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,

Defendant.

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

BRIEF OF *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE, GRADUATE STUDENT ASSEMBLY AND STUDENT GOVERNMENT OF THE UNIVERSITY OF TEXAS AT AUSTIN, MOTHERS AGAINST TEEN VIOLENCE, STUDENTS FOR GUN-FREE SCHOOLS IN TEXAS, AND TEXAS CHAPTERS OF THE BRADY CAMPAIGN TO PREVENT GUN VIOLENCE IN SUPPORT OF DEFENDANTS

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INTRODUCTION

The Second Amendment right to keep and bear arms 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 Texas law recognizes, these risks are further intensified when teens and young persons under 21 are permitted to carry loaded firearms in public.

Teenagers and young people under 21 often lack the same ability as adults to "govern impulsivity, judgment, planning for the future, [and] foresight of consequences."[1] Arrests for murder, nonnegligent homicides and other violent crimes peaks from ages 18 to 20.[2] Even though 18-20 year olds make up only about 5% of the population, they account for about 20% of homicide and manslaughter arrests.[3] "Among murderers," persons 18 to 20 have been "more likely to use a firearm than adults 21 and over."[4] 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 ask this Court to hold that 18 year-olds enjoy a right to carry guns in public even though the Supreme Court has not recognized such a right for mature adults. While 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*, 554 U.S. 570, 635 (2008), the Court 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.*

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

[2] U.S. Department of Justice, *Crime in the United States*, Arrests, by Age, 2009, at Table 38, accessible at http://www2.fbi.gov/ucr/cius2009/data/table_38.html.

[3] *Id*.; Census Bureau, *U.S. Population Projections*, State Interim Population Projections by Age and Sex: 2004 – 2030, Annual projections by single year of age, accessible at http://www.census.gov/population/www/projections/projectionsagesex.html.

Baldwin, 165 U.S. 275, 281-82 (1897). The Court's approval of concealed weapons restrictions is in line with similar state rulings, and *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*, 544 U. S. at 626.

Texas courts 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 may prohibit concealed carrying of firearms altogether, and certainly may, at a minimum, exercise their police powers to protect the public by instituting age limits on the public carrying of loaded guns. 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*, 741 F. Supp. 2d 993, 1005 (N.D. Iowa 2010) (denying Second Amendment and Equal Protection challenges by 18-year-old seeking license to carry a concealed weapon).

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[4] U.S. Department of Treasury and Department of Justice, *Gun Crime in the Age Group 18-20* (June 1999), at 2-3.

An extension of the Second Amendment to deny states the right to restrict teens 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 v. City of Chicago*, 130 S. Ct. 3020, 3047 (2010); *Heller*, 554 U.S. at 626-27 & n.26. Texas law governing the public carrying of handguns by young adults is precisely that 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; 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 would usurp the functions of the Legislature and local law enforcement.

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. *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.

Amici Graduate Student Assembly and Student Government serve as the official voice of 62,000 students at the University of Texas at Austin. They have an interest in preserving student safety and preventing suicide, which are implicated by young peoples' easy access to guns.

Amicus Mothers Against Teen Violence is a Texas organization providing information, education, and advocacy for teen violence prevention, public health, and safety. It recognizes the dangers of people under 21 carrying firearms and opposes lifting restrictions on such carrying.

Amicus Texas Chapters of the Brady Campaign to Prevent Gun Violence is a grassroots organization that works to educate Texans about gun violence. The Texas Chapters work to enact sensible gun laws and prevent dangerous gun bills from being passed by the legislature.

Amicus Students for Gun-Free Schools in Texas is an Austin-based organization founded by survivors of the Virginia Tech shooting. It pursues proactive measures for safer campuses.

LEGAL BACKGROUND

Recent Supreme Court Second Amendment Jurisprudence: In *Heller*, the Supreme Court recognized an individual right to keep and bear arms in the home for the purpose of self-defense. 554 U.S. at 628-29. The Court went out of its way to assure that its holding did not "cast doubt" on other gun laws – approving of the constitutionality of a wide range of laws and making clear that "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 626-27 & n.26. Those "presumptively lawful" measures included laws restricting, and even banning, the public carry of weapons. 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" considered outright "prohibitions

on carrying concealed weapons . . . lawful under the Second Amendment or state analogues." *Id*. at 626; s*ee, e.g.*, *Robertson v. Baldwin*, 165 U.S. at 281-82.

