

MEMORANDUM

February 20, 2018

Subject: Civil-Suit Provision in the House-passed Concealed Carry Reciprocity Act of 2017 (H.R. 38)

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This memorandum evaluates legal issues potentially arising from the civil-suit provision in H.R. 38, the Concealed Carry Reciprocity Act of 2017, which the House of Representatives passed on December 6, 2017.¹ The bill's broader purpose is to allow persons who are eligible to carry a concealed handgun in one state to lawfully carry a handgun in other states that have a concealed-carry regime for their residents, without regard to differences in the states' eligibility requirements for concealed carry.² The bill's civil-suit provision, broadly speaking, authorizes a private right of action against any person who interferes with a concealed-carry right that the bill establishes. This memorandum evaluates what rights are created by the bill, identifies who may be able to sue and be sued under the bill's civil-suit provision, addresses questions of sovereign immunity raised by the civil-suit provision, and examines potential liability under H.R. 38 versus 42 U.S.C. § 1983.

H.R. 38 Civil-Suit Provision

The civil-suit provision in H.R. 38 provides that:

[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.³

Accordingly, the civil-suit provision potentially authorizes a person who is deprived of a concealed-carry right secured by H.R. 38 to sue the responsible person or state or local government entity. Additionally, H.R. 38 allows successful plaintiffs to recover money damages and attorney's fees.⁴

¹ The Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong., 1st Sess. (2017) (as passed by the House on Dec. 6, 2017) [hereinafter H.R. 38].

² H.R. 38 provides that its reciprocity requirements would not supersede state laws that (1) allow private persons or entities to prohibit or restrict the possession of concealed firearms on their property, or (2) prohibit or restrict firearm possession on any state or local government property, installation, building, base, or park. *Id.* § 101. H.R. 38 is otherwise silent on whether state laws pertaining to firearm *possession* eligibility would be affected by the bill's concealed-carry reciprocity provisions.

³ *Id.*

⁴ *Id.*

Scope of Potential Legal Liability: Persons and Activities Protected by H.R. 38

Language in the civil-suit provision of H.R. 38, as well as elsewhere in the bill, aims civil liability at the conduct of state actors. The circumstances when states and their political subdivisions, including their law enforcement officers, may be subject to civil liability under the bill depends on what rights H.R. 38 affords individuals carrying concealed firearms.

Persons Protected by H.R. 38

H.R. 38's provisions generally afford certain rights to any person who either (1) has a valid concealed carry license from any state or (2) may lawfully carry a concealed handgun without a license in his or her state of residence.⁵ Further, such persons “*may* possess or carry a concealed handgun . . . that has been shipped or transported in interstate or foreign commerce” in any state that permits its residents to carry concealed firearms.⁶ Although statutes that use “*may*” to describe authorized conduct are often interpreted as permissive, context is instructive as to whether a particular provision establishes a judicially enforceable right to engage in conduct.⁷ For instance, a law is generally deemed to include “rights-creating” language when the text is “phrased in terms of the persons benefitted.”⁸ Because H.R. 38 states that its purpose is “to provide a means by which nonresidents of a State whose residents may carry concealed firearms may also do so in the State,” it would appear that, by declaring that certain persons may possess or carry concealed weapons in certain states, the bill gives those persons permission, or the *right*, to carry concealed firearms in those states.⁹ Accordingly, preventing a person from exercising that right, for example, by seizing a handgun from a person who was carrying it in compliance with H.R. 38, may violate a right granted by the bill.

To reap protection under H.R. 38 while carrying a concealed handgun, a covered person must also carry a valid, government-issued photo identification (ID).¹⁰ This ID requirement is the sole requisite for H.R. 38's protections to extend to covered residents of permitless carry states (i.e., states that authorize concealed carry without a state-issued permit). Otherwise, a person must also carry a valid concealed-carry license issued by any state.¹¹ Concealed-handgun carriers must also comply with any state laws that (1) permit private persons or entities to restrict the carrying of concealed firearms on their property and (2) prohibit or restrict firearm possession on certain state or local government properties.¹²

Additionally, the bill states that a person who carries a concealed handgun in compliance with the bill's directives “may not be arrested or otherwise detained” for violating a state law related to firearm

⁵ *Id.*

⁶ *Id.* (emphasis added). The bill also requires concealed carriers to bear certain documentation. *Id.* § 101.

⁷ See, e.g., *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) (“Although ‘*may*’ could be read as permissive . . . the mere use of ‘*may*’ is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority.”); *Ballou v. Kemp*, 92 F.2d 556, 559 (D.C. Cir. 1937) (“Whether the language of a statute is imperative or merely permissive depends on the intention as disclosed in the nature of the act and in the context.”) (internal quotation marks and citation omitted).

