UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JAMES D'CRUZ, NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., Plaintiffs, v. STEVEN MCCRAW, in his official capacity as Director of the Texas Department of Public Safety, ALLAN B. POLUNSKY, in his official capacity as Chairman of the Texas Public Safety Commission, CARIN MARCY BARTH, in her official capacity as a Member of the Texas Public Safety Commission, ADA BROWN, in her official capacity as a Member of the Texas Public Safety Commission, JOHN STEEN, in his official capacity as a Member of the Texas Public Safety Commission, C. TOM CLOWE, JR., in his official capacity as a Member of the Texas Public Safety Commission, Defendants.	**CASE NO: 5:10-cv-00141-C**

Application of *Amici Curiae* Brady Center to Prevent Gun Violence, Mothers Against Teen Violence, and Texas Chapters of the Brady Campaign To Prevent Gun Violence to File an Amicus Brief in Support of Defendants' Motion to Dismiss

Through undersigned counsel, the Brady Center to Prevent Gun Violence, Mothers Against Teen Violence, and Texas Chapters of the Brady Campaign to Prevent Gun Violence apply to the Court for leave to file a brief as *amici curiae* in this case for the facts and reasons stated below. The proposed brief is attached hereto as Exhibit A for the convenience of the Court and counsel. Defendants do not take any position regarding this *amicus* brief. Plaintiffs have indicated that they are opposed to the filing of this *amicus* brief.

The Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy.

Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving both state and federal gun laws.

Mothers Against Teen Violence is a Texas organization that works to provide information, education, and advocacy for teen violence prevention, public health, and public safety. Mothers Against Teen Violence recognizes the dangers posed by teenagers and people under the age of 21 carrying firearms and opposes lifting restrictions on carrying by such persons.

Texas Chapters of the Brady Campaign to Prevent Gun Violence is a grassroots organization that strives to educate Texans about gun violence. The Texas Chapters of the Brady Campaign also work to enact sensible gun laws in Texas and to monitor gun bills being considered by the Texas House and Senate.

District courts have inherent power to grant third parties leave to file briefs as *amici curiae*, particularly regarding "legal issues that have potential ramifications beyond the parties directly involved or if the [*amicus* has] unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 335 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005) (internal quotations omitted). Here, *amici* bring a broad and deep perspective to the issues raised by this case and have a compelling interest in the federal courts' interpretation of Second Amendment issues. *Amici* thus respectfully submit the attached brief to assist the Court with the constitutional issues in this case, including important matters of first impression under the Second Amendment.

The proposed brief provides an overview of recent and longstanding Supreme Court Second Amendment jurisprudence, discusses the policy implications of recognizing a right to carry firearms in public, particularly by teenagers and young adults between the ages of 18 and 21, and addresses an open question that has resulted from this jurisprudence—namely, what the

appropriate standard of review for Second Amendment claims should be and how lower courts have answered that question thus far. The brief also discusses the emerging trend in lower courts towards using a two-pronged approach to Second Amendment claims that asks (1) whether the law or regulation at issue implicates protected Second Amendment activity, and if so, (2) whether it passes the appropriate standard of review. The brief then applies this two-pronged approach to Second Amendment issues in the case at hand, employing case law, sociological data, and legal commentary to place Texas Penal Code § 46.02 and Texas Government Code §§ 411.172(a)(2), (a)(9), and (g) in the larger context of Second Amendment issues. The brief concludes that (1) these sections do not implicate protected Second Amendment activity because the Supreme Court has only recognized a Second Amendment right to possess and carry guns in the home, and (2) that even if they did implicate protected Second Amendment activity, they would survive the appropriate level of review – the reasonable regulation test that over forty states have adopted – because they are a valid exercise of the state's police powers to enact legislation designed to protect public safety. *Amici*, therefore, respectfully submit the attached brief to assist the Court in deciding the complex and significant issues raised in this matter.

CONCLUSION

For the foregoing reasons, *amici curiae* the Brady Center to Prevent Gun Violence, Mothers Against Teen Violence, and Texas Chapters of the Brady Campaign to Prevent Gun Violence respectfully request that the Court grant leave to file the attached *amicus* brief.

Dated: November 17, 2010

Respectfully submitted,

s/

Scott Medlock (Texas Bar No. 24044783)
1405 Montopolis Dr.
Austin, TX 78741
Phone: (512) 474-5073
Facsimile: (512) 474-0726
E-mail: smedlock@texascivilrightsproject.org

Adam K. Levin
Tracy L. Hresko
Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
E-Mail: adam.levin@hoganlovells.com

Jonathan E. Lowy
Daniel R. Vice
Brady Center to Prevent Gun Violence
Legal Action Project
1225 Eye Street, NW, Suite 1100
Washington, DC 20005

Attorneys for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2010, I filed this Application of *Amici Curiae* Brady Center to Prevent Gun Violence, Mothers Against Teen Violence, and Texas Chapters of the Brady Campaign To Prevent Gun Violence to File an Amicus Brief in Support of Defendants' Motion to Dismiss through the Court's CF/ECF system, which will electronically serve this document on both Plaintiffs' and Defendants' attorneys as follows:

Fernando M Bustos
Law Offices of Fernando M. Bustos, P.C.
P.O. Box 1980
Lubbock, TX 79408-1980
fbustos@bustoslawfirm.com

Charles J Cooper
Cooper and Kirk PLLC
1523 New Hampshire Ave NW
Washington, DC 20036
ccooper@cooperkirk.com

Drew L Harris
Office of the Texas Attorney General - Gen Lit Div
300 West 15th St
11th Floor
Austin, TX 78701
drew.harris@oag.state.tx.us

Jesse Panuccio
Cooper and Kirk PLLC
1523 New Hampshire Ave NW
Washington, DC 20036
jpanuccio@cooperkirk.com

David H Thompson
Cooper & Kirk PLLC
1523 New Hampshire Ave NW
Washington, DC 20009
dthompson@cooperkirk.com

s/
Scott Medlock (Texas Bar No. 24044783)

CERTIFICATE OF CONFERENCE

I hereby certify that on November 1, 2010, I conferenced with both Plaintiffs' and Defendants' counsel. Defendants do not take any position regarding this *amicus* brief. Plaintiffs have indicated that they are opposed to the filing of this *amicus* brief.

s/
Scott Medlock (Texas Bar No. 24044783)

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JAMES D'CRUZ, NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,

Plaintiffs,

v.

STEVEN MCCRAW, in his official capacity as Director of the Texas Department of Public Safety, ALLAN B. POLUNSKY, in his official capacity as Chairman of the Texas Public Safety Commission; CARIN MARCY BARTH, in her official capacity as a Member of the Texas Public Safety Commission, ADA BROWN, in her official capacity as a Member of the Texas Public Safety Commission, JOHN STEEN, in his official capacity as a Member of the Texas Public Safety Commission, C. TOM CLOWE, JR., in his official capacity as a Member of the Texas Public Safety Commission,

Defendants.

