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BY FIRST-CLASS MAIL

The Hon. Trey Gowdy
Subcomm. on Crime, Terrorism, Homeland Sec'y & Investigations
2418 Rayburn HOB
Washington, DC 20515

The Hon. Richard Hudson
429 Cannon HOB
Washington, DC 20515

The Hon. Justin Amash
114 Cannon HOB
Washington, DC 20515

RE: H.R. 38, Concealed Carry Reciprocity Act of 2017

Dear Chairman Gowdy, Rep. Hudson, and Rep. Amash:

Prof. Randy Barnett (Georgetown University Law Center), Prof. William Baude (University of Chicago Law School), and I write to suggest amendments to H.R. 38, the “Concealed Carry Reciprocity Act of 2017.” As drafted, the bill faces substantial constitutional objections, but these can be fixed with relatively minor changes. Rather than invoking the Commerce Clause, the bill should instead rely on Congress’s power under the Full Faith and Credit Clause of Article IV. The bill should also avoid any unconstitutional attempt to abrogate the states’ sovereign immunity.

(To be clear, we write solely in our capacities as private citizens, without representing our institutions and without expressing any view on the merits of the bill as a whole.)

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The current draft bill conditions the right to carry a concealed handgun on whether the handgun was shipped or transported in interstate or foreign commerce. H.R. 38 does not directly regulate “Commerce with foreign Nations, and among the several States,” U.S. Const. art. I, § 8, cl. 3. Instead, it assumes that a handgun’s *past* movement in cross-border commerce subjects the handgun to federal regulation forever after.

This is a broad and unjustified assertion of federal power. David Engdahl of Seattle University has called this the “‘herpes’ theory” of interstate commerce, whereby “some lingering federal power infects whatever has passed through the federal dominion.” D. Engdahl, *The Necessary and Proper Clause as an Intrinsic Restraint on Federal Lawmaking Power*, 22 Harv. J.L. & Pub. Pol’y 107, 120 (1998). As Chief Justice Roberts wrote of the health insurance mandate, Congress has “power to regulate class[es] of *activities*, not classes of *individuals*, apart from any activity in which they are engaged.” *NFIB v. Sebelius*, 132 S. Ct. 2566, 2590 (2012) (alteration in original) (citations and internal quotation marks omitted). Those who lawfully carry concealed handguns within the body of a state are not engaging in commerce across state lines, and Congress should not treat them as if they were.

By stretching the limits of the Commerce Clause, the current draft unnecessarily limits the bill’s support among constitutional conservatives. (We believe that Rep. Amash, among others, has criticized prior versions of the bill on these grounds.) If Congress can confer a right to carry firearms that once crossed state lines, regardless of state law, then a future Congress could *restrict* the carrying of firearms that once crossed state lines, regardless of state law. Indeed, the federal government could even purport to regulate how Americans brush their teeth, so long as their toothbrushes had previously been shipped across state lines. (Or just the bristles, or the crude oil that was made into plastic, or) In light of precedent, courts are unlikely to strike down every statute that claims this power. But that is no reason for Congress to enact more.

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Relying on the Commerce Clause also creates a hole in the bill's coverage and a potential trap for law-abiding citizens. H.R. 38 does not protect a permitholder who travels to another state and there purchases and carries a handgun *manufactured in-state*—a handgun left outside the bill's coverage because it has never left that state's borders. There is no reason to make a lawful permitholder, who reasonably believes that he is protected by a federal reciprocity statute, into a criminal simply for purchasing and carrying a gun where it was made.

Congress has other powers that would be more appropriate. The Full Faith and Credit Clause empowers Congress to “prescribe * * * the Effect” of state acts, records, or judicial proceedings in other states. U.S. Const. art. IV, § 1. For instance, the Full Faith and Credit for Child Support Orders Act requires certain state child support laws to be given their full effect in every other state. See 28 U.S.C. § 1738B(h). Similarly, the Parental Kidnaping Prevention Act requires every state to recognize certain child custody judgments from other states, and it forbids them from exercising their ordinary jurisdiction over such disputes. See 28 U.S.C. § 1738A.

