding that "a provision of the Bill of Rights that protects a right that is fundamental from an American perspective applies equally to the Federal Government and the States,"<sup>142</sup> the majority struck down the ordinance purely under the justification that such a restriction was held to be unconstitutional in *Heller*.<sup>143</sup> Since *McDonald*, the Supreme Court has not further answered the question.<sup>144</sup> While it is clear that bans on handgun possession in the home are unconstitutional,<sup>145</sup> the Second Amendment remains without a clear test following *McDonald*. Luckily, the circuit courts have begun to take matters into their own hands.

Regardless of the majority's actual desire in *Heller*, the circuit courts have not adopted a strict categorical approach.<sup>146</sup> Many circuits begin by using a categorical approach to determine if the class of people, type of weapon, or method of restriction at issue are intended to receive protection under the Second Amendment.<sup>147</sup> If

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prohibited.”).

140. See *McDonald*, 561 U.S. at 748–91 (discussing the incorporation of the Second Amendment to the states through the Fourteenth Amendment for almost all of the majority opinion).

141. See *id.* at 791 (using the holding in *Heller* to quickly determine that the Chicago ordinance is unconstitutional based on identical application of the Second Amendment to the federal government and the states).

142. *Id.*

143. See *id.* (“In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense.”).

144. The Court did take one more Second Amendment case, but in a short per curiam opinion it struck down a ban on stun guns under *Heller* without further analysis. See *Caetano v. Massachusetts*, 136 S.Ct. 1027, 1028 (2016) (per curiam).

145. See *Heller*, 554 U.S. at 635 (holding that the District's ban on handguns in the home is in violation of the Second Amendment); *McDonald*, 561 U.S. at 750 (following the precedent set by *Heller* that the Second Amendment protects the right to possession of a handgun for self-defense in the home).

146. See *infra* Part IV.B.2 (analyzing the approach taken by many of the circuits in determining the constitutionality of restrictions under the Second Amendment).

147. See, e.g., *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (testing first whether the prohibition “falls within the historical scope of the Second Amendment”).

the Second Amendment's protection applies, the court employs a sliding scale of strict and intermediate scrutiny to determine the constitutionality of the restriction in question.<sup>148</sup> The issues with the strict categorical approach justify the use of the test employed by the circuit courts, as will be shown in Part IV.B.

### *B. Application of Heller to New Regulations*

*Heller* left many questions that need to be answered before new regulations can be analyzed under the Second Amendment.<sup>149</sup> To answer these questions and develop a test to apply to new regulations, the categorical and balancing approaches discussed in *Heller* are examined, and then the analysis used by the circuit courts is explained.<sup>150</sup> Then, a proper test to evaluate the MDHHS regulations is chosen.<sup>151</sup>

#### *1. Assessing Regulations Through Categorical Exclusions Versus a General Balancing Test*

Joseph Blocher, a Constitutional Law Professor at Duke University School of Law who focuses on the First and Second Amendments, notes that *Heller* presents a fight between two possible approaches to Second Amendment challenges.<sup>152</sup> The majority pushed for a categorical approach after determining that a balancing approach would open up the Second Amendment to future judgments as to whether the Amendment's protections continue to be useful.<sup>153</sup> The majority posits that a constitutional

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148. See, e.g., *id.* at 961 (testing the restriction's impact on the core of the right, and the extent of the burden on the right, in determining the level of scrutiny to apply).

149. See *supra* Part IV.A (describing the issues with *Heller's* analysis of the Second Amendment).

150. *Infra* Parts IV.B.1 and IV.B.2.

151. See *infra* Part IV.B.2 (concluding that the circuit court test is proper for this analysis).

152. See Blocher, *supra* note 76, at 379–80 (describing two potential approaches to the analysis of Second Amendment conflicts following *Heller*).

153. See *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (mentioning that a balancing approach would subject the Second Amendment to “future judges’ assessments of its usefulness”).

guarantee subject to such review in the future is “no constitutional guarantee at all.”<sup>154</sup> In dissent, Justice Breyer stressed the need for a defined balancing standard, arguing that self-defense is not dispositive of unconstitutionality, but it merely “raises *questions* about the law’s constitutionality.”<sup>155</sup> Historical evidence suggests that the practicalities and rationales behind each law must be considered before declaring it unconstitutional.<sup>156</sup> While the majority desired to preserve the strength of the Amendment by avoiding a balancing approach, there are issues with developing a purely categorical approach following *Heller*.<sup>157</sup> This Part argues that the categorical approach should be bolstered by a balancing test in a two-step process.<sup>158</sup>

*a. The Categorical Approach*

The categorical approach draws a predetermined line between those categories that are protected by the Second Amendment and those that fall outside of the Amendment’s scope, making membership in a certain category outcome-determinative.<sup>159</sup> Such an approach allows for the outcome to be determined at the outset of the litigation based on the right and the mode in which it is infringed.<sup>160</sup> The benefit of categorization is that it conforms to rules.<sup>161</sup> Once the category is formed, it governs all subsequent

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154. *Id.* at 634.

155. *Id.* at 687 (Breyer, J., dissenting).

156. *Id.* (“[T]o answer the questions that are raised . . . requires us to focus on practicalities, the statute’s rationale, the problems that called it into being, [and] its relation to those objectives . . .”).

157. *See infra* Part IV.B.1.a (conducting a deeper analysis of the categorical approach and the issues that arise in trying to apply it following *Heller*).

158. *See infra* Part IV.B.2 (recommending a two-step approach to analyzing restrictions that conflict with the Second Amendment).

159. *See Blocher, supra* note 76, at 405 (addressing the categorical approach’s exclusion of certain categories, such as felons and types of arms, from Second Amendment protection).

160. *See id.* at 382 (stating that categoricism allows cases to be governed without any further reference to the background values); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 294–96 (1992) (discussing the benefits of the consistency of a categorical approach).

161. *See Blocher, supra* note 76, at 382 (noting that categoricism allows judges to create a rule that will bind in future cases); Kathleen M. Sullivan, *The*



cases, and stops future judges from reweighing the values and interests in any individual case.<sup>162</sup>

There are issues with the Court's attempt to establish a categorical framework for the Second Amendment.<sup>163</sup> The *Heller* majority compared the Second Amendment to the First Amendment by positing that an interest balancing test had been done at the time of the Second Amendment's creation by the people, and that the extent of its protection from that time should remain stable.<sup>164</sup> The majority asserts that the dissent's balancing approach would simply allow courts to reweigh interests that were already considered, allowing future judges to change the scope of the Amendment.<sup>165</sup> However, the First Amendment has previously been opened up to a balancing of interests that changes the scope of its coverage at different times in history.<sup>166</sup>

There are also issues with the examples *Heller* presents. First, the majority suggests the categorical exclusion of two groups—felons and the mentally ill—from the Second Amendment's coverage.<sup>167</sup> The majority never purports to justify such an exclusion.<sup>168</sup> The analysis undercuts the Court's use of the First and Fourth Amendments as justification for categorical exclusions, because those Amendments do not restrict any subsets of people,

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*Justices of Rules and Standards*, 106 HARV. L. REV. 22, 59 (1992) (“Categorization corresponds to rules, balancing to standards.”).

162. See Blocher, *supra* note 76, at 382 (“[C]ategoricalism allows a judge to transform some background value into a rule that will govern all subsequent cases inside the category.”).

163. See *id.* at 405–30 (noting that there are issues in *Heller*'s category examples).

164. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (“Like the First [Amendment], [the Second] is the very *product* of an interest balancing by the people—which Justice Breyer would now conduct for them anew.”).

165. See *id.* at 634–35 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or . . . judges think that scope too broad.”).

166. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (determining that speech may be protected in one situation but not in another, because “the character of every act depends upon the circumstances in which it is done”).

167. See *Heller*, 554 U.S. at 626 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . .”).

168. See Blocher, *supra* note 76, at 414 (describing it as unclear why these groups should be excluded).

including felons, from their protections.<sup>169</sup> It is unclear how to determine what groups can be excluded from coverage. *Heller*'s only other potential guidance comes from the label of presumptively constitutional exclusions as "longstanding,"<sup>170</sup> and explicitly extending the Second Amendment's protection to "law-abiding, responsible citizens."<sup>171</sup> Domestic violence misdemeanants and undocumented immigrants have been excluded from protection without *Heller*'s explicit approval.<sup>172</sup> However, laws restricting immigrants and domestic violence misdemeanants from possessing firearms do not meet the longstanding requirement.<sup>173</sup> Therefore, either falling outside of the "law-abiding, responsible citizens"<sup>174</sup> language alone is sufficient or a balancing test is necessary to allow for more restrictions outside of those categories excluded from protection. Because *Heller* specifically aimed its exclusions at longstanding restrictions,<sup>175</sup> and to not require this would lead to more confusion, adopting a balancing approach better justifies validating more recent laws.

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169. See *Heller*, 554 U.S. at 644 (Stevens, J., dissenting) (rejecting the majority's argument for using the First and Fourth Amendments to define "the people" and then hinting at groups excluded from Second Amendment protection who are not restricted under the First and Fourth Amendments).

170. *Heller*, 554 U.S. at 626.

171. *Id.* at 635.

172. See 18 U.S.C. § 922(g) (2012) (criminalizing possession of a firearm by different groups, including undocumented immigrants and domestic violence misdemeanants). The confusion in interpretation has led to a circuit split on whether undocumented immigrants are excluded from the Second Amendment's protection. See D. McNair Nichols, Note, *Guns and Alienage: Correcting a Dangerous Contradiction*, 73 WASH. & LEE L. REV. 2089, 2101–02 (2016). There are also disagreements among the circuit courts about whether domestic violence misdemeanants are excluded from coverage. See *infra* notes 207–212 and accompanying text.

173. See *Stimmel v. Sessions*, 879 F.3d 198, 205 (6th Cir. 2018) (determining that prohibitions on domestic violence misdemeanant's possession of firearms are twentieth-century restrictions); *United States v. Chester*, 628 F.3d 673, 681 (4th Cir. 2010) (noting the lack of historical gun restrictions on domestic violence misdemeanants).

174. *Heller*, 554 U.S. at 635.

175. See *id.* at 626 (specifically noting "longstanding prohibitions" as those which should not have doubt cast on them).

Second, *Heller* attempted to pave the way for the enactment of certain safe storage laws to prevent gun accidents.<sup>176</sup> However, the Court proceeded to invalidate a law aimed directly at the safe storage of firearms.<sup>177</sup> D.C. imposed a restriction that firearms in the home must be “unloaded and disassembled or bound by a trigger lock or similar device.”<sup>178</sup> The Court invalidated this law on the basis that it did not explicitly allow for self-defense, nor could a self-defense exception be read in.<sup>179</sup> The restrictions on foster parents are regulations on storage similar to D.C.’s.<sup>180</sup> In turn, the Court’s failure to acknowledge the true existence of such a category makes an analysis difficult under a solely categorical approach.

Finally, the Court acknowledges the constitutionality of certain laws “forbidding the carrying of firearms in sensitive places.”<sup>181</sup> The two examples given are “schools and government buildings.”<sup>182</sup> However, *Heller*’s holding only extends to the private home. Both examples given are places outside of this holding.<sup>183</sup> Should these examples be read to extend the Second Amendment outside of the home? Or should this exception be read to allow restrictions in private homes when they can be considered a sensitive place? Foster homes are private homes within the Second Amendment’s protection—but are also arguably a “sensitive place”<sup>184</sup>—so it is unclear whether they can be excluded as a category under *Heller*. All of these issues justify strengthening the

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176. *See id.* at 632 (“Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”).

177. *See id.* at 630 (invalidating a safe-storage requirement).

178. *Id.* at 575.

179. *See id.* at 630 (stating that the law made it impossible for citizens to use firearms for self-defense and explaining why an exception could not be read in).

