



North Dakota Legislative Council

Prepared for the Judiciary Committee
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FIREARM AND DANGEROUS WEAPON RESTRICTIONS - BACKGROUND MEMORANDUM

Section 1 of House Bill No. 1341 (2023) ([appendix](#)) directs the Legislative Management to study the provisions of the North Dakota Century Code which place restrictions on carrying firearms and dangerous weapons. The study must include an examination of the state's current firearm and weapon possession prohibitions as compared to the nation's historical regulations and restrictions on the time, place, and manner in which firearms and dangerous weapons may be restricted. The study must include an assessment of recent federal court cases relating to firearm restrictions, including public carry, and an examination of the definition of a dangerous weapon and whether the current definition of a dangerous weapon should be maintained, narrowed, or expanded.

FEDERAL LAW

Prohibited Individuals

The Gun Control Act of 1968, codified at 18 U.S.C. § 922(g), is a federal law that regulates the firearms industry and firearm ownership. Due to constitutional limitations, the Act primarily is based on regulating interstate commerce by prohibiting interstate firearm transfers except by manufacturers, dealers, and importers licensed under a scheme set up under the Act. The Act was amended in 1993 to include a background check requirement of prospective firearm purchasers by licensed sellers, and to create a list of individuals to whom the sale of a firearm is prohibited. The 1993 amendment to the Act was aimed primarily at prohibiting firearm possession by convicted felons; however, the amendment also included prohibiting the following individuals from firearm possession and ownership:

- A fugitive from justice;
- An unlawful user of or individual addicted to any controlled substance;
- An individual who has been adjudicated as mentally defective or who has been committed to a mental institution;
- An alien who:
 - Is illegally or unlawfully in the United States; or
 - Has been admitted to the United States under a nonimmigrant visa;
- An individual who has been discharged from the armed forces under dishonorable conditions;
- A citizen of the United States, who has renounced their citizenship;
- An individual who, subject to a court order, is restrained from harassing, stalking, or threatening an intimate partner or child of the intimate partner; and
- An individual who has been convicted of a misdemeanor crime of domestic violence.

Prohibited Places

Federal law prohibits possessing a firearm on certain types of federal property and near schools, though the prohibition is subject to several exceptions.

Federal Facilities

Federal law prohibits an individual from knowingly possessing or attempting to possess a firearm in a federal facility, which is defined as "a building or part thereof owned or leased by the federal government, where federal

employees are regularly present for the purpose of performing their official duties."¹This prohibition does not apply to the:

- Lawful performance of official duties by an officer, agent, or employee of the United States, a state, or a political subdivision thereof, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law;
- Possession of a firearm or other dangerous weapon by a federal official or a member of the armed forces if such possession is authorized by law; or
- Lawful carrying of firearms or other dangerous weapons in a federal facility incident to hunting or other lawful purposes.²

Post Offices

Firearms are prohibited on postal property, including parking lots, whether carried openly or concealed, except for official purposes.³

Airports and Airplanes

Firearms are prohibited in "sterile areas" of airports, which are those portions of an airport which provide passengers access to boarding aircrafts and to which the access generally is controlled by the Transportation Security Administration, or by an aircraft operator, through the screening of persons and property.⁴ Firearms are generally prohibited on airplanes except when an individual is transporting a weapon (except a loaded firearm) in baggage not accessible to a passenger in flight and the air carrier was informed of the presence of the weapon.⁵

Capitol Building

Federal law prohibits firearms in the federal Capitol Building except as authorized by regulations prescribed by the Capitol Police Board.⁶

Schools

The Gun-Free School Zones Act prohibits an individual from knowingly possessing a firearm at a place the individual knows, or has reasonable cause to believe, is a "school zone."⁷ A school zone is defined as in, or on the grounds of, or within a distance of 1,000 feet from the grounds of, a public, parochial or private school that provides elementary or secondary education.⁸ However, an individual with state-issued concealed carry permit is not prohibited by the Act from possessing a gun in a school zone.

Recent Federal Case Law

New York State Rifle and Pistol Association v. Bruen

On June 23, 2022, the United States Supreme Court issued its decision in *NYSRPA v. Bruen*⁹, the most important Second Amendment case the Court has decided in over a decade. The State of New York required an individual to show a special need for self-protection to receive an unrestricted license to carry a concealed firearm outside the home. Robert Nash and Brandon Koch challenged the law after New York rejected their concealed-carry applications based on failure to show "proper cause." A district court dismissed their claims, and the United States Court of Appeals for the Second Circuit affirmed. In a 6-3 opinion authored by Justice Clarence Thomas, the Supreme Court held the state law was unconstitutional as it infringed on the right to keep and bear arms by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right in public for self-defense. Because public carry was considered a right, the Court ruled out use of the two-part test to evaluate state gun laws, which generally involved application of intermediate scrutiny, which many lower courts had used, and instead evaluated the state's law under the more-stringent test of whether the proper-cause requirement is consistent with the nation's historical tradition of firearm regulation. The Court, abrogating the two-step intermediate scrutiny test used by the Courts of Appeals to address Second Amendment concerns, identified the new test to be used in applying the Second Amendment. The Court wrote, "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then

¹ 18 U.S.C. § 930(a), (g)(1). The prohibition does not extend to "the lawful carrying of firearms or other dangerous weapons in a Federal facility incident to hunting or other lawful purposes." § 930(d).