CASE NO: 5:10-cv-00141-C

BRIEF OF *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE, MOTHERS AGAINST TEEN VIOLENCE, AND TEXAS CHAPTERS OF THE BRADY CAMPAIGN TO PREVENT GUN VIOLENCE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

INTRODUCTION

The Second Amendment right to keep and bear arms in the home for self-defense is unique among constitutional rights in the risks that it presents. Gun possession and use subject others to a serious risk of harm and, as both state and federal law recognize, these risks are further intensified when teenagers and young persons under 21 are permitted to purchase or carry firearms. Persons under 21 often lack the same ability as adults to "govern impulsivity, judgment, planning for the future, [and] foresight of consequences"[1] and persons age 18-20 are within the age range with the highest rate of offenders committing homicides and engaging in criminal gun possession.[2] As a result of the danger posed to the public when such young persons are armed with lethal firearms outside the home, most states, like Texas, prohibit persons under 21 from carrying loaded, concealed weapons in public.

Nonetheless, Plaintiffs not only contend that the Texas legislature may not protect the public from these dangers, but they ask this Court to hold that 18 year-olds enjoy a right to carry firearms in public even though the Supreme Court has not recognized such a right even for mature adults. While the Supreme Court has held that the Second Amendment protects a limited "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *District of Columbia v. Heller*, 128 S. Ct. 2783, 2821 (2008), it has also made clear that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897). The Court's approval of concealed weapons restrictions as constitutional is in line with similar rulings in the states, and

---

[1] Adam Ortiz, *Adolescence, Brain Development, and Legal Culpability*, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE CENTER at 2 (January 2004).

[2] Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics (2005 data), available at http://www.albany.edu/sourcebook/pdf/t31272005.pdf; Bureau of Alcohol, Tobacco & Firearms, Crime Gun Trace Reports (2000), at 6-7 (2002) and Bureau of Alcohol, Tobacco & Firearms, Crime Gun Trace Reports (1999), at 6-7 (2000).

Heller noted that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Heller*, 128 S. Ct. at 2816. Texas courts, for example, have long upheld restrictions on concealed carrying of firearms. *See, e.g., English v. State*, 35 Tex. 473 (Tex. 1872) (Texas concealed carry restrictions valid under federal and state constitutions); Vernon's Ann. Tex. Const., Art. 1, § 23 ("Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; *but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime*.") (emphasis added). While the right to keep and bear arms under the Texas constitution is broader than its federal analogue, *see, e.g., Masters v. State*, 653 S.W.2d 944, 946 (Tex. App. Ct. 1983), in Texas "[a] permit to carry a concealed handgun, like other permits and licenses, is not a right but a privilege under regulations prescribed by the legislature." *Tex. Dep't of Pub. Safety v. Tune*, 977 S.W.2d 650, 653 (Tex. App. Ct. 1998), pet. dism'd w.o.j., 23 S.W.3d 358 (Tex. 2000).

Under the Second Amendment, states have the power to prohibit concealed carrying of firearms altogether, and they certainly may, at a minimum, exercise their police powers to protect the public by instituting age limits on the public carrying of loaded firearms. Such an age limitation also does not violate equal protection, as the Supreme Court has held "that age is not a suspect classification under the Equal Protection Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). *See also Dorr v. Weber*, --- F.Supp.2d --- , 2010 WL 1976743, *8, *10 (N.D. Iowa 2010) (denying Second Amendment and Equal Protection challenges by 18-year-old seeking license to carry a concealed weapon).

An extension of the Second Amendment to deny states the right to restrict teenagers and young persons ages 18 to 20 from carrying handguns in public would endanger public safety, is

unsupported by precedent, and would run counter to *Heller* and *McDonald*'s "assurances" that "reasonable firearms regulations" remain permissible. It would also contradict the Court's longstanding recognition that the exercise of protected activity must be balanced against legitimate public interests, chief among which is public safety. *McDonald*, 130 S. Ct. at 3047; *Heller*, 128 S. Ct at 2816-17, 2871 & n. 26. Texas's law restricting the ability of young adults to carry handguns is precisely such a reasonable regulation. Texas Penal Code § 46.02 and Texas Government Code Sections 411.172(a)(2), (a)(9), and (g).

Thus, Texas Penal Code § 46.02 and Texas Government Code Sections 411.172(a)(2), (a)(9), and (g) do not implicate protected Second Amendment activity and, even if they did, prohibiting teenagers and young persons age 18 to 20 from carrying handguns is a reasonable, justified, and permissible exercise of the state's police powers. While Plaintiffs may disagree with Sections 46.02, 411.172(a)(2), (a)(9), and (g), their recourse is through the legislative process, not the judiciary. This Court is obligated to uphold legislation where there is a reasonable basis to do so; it should not usurp the functions of the Legislature by declaring a new Second Amendment right that the Supreme Court has not acknowledged and by striking down a law that so plainly satisfies the state's interest in protecting public safety.

INTEREST OF *AMICI*

Amicus Brady Center to Prevent Gun Violence is the nation's largest non-partisan, non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. Through its Legal Action Project, the Brady Center has filed numerous briefs *amicus curiae* in cases involving both state and federal gun laws including in the U.S. Supreme Court cases *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), *United States v. Hayes*, 129 S. Ct. 1079 (2009), and *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010). *Amicus* brings a broad

and deep perspective to the issues raised by this case and has a compelling interest in ensuring that the Second Amendment does not impede reasonable governmental action to prevent gun violence.

Amicus Mothers Against Teen Violence is a Texas organization that works to provide information, education, and advocacy for teen violence prevention, public health, and public safety. Mothers Against Teen Violence recognizes the dangers posed by teenagers and young people under 21 carrying firearms and opposes lifting restrictions on carrying by such persons.

Amicus Texas Chapters of the Brady Campaign to Prevent Gun Violence is a grassroots organization that strives to educate Texans about gun violence. The Texas Chapters of the Brady Campaign also work to enact sensible gun laws in Texas as well as prevent dangerous gun bills from being passed by the Texas House and Senate.

LEGAL BACKGROUND

Recent Supreme Court Second Amendment Jurisprudence: In *Heller*, the Supreme Court recognized the right of "law-abiding, responsible citizens" to keep and bear arms in the home for the purpose of self-defense. 128 S. Ct. at 2818, 2821. While the Court could have simply decided whether the District's handgun ban was unconstitutional, it went out of its way to assure courts that its holding did not "cast doubt" on other gun laws – even approving of the constitutionality of a number of gun laws and then making clear that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 2816-17, 2871 & n. 26. Moreover, in approvingly discussing long-understood limitations on the right to keep and bear arms, the Court specifically noted that "the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues." *Id.* at 2816.