In *McDonald*, the Court incorporated the Second Amendment to the states but 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.

Standard of Review: Neither *Heller* nor *McDonald* articulated a standard of review for Second Amendment challenges, though the Court in *Heller* 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) ("[S]trict scrutiny standard of review would not square with the [*Heller*] majority's references to 'presumptively lawful regulatory measures'"). The Court's reasoning foreclosed any heightened scrutiny that would require the government to ensure that gun 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*, 554 U.S. at 636, and listed as examples a host of "presumptively lawful" existing regulations without subjecting those laws to any such analysis. *Id.* at 627 & n.26.

Heller and *McDonald* left lower courts to determine an appropriate standard for Second Amendment claims: one that is less rigorous than strict scrutiny, "presumes" the lawfulness of a wide gamut of gun laws, allows for "reasonable firearms regulations," and permits law-abiding, responsible citizens to keep guns at home for self-defense. 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 for reviewing the statutes at issue here.

The Two-Pronged Approach: Following *Heller*, a number of courts have utilized a two-pronged approach to Second Amendment claims. *See, e.g.*, *United States v. Chester*, 628 F.3d 673 (4th Cir. 2010); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010); *Heller II*, 698 F. Supp. 2d at 188. Courts ask: (1) does the law 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 law does not implicate protected activity, then the analysis ends and the law is constitutional. If the law implicates protected activity, however, it still is constitutional if it meets the appropriate level of scrutiny. *Marzzarella*, 614 F.3d at 89.

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

ARGUMENT

For at least two principal reasons, the firearms regulations 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 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*, 554 U.S. at 635 (emphasis added). In the course of its lengthy majority opinion, the Court had ample opportunity to state that Mr. Heller had a right to carry guns in public. However, it did not do so: the Court never recognized a right to carry guns in public. The Court's holding is 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 635 (emphasis added). The code sections at issue here do not meaningfully impede on the ability of individuals to keep handguns "in defense of hearth and home." *Heller*, 554 U.S. at 635. Indeed, Plaintiff D'Cruz admits that, under these laws, he "may possess a handgun in his home and automobile." Amended Complaint ¶ 21. These provisions are thus consistent with the Court's holding in *Heller* and *McDonald*, and do not implicate protected Second Amendment activity.

Plaintiffs argue, essentially, 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. This is a misreading of *Heller*. Indeed, Plaintiffs cannot explain why the Court 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 its supposed ruling that the Second Amendment protected a right to carry guns in public hidden, leaving courts with (at

most) supposed tea leaves on which to find a broad right to carry in public.[5] 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 public carrying nonetheless must be permitted.

When reviewing a statute's constitutionality, courts "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 keeping with these long-held principals, courts have refused to read *Heller* as conferring a broad right to carry guns outside the home. In *United States. v. Bledsoe*, for instance, the U.S. District Court for the Western District of Texas noted:

> 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, *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).

Other courts have similarly held that the Second Amendment, post-*Heller*, does not protect a right to carry concealed weapons in public. In *Williams v. State*, Maryland's highest court considered, and rejected, the argument that *Heller* endorsed a public right to carry guns:

> [Defendant] attempts to bring his conviction of wearing, carrying, or transporting a handgun in public, without a permit, within the ambit of *Heller* and *McDonald* by claiming that those opinions would prohibit his conviction. This is not the case, because *Heller* and *McDonald* emphasize that the Second Amendment is applicable to statutory prohibitions *against home possession*, the dicta in *McDonald* that "the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home," notwithstanding. Although Williams attempts to find succor in this dicta, it is clear that *prohibition of firearms in the home* was the gravamen of the certiorari questions in both *Heller* and *McDonald* and their answers. If the Supreme Court,

[5] Nor do the Court's "tea leaves" even indicate any 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. 554 U.S. at 584. The *Heller* Court did *not* state that the Second Amendment protects a right to carry arms in public.

