[FPC] FIREARMS POLICY COALITION

Wednesday, March 1, 2017

The Honorable Rep. Richard Hudson
429 Cannon House Office Building
Washington, D.C. 20515

Regarding: **H.R. 38 (Concealed Carry Reciprocity Act of 2017)**
Position: **Support (Amendments Requested)**

Dear. Representative Hudson,

I write you today on behalf of Firearms Policy Coalition and our hundreds of thousands of members and supporters across the United States. Specifically, I wish to offer our **support** for your H.R. 38, which would advance the fundamental, individual civil rights of millions of law-abiding Americans.

Having fought to advance the Second Amendment right to bear arms in public for self-defense through legislation, litigation, and grassroots efforts for over a decade now, we are deeply grateful to you and your co-sponsors for courageously standing for fundamental constitutional principles.

Given our deep experience on this subject, I would respectfully offer a few thoughts for your consideration relating to potential amendments to bolster the intent of the measure and better protect law-abiding people who would exercise their Second Amendment rights under the provisions of H.R. 38.

1. H.R. 38 should be amended to properly address patchwork federal, state, and local restrictions on the time, place, and manner of carry (i.e. "gun free" zones and other regulations).

As it is currently written, H.R. 38 would leave law-abiding people exposed to serious criminal liability that comes from a byzantine patchwork of state and local prohibitions (many of which do not require for the posting of signs indicating that the areas are off limits to those carrying guns). Indeed, the proposed reciprocity in H.R. 38 "....shall not be construed to supersede or limit the laws of any State that ...prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park."

For example, San Mateo (California) County Ordinance No. 3.68.080 states, in relevant part, that "[e]xcept as provided in subsection (p) and subsection (q), no person shall have in his possession within any County Park or Recreation area, or on the San Francisco Fish and Game Refuge, […]any gun or firearm, spear, bow and arrow, cross bow, slingshot, air or gas weapon or any other dangerous weapon."

As another example, under H.R. 38, were one to carry in the (unfenced) park outside the California Capitol Building (perhaps to gaze upon that place where many corrosive gun control ideas seem to begin):

> Any person who brings a loaded firearm into, or possesses a loaded firearm within, the State Capitol, any legislative office, any office of the Governor or other constitutional officer, or any hearing room in which any committee of the Senate or Assembly is conducting a hearing, or upon the grounds of the State Capitol, which is bounded by 10th, L, 15th, and N Streets in the City of Sacramento, shall be punished by imprisonment in a county jail for a period of not more than one year, a fine of not more than one thousand dollars ($1,000), or both such imprisonment and fine, or by imprisonment pursuant to subdivision (h) of Section 1170.

Cal. Penal Code Section 171c (a)(1).

And the Gun-Free School Zone Act of 1995, now codified at California Penal Code Section 626.9, generally prohibits the carry of handguns on school grounds—which includes many large, open areas subject to public traffic—even though they are not required to be marked, and indeed, are virtually never so marked:

> Any person who possesses a firearm in a place that the person knows, or reasonably should know, is a school zone, as defined in paragraph (1) of subdivision (e), unless it is with the written permission of the school district superintendent, his or her designee, or equivalent school authority, shall be punished as specified in subdivision (f).

Cal. Penal Code Section 626.9(b).

The (federal) Gun-Free School Zones Act of 1990, as amended by the Omnibus Consolidated Appropriations Act of 1997 following the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), is found at 18 U.S.C. § 922(q) and states in relevant part that:

> The Congress finds and declares that....the Congress has the power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection.

18 U.S.C § 922(q)(1),(I).

The Act further provides that "[i]t shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone."

18 U.S.C § 922(q)(2)(A).

And, indeed:

> Subparagraph (A) does not apply to the possession of a firearm....if the individual possessing the firearm is licensed to do so by the State in which the school zone is located or a political subdivision of the State, and the law of the State or political subdivision requires that, before an individual obtains such a license, the law enforcement authorities of the State or political subdivision verify that the individual is qualified under law to receive the license.

18 U.S.C. § 922(q)(3)(B),(ii).

Moreover, 18 U.S.C. § 922(q)(4) states that "[n]othing in this subsection shall be construed as preempting or preventing a State or local government from enacting a statute establishing gun free school zones as provided in this subsection."

The current federal statutes define the term "school zone" to be "in, or on the grounds of, a public, parochial or private school; or within a distance of 1,000 feet from the grounds of a public, parochial or private school." 18 U.S.C. § 921(a)(25).

And "[t]he term 'school' means a school which provides elementary or secondary education, as determined under State law." 18 U.S.C. § 921(a)(26).

H.R. 38's current exemption from the federal Gun Free School Zone Act is of limited utility: "A person who possesses or carries a concealed handgun under subsection (a) shall not be subject to the prohibitions of section 922(q) with respect to that handgun." (Emphasis added.) Note that the exemption applies only to "that" (singular) "concealed handgun."

H.R. 38 would provide that the term "handgun" would include "any magazine for use in a handgun" and "any ammunition loaded into the handgun or its magazine." (Emphasis added.) Again, the use of these terms in their singular form could easily be narrowly construed — particularly in jurisdictions hostile to Second Amendment rights, where the benefits of H.R. would most directly apply — to leave unprotected peaceful conduct that is common among people who lawfully carry a handgun for self-defense in public.