This language is consistent with the Court's statement in *Robertson v. Baldwin* that "the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons." 17 S. Ct. at 326.[3]

In *McDonald*, the Court incorporated the Second Amendment to the states, but it did not broaden the right recognized in *Heller*. On the contrary, the Court "repeat[ed]" the "assurances" it made in *Heller* regarding its limited effect on other gun laws, and agreed with the *amicus* brief submitted by the Attorneys General of Texas and other states that "state and local experimentation with reasonable firearms regulation will continue under the Second Amendment." 130 S. Ct. at 3047 (internal citation omitted). Once again, the Court again went out of its way to list a broad range of presumptively lawful gun restrictions.

The Standard of Review: Neither *Heller* nor *McDonald* articulated a standard of review for Second Amendment challenges, though the Court in *Heller* explicitly rejected the "rational basis" test and implicitly rejected the "strict scrutiny test." *See Heller v. District of Columbia* ("*Heller II*"), 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (the "strict scrutiny standard of review would not square with the [*Heller*] majority's references to 'presumptively lawful regulatory measures' . . . ."). The Court's reasoning also foreclosed any form of heightened scrutiny that would require the government to ensure that firearms legislation has a tight fit between means and ends, as *Heller* recognized that the Constitution provides legislatures with "a variety of tools for combating" the "problem of handgun violence," *Heller*, 130 S. Ct. at 2822, and listed as examples a host of "presumptively lawful" existing firearms regulations without subjecting those laws to any such analysis. *Id.* at 2816-17 & n. 26.

[3] The narrow scope of the Court's ruling in *Heller* was also apparent in the Court's 2009 opinion in *United States v. Hayes*, 129 S. Ct. 1079 (2009), in which the Court upheld a broad reading of 18 U.S.C. § 922(g)(9) – which prohibits possession of firearms by persons convicted of misdemeanor crimes of domestic violence – without even mentioning the Second Amendment.

Heller and *McDonald* thus left lower courts with the task of determining an appropriate standard of review for Second Amendment claims: one that is less rigorous than strict scrutiny, "presumes" the lawfulness of a wide gamut of gun laws currently in force, allows for "reasonable firearms regulations," and permits law-abiding, responsible citizens to keep guns in their homes for self-defense. As discussed below, the "reasonable regulation" test, overwhelmingly applied by courts throughout the country construing state right to keep and bear arms provisions, is the most appropriate standard of review for the Texas statutes at issue here.

The Two-Pronged Approach: In the wake of *Heller* and its progeny, a number of courts have begun to utilize a two-pronged approach to Second Amendment claims. *See, e.g.*, *United States v. Skoien*, 615 F.3d 638 (7th Cir. 2010); *Heller II*, 698 F. Supp. 2d at 188; *United States v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010). Under this approach, courts ask: (1) does the law or regulation at issue implicate protected Second Amendment activity, and (2) if so, does it withstand the appropriate level of scrutiny? *See, e.g.*, *Heller II*, 698 F. Supp. 2d at 188; *Marzzarella*, 614 F.3d at 89. If the challenged law or regulation does not implicate protected Second Amendment activity, then the analysis ends and the law is deemed constitutional. Even if the law implicates protected activity, however, it will only be deemed constitutional if it passes muster under the appropriate level of scrutiny. *Marzzarella*, 614 F.3d at 89.

This two-pronged approach represents an appropriate manner in which to approach the issues presented by Second Amendment claims. *Amici* advocate its use by this Court here.

ARGUMENT

For at least two principal reasons, the firearms regulation in Sections 46.02, 411.172(a)(2), (a)(9), and (g) are constitutional. First, these sections do not implicate protected Second Amendment Activity. Second, even if they did, they are reasonable regulations that

further important governmental interests established by the Texas Legislature.

I. SECTIONS 46.02, 411.172(a)(2), (a)(9), AND (g) DO NOT IMPLICATE PROTECTED SECOND AMENDMENT ACTIVITY.

In analyzing the pending motion to dismiss, *amici* respectfully suggest that the Court use the two-prong approach to Second Amendment claims and hold that Sections 46.02, 411.172(a)(2), (a)(9), and (g) do not implicate protected Second Amendment activity because Plaintiffs have no general Second Amendment right to possess and carry weapons in public.

A. Sections 46.02, 411.172(a)(2), (a)(9), and (g) Do Not Implicate Protected Second Amendment Activity Because They Do Not Impact The Right to Possess Firearms in The Home Protected in *Heller* and *McDonald*.

The Supreme Court's decision in *Heller* recognized that the Second Amendment protects "the right of law-abiding, responsible citizens to use arms *in defense of hearth and home*." *Heller*, 128 S. Ct. at 2821 (emphasis added). In so doing, the Court carefully limited its holding to Mr. Heller's right "*to carry* [] *in the home*," *id.* at 2822 (emphasis added). The Court's opinion focuses on the historical recognition of the right of individuals "to keep and bear arms to defend their homes, families or themselves," *id.* at 2810, and the continuing need to keep and use firearms "in defense of hearth and home." *Id.* at 2821. The Court's holding is also specifically limited to the right to keep firearms in the home: "[i]n sum, we hold that the District's ban on handgun possession *in the home* violates the Second Amendment, as does its prohibition against rendering any lawful firearm *in the home* operable for the purpose of immediate self-defense." *Id.* at 2821-22 (emphasis added).

Ignoring the Court's extensive and careful language limiting the right to keep and bear arms in the home, Plaintiffs seem to imply in their Amended Complaint that the *Heller* Court actually embraced a Constitutional right of teens and young persons age 18 to 20 to carry guns in

public. *See* Amended Complaint ¶ 15. The *Heller* opinion did no such thing. Indeed, Plaintiffs cannot explain why Justice Scalia would be so explicit about the fact that the Second Amendment was "not unlimited" and that a (non-exhaustive) host of gun laws remained "presumptively lawful," yet keep his supposed ruling that the Second Amendment protected a right to carry guns in public hidden and implicit, leaving courts with (at most) supposed tea leaves on which to find a broad right to carry in public.[4] *Id.* at 2817 n. 26. Nor can Plaintiffs explain why the *Heller* Court expressly approved of decisions upholding concealed carry bans, but chose not to state the flip-side that is crucial to Plaintiffs' argument – that public carrying for persons 18 and over must be permitted.