180. *Compare id.* at 574 (“District of Columbia law . . . requires residents to keep their lawfully owned firearms . . . ‘unloaded and disassembled or bound by a trigger lock or similar device’ unless they are . . . being used for lawful recreational activities.”), with MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring firearms be kept in locked storage or trigger locked, with ammunition locked in separate storage).

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

182. *Id.*

183. *See id.* at 635 (holding the ban on “handgun possession *in the home*” and prohibition against rendering firearms operable “*in the home*” unconstitutional) (emphasis added).

184. *Id.* at 626.

categorical approach with a balancing test to ease the confusion left by *Heller*.

*b. The Balancing Approach*

The balancing approach consists of weighing the individual interest in the Second Amendment right against the Government's interest in regulating that right.<sup>185</sup> Balancing opens up decision-making to the application of principles and policy to the facts of a case, which risks a factual influence that a categorical approach does not allow.<sup>186</sup> Balancing generally leads to the application of a certain level of scrutiny, which may vary depending on the type of restriction.<sup>187</sup> Justice Breyer, in dissent, encouraged the use of a test that asks “whether the statute imposes burdens that, when viewed in light of the statute’s legitimate objectives, are disproportionate.”<sup>188</sup> Breyer analyzed the empirical arguments presented by *Heller* and asserted that the Court must ask if these arguments are “strong enough to destroy judicial confidence in the reasonableness of a legislature that rejects them.”<sup>189</sup> Breyer defends the use of balancing over a strict categorical approach because different areas may have different interests in restrictions. He cites the difference in incidents of gun crime between urban and rural areas, an issue that an originalist categorical approach cannot seemingly address.<sup>190</sup> The method the circuit courts use combines these two approaches and stays true to *Heller*'s exclusions while filling in the holes the Court left.

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185. See Blocher, *supra* note 76, at 381 (defining the balancing approach).

186. See *id.* (discussing how balancing involves the application of a principle to facts, while categorization requires a determinative response); Sullivan, *supra* note 161, at 58–59 (comparing balancing and categorization based on rules versus standards).

187. See, e.g., *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960–61 (9th Cir. 2014) (discussing the test for selecting an appropriate level of scrutiny).

188. *Heller*, 554 U.S. at 693 (Breyer, J., dissenting).

189. *Id.* at 702 (Breyer, J., dissenting).

190. See Blocher, *supra* note 76, at 412 (noting that Justice Breyer, following his description of a balancing test, recognized the special interest of urban areas with gun issues); *Heller*, 554 U.S. at 705 (Breyer, J., dissenting) (“[D]eference to legislative judgment seems particularly appropriate here, where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions.”).

## 2. Circuit Court Application of *Heller*

Following *Heller*, the circuit courts were challenged with determining the constitutionality of many different kinds of restrictions on gun possession and use.<sup>191</sup> Because *Heller* and *McDonald* relied on similarities between the First and Second Amendment to establish the right to bear arms as an individual right of the people,<sup>192</sup> the circuit courts used these connections to form a test analogous to the courts' inquiry in First Amendment cases.<sup>193</sup> Under a categorical approach, certain classes of speech have been recognized as falling outside of the protection of the First Amendment.<sup>194</sup> Outside of these classes, the courts have used balancing in determining that restrictions on the manner in which the First Amendment right is exercised, or restrictions that leave open alternative channels to exercise the right, will be subject to intermediate scrutiny.<sup>195</sup> Taking from the First Amendment's mixed approach, the circuits have chosen to analyze the Second Amendment under both in a two-step approach.<sup>196</sup>

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191. See, e.g., *Jackson*, 746 F.3d at 958 (analyzing a challenge to California's safe storage laws); *United States v. Chester*, 628 F.3d 673, 677 (4th Cir. 2010) (addressing a challenge to West Virginia's law against possession by domestic violence misdemeanants); *United States v. Marzzarella*, 614 F.3d 85, 88 (3d Cir. 2010) (reviewing Pennsylvania's law against possession of a firearm with a destroyed serial number).

192. See *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (recognizing the similarities between the Second, First, and Fourth Amendments as "pre-existing right[s]"); *McDonald v. City of Chicago*, 561 U.S. 742, 778–79 (2010) (suggesting that the Second Amendment should not be singled out for separate treatment from the First and Fourth Amendments).

193. See *Ezell v. City of Chicago*, 651 F.3d 684, 706–07 (7th Cir. 2011) ("Both *Heller* and *McDonald* suggest that First Amendment analogues are more appropriate, and on the strength of that suggestion, we and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context." (internal citations omitted)).

194. See *id.* at 702 (recognizing certain categories of speech that are outside of the First Amendment's reach, such as obscenity or defamation) (citing *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

195. See *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) (discussing the parallel between the First Amendment and the current analysis) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

196. See *id.* at 960 (describing the two-step approach used by the circuits); *Chester*, 628 F.3d at 680 (applying the two-step approach); *Marzzarella*, 614 F.3d at 89 (establishing the two-step approach).

In the first step, the court determines whether the challenged regulation burdens protected conduct or if the regulation falls within the category of restrictions that historically are not protected by the Second Amendment.<sup>197</sup> This is the categorical approach, which draws a line between protected conduct and those laws considered to be “presumptively lawful regulatory measures.”<sup>198</sup> In *Jackson v. City and County of San Francisco*,<sup>199</sup> the Ninth Circuit applied this standard.<sup>200</sup> The court asked two questions to determine if the restrictions fell outside of the Second Amendment’s protection.<sup>201</sup> First, the court looked to the “presumptively lawful measures” identified in *Heller*.<sup>202</sup> These are identified as the specific restrictions mentioned by the *Heller* majority, including restrictions on felons and the mentally ill, laws forbidding possession in sensitive places, restrictions on the sale of arms, and prohibitions on dangerous and uncommon weapons.<sup>203</sup>

The second question attempts to determine if there are categories outside of those mentioned explicitly in *Heller*.<sup>204</sup> For this analysis, the court asked “whether the record includes persuasive historical evidence establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment.”<sup>205</sup>

When deciding the first question, the circuit courts are inconsistent in determining what measures related to classes of people are “presumptively lawful”<sup>206</sup> outside of the examples

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197. See *Jackson*, 746 F.3d at 960 (discussing the first step of the analysis).

198. *Id.* (quoting *Heller*, 554 U.S. at 627 n.26).

199. 746 F.3d 953 (9th Cir. 2014).

200. See *id.* at 961 (determining if the challenged law burdens conduct within the Second Amendment’s protection).

201. See *id.* at 962 (asking if it is “presumptively lawful” under *Heller*, or if history suggests that it should be).

202. See *id.* at 960 (“[W]e ask whether the regulation is one of the ‘presumptively lawful regulatory measures’ identified in *Heller* . . . .” (internal citations omitted)).

203. See *id.* at 959 (summarizing the potential regulations that are constitutional).

204. See *id.* at 960 (discussing that the analysis considers those restrictions *Heller* identified or one which falls outside of the historical scope of the Second Amendment).

205. *Id.* at 960.

206. *District of Columbia v. Heller*, 554 U.S. 570, 627 n.26 (2008).

explicitly listed throughout *Heller*. This is seen in the split over the constitutionality of the federal law restricting domestic violence misdemeanants from possessing firearms.<sup>207</sup> Despite being outside of *Heller*'s explicit mention of "law-abiding, responsible citizens,"<sup>208</sup> the Fourth and Ninth Circuits determined that the federal law restricting domestic violence misdemeanants from possessing or receiving firearms did not clearly fall under *Heller*'s categorical exclusions from Second Amendment protection.<sup>209</sup> The courts recognized the lack of historic evidence of such restrictions, with the Ninth Circuit specifically noting that domestic violence misdemeanants were not prohibited from possessing firearms until 1996.<sup>210</sup> Similarly, the First and Seventh Circuits upheld the same statute after an application of intermediate or heightened scrutiny rather than outright recognizing the statute as presumptively lawful.<sup>211</sup> However, the Eleventh Circuit found the statute to be analogous to the ban on possession by felons, and determined that it was presumptively lawful under *Heller*.<sup>212</sup> It is clear that even when a restriction falls on a class outside of law-abiding, responsible citizens, the courts are still skeptical about categorically excluding full classes of people from the Second Amendment's protection.

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207. See 18 U.S.C. § 922(g)(9) (2012) (making it a crime for domestic violence misdemeanants to possess a firearm).

208. *Heller*, 554 U.S. at 635.

209. See *United States v. Chester*, 628 F.3d 673, 681 (4th Cir. 2010) (assuming that the defendant's Second Amendment rights are still intact); *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013) ("We must assume, therefore, that [Chovan]'s Second Amendment rights are intact . . .").

210. See *Chovan*, 735 F.3d at 1137 ("Because of 'the lack of historical evidence in the record before us, we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors.'" (quoting *Chester*, 735 F.3d at 681)); *Chester*, 628 F.3d at 681 (mentioning the lack of government contention and historical evidence that domestic violence misdemeanants were historically unprotected by the Second Amendment).

211. See *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011) (determining that a categorical ban requires a "substantial relationship between the restriction and an important governmental objective"); *United States v. Skoien*, 614 F.3d 638, 641 (7th Cir. 2010) (noting that § 922(g)(9) is valid only if "substantially related to an important governmental objective").

212. See *United States v. White*, 593 F.3d 1199, 1206 (11th Cir. 2010) ("We now explicitly hold that § 922(g)(9) is a presumptively lawful 'longstanding prohibition[] on the possession of firearms.'" (quoting *Heller*, 554 U.S. at 626)).

The courts are also skeptical about creating a category of restrictions regarding storage. The Ninth Circuit reviewed a San Francisco ordinance that requires handguns within a residence be locked in a storage container, disabled by a trigger lock, or carried on the person.<sup>213</sup> Despite recognizing that a Massachusetts storage law existed in 1783, the court acknowledged that *Heller* construed that statute narrowly, and recognized the law to be an outlier.<sup>214</sup> Similarly, the Court determined storage laws regarding gunpowder were geared towards fire safety and were not dispositive of the issue.<sup>215</sup> The safe storage law was determined not to be outside of Second Amendment protection based on the lack of historical evidence of such restrictions.<sup>216</sup>

If the court determines that the law falls within the Second Amendment's protection, then it moves on to the second step, where the court proceeds to apply an "appropriate level of scrutiny."<sup>217</sup> The second step follows its own two-question analysis.<sup>218</sup> First, the court asks how close the law's burden comes to the core of the Second Amendment.<sup>219</sup> As discussed, *Heller* established that the core of the right is the purpose of self-defense.<sup>220</sup> Second, the court analyzes how severe of a burden is placed on the right.<sup>221</sup> A law that places a severe burden on the core of the Second Amendment right will be found unconstitutional under any level of scrutiny.<sup>222</sup> However, the circuit courts have

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213. See *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 958 (9th Cir. 2014) (describing the restrictions set forth in San Francisco Police Code Section 4512).

214. See *id.* at 962–63 (discerning the current regulations from those restricting loaded weapons from being allowed inside homes in 1783).

215. See *id.* at 963 (describing gunpowder laws from the 18th century as "fire-safety regulations," and suggesting that the Second Amendment applies to the case).

216. See *id.* ("The other historical evidence in the record does not establish that prohibitions such as those in section 4512 fall outside the scope of the Second Amendment, as historically understood." (internal quotations omitted)).

217. *Id.* at 962.

218. See *id.* at 961 (discussing the analysis under the second prong of the test).

219. See *id.* (laying out the second step analysis).

220. See *supra* note 83 and accompanying text (noting *Heller's* decision as to the core of the Second Amendment right).