² 18 U.S.C. § 930(d).

³ 39 CFR § 232.1.

⁴ 49 CFR §§ 1540.111 and 1540.5.

⁵ 49 U.S.C. § 46505.

⁶ 40 U.S.C. § 5104(e)(1)(A).

⁷ 18 U.S.C. § 922(q)(2)(A).

⁸ 18 U.S.C. § 921(a)(25)-(26).

⁹ *NYSRPA v. Bruen*, 142 S. Ct. 2111 (2022).

justify its regulation by demonstrating that it is consistent with the nation's historical tradition of firearm regulation. Only then may a court conclude the individual's conduct falls outside the Second Amendment's 'unqualified command.'"

The *Bruen* case pertained to New York's "may issue" provision. There are six states and the District of Columbia that have these "may issue" licensing laws, under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria, usually because the applicant has not demonstrated cause or suitability for the relevant license (aside from New York, then, only California, the District of Columbia, Hawaii, Maryland, Massachusetts, and New Jersey have analogues to the "proper cause" standard). The vast majority of states, 43 states, are "shall issue" jurisdictions, where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability. North Dakota is among the "shall issue" states and its provision is codified as North Dakota Century Code Section 62.1-04-03.

The *Bruen* court opined that gun control laws that identify restricted "sensitive places," such as courthouses, schools, government buildings, and polling places, would still likely pass constitutional muster, though urban areas would not qualify as such sensitive places. Since the historical record yields relatively few 18th and 19th century "sensitive places" where weapons were altogether prohibited, the Court assumed it is settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. Courts now can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible. The term "sensitive place" can be interpreted to mean "places where people typically congregate and where law enforcement and other public safety professionals are presumptively available." Under Section 62.1-02-05, the "sensitive places" for possession of a firearm in North Dakota are schools, churches, and publicly owned or operated buildings. These "sensitive places" align with the United States Supreme Court's opinion in *Bruen*.

Hardaway v. Nigrelli

On October 20, 2022, in *Hardaway v. Nigrelli*,¹⁰ a federal judge struck down New York's restriction on carrying firearms in houses of worship. Although the court recognized that *Bruen* had approved of limits on carrying weapons in "sensitive places," the court held that houses of worship did not qualify as "sensitive places" because there was not a sufficient historical record justifying the restriction.

United States v. Price

On October 12, 2022, in *United States v. Price*,¹¹ a federal judge held the longstanding federal law barring an individual from possessing firearms with obliterated serial numbers violated the Second Amendment. The court found there was no historical tradition prohibiting an individual from possessing firearms with obliterated serial numbers. Although the court conceded serial numbers barely existed at the time of the founding and did not arise until the mass production of firearms, the court still concluded the federal government could not bar an individual from possessing firearms with obliterated serial numbers.

United States v. Bullock

On October 27, 2022, in *United States v. Bullock*,¹² a federal judge faced with a Second Amendment challenge to the federal ban on felons possessing firearms issued an order asking whether he should appoint a historian to assist in evaluating the law's constitutionality. The judge expressed frustration with the *Bruen* approach, explaining that lawyers and judges are not trained historians and the historical readings often advanced by litigants are either incomplete or inaccurate.

NORTH DAKOTA

Title 62.1 sets forth the provisions relating to weapons, specifically the possession of weapons, handguns, concealed weapons, machine guns, automatic rifles, silencers, and bombs.

Dangerous Weapon

Chapter 62.1-01 sets forth the definitions applicable to Title 62.1 and Section 62.1-01-01 defines a dangerous weapon to include any:

- Switchblade or gravity knife, machete, scimitar, stiletto, sword, dagger, or knife with a blade of five inches [12.7 centimeters] or more;

¹⁰ *Hardaway v. Nigrelli*, 639 F. Supp. 3d 422, 429 (W.D.N.Y. 2022).

¹¹ *United States v. Price*, 635 F. Supp. 3d 455, 459 (S.D.W.Va 2022).

¹² *United States v. Bullock*, No. 3:18-CR-165-CWR-FKB, 2023.

- Throwing star, nunchaku, or other martial arts weapon; any billy, blackjack, sap, bludgeon, cudgel, metal knuckles, or sand club;
- Slungshot;
- Bow and arrow, crossbow, or spear;
- Weapon that will expel, or is readily capable of expelling, a projectile by the action of a spring, compressed air, or compressed gas, including any such weapon, loaded or unloaded, commonly referred to as a BB gun, air rifle, or CO₂ gun; and
- Projector of a bomb or any object containing or capable of producing and emitting any noxious liquid, gas, or substance.