This Court should not reach for an interpretation of *Heller* as implicitly overruling *Robertson*'s recognition that the Second Amendment does not protect a right to carry concealed weapons – especially given *Heller*'s explicit embrace of concealed carry bans and its repeated statements limiting its holding to the home. Indeed, when reviewing the constitutionality of a statute, lower courts should "presume that the statute is valid and that the legislature acted reasonably in enacting the statute." *Walker v. State*, --- S.W.3d ----, 2010 WL 4028439 at *5 (Tex. Ct. App. 2010).

In fact, district courts have refused to read *Heller* as conferring a broad right to carry guns outside of the home. In *U.S. v. Bledsoe*, for instance, the United States District Court for the Western District of Texas noted that:

> The principal holding of *Heller* is that the Second Amendment protects an individual's right to possess and bear arms, irrespective of maintaining a militia,

[4] Nor do the Court's "tea leaves" even indicate its recognition of a right to carry guns in public. For example, the *Heller* Court discussed "bear" as meaning "carry" simply to support its position that the Second Amendment's use of "bear arms" "in no way connotes participation in a structured military organization," and, therefore, the Court opined, the phrase did not indicate that the Second Amendment was limited to militia matters. 128 S. Ct. at 2793. The *Heller* Court did ***not*** state that the Second Amendment protects a right to carry arms in public.

> *in one's home* for the purpose of self-defense. More specifically, the Supreme Court held that a law proscribing handgun possession *in the home* is unconstitutional.

2008 WL 3538717 at *2 (W.D. Tex. Aug. 8, 2008) (emphasis added) (internal citations omitted). The court also made a point of noting that "[t]he Supreme Court majority explicitly stated that the opinion in *Heller* was not to be viewed as an exhaustive and conclusive decision concerning the many statutes regulating the Second Amendment right to bear arms." *Id.* at *3.

Other courts have similarly held that the Second Amendment, post-*Heller*, does not protect a right to carry concealed weapons in public. In *People v. Dawson*, for instance, the Illinois Court of Appeals held:

> The specific limitations in *Heller* and *McDonald* applying only to a ban on handgun possession in a home cannot be overcome by defendant's pointing to the *Heller* majority's discussion of the natural meaning of "bear arms" including wearing or carrying upon the person or in clothing. Nor can the *Heller* majority's holding that the operative clause of the second amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation" require heightened review of the AUUW [aggravated unlawful use of a weapon] statute's criminalization of the carrying of an uncased and loaded firearm. As addressed above, *Heller specifically limited its ruling to interpreting the amendment's protection of the right to possess handguns in the home*, not the right to possess handguns outside of the home in case of confrontation-a fact the dissent heartily pointed out by noting that "[n]o party or *amicus* urged this interpretation; the Court appears to have fashioned it out of whole cloth." The *McDonald* Court refused to expand on this right, explaining that the holding in *Heller* that the second amendment protects "the right to possess a handgun in the home for the purpose of self-defense" was incorporated.

2010 WL 3290998, *7 (Ill. App. Ct. Aug. 18, 2010) (internal citations omitted) (emphasis added). Recognizing that "when reasonably possible, a court has the duty to uphold the constitutionality of a statute," *id.* at *6, the *Dawson* Court rejected the contention that the Second Amendment protects a broad right to carry that would invalidate Illinois's law.

The Kansas Court of Appeals also recognized that "[i]t is clear that the [*Heller*] Court was drawing a narrow line regarding the violations related solely to use of a handgun in the

home for self-defense purposes. [The defendant's] argument, that *Heller* conferred on an individual the right to carry a concealed firearm, is unpersuasive." *State v. Knight*, 218 P.3d 1177, 1189 (Kan. Ct. App. 2009).

Other courts – both state and federal – have similarly held that the right recognized in *Heller* and *McDonald* is confined to the home. *See, e.g., Gonzalez v. Village of West Milwaukee*, 2010 WL 1904977, *4 (E.D. Wis. May 11, 2010) ("The Supreme Court has never held that the Second Amendment protects the carrying of guns outside the home."); *United States v. Hart*, 2010 WL 2990001, *3 (D. Mass. July 30, 2010) ("*Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional."); *Dorr v. Weber*, 2010 WL 1976743, *8 (N.D. Iowa May 18, 2010) (*Robertson* remains the law, and "a right to carry a concealed weapon under the Second Amendment has not been recognized to date"); *Teng v. Town of Kensingson*, 2010 WL 596526 (D. N.H. Feb. 17, 2010) ("Given that *Heller* refers to outright prohibition on carrying concealed weapons" as "presumptively lawful". . . far lesser restrictions of the sort imposed here (i.e., requiring that Teng complete a one-page application and meet with the police chief to discuss it) clearly do not violate the Second Amendment.") (internal citation omitted); *In re Factor*, 2010 WL 1753307, *3 (N.J. Sup. Ct. Apr. 21, 2010) ("[T]he United States Supreme Court has not held or even implied that the Second Amendment prohibits laws that restrict carrying of concealed weapons."); *see also United States v. Tooley*, 2010 WL 2380878, *15 (S.D.W.Va. June 14, 2010) ("Additionally, possession of a firearm outside of the home or for purposes other than self-defense in the home are not within the "core" of the Second Amendment right as defined by *Heller.* "); *but see Peruta v. County of San Diego*, 678 F. Supp. 2d 1046 (S.D. Cal. 2010), *appeal pending*.

Furthermore, this understanding of the Second Amendment (and its state analogues) as

not protecting a general right to carry has been recognized for well over a century, including in the state of Texas. Indeed, the Texas State Constitution states, "Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; *but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime*." Vernon's Ann. Tex. Const., Art. 1, § 23 (emphasis added). Texas courts have long upheld restrictions on the carrying of firearms. In *State v. Duke*, 42 Tex. 455, 459 (1874), for example, the Texas Supreme Court held that a statute that generally prohibited people from carrying pistols and other weapons "on or about his person, saddle, or in his saddle-bags" was constitutional under the Second Amendment and the Texas Constitution. *Id.* at 456, 459. And Texas courts have continued to uphold State prohibitions against unlawfully carrying arms, recognizing the legislature's power to impose limitations on the carrying of arms in order to prevent crime. *See Masters v. State*, 685 S.W.2d 654, 655 (Tex. Crim. App. 1985); *Morrison v. State*, 339 S.W.2d 529, 531 (Tex. Crim. App. 1960); *Ex parte Williams*, 786 S.W.2d 781, 783 (Tex. App. 1990).