221. See *Jackson*, 746 F.3d at 961 (setting out the second piece of the analysis in determining the level of scrutiny).

222. See *id.* (discussing the analysis for laws which fail both tests in the



determined laws that do not burden the core of the right, or that do not place substantial restrictions on that right, will allow the court to apply intermediate scrutiny.<sup>223</sup> Such restrictions may simply restrict the manner in which the right may be used, or leave ample alternative channels for the exercise of the right.<sup>224</sup>

The circuits have been fairly uniform when answering the first question. The Third,<sup>225</sup> Fourth,<sup>226</sup> Sixth,<sup>227</sup> Ninth,<sup>228</sup> Tenth,<sup>229</sup> Eleventh,<sup>230</sup> and D.C. Circuits<sup>231</sup> have all determined that the core of the Second Amendment recognized in *Heller* is the “right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>232</sup> The Ninth Circuit determined that restrictions on storage of firearms in the home surely burden the core of the right, as they directly affect the ability of an individual to use his

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second step).

223. *See id.* (addressing the analysis of laws which do not severely burden the right to self defense).

224. *See id.* (describing potential restrictions that may be granted intermediate scrutiny review).

225. *See United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010) (discussing the *Heller* determination that the core purpose of the Second Amendment is to allow law-abiding citizens to use firearms for self-defense in the home).

226. *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) (defining the core right identified by *Heller* as “the right of a law-abiding, responsible citizen to possess and carry a weapon for self-defense”).

227. *See United States v. Greeno*, 679 F.3d 510, 517 (6th Cir. 2012) (citing *Heller* in determining the core of the Second Amendment to be self-defense in the home).

228. *See Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) (defining the core of the Second Amendment as self-defense by law-abiding citizens).

229. *See United States v. Reese*, 627 F.3d 792, 800 (10th Cir. 2010) (“[T]he Court suggested that the core purpose of the right was to allow law-abiding, responsible citizens to use arms in defense of hearth and home.” (internal quotations omitted)).

230. *See GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1259 (11th Cir. 2012) (stating that the right to self-defense is the “central component” of the Second Amendment).

231. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1255 (D.C. Cir. 2011) (describing the burden the law in question placed on “purpose of self-defense in the home—the ‘core lawful purpose’ protected by the Second Amendment” (quoting *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008))).

232. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

firearms to defend himself in his home.<sup>233</sup> In another case, the Ninth Circuit determined that the core is not burdened by restrictions on possession by persons who do not fit into the category of “law-abiding, responsible citizens,” such as domestic violence misdemeanants.<sup>234</sup> This reasoning was used in the Fourth Circuit as well.<sup>235</sup> For those regulations that do not burden the Second Amendment, the analysis of the regulation is done under intermediate scrutiny.<sup>236</sup> For those that do burden the core, the second question must be answered before a level of scrutiny can be tested.<sup>237</sup>

The second question asks whether the burden on the core of the Amendment is substantial.<sup>238</sup> In *Jackson*, the court determined that the restriction did not impose a substantial burden on the core of the Second Amendment.<sup>239</sup> The reasoning was that the regulations simply controlled the manner in which the right was regulated, and did not amount to a prevention of the exercise of the right.<sup>240</sup> This decision has not gone unquestioned, with Justice Scalia and Justice Thomas dissenting from the denial of certiorari.<sup>241</sup> The Justices feared that any restriction found to burden the core of the Amendment is a threat to the right, and that the Supreme Court should answer the question of whether the

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233. See *Jackson*, 746 F.3d at 964 (“Section 4512 therefore burdens the core of the Second Amendment right.”).

234. See *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013) (“Section 922(g)(9) does not implicate this core Second Amendment right because it regulates firearm possession for individuals with criminal convictions.”).

235. See *Chester*, 628 F.3d at 683 (determining that the claim is outside of the core of the Second Amendment due to Chester’s criminal history).

236. See, e.g., *id.* (“[W]e conclude that intermediate scrutiny is more appropriate than strict scrutiny for Chester and similarly situated persons.”).

237. See *Jackson*, 746 F.3d at 964 (stating that the core analysis is not the end of the court’s inquiry).

238. See *supra* note 221 and accompanying text (summarizing the second question).

239. See *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014) (“Section 4512 does not impose the sort of severe burden that requires the higher level of scrutiny applied by other courts . . .”).

240. See *id.* (stating that the restriction was only on the “manner in which persons may exercise their Second Amendment rights” (quoting *Chovan*, 735 F.3d at 1138)).

241. See *Jackson v. City & Cty. of San Francisco (Jackson II)*, 135 S. Ct. 2799, 2802 (2015) (Thomas, J., dissenting) (dissenting from the denial of certiorari).

restriction is constitutional.<sup>242</sup> Similarly, the D.C. Circuit found that bans on assault weapons and large capacity magazines do not prevent an individual from possessing a firearm in the home for self-defense, and, therefore, the burden was not substantial.<sup>243</sup> Each of these cases applied intermediate scrutiny to test the regulation in question.<sup>244</sup>

In contrast, the Seventh Circuit's review of a blanket ban on carrying an operable firearm in public and a Chicago ban on firing ranges determined each to be substantial burdens which amounted to prohibitions on exercising the Second Amendment right.<sup>245</sup> The court required an analysis higher than intermediate scrutiny be applied to these substantial burdens.<sup>246</sup> Finally, the Ninth Circuit recognized that a law that imposes a burden on the core of the Second Amendment severe enough to essentially destroy the right is "unconstitutional under any level of scrutiny."<sup>247</sup> These cases amount to three potential levels of scrutiny which may be applied to a burden on the core right of the Second Amendment. Because this test is able to fall within the categorical approach designed by *Heller* while also filling the holes left by the Supreme Court, it is the best test under which to analyze the MDHHS regulation.<sup>248</sup>

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242. See *id.* (Thomas, J., dissenting) (recognizing that the court of appeals determined that the law burdened the core of the right, and calling the court of appeals' judgment "questionable").

243. See *Heller II*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) ("[W]e are reasonably certain the prohibitions do not impose a substantial burden upon [the Second Amendment] right.").

244. See *id.* at 1261–62 (determining intermediate scrutiny was appropriate); *Jackson*, 746 F.3d at 965 ("[W]e apply intermediate scrutiny.").

245. See *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (determining that a ban on carrying firearms in public was a substantial curtailment of the Second Amendment right); *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) (describing the law as a "serious encroachment" on an "important corollary" to the Second Amendment's core right).

246. See *e.g.*, *Ezell*, 651 F.3d at 708 ("All this suggests that a more rigorous showing than [intermediate scrutiny] should be required, if not quite 'strict scrutiny.'").

247. *Jackson*, 746 F.3d at 961.

248. See *infra* Part V.A (describing why this test is the best to use in this situation).

### V. Applying the Test to the Michigan Regulation

The MDHHS regulation must be subjected to a test to determine if it is constitutional. This Part describes why the test applied by the circuit courts is the best option.<sup>249</sup> Next, it analyzes whether foster parents are categorically excluded from Second Amendment protection as a class.<sup>250</sup> Then, should they fall under the Second Amendment's protection, the two-step approach, discussed in Part IV.B.2, determines a proper level of scrutiny.<sup>251</sup> Finally, this Part draws a conclusion on the constitutionality of the regulation after testing it under the proper scrutiny.<sup>252</sup>

#### A. The Proper Test to Analyze the Michigan Restrictions

For the purposes of the current analysis, the review laid out by the circuit courts<sup>253</sup> appears to be the best method to test the regulations in question. Two potential approaches exist—a categorical approach and an interest balancing test.<sup>254</sup> While the majority in *Heller* was guiding the Court towards a categorical-only review, it left too many holes to properly apply that method following the decision.<sup>255</sup> Not only does the circuit courts' two-prong approach have the potential to provide better coverage for some of the weaknesses in each approach<sup>256</sup> by adding the strengths of the other, but it also allows for both a balancing test and a categorical test to be done on the regulation.<sup>257</sup> If the

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249. *Infra* Part V.A.

250. *See supra* Part IV.B.2 (discussing the first step of the circuit court test being used to analyze the current restriction).

251. *See supra* Part IV.B.2 (laying out the proper approach to determining the level of scrutiny that a regulation should be subject to when it burdens conduct protected by the Second Amendment).

252. *Infra* Part V.D.

253. *See supra* Part III.B.2 (describing the approach commonly used by circuit courts in interpreting the Second Amendment).

254. *See supra* Part III.B.1 (discussing both the categorical and balancing approach).

255. *See supra* Part III.B.1 (laying out an analysis of the weaknesses of the categorical approach that *Heller* attempts to create).

256. *See supra* Part III.B.1 (noting shortcomings in each approach).

257. *See supra* Part III.B.2 (setting out both the categorical and balancing sides to the circuit court test).

Supreme Court determines that one of the two is the sole test to be used, the regulation will already be analyzed under each, allowing for the test to remain partially applicable. Also, *Heller* relied on the First Amendment as an analogy when supporting the refusal to adopt an interest balancing approach.<sup>258</sup> The First Amendment has frequently been analyzed under this approach as well, justifying its use under *Heller*.<sup>259</sup> Finally, should the Supreme Court decide not to take up any more Second Amendment cases, this test represents the likely style of appellate review to be applied should any regulation be challenged.

*B. Part 1: Is the Burdened Conduct Protected by the Second Amendment?*

The first question asks whether the conduct burdened by the regulations is protected by the Second Amendment.<sup>260</sup> Initially, *Heller* specifically recognized that certain “longstanding” measures would be presumed lawful.<sup>261</sup> It is clear that these restrictions are a new development and cannot be justified simply by their longstanding nature.<sup>262</sup> However, this alone does not dispose of the question as to whether the prohibited conduct is protected by the Second Amendment.<sup>263</sup> There still may be other factors that could exclude foster parents from protection, so further analysis is necessary.

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258. See *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (referencing the First Amendment multiple times in justifying the majority approach to the Second Amendment).

259. See *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (discussing the parallel between the First Amendment and the current analysis).

260. See *id.* at 960 (determining that the analysis should start by questioning if the burdened conduct is even protected by the Second Amendment).

261. See *Heller*, 554 U.S. at 626 (noting that the opinion should not “cast doubt” on certain prohibitions existing before the decision).

262. See *Everytown Brief*, *supra* note 42, at 10 (conceding that laws prohibiting irresponsible storage of firearms by foster parents are a “product of modern society” without a “precise historical analogue”).

263. See *United States v. Greeno*, 679 F.3d 510, 519 (6th Cir. 2012) (recognizing that the fact that a law was “not enacted until recently does not automatically render the [regulated conduct] within the scope of the Second Amendment right as historically understood”).

As recognized above, *Heller* presented five potential types of categories that may be excluded from protection, including restrictions on: (1) certain people, (2) certain places, (3) the sale of firearms, (4) certain types of weapons, and (5) storage to prevent accidents.<sup>264</sup> Nothing in the MDHHS regulations, or any of the state regulations, relates to the type of firearm or the sale of firearms, so those will not be analyzed.<sup>265</sup> To see if foster parents may be excluded from Second Amendment protection under *Heller*, three exceptions will be tested. First, foster parents may constitute a class of people.<sup>266</sup> Next, *Heller* recognized that certain places may justify restrictions on their premises,<sup>267</sup> so the foster home is considered under this possibility.<sup>268</sup> Finally, the specific storage requirements are analyzed to see if *Heller*'s specific exception for accident prevention applies.<sup>269</sup> These will be analyzed in light of the fact that courts are skeptical to extend these categories beyond *Heller*'s specific examples.<sup>270</sup> Then, this Note explores whether the Second Amendment right can be relinquished through a voluntary contract, allowing courts to disregard *Heller*.<sup>271</sup>

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264. See *supra* notes 111–115 and accompanying text (pulling the five potential classes that are excluded from the Second Amendment based on *Heller*'s examples).

265. See MICH. ADMIN. CODE r. 400.9415(3) (2018) (regulating the storage of firearms in general, making no distinction between type, and making no mention of the sale of firearms); *infra* Figure 1 (listing the restrictions in each state on storage alone).