> in this dicta, meant its holding to extend beyond home possession, it will need to say so more plainly.

10 A.3d 1167, 1176-77 (Md. 2011).[6] This reasoning is hardly unique. In *People v. Dawson*, the Illinois Court of Appeals rejected arguments strikingly similar to Plaintiffs' and 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).

[6] *See also United States v. Masciandaro*, --- F.3d ---, 2011 WL 1053618 at *16-17 (4th Cir. Mar. 24, 2011) ("On the question of Heller's applicability outside the home environment, we think it prudent to await direction from the Court itself . . . If ever there was an occasion for restraint, this would seem to be it.").

Other courts *post-Heller* have similarly held that the Second Amendment right is confined to the home. *See, e.g., Gonzalez v. Village of W. Milwaukee*, No. 09CV0384, 2010 WL 1904977, at *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*, 725 F. Supp. 2d 56, 60 (D. Mass. 2010) ("*Heller* does not hold, nor even suggest, that concealed weapons laws are unconstitutional."); *Dorr v. Weber*, 741 F. Supp. 2d 993, 1005 (N.D. Iowa 2010) ("[A] right to carry a concealed weapon under the Second Amendment has not been recognized to date."); *Teng v. Town of Kensington*, No. 09-cv-8-JL, 2010 WL 596526, at *5 (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."); *United States v. Tooley*, 717 F. Supp. 2d 580, 596 (S.D. W. Va. 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*."); *People v. Aguilar*, No. 1-09-0840, 2011 WL 693241, at *6 (Ill. App. Ct. Feb. 23, 2011) ("[T]he decisions in *Heller* and *McDonald* were limited to interpreting the second amendment's protection of the right to possess handguns in the home, not the right to possess handguns outside the home."); *In re Factor*, 2010 WL 1753307, at *3 (N.J. Super. Ct. App. Div. 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."); *Riddick v. United States*, 995 A.2d 212, 222 (D.C. 2010) (Second Amendment does not "compel the District to license a resident to carry and possess a handgun outside the confines of his home, however broadly defined." (quoting *Sims v. United States*, 963 A.2d 147, 150 (D.C. 2008))).

Furthermore, in Texas, this understanding of the Second Amendment (and its state analogues) as not protecting a general right to carry or a more particular right to carry concealed pre-dates *Heller*. Indeed, the Texas 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), 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 prohibitions against unlawfully carrying arms, recognizing the legislature's power to impose limitations on the carrying of weapons 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).

The same holds true across the country. *See, e.g.*, *Andrews v. State*, 50 Tenn. 165 (1871) (upholding law forbidding carrying "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 state right-to-bear-arms provision, which it read *in pari materia* with the Second Amendment); *Fife v. State*, 31 Ark. 455 (1876) (upholding carry prohibition as 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" of "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, noting, "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…ha[s] 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."); 1876 Wyo. Comp. Laws ch. 52, § 1 (prohibiting bearing "concealed or openly, any firearm or other deadly weapon, within the limits of any city, town or village").[7]

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. 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, 554 U.S. at 618, 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). 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 Public and Private Defense (Part 3),* 1 Cont. L.J. 259, 287 (1874). An authoritative 1904 study concluded that the Second Amendment and similar state provisions had "not prevented the very general enactment of statutes forbidding the carrying of concealed weapons," which demonstrated that "constitutional

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

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).

B. Sections 46.02, 411.172(a)(2), (a)(9), and (g) Do Not Violate Equal Protection.

Plaintiffs' Equal Protection challenge is also unsupported by precedent, 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). 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*, 741 F.Supp.2d 993, 1004, 1007 (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 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); U.S. Const., Amend. 26 (ratified July 1, 1971).

C. 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:

> 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) (citing "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 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. Public carrying of firearms poses safety risks to the general public.

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

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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"). Carrying guns in public poses a number of issues and challenges not presented by guns in the home.