This approach – allowing state legislatures to bar or limit the carrying of arms in public – has been historically adopted by other states as well. *See, e.g.*, 1876 Wyo. Comp. Laws ch. 52, § 1 (1876 Wyoming law prohibiting anyone from "bear[ing] upon his person, concealed or openly, any firearm or other deadly weapon, within the limits of any city, town or village"); *Andrews v. State*, 50 Tenn. 165 (1871) (upholding statute forbidding any person to carry "publicly or privately, any . . . belt or pocket pistol, revolver, or any kind of pistol, except the army or navy pistol, usually used in warfare, which shall be carried openly in the hand" and relying on the state right-to-bear-arms provision, which it read *in pari materia* with the Second Amendment); *Fife v. State*, 31 Ark. 455 (1876) (upholding carrying prohibition as a lawful "exercise of the police power of the State without any infringement of the constitutional right" to bear arms); *Hill*

v. State, 53 Ga. 472, 474 (1874) ("at a loss to follow the line of thought that extends the guarantee"—in the state Constitution of the "right of the people to keep and bear arms"—"to the right to carry pistols, dirks, Bowie knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day."); *State v. Workman*, 35 W. Va. 367, 373 (1891) (upholding conviction for carrying concealed weapon, court notes that "As early as the second year of Edward III, a statute was passed prohibiting all persons, whatever their conditions, 'to go or ride armed by night or by day.'"); *Aymette v. State*, 21 Tenn. 154, 159-61 (1840) ("The Legislature . . . have a right to prohibit the wearing or keeping weapons dangerous to the peace and safety of the citizens, and which are not usual in civilized warfare, or would not contribute to the common defense.").[5]

Noted scholars and commentators have also long recognized that a right to keep and bear arms does not prevent states from restricting or forbidding guns in public places. For example, John Norton Pomeroy's Treatise, which the *Heller* majority cited as representative of "post-Civil War 19th century sources" commenting on the right to bear arms, 128 S. Ct. at 2812, stated that the right to keep and bear arms "is certainly not violated by laws forbidding persons to carry dangerous or concealed weapons . . . ." John Norton Pomeroy, *An Introduction to the Constitutional Law of the United States* 152-53 (1868). Similarly, Judge John Dillon explained that even where there is a right to bear arms, "the peace of society and the safety of peaceable citizens plead loudly for protection against the evils which result from permitting other citizens to go armed with dangerous weapons." Hon. John Dillon, *The Right to Keep and Bear Arms for*

[5] *Bliss v. Commonwealth*, 12 Ky. 90, 91, 93 (1822), in which the Kentucky Supreme Court declared Kentucky's concealed-weapons ban in conflict with its Constitution, is recognized as an exception to this consistent precedent. *See* Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 125, at 75-76 (1868). In fact, the Kentucky legislature later corrected the anomalous decision by amending the state constitution to allow a concealed weapons ban. *See* Ky. Const. of 1850, art. XIII, § 25.

Public and Private Defense (Part 3), 1 Cont. L.J. 259, 287 (1874). An authoritative study published in 1904 concluded that the Second Amendment and similar state constitutional provisions had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons," which demonstrated that "constitutional rights must if possible be so interpreted as not to conflict with the requirements of peace, order and security." Ernst Freund, *The Police Power, Public Policy and Constitutional Rights* (1904).

Plaintiffs' Equal Protection challenge is also unsupported by precedent, as the Supreme Court has made clear "that age is not a suspect classification under the Equal Protection Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). Thus, courts have rejected Second Amendment and Equal Protection challenges to laws banning persons under 21 from carrying or possessing firearms. *See Dorr v. Weber*, --- F.Supp.2d --- , 2010 WL 1976743, *8, *10 (N.D. Iowa 2010) (denying Second Amendment and Equal Protection challenges by 18-year-old seeking license to carry concealed weapon); *State v. Sieyes*, 225 P.3d 995, 1004-1006 (Wash. 2010) (rejecting Second Amendment challenge to ban on 17-year-old possessing firearms); *see also Glenn v. State*, 72 S.E. 927 (Ga. App. Ct. 1911) (no right of minor to keep and bear arms). Indeed, a constitutional amendment was necessary to give persons under 21 the right to vote, even though voting is a fundamental right. *See Oregon v. Mitchell*, 400 U.S. 112, 123 (1970) (there was not "[a]ny doubt about the powers of Congress to regulate congressional elections, including the age and other qualifications of the voters."); U.S. Const., Amend. 26 (ratified July 1, 1971).

The Texas code sections at issue here do not meaningfully impede on the ability of individuals to keep handguns "in defense of hearth and home." *Heller*, 128 S. Ct. at 2821. Indeed, plaintiff himself admits that, under these laws, he "may possess a handgun in his home and automobile." Amended Complaint ¶ 21. These code sections are thus consistent with the

Supreme Court's holding in *Heller* and *McDonald*, and accordingly, the Court should not find that Plaintiffs are challenging protected Second Amendment activity.

B. The Second Amendment Right Should Not Be Extended to Prevent Communities from Restricting or Prohibiting Carrying Guns in Public, Particularly by Young Adults.

There are profound public safety rationales for restricting guns in public, as courts continue to recognize post-*Heller*:

> Unlike possession of a gun for protection within a residence, carrying a concealed firearm presents a recognized threat to public order, and is prohibited as a means of preventing physical harm to persons other than the offender. A person who carries a concealed firearm on his person or in a vehicle, which permits him immediate access to the firearm but impedes others from detecting its presence, poses an imminent threat to public safety. . . .

People v. Yarbrough, 169 Cal.App.4th 303, 314 (2008) (internal quotations and citations omitted); *see also United States v. Walker*, 380 A.2d 1388, 1390 (D.C. 1977) (there is an "inherent risk of harm to the public of such dangerous instrumentality being carried about the community and away from the residence or business of the possessor"). The carrying of firearms in public – and the carrying of firearms by teens and young persons ages 18 to under 21, in particular – pose a number of issues and challenges not presented by the possession of firearms in the home.

1. The public carrying of firearms poses safety risks to the general public.

The carrying of firearms in public poses safety risks to the general public, unlike the possession of firearms in the home. Three issues, in particular, are worthy of note. First, when firearms are carried out of the home and into public, the safety of a broader range of individuals is threatened. While firearms kept in the home are primarily a threat to their owners, family members, visitors, and houseguests, firearms carried in public are a threat to strangers,

neighbors, law enforcement officers, random passersby, and other private citizens. One study has shown that "[b]etween May 2007 and April 2009, concealed handgun permit holders shot and killed 7 law enforcement officers and 42 private citizens." Violence Policy Center, *Law Enforcement and Private Citizens Killed by Concealed Handgun Permit Holders*, July 2009. States, therefore, have a stronger need to protect their citizens from individuals carrying guns in public than they do from individuals keeping guns in their homes.