266. See *infra* Part V.B.1 (determining whether foster parents as a class are excluded from the Second Amendment's protection).

267. See *Heller*, 554 U.S. at 626–27 (“[N]othing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places . . .”).

268. *Infra* Part V.B.2.

269. *Infra* Part V.B.3; see also *Heller*, 554 U.S. at 632 (“Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”).

270. See *supra* Part VI.B.2 (discussing the circuit courts’ extension of *Heller*'s categories).

271. *Infra* Part V.B.4.

### 1. Foster Parents as a Class of People

*Heller* only gave two examples of classes of people who may be subject to presumptively lawful restrictions.<sup>272</sup> These examples are felons and mentally ill persons,<sup>273</sup> both regulated at the federal and state levels.<sup>274</sup> The *Heller* Court did not mean for this list to exhaust all possible classes,<sup>275</sup> and some other classes of people have been regulated by either federal or state law. These classes include domestic violence misdemeanants or persons under a domestic violence restraining order, undocumented immigrants, illegal drug users, former military members who were dishonorably discharged, and minors.<sup>276</sup>

These groups differ from foster parents in two ways. First, the restrictions on these groups seems to best be justified by the dangers that the restricted person would pose with a firearm based on a tendency towards crime or lack of reason.<sup>277</sup> Foster parents, on the other hand, are restricted because of the danger that a third party—the foster child—might pose if they gained access to the firearm.<sup>278</sup> While this is a risk the state has an interest in

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272. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (noting that *Heller* should not be read to “cast doubt” on certain restrictions, such as possession by the mentally ill and felons).

273. See *id.* (recognizing restrictions on felons and the mentally ill as prohibitions that should not be looked at with doubt following *Heller*).

274. See 18 U.S.C. §§ 922(g)(1), (g)(4) (2012) (criminalizing the possessing, receiving, or transporting of a firearm by any person convicted of a crime punishable by imprisonment of longer than a year, and by any person adjudicated as “a mental defective” or who has been “committed to a mental institution”).

275. See *Heller*, 554 U.S. at 627 n.26 (“[O]ur list does not purport to be exhaustive.”).

276. See, e.g., 18 U.S.C. § 922(g) (prohibiting possession, transporting, or receiving of a firearm by felons, unlawful drug users, mentally ill persons, undocumented or nonimmigrant aliens, persons who have been discharged from the military under “dishonorable conditions,” persons with restraining orders against them by an “intimate partner,” and domestic violence misdemeanants); *id.* § 922(x)(2) (making it unlawful for a juvenile to possess a handgun or ammunition suitable for a handgun).

277. See, e.g., *United States v. Dugan*, 657 F.3d 998, 999 (9th Cir. 2011) (justifying restriction of habitual drug users from possessing firearms because “like career criminals and the mentally ill, [habitual drug users] more likely will have difficulty exercising self-control”).

278. See *Everytown Brief*, *supra* note 42, at 3–7 (citing statistics of the dangers posed to children by firearms through suicide and accidents but saying nothing about foster parents being dangerous).

mitigating,<sup>279</sup> there appear to be no examples of lawful restrictions that fully remove a person from Second Amendment protection to prevent the harm by third parties. Such potential injuries are normally regulated by placing restrictions on the risky individual, such as juveniles;<sup>280</sup> by punishing negligent storage instead of strictly regulating the method of storage;<sup>281</sup> or by restricting storage, but with an exception for firearms under the control of the owner.<sup>282</sup> This Note does not confirm the constitutionality of those restrictions, but they are not as severe of a restriction on the Second Amendment as those placed on foster parents to prevent harm by third parties regardless of validity.

Second, the Supreme Court specifically stated that the Second Amendment “surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”<sup>283</sup> Each of the groups mentioned above fall outside of these categories: (1) the mentally ill and juveniles would likely not be considered “responsible;”<sup>284</sup> (2) undocumented immigrants are not “citizens;”<sup>285</sup> and (3) the others fall outside of the “law-abiding”<sup>286</sup> language. For each of these, the entire category falls outside of the law-abiding and responsible framework. Foster parents do not, as a class, fall outside of this framework. Individually, foster parents are held to a high standard. Federal law requires states to submit prospective foster parents to background checks.<sup>287</sup> Certain crimes automatically disqualify an

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279. See *supra* Part II.B (describing Michigan’s interest in regulating firearm storage in the foster home).

280. See 18 U.S.C. § 922(x)(2) (prohibiting possession of handguns by juveniles).

281. See, e.g., HAW. REV. STAT. § 707-714.5 (2018) (criminalizing negligent storage of a firearm if a minor obtains access to the firearm).

282. See, e.g., CAL. PENAL CODE § 25135 (West 2018) (requiring persons who own or reside in a residence with a person prohibited from owning, possessing, or receiving a firearm to keep any firearms in the residence in locked storage or on their person).

283. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

284. *Id.*

285. *Id.*

286. *Id.*

287. See 42 U.S.C. § 671(a)(20)(A) (2012) (requiring for states to “provide[] procedures for criminal records checks . . . for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved”).



applicant or require revocation of a license,<sup>288</sup> and the states still have discretion to disqualify applicants convicted of other offenses if they are not of good character.<sup>289</sup> For example, Michigan requires foster home licensees be “of such physical, mental, and emotional health to assure appropriate care of children,”<sup>290</sup> and “[b]e of responsible character.”<sup>291</sup> The state also requires good character and mental and emotional health of other members of the foster home.<sup>292</sup> The agency conducts a criminal record check of all members of the household, including any who move in.<sup>293</sup> MDHHS also requires the licensee to assist in determining whether each of these requirements is met.<sup>294</sup> Finally, MDHHS requires an update of any changes regarding these requirements on an ongoing basis,<sup>295</sup> and may revoke the license of any person who substantially violates these rules.<sup>296</sup> Therefore, individual foster parents are required by the state to be law-abiding and responsible. While *Heller* did not present the full list of potential exclusions, the “law-abiding, responsible citizen” language explicitly pulls foster parents within the Second Amendment’s protection. While this is not dispositive of the issue of constitutionality and further analysis is necessary, foster parents, as a class, are not excluded from Second Amendment protection.

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288. *See id.* (listing crimes for which a past conviction would be disqualifying); MICH. COMP. LAWS ANN. § 722.115(9)–(10) (West 2018) (mandating revocation of a license based on certain criminal convictions).

289. *See* MICH. ADMIN. CODE r. 400.9201 (2018) (specifying the qualifications for approval of a foster home, including requiring that a licensee be “of good moral character”).

290. *Id.*

291. *Id.*

292. *See id.* r. 400.9202 (listing the requirements for members of the household).

293. *See id.* r. 400.9205 (requiring a record check of each individual in the household).

294. *See id.* r. 400.9206 (stating what licensees must assist the agency in determining).

295. *See id.* r. 400.9207 (allowing for reevaluations throughout the license period).

296. *See id.* § 722.121(2) (describing the power of revocation).

## 2. Foster Homes as a Sensitive Area

*Heller* left open the ability to restrict possession of firearms in certain areas designated as “sensitive places.”<sup>297</sup> The two examples given are government buildings and schools.<sup>298</sup> The foster home is more sensitive than a normal home. The foster home contains children who are the direct responsibility of the state.<sup>299</sup> Also, the state has a limited duty to protect the child from a dangerous foster home.<sup>300</sup> However, there is one major difference between the foster home and the examples given that is likely dispositive. The examples given in *Heller* are spaces that do not seemingly fall within *Heller*’s holding, as is, because neither of the examples given describes a private home.<sup>301</sup> The Supreme Court has never taken up the question of whether the Second Amendment protects the right to possess a firearm outside of the home.<sup>302</sup> Even without *Heller*’s acknowledgment of an exception, laws prohibiting firearms in public places or in private schools may not be within the protection of the Second Amendment regardless of how “sensitive” they may be. The private home is specifically protected in *Heller* as the place where the need for defense is “most acute.”<sup>303</sup> A foster home, while subject to extra state control, remains a private home.<sup>304</sup> While there is an interest of the state in protecting the child, that is an analysis that should be left to a scrutiny test

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

298. *See id.* (providing examples of “sensitive places” that may be subject to “presumptively lawful” restrictions).

299. *See, e.g.*, MICH. ADMIN. CODE r. 400.10(1)(c) (2018) (defining “foster care” as “24-hour substitute care for children placed away from their parents or guardians and for whom the *state agency has placement and care responsibility*” (emphasis added)).

300. *See Doe ex rel. Johnson v. S.C. Dep’t of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010) (determining that the state had a duty to refrain from placing a foster child in a known dangerous environment).

301. *See Heller*, 554 U.S. at 635 (confining each of the Court’s holdings to “the home”).

302. *See Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012) (“[T]he Supreme Court has not yet addressed the question whether the Second Amendment creates a right of self-defense outside the home.”).

303. *Heller*, 554 U.S. at 628.

304. *See, e.g.*, MICH. COMP. LAWS § 722.111 (2018) (“Private home includes a full-time foster family home . . .”).

and should not be dispositive of a restriction inside of any private home.

### 3. Reasonable Restrictions to Prevent Accidents

The Court did not present any examples of the final exception: reasonable restrictions to prevent accidents.<sup>305</sup> The extent of the accident prevention exception is the statement: “Nor, correspondingly, does our analysis suggest the invalidity of laws regulating the storage of firearms to prevent accidents.”<sup>306</sup> The regulations in question are specifically directed at storage,<sup>307</sup> and their purpose is directly aimed at preventing accidents and stopping access by prohibited persons.<sup>308</sup> Seemingly, the wording of *Heller* would apply to the regulations at hand if read with the little guidance given. However, *Heller* followed that statement by declaring a law requiring trigger locks on all lawfully owned firearms unconstitutional because of the burden it placed on the ability to use a firearm for self-defense.<sup>309</sup> The regulations at hand require storage either with a trigger lock or in a locked cabinet or safe.<sup>310</sup> The holding of *Heller* seems to directly exclude the ability to justify the MDHHS regulation under the accident prevention exception. A locked safe or cabinet is no less of a burden than a device directly locking the firearm. In addition, the requirements of keeping the gun unloaded and locking the ammunition separately increases the burden beyond what *Heller* found unconstitutionally onerous.

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305. See *Heller*, 554 U.S. at 632 (mentioning the validity of regulations aimed at storage to prevent accidents without describing potential methods).

306. *Id.*

307. See MICH. ADMIN. CODE r. 400.9415(3) (2018) (regulating the manner in which firearms are stored within the foster home).

308. See Everytown Brief, *supra* note 42, at 7 (discussing the dangers of child access to firearms in the home and the risk of accidents that comes with it); see also 18 U.S.C. § 922(x)(2) (2012) (criminalizing the possession of firearms by juveniles).

309. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (“[T]he District’s requirement . . . that firearms in the home be rendered and kept inoperable at all times . . . is hence unconstitutional.”).

310. See MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring that firearms are “[s]tored in a locked . . . gun safe” or “[t]rigger-locked and stored without ammunition in a locked area”).

*Heller* specifically acknowledged the lack of a self-defense exception in the D.C. statute.<sup>311</sup> Also, other states and municipalities that have enacted similar storage requirements to the Michigan regulation allow an exception for direct control and possession of the firearm.<sup>312</sup> Only South Carolina has such an exception in foster homes.<sup>313</sup> Under *Heller*, it seems that there is no way to read in a self-defense exception to the Michigan regulations, and those like it.<sup>314</sup> Also, while the Supreme Court has not determined the constitutionality of storage laws with an exception for personally carrying the firearm, the validity of such a statute would not be analogous to the MDHHS regulations because no such option exists.<sup>315</sup> The regulations in question directly violate *Heller*, and therefore cannot be read to fall within the accident prevention exception.