⁸ See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (internal quotation marks and citation omitted).

⁹ See H.R. 38, § 101; Office of Congressman Richard Hudson, Rep. Richard Hudson's (NC-08) Concealed Carry Reciprocity Act of 2017, <https://hudson.house.gov/uploads/Concealed%20Carry%20Reciprocity%20Act%20of%202017%201-pager.pdf> (“This legislation prioritizes the rights of law-abiding citizens to concealed carry and the ability to travel freely between states without worrying about conflicting state codes.”).

¹⁰ H.R. 38, § 101.

¹¹ *Id.*

¹² *Id.*

possession “unless there is probable cause to believe that the person is doing so in a manner” that fails to comply with the bill’s concealed carry requirements.¹³ The bill thus appears to give a covered person a right to be free from arrest or detention for carrying a concealed handgun in a state that authorizes concealed carry for its residents, so long as law enforcement does not have probable cause to believe that the person is carrying the handgun in a manner that contravenes H.R. 38’s standards.¹⁴ Further, the bill states that “[p]resentation of facially valid documents” (government-issued photo ID and, as necessary, a concealed-carry permit) to law enforcement “is prima facie evidence that the individual has a license or permit” that H.R. 38 requires.¹⁵

Activities by State Law Enforcement Potentially Giving Rise to Liability

As mentioned above, in addition to protecting a person against certain firearms-related arrests, similar safeguards in H.R. 38 prevent police from “*otherwise detain[ing]*” a person for violating state laws related to possessing, carrying, and transporting handguns, absent probable cause that the detainee’s conduct is unprotected by the bill.¹⁶ The text of H.R. 38 does not expressly define the scope of conduct covered by the phrase “otherwise detain.” The ordinary meaning of “detain,” according to *Merriam-Webster Dictionary*, is “to hold or keep in or as if in custody.”¹⁷ This definition seems to cover conduct that would be considered a “seizure” in Fourth Amendment jurisprudence.¹⁸ Activities that qualify as a police seizure for Fourth Amendment purposes include briefly stopping a person for questioning,¹⁹ a traffic stop,²⁰ arresting someone,²¹ or confiscating property,²² among other things. Unlike an arrest or confiscation of property, for which probable cause typically is required, a brief investigatory stop requires only “reasonable suspicion” that the person has committed, or is about to commit, a crime.²³

¹³ *Id.*

¹⁴ Judicial assessments concerning whether there is probable cause to support an arrest turn on the particular facts of the case, although, generally, “[p]robable cause is a common-sense inquiry requiring only a probability of criminal activity . . . exist[ing] whenever an officer or a court has enough information to warrant a prudent person to believe criminal conduct has occurred.” *See* *Leaver v. Shortess*, 844 F.3d 665, 669 (7th Cir. 2016); *see also* *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004) (“Probable cause to arrest exists when the arresting officer has knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested has committed or is committing a crime.”) (internal quotation marks and citation omitted).

¹⁵ H.R. 38, § 101.

¹⁶ *Id.*

¹⁷ *Detain*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/detain?utm_campaign=sd&utm_medium=serp&utm_source=jsonld.

¹⁸ A Fourth Amendment seizure may occur when an officer, “by means of physical force or show of authority, has in some way restrained the liberty of a citizen.” *See* *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *United States v. Stover*, 808 F.3d 991, 995 (4th Cir. 2015); *Salmon v. Blesser*, 802 F.3d 249, 252 (2d Cir. 2015). An encounter between a police officer and private citizen is deemed to have risen to the level of a seizure when it would be reasonable for the person who has been stopped to believe that he is not free to walk away and end the encounter. *See* *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *United States v. Foster*, 824 F.3d 84, 88 (4th Cir. 2016); *United States v. Lopez*, 443 F.3d 1280, 1283 (10th Cir. 2006); *see also* *United States v. Berry*, 670 F.2d 583, 591 (5th Cir. 1982) (describing types of police encounters).

¹⁹ *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (“The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.”); *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (“It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”).

²⁰ *See, e.g.,* *United States v. Pacheco*, 841 F.3d 384, 389-90 (6th Cir. 2016).

²¹ *See, e.g.,* *Fontana v. Haskin*, 262 F.3d 871, 879 (9th Cir. 2001).

²² *See, e.g.,* *Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 61 (1992) (noting that property is seized “when there is some meaningful interference with an individual’s possessory interests in that property”) (internal quotation mark and citation omitted).

²³ *See* *United States v. Manzo-Jurado*, 457 F.3d 928, 934 (9th Cir. 2006). “Reasonable suspicion” exists when the detaining officer has “a particularized and objective basis” for suspecting that the person stopped has committed criminal activity. (continued...)

