

# Senate Bill 303

## Proposed State Constitutional Amendment Protecting the Right to Keep and Bear Arms

"The right of individuals to acquire, keep, possess, transport, carry, transfer, and use arms for defense of life and liberty, and for all other legitimate purposes is fundamental and shall not be denied or infringed, and any restriction on this right must be subjected to strict scrutiny."

### *Why is Senate Bill 303 necessary?*

- The landmark Second Amendment cases—*Heller* and *McDonald*—were decided by a ONE VOTE MAJORITY.
- Four U.S. Supreme Court Justices disagreed that the Second Amendment protects a fundamental individual right to keep and bear arms – dissents have already been written that create roadmaps for the future destruction of the right.
- Because the Louisiana Supreme Court eviscerated the current right to keep and bears arms provision, Louisianans have little protection in the event *Heller* or *McDonald* are overturned or from overreaching state-imposed gun control.
- In fact, the current Louisiana provision has been so weakened by the state court that it would likely only prevent a complete, across-the-board ban on firearms.
- Strengthening Louisiana’s state constitutional provision is necessary and will provide a critical defense against future efforts to infringe on Louisianan’s rights to keep and bear arms.

### *What will the new provision accomplish?*

- SB 303 is attempting to accomplish three major goals:
  - (1) give Louisiana a meaningful right to arms amendment, for many reasons, including the possibility that the *Heller* or *McDonald* cases could be overruled;
  - (2) recognize the full scope of the right to keep and bear arms, not just the 'right to an operable handgun in the home' that some courts have incorrectly concluded is all that *Heller* and *McDonald* protect; and
  - (3) prevent the worst of the judicial abuses that have all but nullified Louisiana's and various other states’ constitutional rights to arms .

### *Generally, what does the wording mean?*

- First, the language ensures the right is understood to belong to “individuals.”
- Second, it protects “arms” generally, rather than firearms specifically. This allows persons to claim that other weapons that aren’t firearms are also protected and allows for advancements in technology that may someday make metallic cartridge firearms obsolete.
- Third, it lists a number of things that may be done with arms without purporting to establish an exhaustive list. Importantly, the core of the right is “use [of] arms to defend life and liberty.”
- Defense of “liberty” is obviously a broader term than self-defense and at least leaves the door open for arguments against categorical prohibitions like bans on certain semi-automatic arms. At the same time, the phrasing is fairly innocuous, as reasonable people will generally agree that “liberty” is something worth defending. The Preamble to the U.S. Constitution, after all, states that it was ordained and established for reasons that include “provid[ing] for the common defence” and “secur[ing] the blessings of liberty.”
- Other “legitimate purposes,” which would include training, competition, historical preservation, hunting, etc., are also protected.
- And finally, the “right of individuals” that is protected is explicitly deemed to be “fundamental.” And because the enumerated right is “fundamental,” it requires “strict scrutiny” or the highest level of review. This level of review requires the government to prove a compelling state interest.

***Why is Louisiana’s current right to keep and bear arms amendment inadequate?***

- Because the Louisiana courts have determined that the current right to arms provision deserves the lowest level of review, the provision provides less protection than the Second Amendment itself, rendering Louisiana’s constitutional provision meaningless under *Heller* and *McDonald*.
- According to the Louisiana Supreme Court, “The State of Louisiana is entitled to restrict that right for legitimate state purposes, such as public health and safety.” *State v. Blanchard*, 776 So.2d 1165, 1168 (La. 2001).
- The requirement of only a “legitimate” state purpose, and no specified degree of “fit” between the restriction and that purpose, basically subjects restrictions of the right to keep and bear arms under the Louisiana Constitution to rational basis scrutiny. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
- During the *Heller* case, Justice Scalia noted:

*Obviously, [rational basis scrutiny] could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. \* \* \* If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.*

*District of Columbia v. Heller, 554 U.S. 570, 628 fn. 27 (2008). As Justice Scalia notes, "almost all laws ... would pass rational-basis scrutiny." Id.*

- Additionally, the current provision expressly allows the legislature to impose a ban on the carrying of weapons concealed on the person – even in one’s home or on one’s own property or under specific threat of harm.
- Further, the passage of an outright ban on law-abiding Louisianans carrying a concealed firearm would not likely be deemed unconstitutional based on the current state-level provision.

#### ***Why is strict scrutiny used as the level of review?***

- Louisiana’s current right to keep and bear arms provision is deemed to only deserve a rational basis level of review – virtually any rights-infringing law can pass this level of review.
- Because the right to keep and bear arms is deemed “fundamental,” it should require – as state and federal case law has shown – a strict scrutiny level of review. It is important to note that the U.S. Supreme Court has expressly rejected a rational basis level of review, as well as an “interest-balancing” test.

#### ***Would strict scrutiny mean the legislature could no longer regulate firearms?***

- The short answer is “no.”
- A key point to keep in mind is that the proposed language protects the right to arms only for *defensive* and other *legitimate* purposes.
- The possession or use of firearms in furtherance of criminal activity would not be protected, and the legislature would continue to have broad discretion in prohibiting and regulating this sort of illegitimate activity.
- As far as the effects of strict scrutiny, this standard of review requires the state to prove that a prohibition is narrowly tailored to meet a compelling governmental interest.
- Cases have uniformly recognized that suppression of violent crime and maintenance of public safety are compelling governmental interests. Cases have also recognized that prior

violent behavior is a good predictor of future violent behavior. The interest in keeping private firearms out of certain *truly* sensitive places may well be compelling as well.