Second, the carrying of firearms in public is not a useful or effective form of self-defense and, in fact, has been shown in a number of studies to *increase* the chances that one will fall victim to violent crime. One study, for instance, found that "gun possession by urban adults was associated with a significantly increased risk of being shot in an assault," and that "guns did not protect those who possessed them from being shot in an assault." Charles C. Branas, *et al.*, *Investigating the Link Between Gun Possession and Gun Assault*, AMER. J. PUB. HEALTH, vol. 99, No. 11 at 1, 4 (Nov. 2009). Likewise, another study found that:

> Two-thirds of prisoners incarcerated for gun offenses reported that the chance of running into an armed victim was very or somewhat important in their own choice to use a gun. Currently, criminals use guns in only about 25 percent of noncommercial robberies and 5 percent of assaults. If increased gun carrying among potential victims causes criminals to carry guns more often themselves, or become quicker to use guns to avert armed self-defense, the end result could be that street crime becomes more lethal.

Philip Cook, *et al.*, *Gun Control After Heller: Threats and Sideshows from a Social Welfare Perspective*, 56 UCLA L. REV. 1041, 1081 (2009).

Third, the carrying of firearms in public has other negative implications for a number of social issues and societal ills that are not impacted by the private possession of handguns in the home. For instance, if drivers are allowed to carry loaded guns, road rage can become a more serious and even potentially deadly phenomenon. David Hemenway, *Road Rage in Arizona:*

Armed and Dangerous, 34 ACCIDENT ANALYSIS AND PREVENTION 807-14 (2002). And an increase in gun prevalence in public may cause an intensification of criminal violence. Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, J. PUB. ECON. 379, 387 (2006).

2. The carrying of firearms by individuals under the age of 21 poses unique threats to public safety.

The carrying of firearms by teens and young persons under 21 also poses a unique set of threats to the general public that is not present when older persons carry firearms. For that reason, several states ban handgun possession by anyone under 21 and most states prohibit persons under 21 from carrying concealed firearms in public.[6] Federal law also prohibits licensed gun dealers from selling handguns to anyone under 21. 18 U.S.C. § 922(b)(1).

Studies show the dangers of allowing teens and young persons age 18 to 20 to possess firearms, because "[t]he evidence now is strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable." Adam Ortiz, *Adolescence, Brain Development, and Legal Culpability*, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE CENTER at 2 (January 2004). Studies on this topic suggest, moreover, that "age 21 or 22 would be closer to the 'biological' age of maturity." *Id.*

---

[6] *See, e.g.*, Alaska Stat. § 11.61.220 (2010) (individuals otherwise allowed to possess firearms may carry a concealed gun if 21 or older); Ariz. Rev. Stat. Ann. § 13-3112 (2010) (must be 21 to receive carrying concealed weapon (CCW) permit); Colo. Rev. Stat. § 18-12-203 (2010) (must be 21 to receive CCW permit); Ga. Code Ann. § 16-11-129 (2010) (must be 21 to receive CCW permit); Idaho Code Ann. § 18-3302 (2010) (must be 21 to receive CCW permit); Kan. Stat. Ann. § 75-7c04 (2010) (must be 21 to receive CCW permit); Miss. Code Ann. § 45-9-101 (2010) (must be 21 to receive CCW permit); Mo. Rev. Stat. § 571.101 (2010) (must be 23 to receive CCW permit); Neb. Rev. Stat. § 69-2433 (2010) (must be 21 to receive CCW permit); N.J. Stat Ann. § 2C:58-6.1 (West 2010) (bans possession of handguns by individuals under 21); N.M. Stat. Ann. § 29-19-4 (West 2010) (must be 21 to receive CCW permit); N.Y. Penal Law § 400.00(1)(a) (West 2010) (bans possession of handguns by individuals under 21); N.C. Gen. Stat. § 14-415.12 (2010) (must be 21 to receive CCW permit); Utah Code Ann. § 53-5-704 (2010) (must be 21 to receive CCW permit); Va. Code Ann. § 18.2-309(D) (2010) (must be 21 to receive CCW permit); W. Va. Code § 61-7-4 (2010) (generally must be 21 to receive CCW permit); and Wyo. Stat. Ann. § 6-8-104 (2010) (generally must be 21 to receive a CCW permit).

Teenagers and young people ages 18 to under 21 are also within the age range most associated with violent crime. The rate of murder offenders per 100,000 population peaks between the ages of 18 to 24, at 26.5 murder offenders per 100,000 population. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* (2005 data), available at http://www.albany.edu/sourcebook/pdf/t31272005.pdf. Among firearm homicide offenders, the highest percent of offenders falls into the 18 to 24 year age range at 37.3 percent. C. Puzzanchera and W. Kang, *Easy Access to the FBI's Supplementary Homicide Reports: 1980-2008* (2010), available at http://ojjdp.gov/ojstatbb/ezashr/. Criminal gun possession is highest for youth in this age group and peaks between ages 19 to 21. Bureau of Alcohol, Tobacco & Firearms, Crime Gun Trace Reports (2000), at 6-7 (2002) and Bureau of Alcohol, Tobacco & Firearms, Crime Gun Trace Reports (1999), at 6-7 (2000).

Similar studies have shown that college-aged gun owners are more likely to engage in behavior that puts themselves and others at risk of injury. *See* Matthew Miller, *et al.*, *Guns at College*, J. AM. COLLEGE HEALTH, Vol. 48, Issue 1 (1999). For instance,

> Having a working firearm at college was more likely if the student had, since the term began, been arrested for DUI, damaged property as a result of alcohol ingestion, or driven an automobile after consuming five or more alcoholic drinks in the months before the survey. Seven percent of the students who engaged in any of these alcohol-related behaviors had guns, compared with 3% of those who had not had an externality-related driving/drinking episode. Among owners of guns, 36% engaged in at least one of these behaviors, compared with 19% of the student respondents who did not own a gun.

Id. This particular study concludes that "[t]hese alcohol-related behaviors suggest that college gun owners are more likely than those who do not own guns to engage in activities that put themselves and others at risk for severe or life threatening injuries," and notes that these behaviors suggest "an inability to contain aggressive impulses," "poor judgment and indifference to the effect one's actions have on the well-being and safety of others." *Id.*

In light of what studies such as these consistently show – that individuals under the age of 21 have less of a capacity to control their impulsivity, make good decisions, and appreciate the consequences of their actions than individuals over the age of 21 – states are well justified in having laws that restrict the ability of young adults to carry firearms in public. In fact, even United States military academies, which arguably admit only the most responsible and upstanding of young adults, prohibit the carrying of handguns by anyone under the age of 21. *See* United States Military Academy Regulations, Section II, 1-6(b)(1) ("No pistols or handguns may be registered or carried by anyone under the age of twenty-one (21) to include Cadets."). Texas, therefore, is certainly within its rights to prohibit teens and young persons under 21 from carrying firearms in public.