First, when firearms are carried out of the home and in public, the safety of a broader range of individuals is threatened. While guns in the home are primarily a threat to their owners, family members, friends, and houseguests,[8] firearms carried in public are a threat to strangers,

[8] *See, e.g.*, Matthew Miller, David Hemenway, Deborah Azrael, *State-level homicide victimization rates in the US in relation to survey measures of household firearm ownership, 2001-2003*, SOCIAL SCIENCE & MEDICINE (2006) ("States with higher rates of firearm ownership had significantly higher homicide victimization rates"); Lisa M. Hepburn, David Hemenway, *Firearm availability and homicide: A review of the literature*, 9 AGGRESSION & VIOLENT BEHAVIOR 417 (2004) ("households with firearms are at higher risk for homicide, and there is no net beneficial effect of firearm ownership"); Matthew Miller, et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988–1997*, 92 AM J. PUBLIC HEALTH 1988 (Dec 2002) ("in areas where household firearm ownership rates were higher, a disproportionately large number of people died from homicide); Mark Duggan, *More Guns, More Crime*, 109 J. POL'Y. ECON. 1086 (2001); Matthew Miller, et al., *Firearm availability and unintentional firearm deaths*, 33 ACCIDENT ANALYSIS & PREVENTION 477 (Jul. 2000) ("A statistically significant and robust association exists between gun availability and unintentional firearm deaths.").

law enforcement officers, random passersby, and other private citizens. Guns in public expose all members of society to great risks, as guns are used "far more often to kill and wound innocent victims than to kill and wound criminals … [and] guns are also used far more often to intimidate and threaten than they are used to thwart crimes."[9] Another study has shown that in the last four years, concealed handgun permit holders have shot and killed at least 11 law enforcement officers and 289 private citizens.[10] States 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 guns in public is not a useful or effective form of self-defense and, in fact, repeatedly has been shown to *increase* the chances that one will fall victim to violent crime. Most states that enact laws broadly allowing concealed carrying of firearms in public appear to "experience increases in violent crime, murder, and robbery when [those] laws are adopted."[11] Laws broadly allowing concealed carrying of weapons "have resulted, if anything, in an *increase* in adult homicide rates."[12] Likewise, "firearms homicides increased in the aftermath of [enactment of these] laws," and may "raise levels of firearms murders" and "increase the frequency of homicide."[13] Similarly, "[f]or robbery, many states experience increases in crime" after concealed carry laws are enacted.[14] Several different statistical approaches to the question "indicate a rather substantial increase in robbery," while "policies to

[9] David Hemenway & Deborah Azrael, *The Relative Frequency of Offensive and Defensive Gun Uses: Results From a National Survey*, 15 VIOLENCE & VICTIMS 257, 271 (2000).

[10] Violence Policy Center, *Concealed Carry Killers* (2011), available at http://vpc.org/ccwkillers.htm.

[11] John J. Donohue, *The Impact of Concealed-Carry Laws*, in EVALUATING GUN POL'Y: EFFECTS ON CRIME AND VIOLENCE 289, 320 (2003).

[12] Jens Ludwig, *Concealed-Gun-Carrying Laws and Violent Crime: Evidence from State Panel Data*, 18 INT'L REV. L. & ECON. 239 (1998) (emphasis in original).

[13] David McDowall, et. al., *Easing Concealed Firearms Laws: Effects on Homicide in Three States*, 86 J. CRIM. L. & CRIMINOLOGY 193, 202-203 (1995).

[14] Hashem Dezhbakhsh & Paul Rubin, *Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime*, THE ECON. OF GUN CONTROL 473 (May 1998).

discourage firearms in public may help prevent violence."[15] Another study 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."[16] 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.[17]

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. When the carrying of guns in public is restricted, "possession of a concealed firearm by an individual in public is sufficient to create a reasonable suspicion that the individual may be dangerous, such that an officer can approach the individual and briefly detain him in order to investigate whether the person is properly licensed." *Commonwealth v. Robinson*, 600 A.2d 957, 959 (Pa. Super. Ct. 1991); *see also Commonwealth v. Romero*, 673 A.2d 374, 377 (Pa. Super. Ct. 1996) ("officer's observance of an individual's possession of a firearm in a public place in Philadelphia is sufficient to create reasonable suspicion to detain that individual for further investigation"). Law enforcement's ability to protect the public could be greatly restricted if officers were required to effectively presume that a person carrying a gun in public was doing so lawfully. Under such a legal regime, it is possible that an officer would not be deemed to have

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[15] John Donohue, *Guns, Crime, and the Impact of State Right-To-Carry Laws*, 73 FORDHAM L. REV. 623 (2004).