- In the context of gun control, then, the question would likely be whether the regulation is sufficiently tailored to avoid infringing on persons or activities that have not been shown to pose an enhanced risk. This only makes sense. Why would the state want to limit the responsible exercise of the right by peaceable, competent persons anyway?

***Would strict scrutiny allow violent felons, mental incompetents, or individuals convicted of misdemeanor crimes of domestic violence possess or carry firearms?***

- The short answer is almost certainly “no.”
- In post *Heller* and *McDonald* case law interpreting the fundamental right protected by the Second Amendment, state and federal courts have found that states have a compelling interest in prohibiting firearm possession by various groups of presumptively dangerous persons, including violent criminals and the dangerously insane.
- The *Heller* Court itself strongly suggested that laws prohibiting firearm possession by convicted felons, or possession in sensitive places like courthouses or prisons, would survive Second Amendment analysis .
- It is also important to note that federal prohibitions on firearm possession remain in effect. Even since *McDonald* clarified that the Second Amendment protects a “fundamental” right, not a single federal gun control statute has been facially invalidated.

***Has Louisiana ever made any amendments to its right to keep and bear arms provisions?***

- Yes. In 1974, Louisiana deleted the “militia clause” from the provision.

1879 *Louisiana*: A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.

1974 *Louisiana*: [Militia clause deleted.] The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.

***What are the three levels of judicial review?***

- Rational Basis

This level of judicial review is for determining the constitutionality of a federal or state statute that does not implicate a fundamental right or a “suspect” classification (such as race). Under

the rational basis test, the courts will uphold a law if it is rationally related to a legitimate government purpose. This test is the most deferential of the three levels of review and it requires only a minimum level of judicial scrutiny.

- Intermediate Review

To pass intermediate scrutiny, the challenged law must further an important government interest by means that are substantially related to that interest.

- Strict Scrutiny

To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest.

***Why shouldn't the legislature be able to prohibit the carry of concealed firearms?***

- Why would the state want to prohibit law-abiding citizens from exercising their constitutional rights?
- Both the current Louisiana constitutional provision and the Second Amendment protect the right to "bear" arms. In *Heller*, the court found that the Second Amendment guarantees an individual right to possess and carry weapons in case of confrontation.
- 49 States now allow some form of concealed carry. 38 states now have "shall-issue" non-discretionary permit laws.
- While the right to "bear" arms has long been an unquestioned right in America, public opinion has shifted over time to favor as more socially acceptable the concealed carrying of arms over the open carrying of arms. Many believe concealed carry is more convenient and unobtrusive, and perhaps safer, than wearing arms openly.

***Would SB303 overturn the prohibition on guns on campus?***

- *Heller* and *McDonald* held that prohibitions on carrying firearms in "sensitive" places like schools, government buildings, and prisons are presumptively lawful.
- It is important to note that Louisiana law currently allows firearm's on school property for a variety of reasons including participation in ROTC programs, 14:95.2 (C)(7) the firearm is contained within a motor vehicle, 14:95.2 (C)(5), a student whose class requires the use of the firearm in the class, 14:95. 2(C)(6), and within an individual's dorm room, 14:95.2 (C)(8).
- So long as any "prohibited place" law contains accommodations for legitimate uses and is not overbroad, it should not run afoul of the language proposed by SB 303

***Would SB303 allow guns in churches?***

- Current state law does not prohibit the open carry of firearms in a church. Permit holders are prohibited from carrying in a church, except under limited circumstances. (40:1379.3 (N)(8)).
- It is possible under SB303 that the *state* would be prohibited from banning the otherwise lawful carrying of a firearm into a church. However, it would not prohibit the church (or any other private property owner) from imposing its own ban.
- It is also important to note that, if challenged, the current state ban on church carry for permit holders could be strike down under the Second Amendment.

***Would SB303 eradicate the permit-to-carry system?***

- The state would likely have a compelling interest in preventing violent felons and the mentally ill from carrying a concealed firearm. However, restrictions on the law-abiding would have to be narrowly tailored and not be overly broad or ambiguous.
- It is important to note that the open carry of a lawfully-possessed firearm is legal in Louisiana. An individual does not need a permit or training. This fact would likely strengthen the likelihood of maintaining the permitting system – because the permitting system would not be seen as overly burdensome on the exercise of the right when a Louisiana could simply “open carry.”

***How many states have a state-level right to keep and bear arms amendment?***

- 44 States have protected the right to keep and bear arms in their state’s constitutions.

***Has any other state adopted this language?***

- No. Unfortunately, most states’ right to keep and bear arms amendments – like Louisiana’s – have been rendered meaningless.
- With the shortcomings of many states’ constitutional provisions as a road map, the proposed language is attempting to provide a meaningful protection for all law-abiding Louisianans.

(Note: Many state provisions have been rendered meaningless because of the associated level of judicial review – most provisions were passed prior to *Heller* and *McDonald*)

*Will this provisions allow everyone to have a “machine-gun?”*

- No.
- However, it is important to note that Louisiana allows law-abiding citizens to possess, based on federal approval, automatic weapons and suppressors.
- The federal government stringently regulates the civilian possession of automatic firearms and suppressors.