Overall, therefore, the laws at issue here prevent a number of risks to the public without implicating the Second Amendment activity protected in *Heller*. They are not, moreover, complete prohibitions on the carrying of firearms by young adults. Individuals in Texas who are under the age of 21 may still keep handguns in their homes and cars and may possess and carry a rifle at home and in public. *See* Amended Complaint ¶ 21. Sections 46.02, 411.172(a)(2), (a)(9), and (g), therefore, are perfectly consistent with the Supreme Court's ruling in *Heller* and do not implicate protected Second Amendment activity.

II. EVEN IF SECTIONS 46.02, 411.172(a)(2), (a)(9), AND (g) DID IMPLICATE PROTECTED SECOND AMENDMENT ACTIVITY, IT WOULD WITHSTAND THE APPROPRIATE LEVEL OF SCRUTINY.

In choosing a level of scrutiny appropriate for Second Amendment challenges, courts need not – and should not – limit themselves to the choices utilized in First Amendment jurisprudence: strict scrutiny, intermediate scrutiny, or rational basis review. While these levels of scrutiny may seem to be the easiest and most obvious options in picking a standard of review,

key differences between the First and Second Amendments suggest that using one of these three levels of scrutiny is *not*, in fact, an appropriate choice. The exercise of Second Amendment rights creates unique risks that threaten the safety of the community and can be far more lethal than even the most dangerous speech. While "words can never hurt me," guns are designed to inflict grievous injury and death. To protect the public from the risks of gun violence – unlike the more modest risks posed by free speech – states must be thus allowed wide latitude in exercising their police power authority. Otherwise, the exercise of Second Amendment rights could infringe on the most fundamental rights of others – the preservation of life.

The Supreme Court, moreover, has not limited itself to these three levels of scrutiny in the past, but has instead fashioned a wide variety of standards of review that are tailored to specific constitutional inquiries.[7] For all these reasons, a standard of review specific to the Second Amendment context is warranted here, particularly given the Supreme Court's recognition that an individual's right to bear arms must be evaluated in light of a state's competing interest in public safety. To that end, *amici* respectfully suggest that this Court apply the test that state courts throughout the country have crafted and utilized for over a century in construing the right to keep and bear arms: the "reasonable regulation" test.

A. The Reasonable Regulation Test is the Appropriate Standard of Review.

While courts are just beginning to grapple with a private right to arms under the federal Constitution, courts have construed analogous state provisions for over a century. Over forty states have constitutional right-to-keep-and-bear-arms provisions, many of which protect broader rights than the Second Amendment. Yet despite significant differences in the political backdrop,

timing, and texts of these provisions, the courts in these states have, with remarkable unanimity, coalesced around a single standard for reviewing limitations on the right to bear arms: the "reasonable regulation" test. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 Mich. L. Rev. 683, 686-87, n. 12 (2007) (describing "hundreds of opinions" by state supreme courts with "surprisingly little variation" that have adopted the "reasonableness" standard of review for right-to-bear-arms cases). Under the reasonable regulation test, a state "may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable." *Robertson v. City & County of Denver*, 874 P.2d 325, 328, 333 n. 10 (Colo. 1994).

Texas courts have recognized that the right to keep and bear arms is subject to reasonable regulation. *See Wilt v. Texas Dept. Of Public Safety*, 2004 WL 1459375 (Tex. App. Ct. 2004) (noting that federal government and states "may impose reasonable regulations on gun ownership."). Indeed, Texas courts have stated that:

> [O]ur State Constitution limits that right by *implicitly mandating the Legislature to enact reasonable regulations concerning the keeping and bearing of such arms* in order that the Legislature prevent disorder in our society. * * * The need for reasonable regulation of the wearing of arms by the Legislature is no less needed in today's modern world as in the development of our State's frontier generations ago. As long as that need exists, *the Legislature will be normally charged with its Constitutional duty to regulate the carrying of weapon*, a duty we cannot and will not deny it.

Masters v. State, 653 S.W.2d 944, 946 (Tex. App. Ct. 1983) (emphasis added).

The "reasonable regulation" test protects Second Amendment activity without unduly restricting states from protecting the public from gun violence. The test, which was specifically

---

[7] *See, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (affirming that the Eighth Amendment's prohibition of cruel and unusual punishment should be measured by an "evolving standards of decency" test); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (holding that determinations of procedural due process require a balancing of three competing interests); *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (upholding a "stop and frisk" under the Fourth Amendment where an officer had "reasonable grounds" to believe a suspect was armed and dangerous).

designed for cases construing the right to keep and bear arms and has been adopted by the vast majority of states, remains the standard of review best-suited for Second Amendment cases after *Heller* and for the case at hand. Indeed, it would make little sense to demand that Texas courts impose a more rigorous standard of review (such as strict scrutiny) on the narrower federal right to keep and bear arms than is imposed on the broader state right.

The test is also in line with the Supreme Court's statement in *McDonald* agreeing that "state and local experimentation with reasonable firearms regulation will continue under the Second Amendment." 130 S. Ct. at 3047 (internal citation omitted). Further, pre-*Heller* courts that recognized an individual, non-militia-based right to keep and bear arms under the Second Amendment agreed that "reasonable" firearms restrictions remained permissible. *See, e.g.*, *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (right is subject to "reasonable" restrictions if they are "not inconsistent with the right . . . to individually keep and bear . . . private arms."); *Nordyke v. King*, 319 F.3d 1185, 1193 (9th Cir. 2003) ("We would make progress if the Supreme Court were to establish a doctrine of an individual Second Amendment right subject to reasonable government regulation.") (Gould J., specially concurring).

The reasonable regulation test is a more heightened form of scrutiny than the rational basis test that the majority opinion in *Heller* rejected (and is more demanding than the "interest balancing" test suggested by Justice Breyer in dissent) because it does not permit states to prohibit all firearm ownership, even if there is a rational basis to do so. *See* Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA LAW REVIEW 1443, 1458 (2009). Laws and regulations governing the use and possession of firearms must thus meet a higher threshold under the reasonable regulation test than they would under rational basis review.

Although the reasonable regulation test may be more deferential than intermediate or strict scrutiny, it is not toothless. Under the test, laws that "eviscerate," *State v. Hamdan*, 665 N.W.2d 785, 799 (Wis. 2002), render "nugatory," *Trinen v. City of Denver*, 53 P.3d 754, 757 (Colo. Ct. App. 2002), or result in the effective "destruction" of a Second Amendment right, *State v. Dawson*, 159 S.E.2d 1, 11 (N.C. 1968), must be struck down. Laws that are reasonably designed to further public safety, by contrast, are upheld. *See, e.g.*, *Robertson v. City & County of Denver*, 874 P.2d at 328, 330 n. 10 ("The state may regulate the exercise of [the] right [to bear arms] under its inherent police power so long as the exercise of that power is reasonable."); *Jackson*, 68 So.2d at 852 (same).