#### 4. Voluntary Entry into a State Program

The next potential avenue for excluding foster parents from the protection of the Second Amendment is that the foster program is a voluntary, contractual agreement that allows the waiver of all Second Amendment rights.<sup>316</sup> There is no constitutional right to be a foster parent,<sup>317</sup> and the foster parents receive funding in return

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311. See *Heller*, 554 U.S. at 630 (rejecting the argument that a self-defense exception can be read in to the D.C. statute).

312. See, e.g., MASS. GEN. LAWS ch. 140, § 131I (2018) (“[S]uch weapon shall not be deemed stored or kept if carried by or under the control of the owner or other lawfully authorized user.”).

313. See S.C. CODE ANN. REGS. 114-550(H)(18) (2018) (“Firearms and any ammunition shall be kept in a locked storage container except when being legally carried upon the foster parent’s person . . .”).

314. See *Heller*, 554 U.S. at 630 (refusing to read a self-defense exception where none is explicitly mentioned).

315. See MICH. ADMIN. CODE r. 400.9415(3) (2018) (creating no exception for firearms carried by a person).

316. See generally MICH. DEP’T OF HEALTH & HUMAN SERVS., DHS-1709, DEPARTMENT/FOSTER PARENT AGREEMENT (2018), [https://www.michigan.gov/documents/dhs/DHS-1798\\_Department\\_Foster\\_Parent\\_Agreement\\_320174\\_7.pdf](https://www.michigan.gov/documents/dhs/DHS-1798_Department_Foster_Parent_Agreement_320174_7.pdf) (requiring foster parents to follow all agency licensing rules).

317. See Defendant’s Memorandum in Support of His Motion to Dismiss at 8, *Shults v. Sheldon*, 2:16-cv-02214 (C.D. Ill. Nov. 16, 2016) (“No court has found that there is a constitutional right to be a foster parent.”).

for fostering children.<sup>318</sup> In addition, courts have determined that foster parents do not have the same constitutional liberty interest as biological families in keeping the family together once the relationship has been formed.<sup>319</sup> The possibility of some liberty interest in foster families exists in long-term foster relationships or existing familial relationships.<sup>320</sup> However, because most of the families burdened by these restrictions will not have such an interest, the restrictions must be analyzed as if the ability to be a foster parent is a benefit and not a right.

The states may argue that any person may fully exercise their Second Amendment right by not becoming a foster parent.<sup>321</sup> “[F]oster parents do not enjoy the same constitutional protections that natural parents do,”<sup>322</sup> and have been forced to sacrifice in other areas that raise questions of constitutionality, such as the First and Fourth Amendments.<sup>323</sup>

Foster parents are treated as independent contractors, and on occasion employees, in their relationship with the state.<sup>324</sup> “[T]he

318. See, e.g., MICH. ADMIN. CODE r. 400.2023 (2018) (setting out the rules for receiving state reimbursement as a foster parent).

319. See, e.g., *Kyees v. Cty. Dep’t of Pub. Welfare*, 600 F.2d 693, 699 (7th Cir. 1979) (“[T]he question left open by the Supreme Court in *Smith* should be decided adversely to the existence of a liberty interest in a foster care arrangement of the nature and duration considered here.”); *Drummond v. Fulton Cty. Dep’t of Family & Children’s Servs.*, 563 F.2d 1200, 1208 (5th Cir. 1977) (en banc) (“[W]e conclude that the *Drummonds* have no protectable liberty interest in this case.”).

320. See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 847 (1977) (“[The foster parents’] claim to a constitutionally protected liberty interest raises complex and novel questions. It is unnecessary for us to resolve those questions definitively in this case.”); *Brown v. San Joaquin Cty.*, 601 F. Supp. 653, 665 (E.D. Cal. 1985) (“[T]he court concludes that the foster family relationship is sufficiently similar to other familial relationships held by the Supreme Court to be entitled to constitutional protection.”).

321. See Defendant’s Memorandum in Support of His Motion to Dismiss at 9, *Shults v. Sheldon*, No. 2:16-cv-02214 (C.D. Ill., Nov. 16, 2016) (“If [the *Shultses*] choose to no longer be foster parents, they will not be subject to any of the restrictions that they complain of.”).

322. *Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985).

323. See *infra* notes 344–362 and accompanying text (discussing the potential conflicts between foster home regulation and the First and Fourth Amendments).

324. See, e.g., *Mitzner ex rel. Bishop v. State*, 891 P.2d 435, 439 (Kan. 1995) (“Limiting our choice of status to employee or independent contractor, the latter is the appropriate categorization of a foster parent.”); *Nichol v. Stass*, 735 N.E.2d 582, 587 (Ill. 2000) (“[W]e must conclude that the [foster parents] were independent contractors rather than employees or agents of the state.”); see also

government as employer indeed has far broader powers than does the government as sovereign.”<sup>325</sup> The Supreme Court has limited this by establishing that employment’s voluntary nature does not allow the government to unreasonably infringe on the constitutional rights of employees.<sup>326</sup> However, the courts have never discussed the topic of unconstitutional conditions in the context of foster care or the Second Amendment. This Note will next look at the application of the unconstitutional conditions doctrine in the First Amendment to see how it might apply to the Second Amendment question presented. Next, this section will look at other potential conflicts that arise between restrictions on foster parents and constitutional rights to see if they can guide the question in the foster care context.

The Supreme Court has held on multiple occasions that the voluntary nature of employment is not alone sufficient to justify the waiver of constitutional rights.<sup>327</sup> The Court has applied this in the employment context for hiring,<sup>328</sup> firing,<sup>329</sup> and nonrenewal of a contract.<sup>330</sup> The same standard has been extended to protect independent contractors with pre-existing relationships with the government from having their contract terminated for exercising their First Amendment rights.<sup>331</sup> The Court has not had the opportunity to answer this question as it pertains to independent

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Hunte v. Blumenthal, 680 A.2d 1231, 1235 (Conn. 1996) (“[T]he [foster parents] qualify as employees of the state and are not independent contractors.”).

325. *Waters v. Churchill*, 511 U.S. 661, 671 (1994).

326. *See Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (recognizing that the court has held on multiple occasions that unconstitutional conditions may not be placed on the receipt of government benefits).

327. *See, e.g., id.* (“For at least a quarter-century, this Court has made clear that even though a person has no ‘right’ to a valuable governmental benefit . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . .”).

328. *See Rutan v. Republican Party of Ill.*, 497 U.S. 62, 79 (1990) (extending First Amendment protections to employees in hiring decisions).

329. *See Elrod v. Burns*, 427 U.S. 347, 372 (1976) (applying First Amendment protections to employees dismissed for their political beliefs).

330. *See Perry*, 408 U.S. at 598 (stating that the Court has held on multiple occasions that nonrenewal of a nontenured teacher’s contract may not be based on the exercise of First or Fourteenth Amendment rights).

331. *See Bd. of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 685 (1996) (applying the same test to the termination of an independent contract as would be applied in an employment case that involves an unconstitutional condition).

contractors who do not have existing relationships with the government, such as those bidding for a contract, and the circuit courts are split on the issue.<sup>332</sup> However, in the context of the current regulations on foster homes, the test should be applied equally to new foster parents as well as those with longstanding relationships, similar to the extension to employees in the hiring context.<sup>333</sup> First, the main concern of the Court in extending employee protection to independent contractors is the reduced control.<sup>334</sup> Through its regulations and routine checks of the foster home, the state still maintains a significant amount of control over foster parents.<sup>335</sup> Also, the danger the state is trying to mitigate arrives once the foster child is in the home,<sup>336</sup> so it makes no sense to differentiate between people applying and those who have an existing relationship with the state. If the state is able to place a restriction on firearms storage when approving a foster license, to have the existence of the relationship allow the foster parent to disregard the restrictions once the child is in the home would defeat the purpose of the regulations. Therefore, the test below for unconstitutional conditions should be applied equally to prospective and existing foster parents, whether considered employees or independent contractors. Because the Second Amendment right has been analogized to the First Amendment,<sup>337</sup> the same test should be applied to burdens placed on each right.

In analyzing conflicts that arise when employees and independent contractors face conditions that restrict First

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332. See *Oscar Renda Contracting, Inc. v. City of Lubbock*, 463 F.3d 378, 386 (5th Cir. 2006) (extending *Umbehr* to government contractors without an existing relationship with the government). *But see* *McClintock v. Eichelberger*, 169 F.3d 812, 817 (3rd Cir. 1999) (limiting *Umbehr* to existing relationships).

333. See *Rutan*, 497 U.S. at 79 (applying First Amendment protection in the context of employee hiring).

334. See *Umbehr*, 518 U.S. at 676–77 (discussing how independent contractors are greater removed from government control than employees).

335. See, e.g., MICH. DEP'T OF HEALTH & HUMAN SERVS., LICENSING RULES FOR FOSTER FAMILY HOMES AND FOSTER FAMILY GROUP HOMES FOR CHILDREN (2015), [https://www.michigan.gov/documents/mdhhs/CWL-PUB-10\\_502652\\_7.pdf](https://www.michigan.gov/documents/mdhhs/CWL-PUB-10_502652_7.pdf) (setting out the requirements for the licensing of foster homes in Michigan).

336. See *supra* Part II.B (setting out the justification for regulating firearm storage in foster homes).

337. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (comparing the Second Amendment right to the individual rights protected by the First Amendment).

Amendment rights, the Court applies the test developed in *Pickering v. Board of Education*.<sup>338</sup> This test requires balancing the “interests of the [employee], as a citizen . . . and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”<sup>339</sup> The interest in *Pickering* of commenting on matters of public concern was recognized as a core value of the First Amendment’s Free Speech Clause.<sup>340</sup> Similarly, the interest in keeping an operational firearm in the home for the purpose of self-defense is a core value of the Second Amendment.<sup>341</sup> As for the state’s interest in promoting the efficiency of the foster system, while they must regulate the foster parents due to a lack of direct control over day to day operations, there is no evidence to suggest that foster homes would not be equally as efficient under less restrictive firearm requirements. Some states use less restrictive alternatives,<sup>342</sup> and nothing suggests that their systems are unable to achieve the state’s goals.<sup>343</sup> To require measures as restrictive as Michigan’s is impermissible based on this analysis, as it restricts the interest of the foster parent beyond what is necessary. Because this test has not been applied directly to foster care regulations, some of the other restrictions that raise constitutional questions are reviewed to see if an analogy suggests that the Second Amendment may be restricted outside of the *Pickering* analysis.

First, the Ninth Circuit concluded that foster parents did not have a constitutionally protected free exercise right to use corporal punishment on their foster child.<sup>344</sup> In response to the religious

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338. 391 U.S. 563 (1968); *see also* *Umbehr*, 518 U.S. at 676–79 (discussing the application of the *Pickering* test to employees and independent contractors).

339. *Pickering*, 391 U.S. at 568.

340. *See id.* at 573 (recognizing debate on matters of public concern as the “core value” of free speech).

341. *See Heller*, 554 U.S. at 630 (describing the “core lawful purpose of self-defense” under the Second Amendment).

342. *See, e.g.*, HAW. CODE R. § 17-1625-22 (LexisNexis 2018) (requiring that the foster home be generally equipped with protection from firearms).

343. *See infra* notes 425–426 and accompanying text (discussing the very limited research on the dangers posed to foster children).