[16] 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).

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

cause to arrest, search, or stop a person seen carrying a loaded gun, even though far less risky behavior could justify police intervention. Law enforcement should not have to wait for a gun to be fired before protecting the public. Further, if drivers are allowed to carry loaded guns, road rage can become a more serious and even potentially deadly phenomenon.[18] And an increase in gun prevalence in public may cause an intensification of criminal violence.[19]

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 poses a unique set of threats to the general public that is not present when older persons carry guns. For that reason, most states prohibit persons under 21 from carrying concealed firearms in public and several states ban all handgun possession by anyone under 21.[20] These restrictions are crucial for public safety, given that handguns have "comprised 85 percent of the crime guns known to be recovered from 18 to 20 year olds," and "[a]mong murderers, 18 to 20 year olds were more likely to use a

[18] *See* David Hemenway, *Road Rage in Arizona: Armed and Dangerous*, 34 ACCIDENT ANALYSIS AND PREVENTION 807-14 (2002).

[19] *See* Philip Cook & Jens Ludwig, *The Social Costs of Gun Ownership*, J. PUB. ECON. 379, 387 (2006).

[20] *See* Alaska Stat. § 11.61.220 (may carry concealed gun if 21 or older); Ariz. Rev. Stat. Ann. § 13-3112 (must be 21 to get carrying concealed weapon (CCW) permit); Ark. Code Ann. § 5-73-309 (same); Colo. Rev. Stat. § 18-12-203 (same); Conn. Gen. Stat. § 29-28(b) (same) and Conn. Gen. Stat. Ann. § 29-36f (must be 21 to possess handgun); Fla. Stat. Ann. § 790.06 (must be 21 to get CCW permit); Ga. Code Ann. § 16-11-129 (same); Haw. Rev. Stat. § 134-9 (same) and Haw. Rev. Stat. § 134-2(d) (must be 21 to possess handgun); Idaho Code Ann. § 18-3302 (must be 21 to get CCW permit); 720 Ill. Comp. Stat. § 5/24-1(a)(4) (concealed carrying prohibited); Kan. Stat. Ann. § 75-7c04 (must be 21 to get CCW permit); Ky. Rev. Stat. Ann. § 237.110(4) (same); La. Rev. Stat. Ann. § 40:1379.3 (same); Md. Code Ann., Pub. Safety § 5-133(d) (generally must be 21 to possess handgun); 21. Mass. Gen. Laws Ann. ch. 140, § 131(iv) (must be 21 to possess handgun); Mich. Comp. Laws § 28.425b (must be 21 to get CCW permit); Minn. Stat. Ann. § 624.714 (same); Miss. Code Ann. § 45-9-101 (same); Mo. Rev. Stat. § 571.101 (must be 23 to get CCW permit); Neb. Rev. Stat. § 69-2433 (must be 21 to get CCW permit); Nev. Rev. Stat. § 202.3657 (same); N.J. Stat Ann. § 2C:58-6.1 (bans possession of handguns by individuals under 21); N.M. Stat. Ann. § 29-19-4 (must be 21 to get CCW permit); N.Y. Penal Law § 400.00(1)(a) (must be 21 to possess handgun); N.C. Gen. Stat. § 14-415.12 (must be 21 to get CCW permit); Ohio Rev. Code Ann. § 2923.125 (same); Or. Rev. Stat. § 166.291 (same); 18 Pa. Cons. Stat. Ann. § 6109 (same); R.I. Gen. Laws § 11-47-11 (same); S.C. Code Ann. § 23-31-215 (same); Tenn. Code Ann. § 39-17-1351 (same); Utah Code Ann. § 53-5-704 (same); Va. Code Ann. § 18.2-308(D) (same); Wash. Rev. Code § 9.41.070 (same); W. Va. Code § 61-7-4 (generally must be 21 to get CCW permit); Wis. Stat. § 941.23 (concealed carrying prohibited); and Wyo. Stat. Ann. § 6-8-104 (generally must be 21 to get CCW permit).