The reasonable regulation test also has a particular strength that other levels of scrutiny, like intermediate scrutiny, do not: it gives an appropriate amount of deference to legislative directives. As noted above, there is a profound governmental interest in regulating the possession and use of firearms. States have "cardinal civil responsibilities" to protect the health, safety, and welfare of their citizens. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 342 (2008); *see also Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 83 (1946) ("[T]he legislature may choose not to take the chance that human life will be lost . . . ."). States are thus generally afforded "great latitude" in exercising "police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons . . . ." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotations omitted). Regulations on the carrying of firearms are an essential exercise of those powers, for the "promotion of safety of persons and property is unquestionably at the core of the State's police power." *Kelley v. Johnson*, 425 U.S. 238, 247 (1976).

While individuals and organizations may differ on the net risks posed by guns in our society, such disagreement underlines that firearm regulation is best suited for the legislative

arena, not the courts. *See Miller*, 604 F. Supp. 2d at 1172 n. 13 ("[D]ue to the intensity of public opinion on guns, legislation is inevitably the result of hard-fought compromise in the political branches."). Indeed, legislatures are designed to make empirical judgments about the need for and efficacy of regulation, even when that regulation affects the exercise of constitutional rights. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (state legislatures are "far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon legislative questions."); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 544 (1989) ("Local officials, by virtue of their proximity to, and their expertise with, local affairs, are exceptionally well qualified to make determinations of public good within their respective spheres of authority.") (internal quotations and citations omitted). State governments "must [thus] be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v. American Mini Theatres, Inc.*, 427 U.S 50, 71 (1976).

In fulfilling their responsibility to protect the public, states have enacted laws and permitting regimes to ensure that guns are used responsibly and possessed by responsible, law-abiding persons. These laws have helped reduce the use of guns in crime and saved lives. *See, e.g.*, D.W. Webster, *et al.*, *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. URBAN HEALTH: BULLETIN OF THE N.Y. ACAD. OF MED. 525 (2009); D.W. Webster, *et al.*, *Relationship Between Licensing, Registration, and Other State Gun Sales Laws and the Source State of Crime Guns*, 7 INJURY PREVENTION 184 (2001). The risks posed by invalidating or unduly restricting these legislative judgments on firearms regulations is severe, and courts should review such legislative judgments with an appropriate amount of deference. Here, too, therefore, the reasonable regulation test is better situated than either intermediate or strict scrutiny to defer to legislative judgments. It allows for the State of Texas

to enact laws that recognize that individuals 21 and over have a different capacity to carry handguns in public safely, and recognizes the strong interest of the state in protecting its citizens rather than being overly focused on a narrow means-end nexus of the challenged regulation.

B. The Sections at Issue Are Constitutionally Permissible.

Sections 46.02, 411.172(a)(2), (a)(9), and (g) pass the reasonable regulation test and demonstrate the required fit between the law and the interest served. Courts have repeatedly found that there is a "compelling state interest in protecting the public from the hazards involved with certain types of weapons, such as guns," *Cole*, 665 N.W. 2d at 344, particularly given "the danger [posed by the] widespread presence of weapons in public places and [the need for] police protection against attack in these places." *Id.* (internal quotations omitted).

Indeed, as discussed above, there is strong sociological and statistical evidence which suggests that restrictions that make it more difficult for someone to carry a gun in public reduce both the number of gun deaths and criminal access to firearms. *See, e.g.*, Webster, *et al.*, *Relationship Between Licensing*, at 184; Webster, *et al.*, *Effects of State-Level*, at 525; Weil & Knox, *Effects of Limiting Handgun Purchases*, at 1759. Moreover, as noted above, these code sections do not amount to an outright ban on young adults possessing or carrying firearms and thus do not even approach the blanket prohibition on handgun ownership that the Supreme Court struck down in *Heller*. *See Heller*, 128 S. Ct. at 2788. Instead, they merely prevent such teens and young adults from carrying handguns in public until they reach the age of 21. This is a perfectly reasonable restriction designed to ensure that individuals who carry concealed weapons can do so safely and responsibly. The Texas Legislature has decided that this is a reasonable way to protect public safety. The Court should not second-guess that judgment.

In sum, Sections 46.02, 411.172(a)(2), (a)(9), and (g) are both reasonable and not unduly restrictive of individuals' Second Amendment right to keep guns in their home. They are thus a

valid exercise of the state's "police powers to legislate as to the protection of the lives, limb, health, comfort, and quiet of all persons" and pass the reasonable regulation test.[8] *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotations omitted).

CONCLUSION

For all the foregoing reasons, the Court should find that Sections 46.02, 411.172(a)(2), (a)(9), and (g) are constitutional.

Dated: November 17, 2010

Respectfully submitted,

s/

Scott Medlock (Texas Bar No. 24044783)
1405 Montopolis Dr.
Austin, TX 78741
Phone: (512) 474-5073
Facsimile: (512) 474-0726
E-mail: smedlock@texascivilrightsproject.org

Adam K. Levin
Tracy L. Hresko
Hogan Lovells US LLP
555 13th Street, NW
Washington, DC 20004
Telephone: (202) 637-5600
Facsimile: (202) 637-5910
E-Mail: adam.levin@hoganlovells.com

Jonathan E. Lowy
Daniel R. Vice
Brady Center to Prevent Gun Violence
Legal Action Project
1225 Eye Street, NW, Suite 1100
Washington, DC 20005

Attorneys for *Amici Curiae*

[8] Sections 46.02, 411.172(a)(2), (a)(9), and (g) also would survive intermediate (or even strict) scrutiny were the Court to apply that standard of review because it is substantially related to an important government interest. Indeed, a number of courts have found that the protection of the public from gun violence is an important government interest, *see, e.g.*, *Heller II*, 698 F. Supp. 2d at 186; *Miller*, 604 F.Supp.2d at 1171; *Bledsoe*, 2008 WL 3538717 at *4, and have upheld statutes that impose much broader restrictions on an individual's ability to possess and carry firearms. *See, e.g.*, *Marzzarella*, 2010 WL 2947233 at *7; *Heller II*, 698 F. Supp. 2d at 197; *State v. Sieyes*, 225 P.3d 995, 995 (Wash. 2010); *United States v. Engstrum*, 609 F. Supp. 2d 1227, 1233 (D. Utah); *United States v. McCane*, 573 F.3d 1037, 1050 (10th Cir. 2009); *United States v. Masciandaro*, 648 F. Supp. 2d 779, 789-91 (E.D. Va. 2009).