H.R. 38 should therefore be amended to include much more concrete protections from the reach of the Gun-Free School Zones Act of 1990 (as amended), or, more preferably, to repeal 18 U.S.C. § 922(q), leaving such matters to the states, and also provide for adequate protections against state and local laws restricting time, place, and manner that could (and, given benefit of experience, we believe would) catch an otherwise law-abiding and peaceful person carrying a handgun in their sticky webs.

2. H.R. 38 should be amended to expressly provide for the statutory protection of fundamental, individual rights protected under the Second Amendment made applicable to the States and local governments by the Fourteenth Amendment.

Many, if not most, people who respect constitutional values and originalism would agree that federal over-reach, largely based on decades of virtually unchecked abuses of the Commerce Clause, is one of the most serious problems that our Republic faces today.

Indeed, the text, history, and tradition of the Second Amendment's protection of the fundamental, individual right to keep and bear arms – first explored in depth by the late Justice Scalia in *District of Columbia v. Heller*, and further by Justices Alito and Thomas in *McDonald v. City of Chicago* – is exactly what we hope to fully restore. This is a fundamental, individual right that is wholly independent from Congress's right to regulate commerce.

H.R. 38, however, creates a troubling dichotomy wherein a much-desired outcome (here, carry reciprocity) is chained to the albatross that has become the Commerce Clause rather than, for example, Congress' powers to secure the People's fundamental, individual Second Amendment right to keep and bear arms through the Fourteenth Amendment's application of that Second Amendment right as against States and local governments.

Scores of law review articles, lawsuits, books, briefs, and op-eds have explored Commerce Clause abuses and federalism problems over the years, and volumes have been written about, *e.g.*, the Affordable Care Act ("Obamacare") and the Commerce Clause, so, in the interest of brevity, we will offer just a few items for consideration and stand ready to more fully explore this issue should you desire to do so.

Justice Clarence Thomas, in his dissenting opinion in *Gonzales v. Raich*, made plain the dangers of the federal love affair with leveraging the Commerce Clause to meet its many and growing policy objectives:

> Respondents Diane Monson and Angel Raich use marijuana that has never been bought or sold, that has never crossed state lines, and that has had no demonstrable effect on the national market for marijuana. **If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything — and the Federal Government is no longer one of limited and enumerated powers.**

Gonzales v. Raich, 545 U.S. 1 (2005) at 57-58 (emphasis added).

Then, in 2006, Judge Andrew P. Napolitano offered this apt commentary in his book *The Constitution In Exile* (Nelson Current, 2006):

> The feds have grown strong thanks to congressmen and senators from both major American political parties giving power to the government that is not enumerated, delegated, specified, contemplated, or even hinted at in the Constitution. Thanks to the dereliction of duty of the Supreme Court in sanctioning these unjust laws, just about every area of human endeavor and behavior is now regulated by the federal government "in the name of commerce."

And in his July 2011 Cato at Liberty article *Commerce Clause Abuse, Non-Obamacare Division*, law professor Ilya Shapiro frames the issue this way:

> The Court needs to reinforce and rebuild the limits of the Commerce Clause and to reign in a federal government that continues to believe that the Constitution sets no bounds on its power.
> But that laudable goal is extremely difficult, if not impossible, when Congress attaches important policy issues (even those that might, in some manner, protect some exercises of a constitutional right) to its favorite vehicle that in many (if not most) cases unconstitutionally advances the scope and reach of federal powers.

Notably, H.R. 38 never once mentions the Second Amendment, the Fourteenth Amendment, *District of Columbia v. Heller*, or any other connection to the fundamental, individual right to keep and bear arms. That should be remedied.

While we fully appreciate the practical realities of relying on settled law and the [perhaps far too robust] state of Commerce Clause jurisprudence, and do not here suggest that such authority should not be employed in H.R. 38's construction for those same real-world reasons, we do caution that it does come at a cost.

In any case, H.R. 38 should be amended to expressly state the legislative intent to protect and advance the fundamental, individual Second Amendment right to bear arms, one of the most important "privileges or immunities" guaranteed to free people in the Fourteenth Amendment.

* * *

H.R. 38 is a significant and positive piece of legislation, and one that—properly amended to address the issues discussed above—would establish one of the greatest, if not the greatest, legislative advancement of Second Amendment rights in the history of our federal government.

And if, as we expect, a substantial amount of time and resources are going to be required to move this bill to a successful passage that may not be possible again for years, if even in our lifetimes, the final result should be a lasting legacy that has the practical capacity to unlock a Second Amendment rights and secure meaningful protections for all law-abiding people.

H.R. 38 clearly has the potential to be that kind of legislation.

From the time of our organization's founding, our mantra has been that civil rights do not have borders. We encourage you to consider the amendments we suggest and remind all states and local governments that fundamental, individual Second Amendment rights do not begin or end at a state or county line.

Please feel free to contact me at (855) 372-7522 or bcombs@fpchq.org if our policy or legal teams can be of any assistance to you or your office.

Thank you, once more, for your leadership on this critically-important civil rights issue.

Sincerely,

Brandon Combs
President

cc: H.R. 38 co-sponsors
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