firearm than adults 21 and over." *Id.* ar 2-3. Likewise, "in non-lethal crimes, including assault, rape, and robbery, 18 to 20 year old offenders were more likely to use guns than both younger and older offender age groups." *Id.*

Arrests for murder, nonnegligent homicides and other violent crimes peaks from ages 18 to 20,[21] such that "18, 19, and 20 year olds ranked first, second, and third in the number of gun homicides committed. For each of these ages, the number of homicides exceeded the number for any ages older or younger than 18 to 20."[22] Even though 18-20 year olds make up only about 5% of the population, they account for about 20% of homicide and manslaughter arrests.[23] This pattern "is consistent with the historical pattern of gun homicides," according to federal law enforcement.[24] Overall, criminal gun possession is highest for persons in this age group and peaks between ages 19 to 21.[25]

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."[26] Studies on this topic suggest, moreover, that "age 21 or 22 would be closer to the 'biological' age of maturity." *Id.* Teenagers and young people ages 18 to under 21 are also within the age

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[21] U.S. Department of Justice, *Crime in the United States*, Arrests, by Age, 2009, at Table 38, accessible at http://www2.fbi.gov/ucr/cius2009/data/table_38.html.

[22] *Gun Crime in the Age Group 18-20*, at 6.

[23] *Crime in the United States*, Arrests, by Age, 2009, at Table 38; U.S. Census Bureau, *U.S. Population Projections*, State Interim Population Projections by Age and Sex: 2004 – 2030, Annual projections by single year of age, accessible at http://www.census.gov/population/www/projections/projectionsagesex.html.

[24] *Gun Crime in the Age Group 18-20*, at 2.

[25] *See* 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).

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

range most associated with violent crime. The rate of murder offenders per 100,000 population peaks between 18 to 24, at 26.5 murder offenders per 100,000 population.[27] Among firearm homicide offenders, the highest percent of offenders falls into the 18 to 24 year age range at 37.3 percent.[28] Criminal gun possession is highest in this age group and peaks between 19 to 21.[29]

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) (concluding that "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 teens and young people under 21 have less capacity to control impulsivity, make good decisions, and appreciate the consequences of their actions than individuals over 21 – states are well justified in having laws that restrict teens and young adults from carrying guns in public. In fact, even U.S. military academies, which arguably admit only the most responsible and upstanding of young adults, prohibit the carrying of handguns by anyone under 21. *See* U.S. 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.

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[27] Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics* (2005 data), available at http://www.albany.edu/sourcebook/pdf/t31272005.pdf.

[28] C. Puzzanchera and W. Kang, *Easy Access to the FBI's Supplementary Homicide Reports: 1980-2008* (2010), available at http://ojjdp.gov/ojstatbb/ezashr/.

[29] 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).

Overall, therefore, the laws at issue here prevent a number of risks to the public without implicating Second Amendment activity protected in *Heller*. They are not, moreover, complete prohibitions on gun carrying by young adults. Individuals in Texas who are under 21 may 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), are 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, THEY 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 choices used 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, key differences between the First and Second Amendments suggest that these are *not*, in fact, appropriate choices. The exercise of Second Amendment rights creates unique risks that threaten public safety 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 levels of scrutiny in the past, but has instead fashioned a wide variety of standards tailored to specific constitutional

inquiries.[30] For all these reasons, a standard of review specific to the Second Amendment is warranted, particularly given the Supreme Court's recognition that the right to bear arms must be evaluated in light of a state's competing interest in public safety. *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, and despite significant differences in these provisions, courts have, with remarkable unanimity, coalesced around 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" adopting 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:

[30] *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).