Congress has used this power only rarely, but soon after the Founding it often debated doing so. See generally S. Sachs, *Full Faith and Credit in the Early Congress*, 95 Va. L. Rev. 1201 (2009). For example, a bill in the Thirteenth Congress would have entitled the executor of a will or the administrator of an estate to exercise similar authority in other states where the decedent held property. H.R. 45, 13th Cong., 2d Sess., § 4 (1814). Another bill in the Fifteenth Congress would have made the authority of bail bondsmen in one state legally effective in every other state, so that bondsmen could recapture fugitives who had fled across state lines. H.R. 17, 15th Cong., 1st Sess. § 2 (1817). Despite the paucity of judicial precedent construing this clause, the legislative precedent portrays its scope as quite broad.

To achieve reciprocity in concealed-carry rights across state lines, the Full Faith and Credit Clause would seem a natural choice. It avoids

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reliance on the Commerce Clause without making it necessary to address difficult issues regarding another possible ground for the bill, namely Congress's power under Section 5 of the Fourteenth Amendment to enforce Section 1. Compare, *e.g.*, *National Right-to-Carry Reciprocity Act of 2011: Hearing before the Subcomm. on Crime, Terrorism & Homeland Sec'y of the H. Comm. on the Judiciary*, 112th Cong. 27–50 (statement of David B. Kopel) (arguing that the enforcement power can support a reciprocity requirement), with J. Blocher, *Constitutional Hurdles for Concealed Carry Reciprocity*, *Take Care* (Mar. 16, 2017), <http://takecareblog.com/blog/constitutional-hurdles-for-concealed-carry-reciprocity> (arguing that it cannot). We express no view on this debate; but we note that, were the statute ever litigated, the government could always assert the Section 5 power as an alternative defense, even if its primary defense sounds in Full Faith and Credit.

Rephrasing the bill in this way could also correct three unrelated statutory problems. First, the bill as written enables permit holders to carry handguns, without specifying whether the handgun involved is within the scope of the original state law or permit. A simple reciprocity statute should confer no broader right than the underlying permit. Second, the current language of H.R. 38 is ambiguous as to the effect of permits that states might issue to nonresidents. (The phrase “in the State in which the person resides” in the proposed 18 U.S.C. § 926D(a) might attach only to “is entitled to carry a concealed firearm,” or it might attach also to “valid license or permit * * * which permits the person to carry a concealed firearm,” thereby excluding permits for nonresidents.) Third, the protection in the current bill extends only to other states; its text does not discuss the District of Columbia or the territories and possessions of the United States mentioned in the Full Faith and Credit Statute, 28 U.S.C. § 1738.

These issues are addressed in the following draft language:

“§ 926D. Reciprocity for the carrying of certain concealed firearms

“(a) Notwithstanding any provision of the law of any State or political subdivision thereof (except as provided in subsection (b)) and subject only to the requirements of this section, any valid license or permit which is issued

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pursuant to the law of a State and which permits a person to carry a concealed firearm, and any other act, record, or judicial proceeding of a State which entitles a person who resides in such State to carry a concealed firearm, shall have the same effect as it has by law or usage in its State of origin, with respect to a person who is not prohibited by Federal law from possessing, transporting, shipping, or receiving a firearm, who is carrying a valid identification document containing a photograph of the person, who (in the case of a valid license or permit) is carrying such license or permit, and who possesses or carries a concealed handgun (other than a machinegun or destructive device), in every other State that—

“(1) has a statute under which residents of the State may apply for a license or permit to carry a concealed firearm; or

“(2) does not prohibit the carrying of concealed firearms by residents of the State for lawful purposes.

“As used in this section, the term ‘State’ shall include the District of Columbia and any Territory or Possession of the United States.

Finally, we note that H.R. 38 as written may unconstitutionally abrogate state sovereign immunity. The proposed § 926D(d)(1) authorizes lawsuits “in any appropriate court against any other person, including a State * * * .” Despite the word “appropriate,” this language appears to support private lawsuits against unconsenting states, in precisely the manner thought forbidden in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72–73 (1996). The Supreme Court has upheld such abrogation under Section 5 of the Fourteenth Amendment (and, perhaps, under the Bankruptcy Clause), but not under the Commerce Clause. Compare *Seminole Tribe*, 517 U.S. at 73, with *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–56 (1976), and *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356 (2006). Whether the Full Faith and Credit Clause confers any power to abrogate sovereign immunity is at best unclear. To avoid these uncertainties, it would be better to include a clear proviso, along the lines of 15 U.S.C. § 378(c)(1)(B), that “This paragraph shall not be construed to abrogate, or otherwise to restrict, expand, or modify, the sovereign immunity of a State.”