Under Section 62.1-01-01, a dangerous weapon does not include a spray or aerosol containing ortho-chlorobenzamalonitrile; alpha-chloroacetophenone; or other irritating agent intended for use in the defense of an individual, nor does the term include a device that uses voltage for the defense of an individual, unless the device uses a projectile and voltage or the device uses a projectile and may be used to apply multiple applications of voltage during a single incident, then the term includes the device for an individual who is prohibited from possessing a firearm. Section 62.1-01-01 defines a firearm or weapon as any device that expels or is readily capable of expelling a projectile by the action of an explosive and includes any such device, loaded or unloaded, commonly referred to as a pistol, revolver, rifle, gun, machine gun, shotgun, bazooka, or cannon.

Prohibited Individuals

Chapter 62.1-02 provides the specific circumstances under which an individual may not possess a firearm and when an individual's right to possess a firearm may be restored. Section 62.1-02-01 sets forth the limitations as to who may not possess a firearm. Section 62.1-02-01 prohibits the following individuals from possessing a firearm:

- An individual who has been convicted anywhere of a felony offense involving violence or intimidation;
- An individual who has been convicted anywhere of a felony offense or a Class A misdemeanor offense involving violence or intimidation and the use of a dangerous weapon;
- An individual who is or has ever been diagnosed and confined or committed to a hospital or other institution due to mental deficiency; and
- An individual under the age of 18 years, except while under the direct supervision of an adult for the purposes of firearm safety training, target shooting, or hunting.

Prohibited Places

Section 62.1-02-05 prohibits the possession of a firearm or dangerous weapon at:

- A school or school sponsored event on school property;
- A church or other place of worship; and
- A publicly owned or operated building.

The section provides 16 exemptions, including an exemption for:

- A law enforcement officer, or a correctional officer employed by the Department of Corrections and Rehabilitation;
- An individual who is on an ambulance or firefighter crew while the individual is on duty;
- A firearm or dangerous weapon carried in a temporary residence or motor vehicle;
- Private and public security personnel while on duty;
- A state, federal, or municipal court judge, a district court magistrate judge or judicial referee, and a staff member of the Attorney General's office; and
- A member of the armed forces of the United States or National Guard, organized reserves, state defense forces, or state guard organizations, when on duty.

The section allows political subdivisions to enact a less restrictive ordinance and provides a church or place of worship may not be held liable for any injury or death or damage to property caused by an individual permitted to carry a dangerous weapon concealed.

Section 62.1-02-10 prohibits an individual from keeping or carrying a loaded firearm in a motor vehicle, including an off-highway vehicle or snowmobile. The section also sets forth several exceptions, such as a law enforcement officer or an individual engaged in lawful hunting or trapping.

Section 62.1-03-01 allows an individual to carry a handgun if the handgun is unloaded and in plain view or secured. However, the limitation of unloaded and in plain view or secured does not apply to any:

- Individual possessing a valid concealed weapons license from this state, an individual not otherwise precluded from possessing a class 2 firearm and dangerous weapon license under chapter 62.1-04 and who has possessed for at least 30 days a valid driver's license or nondriver identification card issued by the department of transportation, or an individual who has reciprocity under Section 62.1-04-03.1;
- Individual on that person's land, or in that individual's permanent or temporary residence, or fixed place of business;
- Individual while lawfully engaged in target shooting;
- Individual while in the field engaging in the lawful pursuit of hunting or trapping; however, nothing in this exception authorizes the carrying of a loaded handgun in a motor vehicle;
- Individual permitted by law to possess a firearm while carrying the handgun unloaded and in a secure wrapper from the place of purchase to that person's home or place of business, or to a place of repair or back from those locations;
- North Dakota law enforcement officer;
- Law enforcement officer of any other state or political subdivision of another state who possesses active law enforcement credentials;
- Armed security guard or investigator as authorized by law when on duty or going to or from duty.
- Member of the armed forces of the United States when on duty or going to or from duty and when carrying the handgun issued to the member;
- Member of the National Guard, organized reserves, state defense forces, or state guard organizations, when on duty or going to or from duty and when carrying the handgun issued to the member by the organization;
- Officer or employee of the United States duly authorized to carry a handgun;
- Individual engaged in manufacturing, repairing, or dealing in handguns or the agent or representative of that individual possessing, using, or carrying a handgun in the usual or ordinary course of the business; or
- Common carrier, but only when carrying the handgun as part of the cargo in the usual cargo carrying portion of the vehicle.

Section 62.1-04-02 prohibits an individual, other than a law enforcement officer, from carrying a firearm or dangerous weapon concealed unless the individual is licensed to do so or exempted under Chapter 62.1-04. The section allows an individual who is not otherwise precluded from possessing a Class 2 firearm and dangerous weapon license under Chapter 62.1-04 and who has possessed for at least 30 days a valid driver's license or nondriver identification card issued by the Department of Transportation to carry a firearm concealed.

STUDY APPROACH

Pursuant to House Bill No. 1341, the study must include input from the Attorney General, the Superintendent of Public Instruction, a representative of the University System, and representatives of the Supreme Court, the Association of Counties, the League of Cities, the State's Attorneys' Association, the Commission on Legal Counsel for Indigents, the Peace Officers Association, and an association or organization with an interest in firearm legislation.

ATTACH:1