> [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 weapons*, 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. The test, which was 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*. 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.

This test is also in line with the *McDonald* Court's statement that "state and local experimentation with reasonable firearms regulation will continue under the Second Amendment." 130 S. Ct. at 3047 (internal citation omitted). Pre-*Heller* courts that recognized an individual, non-militia-based Second Amendment right agreed that "reasonable" restrictions remain permissible. *See, e.g.*, *United States v. Emerson*, 270 F.3d 203, 261 (5th Cir. 2001) (right is subject to "reasonable" restrictions "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., concurring).

The reasonable regulation test is a more heightened form of scrutiny than the rational basis test that the *Heller* majority 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.[31] Instead, it focuses on whether "the restriction . . . is a reasonable exercise of the State's inherent police powers" and not "merely on whether any conceivable rationale exists under which the legislature may have concluded the law could promote the public welfare." *State v. Cole*, 665 N.W. 2d 328, 338 (Wis. 2003) (adding that principle of "reasonable regulation" is that "the right [to bear arms] must not be allowed to become illusory"). 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. 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), are struck down. Laws that reasonably 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 v. State*, 68 So.2d 850, 852 (Ala. 1953) (same).

The reasonable regulation test also has a particular strength that other levels of scrutiny do not: it gives appropriate deference to legislative directives. States have "cardinal civil responsibilities" to protect their citizens' health, safety, and welfare. *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 generally afforded "great latitude" in exercising "police powers to legislate as to the

[31] *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).

protection of the lives, limbs, health, comfort, and quiet of all persons . . . ." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotations omitted). Gun carrying regulations 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 may differ on the risks posed by guns in society, such disagreement underlines that gun regulation is best suited for the legislative arena, not the courts. *See United States v. Miller*, 604 F. Supp. 2d 1162, 1172 n.13 (W.D. Tenn. 2009) ("[D]ue to the intensity of public opinion on guns, legislation is inevitably the result of hard-fought compromise in the political branches."). Legislatures are designed to make empirical judgments about the need for and efficacy of regulation, even when it affects 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 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.[32] 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. The reasonable regulation test is better situated than intermediate or strict scrutiny to defer to legislative judgments. It allows for Texas to enact laws recognizing that adults 21 and over have a different capacity to carry guns safely, and it recognizes the strong interest in protecting public safety rather than being overly focused on a narrow means-end nexus of the challenged law.

B. The Sections at Issue Are Constitutionally Permissible.

Sections 46.02, 411.172(a)(2), (a)(9), and (g) pass the reasonable regulation test. Courts have repeatedly found 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, 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).

There is strong sociological and statistical evidence that restrictions making it more difficult to carry a gun in public reduce gun deaths and criminal access to firearms. Moreover, these code sections do not completely ban young adults from possessing or carrying guns and thus do not even approach the blanket prohibition on handgun ownership the Court struck down in *Heller*. *See Heller*, 554 U.S. at 574-75. Texas, like most other states in the nation, has decided that limiting teens and young people under 21 from carrying loaded firearms in public is reasonable to protect public safety. Plaintiffs provide no basis to second-guess that judgment.[33]

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[32] D.W. Webster, *Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking*, 86 J. Urban Health: Bulletin of N.Y. Acad. of Med. 525 (2009); D.W. Webster, *Relationship Between Licensing, Registration, and Other State Gun Sales Laws and the Source State of Crime Guns*, 7 Injury Prevention 184 (2001).

[33] 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 because they are 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 2009); *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).

CONCLUSION

Amici respectfully requests that the Court find the sections at issue here constitutional.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2011, I filed the foregoing Brief of *Amici Curiae* Brady Center to Prevent Gun Violence, Graduate Student Assembly and Student Government of the University of Texas at Austin, Mothers Against Teen Violence, Students for Gun-Free Schools in Texas, and Texas Chapters of the Brady Campaign to Prevent Gun Violence in Support of Defendants through the Court's CM/ECF system, which will electronically serve this document on both Plaintiffs' and Defendant's attorneys as follows:

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