The remainder of the statute would then remain intact. (A redlined comparison and a full “clean” copy of the revised bill are included as appendices to this letter.)

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We would be happy to discuss these matters with you or the members of your staff. Prof. Sachs can be reached by email at sachs@law.duke.edu or by phone at 919-613-8542; Prof. Barnett can be reached by email at rb325@law.georgetown.edu or by phone at 202-662-9936; and Prof. Baude can be reached by email at baude@uchicago.edu or by phone at 773-702-0348.

Thank you very much for your time and consideration.

Respectfully,

STEPHEN E. SACHS
Professor of Law
Duke University School of Law

RANDY E. BARNETT
Carmack Waterhouse Professor of Legal Theory
Director, Georgetown Center for the Constitution
Georgetown University Law Center

WILLIAM BAUDE
Neubauer Family Assistant Professor of Law
University of Chicago Law School

Enclosure

CC: Sen. John Cornyn
Chris W. Cox, NRA Institute for Legislative Action

APPENDIX A
Redlined Comparison

Existing Text:

“§ 926D. Reciprocity for the carrying of certain concealed firearms

“(a) Notwithstanding any provision of the law of any State or political subdivision thereof (except as provided in subsection (b)) and subject only to the requirements of this section, a person who is not prohibited by Federal law from possessing, transporting, shipping, or receiving a firearm, who is carrying a valid identification document containing a photograph of the person, and who is carrying a valid license or permit which is issued pursuant to the law of a State and which permits the person to carry a concealed firearm or is entitled to carry a concealed firearm in the State in which the person resides, may possess or carry a concealed handgun (other than a machinegun or destructive device) that has been shipped or transported in interstate or foreign commerce, in any State that—

“(1) has a statute under which residents of the State may apply for a license or permit to carry a concealed firearm; or

“(2) does not prohibit the carrying of concealed firearms by residents of the State for lawful purposes.

* * *

“(d)(1) A person who is deprived of any right, privilege, or immunity secured by this section, under color of any statute, ordinance, regulation, custom, or usage of any State or any political subdivision thereof, may bring an action in any appropriate court against any other person, including a State or political subdivision thereof, who causes the person to be subject to the deprivation, for damages or other appropriate relief.

Revised Text:

“§ 926D. Reciprocity for the carrying of certain concealed firearms

“(a) Notwithstanding any provision of the law of any State or political subdivision thereof (except as provided in subsection (b)) and subject only to the requirements of this section, any valid license or permit which is issued pursuant to the law of a State and which permits a person to carry a concealed firearm, and any other act, record, or judicial proceeding of a State which entitles a person who resides in such State to carry a concealed firearm, shall have the same effect as it has by law or usage in its State of origin, with respect to a person who is not prohibited by Federal law from possessing, transporting, shipping, or receiving a firearm, who is carrying a valid identification document containing a photograph of the person, who (in the case of a valid license or permit) is carrying such license or permit, and who possesses or carries a concealed handgun (other than a machinegun or destructive device), in every other State that—

“(1) has a statute under which residents of the State may apply for a license or permit to carry a concealed firearm; or

“(2) does not prohibit the carrying of concealed firearms by residents of the State for lawful purposes.

“As used in this section, the term ‘State’ shall include the District of Columbia and any Territory or Possession of the United States.

* * *

“(d)(1) A person who is deprived of any right, privilege, or immunity secured by this section, under color of any statute, ordinance, regulation, custom, or usage of any State or any political subdivision thereof, may bring an action in any appropriate court against any other person, including a State or political subdivision thereof, who causes the person to be subject to the deprivation, for damages or other appropriate relief. This paragraph shall not be construed to abrogate, or otherwise to restrict, expand, or modify, the sovereign immunity of a State.

APPENDIX B
Full Text of Revised Bill

A BILL

To amend title 18, United States Code, to provide a means by which nonresidents of a State whose residents may carry concealed firearms may also do so in the State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Short Title.