344. *See Backlund v. Barnhart*, 778 F.2d 1386, 1389 (9th Cir. 1985) (“[T]he Backlunds must show that they, as foster parents, had a clearly established right to exercise their religious beliefs about punishment on a foster care child. They fail to cite any pertinent authority . . . . Nor can they . . .”).



defense of corporal punishment, the court noted that “even natural parents have no clearly established right to unlimited exercise of religious beliefs on their children.”<sup>345</sup> There was no authority to show that foster parents were singled out from the general population.<sup>346</sup>

In contrast, the Second Amendment protects the general population from interference with the right of responsible and law-abiding citizens to protect themselves in the home.<sup>347</sup> Foster parents fit within this definition, and the regulations single them out for exclusion from Second Amendment protection. The Ninth Circuit simply determined that the relationship between the foster parent and foster child “confer[red] no new constitutional rights.”<sup>348</sup> The constitutional right to keep arms already exists.<sup>349</sup> Additionally, other courts have recognized that the foster children and their biological parents have a free exercise interest that must be reasonably accommodated in the foster home.<sup>350</sup> This means that the foster parent’s extension of religious beliefs onto their foster child could potentially conflict with the constitutional rights of others. In contrast, the exercise of Second Amendment rights in the foster home does not conflict with the rights of parents or the child. These situations are not analogous.

Additionally, foster parents often lose their ability to protect themselves from searches of their home by the department responsible for the child.<sup>351</sup> However, the Fourth Amendment comparison also fails to justify the restrictions on firearms. The Fourth Amendment does not protect from searches in general. It

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345. *Id.*

346. *See id.* (determining that the Backlunds failed to cite any pertinent authority showing that a cognizable right had been infringed because that right is not even established for natural parents).

347. *See Heller*, 554 U.S. at 635 (concluding that the Second Amendment protects the right for responsible citizens to possess firearms for the purpose of self-defense in the home).

348. *Backlund*, 778 F.2d at 1390.

349. *See* U.S. CONST. amend. II (preserving the right to “keep and bear arms”).

350. *See Wilder v. Bernstein*, 848 F.2d 1338, 1347 (2d Cir. 1988) (concluding that the state must make reasonable efforts to assure the foster child’s religious needs are met while the state is responsible).

351. *See Wildauer v. Frederick Cty.*, 993 F.2d 369, 373 (4th Cir. 1993) (determining that the state’s interest in examining a foster child who may have been neglected outweighs Wildauer’s privacy interest).

protects the people from searches deemed “unreasonable.”<sup>352</sup> In cases involving foster parents, courts have either applied the “special needs” exception to the Fourth Amendment,<sup>353</sup> or have decided the matter on general principles of qualified immunity.<sup>354</sup> Instead, administrative searches of homes in which foster children reside may simply be deemed reasonable based on the circumstances.<sup>355</sup> This is a fact specific inquiry that the language of the Amendment explicitly calls for with the word “unreasonable.”<sup>356</sup> Similar laws have been upheld in other situations, such as periodic home visits to ensure eligibility as a condition on the receipt of welfare benefits.<sup>357</sup> The Supreme Court determined that such searches by caseworkers were reasonable based on the public interest and the difference between these searches and traditional searches.<sup>358</sup> Also, the home is only opened up to a limited number of officials for specific administrative checks<sup>359</sup> or for investigative home visits that apply in contexts outside of foster homes.<sup>360</sup>

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352. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against *unreasonable* searches and seizures, shall not be violated . . . .” (emphasis added)).

353. See *Wildauer*, 993 F.2d at 372 (“In determining whether a search and seizure is reasonable, we must balance the government’s need to search with the invasion endured by the plaintiff.”); see also Doriane L. Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 417 n.6 (2005) (stating that the “special needs doctrine” applies in civil cases, and the constitutionality of searches and seizures is determined by “reasonableness balancing analysis”).

354. See *Wildauer*, 993 F.2d at 372 (granting the defendants qualified immunity because “they did ‘not violate clearly established statutory or constitutional rights of which a reasonable person would have known’” (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982))).

355. See *id.* at 372–73 (determining that multiple searches of the plaintiff’s home by a social worker accompanied by police officers and nurses were “reasonable” based on the circumstances of each).

356. U.S. CONST. amend. IV.

357. See *Wyman v. James*, 400 U.S. 309, 326 (1971) (determining the searches were a “reasonable administrative tool”).

358. See *id.* at 318–24 (determining that if the searches were those considered by the Fourth Amendment they would not be unreasonable).

359. See, e.g., ILL. ADM. CODE tit. 89 § 402.27 (2018) (requiring at least semiannual visits to licensed facilities to ensure continued compliance).

360. See *Wildauer*, 993 F.2d at 372 (“[I]nvestigative home visits by social workers are not subject to the same scrutiny as searches in the criminal context.”); see also *Wyman*, 400 U.S. at 318 (determining that a New York law conditioning

The Second Amendment, on the other hand, does not qualify the restriction it places on the government. It simply states that the people's right "shall not be infringed."<sup>361</sup> This is bolstered by *Heller* rejecting a fact specific inquiry,<sup>362</sup> meaning that the storage restrictions cannot be justified without a waiver of the Second Amendment. Because the restrictions on firearms apply in the foster home at all times, they are a full denial of the right, not just a partial burden, which goes well beyond the scope of the Fourth Amendment issue that arises from occasional home inspections by agency officials. These Fourth Amendment issues are not analogous and cannot justify the regulations in question.

Because foster parents cannot be removed from the protection of the Second Amendment for any of the above reasons, the regulations in question fall within the scope of the right.<sup>363</sup> Therefore, part two of the test must be conducted to determine if the regulations pass constitutional muster.<sup>364</sup>

### *C. Part 2: Determining the Proper Level of Scrutiny*

As stated above, the circuit courts have employed a two-step inquiry based on the Supreme Court's First Amendment analysis used to determine the constitutionality of restrictions burdening Second Amendment rights.<sup>365</sup> The second step in the test involves its own set of two questions.<sup>366</sup> First, it must be determined how close the burden comes to the core of the Second Amendment

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the receipt of welfare benefits on a social worker's home visit was not unreasonable under the Fourth Amendment).

361. U.S. CONST. amend. II.

362. See *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (rejecting the notion that future courts should weigh the interests in each case involving the Second Amendment).

363. See *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 960 (9th Cir. 2014) (stating that regulations either fall within the scope of the right or within categories that are unprotected).

364. See *id.* ("If a prohibition falls within the historical scope of the Second Amendment, we must then proceed to the second step of the Second Amendment inquiry . . .").

365. See *id.* (describing the two-step inquiry used by the majority of circuits, which "bears strong analogies to the Supreme Court's free-speech caselaw").

366. See *id.* at 960–61 (setting out the two-step process for "ascertaining the appropriate level of scrutiny").

right.<sup>367</sup> The majority of circuits have recognized the core purpose of the right as self-defense within the home.<sup>368</sup> Second, the severity of the burden placed on that right by the regulation is analyzed.<sup>369</sup> A law that imposes a severe restriction on the core of the Second Amendment right will be “unconstitutional under any level of scrutiny.”<sup>370</sup> If the core of the right is not burdened, or that burden is not severe, then intermediate scrutiny is the proper test.<sup>371</sup>

### 1. Does the Regulation Burden the Core of the Second Amendment Right?

There are two restrictions similar to the ones analyzed in this Note that have been tested against the core of the Second Amendment—the right to possess a firearm for self-defense in the home.<sup>372</sup> The most analogous is the D.C. restriction struck down in *Heller*, which required all lawfully owned firearms to be equipped with a trigger lock or rendered inoperable.<sup>373</sup> The other is the San Francisco ordinance in question in *Jackson*, which requires all handguns to be stored in a locked container or with a trigger lock unless carried by a person.<sup>374</sup> While each of these is less restrictive

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367. See *id.* (describing the first step as an analysis of “the extent to which the law burdens the core of the Second Amendment right”).

368. See *supra* notes 225–231 and accompanying text (recognizing multiple circuits that have recognized the core of the Second Amendment right to be self-defense in the home).

369. See *Jackson*, 746 F.3d at 961–62 (noting that the second question is the severity of the burden placed on the right).

370. *Id.* at 961.

371. See *id.* (“[I]f a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right, [the court] may apply intermediate scrutiny.”).

372. See *Heller*, 554 U.S. at 630 (referring to the “core lawful purpose of self-defense”); see also *supra* notes 225–231 and accompanying text (recognizing multiple circuits that have determined the core of the Second Amendment right to be self-defense in the home).

373. Compare *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008) (“District of Columbia law also requires residents to keep their lawfully owned firearms, such as registered long guns, unloaded and disassembled or bound by a trigger lock or similar device . . . .” (internal quotations omitted)), with MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring firearms be kept in locked storage or trigger locked, with ammunition locked in separate storage).

374. See *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 958 (9th Cir.

than the foster care restrictions, each was still determined to burden the core of the Second Amendment by rendering firearms inoperable for the purpose of self-defense.<sup>375</sup> Following these cases, there is no doubt that requiring foster parents to keep all firearms in the home locked in a container places a burden on the core of the Second Amendment. Because of this, the second prong must be analyzed. However, the answer to the second prong is not so easily determined based on these cases.

## 2. How Severe is the Law's Burden on the Right?

*Heller* and *Jackson* remain the best analogies to the regulations on foster parents when determining the proper level of scrutiny to apply.<sup>376</sup> While *Heller* did not apply this exact test, the Court determined that the D.C. requirement was unconstitutional because it made it “impossible for citizens to use them for the core lawful purpose of self-defense.”<sup>377</sup> Impossibility is a severe burden on the right. On the other hand, *Jackson* determined that the San Francisco ordinance was not a severe burden, and applied intermediate scrutiny.<sup>378</sup> Each of these restrictions will be analyzed to determine which is a better comparison to the one in question here.

The D.C. statute analyzed in *Heller* has a couple of important characteristics related to the current analysis. First, the requirement that firearms be bound by a trigger lock or be kept unloaded or disassembled applied to all lawfully owned firearms.<sup>379</sup> Second, the restriction contained no exception for a

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2014) (stating the requirements of San Francisco Police Code Section 4512).

375. See *Heller*, 554 U.S. at 630 (concluding that a requirement that lawfully owned firearms in the home be rendered inoperable “makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional”); *Jackson*, 746 F.3d at 964 (“Section 4512 therefore burdens the core of the Second Amendment right.”).

376. See *supra* notes 373–374 and accompanying text (comparing the Michigan regulation regarding foster parents to the restrictions analyzed in *Heller* and *Jackson*).

377. *Heller*, 554 U.S. at 630.

378. See *Jackson*, 746 F.3d at 965 (“[B]ecause [the ordinance] does not impose a substantial burden on conduct protected by the Second Amendment, we apply intermediate scrutiny.”).

379. See *Heller*, 554 U.S. at 575 (discussing the requirement that District of

weapon that was carried on the person.<sup>380</sup> Finally, while the statute contained exceptions for firearms “located in a place of business” and firearms “being used for lawful recreational activities,”<sup>381</sup> the Court determined that the statute could not be read to contain an exception for self-defense.<sup>382</sup>

The San Francisco ordinance analyzed in *Jackson* differed significantly on these points. First, the ordinance applied only to handguns and not all lawfully owned firearms.<sup>383</sup> Second, the law contained an explicit exception for firearms “carried on the person of an individual over the age of 18.”<sup>384</sup>

With the exception of South Carolina<sup>385</sup> and the states without explicit requirements for firearm storage in foster homes, the regulations in question are significantly more analogous to the D.C. law. First, the regulations each apply to all firearms, and not just a specific subset.<sup>386</sup> Second, the least restrictive regulations, which just require the firearms to be locked, contain no exception for recreational purposes or self-defense.<sup>387</sup> This makes the requirements at least as restrictive as those in *Heller*, if not more so. As each additional requirement is added on in the different

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Columbia residents “keep their lawfully owned firearms” bound by a trigger lock or rendered inoperable).

380. *See id.* (describing the statute and mentioning no exception related to firearms carried on the owner).

381. *Id.*

382. *See id.* at 630 (concluding that a self-defense exception is “precluded by the unequivocal text, and by the presence of certain other enumerated exceptions”).

383. *See Jackson*, 746 F.3d at 958 (stating that San Francisco Police Code Section 4512 provided that “handguns” in a residence must be bound by a trigger lock or kept in a locked container).