This Act may be cited as the “Concealed Carry Reciprocity Act of 2017”.

SEC. 2. Reciprocity for the Carrying of Certain Concealed Firearms.

(a) IN GENERAL.—Chapter 44 of title 18, United States Code, is amended by inserting after section 926C the following:

“§ 926D. Reciprocity for the carrying of certain concealed firearms

“(a) Notwithstanding any provision of the law of any State or political subdivision thereof (except as provided in subsection (b)) and subject only to the requirements of this section, any valid license or permit which is issued pursuant to the law of a State and which permits a person to carry a concealed firearm, and any other act, record, or judicial proceeding of a State which entitles a person who resides in such State to carry a concealed firearm, shall have the same effect as it has by law or usage in its State of origin, with respect to a person who is not prohibited by Federal law from possessing, transporting, shipping, or receiving a firearm, who is carrying a valid identification document containing a photograph of the person, who (in the case of a valid license or permit) is carrying such license or permit, and who possesses or carries a concealed handgun (other than a machinegun or destructive device), in every other State that—

“(1) has a statute under which residents of the State may apply for a license or permit to carry a concealed firearm; or

“(2) does not prohibit the carrying of concealed firearms by residents of the State for lawful purposes.

“As used in this section, the term ‘State’ shall include the District of Columbia and any Territory or Possession of the United States.

“(b) This section shall not be construed to supersede or limit the laws of any State that—

“(1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or

“(2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.

“(c)(1) A person who carries or possesses a concealed handgun in accordance with subsections (a) and (b) may not be arrested or otherwise detained for violation of any law or any rule or regulation of a State or any political subdivision thereof related to the possession, transportation, or carrying of firearms unless there is probable cause to believe that the person is doing so in a manner not provided for by this section. Presentation of facially valid documents as specified in subsection (a) is prima facie evidence that the individual has a license or permit as required by this section.

“(2) When a person asserts this section as a defense in a criminal proceeding, the prosecution shall bear the burden of proving, beyond a reasonable doubt, that the conduct of the person did not satisfy the conditions set forth in subsections (a) and (b).

“(3) When a person successfully asserts this section as a defense in a criminal proceeding, the court shall award the prevailing defendant a reasonable attorney’s fee.

“(d)(1) A person who is deprived of any right, privilege, or immunity secured by this section, under color of any statute, ordinance, regulation, custom, or usage of any State or any political subdivision thereof, may bring an action in any appropriate court against any other person, including a State or political subdivision thereof, who causes the person to be subject to the deprivation, for damages or other appropriate relief. This paragraph shall not be construed to abrogate, or otherwise to restrict, expand, or modify, the sovereign immunity of a State.

“(2) The court shall award a plaintiff prevailing in an action brought under paragraph (1) damages and such other relief as the court deems appropriate, including a reasonable attorney’s fee.

“(e) In subsection (a):

“(1) The term ‘identification document’ means a document made or issued by or under the authority of the United States Government, a State, or a political

subdivision of a State which, when completed with information concerning a particular individual, is of a type intended or commonly accepted for the purpose of identification of individuals.

“(2) The term ‘handgun’ includes any magazine for use in a handgun and any ammunition loaded into the handgun or its magazine.

“(f)(1) 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.

“(2) A person possessing or carrying a concealed handgun in a State under subsection (a) may do so in any of the following areas in the State that are open to the public:

“(A) A unit of the National Park System.

“(B) A unit of the National Wildlife Refuge System.

“(C) Public land under the jurisdiction of the Bureau of Land Management.

“(D) Land administered and managed by the Army Corps of Engineers.

“(E) Land administered and managed by the Bureau of Reclamation.”.

(b) CLERICAL AMENDMENT.—The table of sections for such chapter is amended by inserting after the item relating to section 926C the following:

“**926D. Reciprocity for the carrying of certain concealed firearms.**”.

(c) SEVERABILITY.—Notwithstanding any other provision of this Act, if any provision of this section, or any amendment made by this section, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, this section and amendments made by this section and the application of such provision or amendment to other persons or circumstances shall not be affected thereby.

(d) EFFECTIVE DATE.—The amendments made by this section shall take effect 90 days after the date of the enactment of this Act.