384. *Id.* (internal citation and quotation marks omitted).

385. South Carolina’s regulation contains an explicit exception for firearms carried by the foster parent. S.C. CODE ANN. REGS. 114-550(H)(18) (2018). This Note does not draw any conclusions on the constitutionality of storage requirements with this additional exception.

386. *See, e.g.*, ALASKA ADMIN. CODE tit. 7 § 10.1080(b) (2018) (requiring foster parents “ensure that *any firearms* are unloaded and stored in a locked gun safe or other locked place” (emphasis added)); 10A N.C. ADMIN. CODE 70E.1110(g) (2018) (“Explosive materials, ammunition, and *firearms* shall each be stored separately, in locked places.” (emphasis added)).

387. *See, e.g.*, W. VA. CODE R. § 78-2-15.6 (2018) (“An agency shall ensure that weapons, related attachments and ammunition are stored in a locked container inaccessible to children.”).

states, the burden becomes significantly more severe than in *Heller*. *Jackson* presents one argument relevant to the restrictions at hand, claiming that a modern gun safe can be opened quickly.<sup>388</sup> However, *Heller* makes no mention of the speed at which trigger locks could be removed in its consideration of the restriction just ten years ago.<sup>389</sup> Additionally, *Jackson* relies on the ability of San Francisco's citizens to use alternative channels by carrying the handgun on their person.<sup>390</sup> San Francisco would also allow for the use of lawfully owned firearms other than handguns to be used.<sup>391</sup> No such alternative channels exist in the regulations in question.

There is no doubt that the regulations on foster parents analyzed here place a severe burden on the core of the Second Amendment.

### 3. Rejecting the Case for Intermediate Scrutiny

The Western District of Michigan determined that intermediate scrutiny is the proper measure to apply to regulations like the Michigan safe-storage measure.<sup>392</sup> However, the court's reasoning is flawed for four reasons. First, it relies heavily on the Sixth Circuit's conclusion in *Tyler v. Hillsdale County Sheriff's Department*<sup>393</sup> that firearm bans concerning the mentally ill are subject to intermediate scrutiny.<sup>394</sup> The Western District of Michigan relied on this case because the "Sixth Circuit has never applied strict scrutiny to a Second Amendment

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388. See *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014) ("The record indicates that a modern gun safe may be opened quickly.").

389. See *District of Columbia v. Heller*, 554 U.S. 570, 630 (2008) (addressing the trigger lock requirement but making no mention of the ease or hardship of removing the lock).

390. See *Jackson*, 746 F.3d at 964 (discussing the alternative channels allowing for self-defense in the home).

391. See *id.* at 958 (noting that the restriction only applies to handguns).

392. See opinion at 23, *Johnson v. Lyon*, No. 2:17-cv-00124 (W.D. Mich. Aug. 14, 2018) [hereinafter Opinion] ("[I]ntermediate scrutiny is the appropriate standard despite the Plaintiffs' strong argument for the application of strict scrutiny.").

393. 837 F.3d 678 (6th Cir. 2016) (en banc).

394. See *id.* at 21-22 (citing *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (en banc)) ("The most relevant discussion of the choice of scrutiny from the Sixth Circuit comes from the court's en banc opinion in *Tyler*.").

challenge” under the two-step framework.<sup>395</sup> However, Firearm regulations pertaining to the mentally ill are specifically noted in *Heller* as potential exclusions under the Second Amendment.<sup>396</sup> In the end, the Sixth Circuit did not exclude the mentally ill from the Second Amendment. Instead, it reasoned, based on *Heller*, that the mentally ill are not at the core of the Second Amendment in the second step of the two-step framework.<sup>397</sup> The court’s reasoning also focused on the mentally ill as being “presumptively dangerous.”<sup>398</sup> Nothing suggests that foster parents would be treated similarly. The Western District of Michigan relies on a dangerous false equivalency by adopting the *Tyler* rationale to analyze the Michigan regulation.

Second, in deciding that intermediate scrutiny should apply, the district court focuses on foster parents as “a narrow class of citizens who volunteer to assume the burdens and benefits of serving as foster parents.”<sup>399</sup> The voluntary aspect of this reasoning has already been analyzed.<sup>400</sup> As for the narrow class, the Second Amendment is an individual right of each person.<sup>401</sup> Never has a court suggested, in deciding the appropriate standard to apply to a regulation affecting an individual right, that lower levels of scrutiny apply when the affected group is smaller. Consequently, a burden on a single individual is still an absolute burden on the Second Amendment because what is at issue is an individual right. *Tyler* makes reference to a “narrow class of individuals.”<sup>402</sup> However, the reference does not focus solely on the size, but rather returns to the court’s reasoning that the class at issue—the mentally ill—is “not at the core of the Second

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395. *Id.* at 22.

396. *See Heller*, 554 U.S. at 626 (suggesting certain “longstanding prohibitions” may still be appropriate following the opinion).

397. *See Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 691 (6th Cir. 2016) (en banc) (“Reviewing § 922(g)(4) under strict scrutiny would invert *Heller*’s presumption that prohibitions on the mentally ill are lawful.”).

398. *Id.* at 691.

399. Opinion, *supra* note 392, at 23.

400. *Supra* Part V.A.4.

401. *See District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (concluding that the Second Amendment confers an individual right based on “both text and history”).

402. *Tyler*, 837 F.3d at 691.



Amendment.”<sup>403</sup> The district court is wrong in relying on the size and voluntary nature of the class.

Third, the district court relies on *Tyler* to suggest that intermediate scrutiny should apply to afford state agencies “considerable flexibility” in regulating health and safety concerns.<sup>404</sup> Yet, *Tyler* does not support this proposition. *Tyler* mentions “[Congress] considerable flexibility to regulate gun safety.”<sup>405</sup> But, *Tyler* does not make mention of health and safety, nor does it reference the benefit of flexibility as a reason to choose intermediate scrutiny.<sup>406</sup> The court simply notes that intermediate scrutiny is beneficial because it allows flexibility while still requiring the government to justify its regulations.<sup>407</sup> The court concluded that intermediate scrutiny is appropriate because the restriction “does not burden the core of the Second Amendment” but does “place a substantial burden on conduct and persons protected by the Second Amendment.”<sup>408</sup>

The district court cannot rely solely on this analysis because the Michigan regulation burdens the core of the Second Amendment and places a substantial burden on protected conduct<sup>409</sup>—the only two questions in the second step of the test applied under the two-step test.<sup>410</sup> Additionally, the government’s interest in protecting health and safety is already analyzed under the test set out by each level of scrutiny.<sup>411</sup> If the interest in

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403. *Id.* It would be absurd to allow regulations that burden individual rights to garner a lower level of scrutiny simply because the burden is placed on one individual at a time rather than the entire population.

404. Opinion, *supra* note 392, at 23 (quoting *Tyler*, 837 F.3d at 692).

405. *Tyler*, 837 F.3d at 692 (alteration in original) (quoting *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015)).

406. *See id.* (noting the benefits of the intermediate scrutiny approach the court had already chosen).

407. *See id.* (noting why intermediate scrutiny is “preferable in evaluating challenges to § 922(g)(4)”).

408. *Id.*

409. *See supra* Parts V.C.1; V.C.2 (concluding that the Michigan regulation meets both requirements for strict scrutiny).

410. *See Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 690 (6th Cir. 2016) (en banc) (setting out the proper test to determine the appropriate level of scrutiny).

411. *See id.* at 693 (stating that intermediate scrutiny requires the government to state an objective that is “significant, substantial, or important”); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (stating that strict scrutiny

regulating safety and health is compelling, it will be considered during the scrutiny analysis. Suggesting that the government's interest in regulating health and safety and its "need" for flexibility should help determine the level of scrutiny would essentially allow any compelling interest to be afforded intermediate scrutiny. This would render strict scrutiny pointless. Therefore, the Western District of Michigan was wrong to consider factors other than the core of the Second Amendment and the severity of the burden in determining the level of scrutiny.

Finally, the district court made reference to *Jackson* as the "most factually-analogous 'safe storage' ordinance" and noted that "the Ninth Circuit applied intermediate scrutiny."<sup>412</sup> However, the Ninth Circuit's reasoning failed to show how *Jackson* is factually analogous. The Ninth Circuit determined that the San Francisco ordinances did not "impose the sort of severe burden that requires the higher level of scrutiny."<sup>413</sup> That was because the San Francisco safe storage ordinance was only applicable to handguns.<sup>414</sup> Also, "section 4512 le[ft] open alternative channels for self-defense in the home, because San Franciscans [we]re not required to secure their handguns while carrying them on their person."<sup>415</sup> In contrast, the Michigan regulation does not provide either of these exceptions.<sup>416</sup> Therefore, the district court was wrong to suggest that *Jackson* was sufficiently analogous to guide its reasoning.

Based on these issues with the district court's analysis, it is still appropriate to reject intermediate scrutiny and suggest that the regulation meets the requirements of the test's second prong.<sup>417</sup> This should end the issue here because such restrictions are

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requires a "compelling Government interest").

412. Opinion, *supra* note 392, at 23 (citing *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 959, 966 (9th Cir. 2014)).

413. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 964 (9th Cir. 2014).

414. *See id.* at 958 (discussing the relevant code section restricting handgun storage in homes).

415. *Id.* at 964.

416. *See* MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring locked storage of all firearms in a foster home).

417. *See supra* Parts V.C.1; V.C.2 (concluding that the Michigan regulation places a severe burden on the core of the Second Amendment).

“unconstitutional under any level of scrutiny.”<sup>418</sup> However, rather than automatically declaring them invalid, some circuits have decided to apply strict scrutiny to regulations that severely burden the core of the Second Amendment.<sup>419</sup> Also, the courts apply strict scrutiny to regulations that severely restrict speech and due process rights.<sup>420</sup> Therefore, the following subpart applies strict scrutiny to the regulation to account for the possibility that a court will do so when analyzing the foster home regulations.

#### *D. Applying Strict Scrutiny*

Strict scrutiny requires that a law be “narrowly tailored to promote a compelling Government interest.”<sup>421</sup> Also, “[i]f a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”<sup>422</sup> There seems to be a compelling interest of the state to protect the children for whom it is responsible from the dangers of firearms in the home.<sup>423</sup> Also, the state has at least some duty to protect the child from a dangerous foster home.<sup>424</sup> Some sources suggest that suicide rates are higher among foster children than the normal population.<sup>425</sup>

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418. *Jackson*, 746 F.3d at 961.

419. *See* *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) (“Our task, therefore, is to select between strict scrutiny and intermediate scrutiny.”).

420. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1269 (2007) (stating that strict scrutiny is “the baseline rule” for analyzing content based restrictions on speech, as well as being applied in due process cases restricting fundamental rights (internal citation and quotation marks omitted)).

421. *Playboy Entm’t Grp., Inc.*, 529 U.S. at 813.

422. *Id.*

423. *See supra* Part II.B (describing the dangers firearms pose to children in the United States).

424. *See Doe ex rel. Johnson v. S.C. Dep’t of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010) (determining that the state had a duty to refrain from placing a foster child in a known dangerous environment).

425. *See* NAT’L CTR. FOR THE PREVENTION OF YOUTH SUICIDE, PREVENTING SUICIDAL BEHAVIOR AMONG YOUTH IN FOSTER CARE 1 (2016), [http://www.mhawisconsin.org/Data/Sites/1/media/impact-of-suicide-2016/out-of-folder-4—preventing-suicidal-behavior-among-youth-in-foster-care-\(foster-parent\).pdf](http://www.mhawisconsin.org/Data/Sites/1/media/impact-of-suicide-2016/out-of-folder-4—preventing-suicidal-behavior-among-youth-in-foster-care-(foster-parent).pdf) (“Studies have found that youth involved in child welfare or juvenile justice were 3 to 5 times more likely to die by suicide than youth in the general population.”); Daniel J. Pilowsky & Li-Tzy Wu, *Psychiatric Symptoms and Substance Use Disorders in a Nationally Representative Sample of American Adolescents*

However, this evidence does not clearly establish that risk of suicide and unintentional firearm injuries are higher in foster homes.<sup>426</sup> Also, *Heller* specifically notes that while handgun violence is an issue, “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”<sup>427</sup> Whether the interest is compelling may be a fact-specific determination made in each case. Assuming the state’s interest is compelling, the restriction must be narrowly tailored as well.<sup>428</sup>

The restrictions in question are not narrowly tailored. As discussed above, the interest Michigan claims in regulating storage in the foster home is to protect foster children from accidents and suicides.<sup>429</sup> The law is overly restrictive in that it attempts to achieve the goal of protecting children by also restricting everyone else in the foster home from accessing firearms. There is no interest cited to suggest that foster parents pose a specific danger to the foster child when they can access firearms for self-defense, so restricting them as well goes beyond the scope of the compelling interest of the state. Also, the government must choose any less restrictive means of achieving the same goal.<sup>430</sup> An exhaustive search has uncovered no evidence that restrictions allowing for foster parents to carry firearms on their person are any less successful than the restrictions in question. Similarly, regulations that punish foster parents who store firearms in a location accessible to the foster children may be similarly as successful without specifically dictating where storage

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*Involved with Foster Care*, 38 J. ADOLESCENT HEALTH 351, 356 (2006) (determining that children living away from both parents are at an increased risk of suicide attempts, whether caused by the separation or some other factor in the relationship prior to separation).

426. The National Center for the Prevention of Youth Suicide relies on a study from Quebec. See NAT’L CTR. FOR THE PREVENTION OF YOUTH SUICIDE, *supra* note 425, at 5. Also, the study cited says there may be a correlation between foster children and higher suicide risk, but does not claim any determinative findings. See Daniel J. Pilowsky & Li-Tzy Wu, *supra* note 425, at 351.

427. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

428. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (setting out the proper test for a strict scrutiny analysis).

429. See *supra* Part II.B (setting out the interests posed in support of the Michigan regulations).

430. See *Playboy Entm’t Grp., Inc.*, 529 U.S. at 813 (“If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.”).

must occur. This would be easier to monitor than in a normal home due to the increased access of the state into foster homes to ensure compliance with regulations.<sup>431</sup> While this Note draws no conclusions on the constitutionality of these restrictions, it also finds no evidence that states without the severe requirements on storage are any less successful in preventing harm to foster children than those with the increased burden. Therefore, the states that require locked storage of all firearms in foster homes, regardless of additional restrictions on ammunition, fail to overcome the heavy burden of strict scrutiny.

### VI. Conclusion

Regulations on firearms in foster homes are commonplace in the United States. Forty-four states and the District of Columbia require foster parents to store firearms in the home in locked cabinets or disable firearms with a trigger lock.<sup>432</sup> Thirty-eight of those states and the District of Columbia add additional requirements on top of those restrictions.<sup>433</sup> This Note does not comment on whether these are common sense regulations from a policy standpoint. When a right is enumerated in the Constitution, common sense is no longer the threshold for achieving state goals. State regulation of firearm storage in foster homes places a burden on an enumerated right and, therefore, must comply with the Second Amendment and *District of Columbia v. Heller*. *Heller* made clear that the Second Amendment protects the right of law-abiding individuals to possess operable, legally owned firearms in the home for use in self-defense.<sup>434</sup> In analyzing the state regulations against this right, foster parents as a class may not be excluded from Second Amendment protection. Additionally, the regulations in question are either unconstitutional under any

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431. See, e.g., MICH. ADMIN. CODE r. 400.9415(3) (2018) (requiring foster parents to allow MDHHS access to the home for licensing and foster care purposes).

432. *Infra* Figure 1.

433. See *infra* Figure 1 (recognizing other restrictions states place on foster parents).

434. See *Heller*, 554 U.S. at 635 (holding that bans on handgun possession and rendering lawful firearms operable for self-defense in the home are unconstitutional).

level of scrutiny, or must be subject to strict scrutiny. Under either test, regulations that require all firearms in the foster home to be stored in a locked safe or disabled by a trigger lock, as well as those which place additional restrictions on the storage of ammunition, are unconstitutional.

The forty-four states that regulate in this fashion have a strong interest in protecting foster children, but they must find an alternative way to achieve their goal. The Author does not recommend the best method to do so without overstepping the limits of the Second Amendment. However, the states have chosen the most restrictive way possible up to this point, and they surely can find less restrictive alternatives for the future. The Attorney General of Michigan put it best: “Given that we trust [certain] individuals with the great responsibility of caring for [the state’s most vulnerable] children, it makes sense that we would also trust them to do what we trust every other law-abiding citizen to do: exercise responsible gun ownership.”<sup>435</sup>

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435. Amicus Curiae Brief of Attorney General Bill Schuette in Support of Plaintiffs at 1, *Johnson v. Lyon*, No. 2:17-cv-00124 (W.D. Mich. Nov. 29, 2017).

Figure 1

States	Requires firearms in foster homes to be kept in locked storage and/or trigger locked	Requires ammunition in firearms to be stored in separate location; and if that location must be locked	Requires firearms in foster homes to be trigger locked AND locked in a safe	Citation to State Regulation specifically addressing storage or handling of firearms in foster homes
Alabama	Yes	Yes (Locked)	No	ALA. ADMIN. CODE r. 660-5-29-.03(3)(g-h) (2018).
Alaska	Yes	Yes	No	ALASKA ADMIN. CODE tit. 7 § 10.1080(b) (2018).
Arizona	Yes	Yes (Locked)	Yes	ARIZ. ADMIN. CODE § R21-8-106 (2018).
Arkansas	Yes	Yes (Locked)	No	016.15.2 ARK. CODE R. § 208 (LexisNexis 2018).
California	Yes	Yes (Locked)	No	CAL. CODE REGS. tit. 22, § 89387.2 (2018).
Colorado	Yes	Yes (Locked)	No	12 COLO. CODE REGS. § 2509-8:7.708.22(B)(2) (2018).
Connecticut	Yes	Yes (Locked)	Yes (when possible)	CONN. AGENCIES REGS. § 17a-145-141 (2018).
Delaware	Yes	Yes (Locked)	No	9 DEL. ADMIN. CODE 201-40.1.18 (2018).
District of Columbia	Yes	Yes (Locked)	Yes	D.C. MUN. REGS. tit. 29, § 6007.9 (2018).
Florida	Yes	Yes (Locked)	No	FLA. ADMIN. CODE ANN. r. 65G-2.007(12)(c) (2018).
Georgia	Yes	No	No	GA. COMP. R. & REGS. 290-9-2-.07(5)(a)(9)(ii)(IX) (2018).
Hawaii	No	No	No	HAW. CODE R. § 17-1625-22 (LexisNexis 2018).
Idaho	Yes	No	No	IDAHO ADMIN. CODE r. 16.06.02.435 (2018)
Illinois	Yes	Yes	Yes	ILL. ADM. CODE tit. 89 § 402.8 (2018); ILL. DEP'T CHILDREN & FAMILY SERVS., POL'Y GUIDE 2015.08, ENHANCED FIREARM SAFETY IN FOSTER FAMILY HOMES (2015).
Indiana	Yes	Yes (Locked)	No	465 IND. ADMIN. CODE 2-1.5-10(c) (West 2018).

Iowa	Yes	Yes (Locked)	No	IOWA ADMIN. CODE r. 441-113.7(237) (2018).
Kansas	Yes	Yes (Locked)	No	KAN. ADMIN. REGS. § 28-4-820 (2018).
Kentucky	No	No	No	922 KY. ADMIN. REGS. 1:350 (2018).
Louisiana	Yes	Yes (Locked)	No	LA. ADMIN CODE. tit. 67, § 7313 (2018).
Maine	Yes	Yes (Locked)	No	10-148-016 ME. CODE R. § 9(E)(7) (LexisNexis 2018).
Maryland	Yes	No	No	MD. CODE REGS. 07.05.02.10(G)(1) (2018).
Massachusetts	Yes	Yes (Locked)	Yes	110 MASS. CODE REGS. 7.105(16) (2018).
Michigan	Yes	Yes (Locked)	No	MICH. ADMIN. CODE r. 400.9415(3) (2018)
Minnesota	Yes	Yes	No	MINN. DEPT OF HUM. SERVS., DHS 0644, CHILD FOSTER CARE HOME SAFETY CHECKLIST (2017).
Mississippi	No	No	No	18-6:1 MISS. ADMIN. CODE. § F-II (2018).
Missouri	Yes	Yes (Locked)	No	MO. CODE REGS. ANN. tit. 13, § 35-60.040 (2018).
Montana	Yes	Yes (Locked)	No	MONT. ADMIN. R. 37.51.901(13) (2018).
Nebraska	Yes	Yes (Locked)	No	395 NEB. ADMIN. CODE § 3-001.17D (2018).
Nevada	Yes	Yes (Locked)	No	NEV. ADMIN. CODE § 424.600 (2018).
New Hampshire	Yes	Yes (Locked)	No	N.H. CODE ADMIN. R. He-C 6446.10 (2018).
New Jersey	Yes	Yes (Locked)	No	N.J. ADMIN. CODE § 3A:51-6.9 (2018).
New Mexico	Yes	Yes	No	N.M. CODE R. § 8.26.4.13(L)(7) (LexisNexis 2018).
New York	No	No	No	N.Y. COMP. CODES R. & REGS. tit. 18, § 443.3 (2018).
North Carolina	Yes	Yes (Locked)	No	10A N.C. ADMIN. CODE 70E.1110 (2018).
North Dakota	Yes	Yes	No	N.D. ADMIN. CODE 75-03-14-03 (2018).
Ohio	Yes	Yes (Locked)	No	OHIO ADMIN. CODE 5101:2-7-12(F) (2018).
Oklahoma	Yes	No	No	OKLA. ADMIN. CODE § 340:110-5-60(b)(3) (2018).
Oregon	No	No	No	OR. ADMIN. R. 413-215-0318 (2018).
Pennsylvania	No	No	No	None Specific to Firearms
Rhode Island	Yes	Yes (Locked)	No	214-40 R.I. CODE R. § 3.7.2(E) (LexisNexis 2018).



South Carolina	Yes (unless being carried)	No	No	S.C. CODE ANN. REGS. 114-550(H)(18) (2018).
South Dakota	Yes	Yes	No	S.D. ADMIN. R. 67:42:05:20 (2018).
Tennessee	Yes	Yes	Yes	TENN. DEP'T OF CHLD. SERVS., ADMIN. POL'S & PROCS.: 16.4, FOSTER HOME SELECTION AND APPROVAL G(7)(b) (2018).
Texas	Yes	Yes (Locked)	No	26 TEX. ADMIN. CODE § 749.2961 (2018).
Utah	Yes	Yes (Locked)	No	UTAH ADMIN. CODE r. 501-12-7(6) (2018).
Vermont	Yes	Yes (Locked)	No	13-7 VT. ADMIN. CODE R. § 40.407 (2018).
Virginia	Yes	Yes (Locked)	No	22 VA. ADMIN. CODE § 40-211-70(J)(2) (2018).
Washington	Yes	Yes (unless in safe made for firearms)	No	WASH. ADMIN. CODE § 110-148-1500 (2018).
West Virginia	Yes	No	No	W. VA. CODE R. § 78-2-15.6 (2018).
Wisconsin	Yes	Yes (Locked)	No	WIS. ADMIN. CODE DCF § 56.08(5) (2018).
Wyoming	Yes	Yes (Locked)	No	049-0029-3 WYO. CODE R. § 18(k) (LexisNexis 2018).