Accordingly, the bill’s reference to “otherwise detaining” a person, outside the context of an arrest, arguably could be construed to cover an investigatory stop or brief hold that constitutes a Fourth Amendment “seizure.” If so, the application of H.R. 38’s civil liability provision to a police interaction with a person suspected of unlawfully carrying a firearm may depend upon the particular circumstances of the encounter. At first blush H.R. 38 appears to require probable cause to “detain” an individual to investigate whether certain firearm activity is unlawful—a standard that is higher than the reasonable suspicion that is constitutionally necessary for law enforcement to conduct brief investigatory stops to investigate potentially unlawful behavior. A rule of construction in the bill specifies, however, that H.R. 38 does not purport to prohibit “a law enforcement officer with reasonable suspicion of a violation of *any* law from conducting a brief investigative stop in accordance with the Constitution of the United States.”²⁴ This rule seems to address the kinds of police stops that the Supreme Court recognized in *Terry v. Ohio* (sometimes referred to as “*Terry* stops”).²⁵ Police activities generally associated with *Terry* stops include questioning, identification checks, and protective searches for, and seizures of, weapons to ensure officer safety—practices that are considered lawful under the Fourth Amendment.²⁶ Accordingly, the rule of construction perhaps nullifies the requirement for officers to have probable cause before initiating brief investigatory stops prompted by reasonable suspicion that a person was unlawfully carrying a concealed weapon. In that case, potential police liability under H.R. 38 likely would depend on the specific facts of the case, particularly, the underlying reason for, and the nature, including the duration, of any police “detention” to investigate certain unlawful firearm activity.²⁷

For example, suppose that a police officer in New York—a state that does not issue concealed carry permits to persons under the age of 21²⁸—identifies an individual who appears to be under 21 and carrying a concealed handgun. In this hypothetical, the concealed carrier is a 16-year-old from Vermont, where persons over the age of 16 may carry a concealed handgun without a license.²⁹ There appear to be a number of ways in which the officer potentially could be exposed to civil liability while investigating whether the 16-year-old Vermonter visiting New York is lawfully carrying a concealed handgun. First, if the officer stops that Vermont resident for questioning to determine whether the person is lawfully carrying a concealed handgun, the officer may become liable if the officer did not have reasonable suspicion to believe that the suspect was carrying a handgun in a manner that does not comply with H.R. 38. Liability may also attach if the length of the detention extends beyond a brief investigatory stop and the officer does not have probable cause to believe that the suspect is carrying a concealed handgun unlawfully.³⁰ Additionally, if the officer temporarily seizes the firearm while investigating whether the person is a Vermont resident and thus lawfully carrying a concealed handgun as a 16-year-old, the seizure potentially may cause liability if the seizure is deemed outside the scope of a *Terry* stop. Finally, the

(...continued)

See Navarette v. California, 134 S. Ct. 1683, 1688 (2014). The suspicion must be more than a “mere hunch,” but it is less than probable cause. *See id.*; *United States v. Whitfield*, 634 F.3d 741, 744 (3d Cir. 2010).

²⁴ The Concealed Carry Reciprocity Act of 2017, H.R. 38, § 102, 115th Cong. (2017) (emphasis added).

²⁵ 392 U.S. 1 (1968).

²⁶ *See Florida v. J.L.*, 529 U.S. 266, 273 (2000); *United States v. Hensley*, 469 U.S. 221, 232 (1985); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983); *Adams v. Williams*, 407 U.S. 143, 156-46 (1972). Additionally, at least one federal appellate court has held that a law enforcement officer may, without violating the Fourth Amendment, frisk an occupant of a vehicle that has been pulled over for a traffic stop, if the officer has reasonable suspicion to believe the occupant is armed, *even if* the state permits the concealed carrying of firearms. *See United States v. Robinson*, 846 F.3d 694, 696-701 (4th Cir. 2017) (en banc).

²⁷ *See Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) (opining that “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”).

²⁸ *See* N.Y. PENAL LAW § 400.00.

²⁹ *See* VT. STAT. ANN. tit. 13, §§ 4008, 4017.

³⁰ *See* The Concealed Carry Reciprocity Act of 2017, H.R. 38, 1st Sess. 115th Cong. (2017); *Terry v. Ohio*, 392 U.S. 1 (1968).

officer potentially may incur liability for extending a stop to investigate the validity of the photo ID presented, if the ID appears to be “facially valid.”³¹

In sum, H.R. 38’s civil-suit provision suggests that civil liability will be triggered for a detention not supported by probable cause unless the detention is a brief investigatory stop for which the officer has reasonable suspicion to believe that (1) the detainee is carrying a concealed firearm in violation of state or local law, and (2) the detainee is not carrying a concealed handgun in a manner protected by H.R. 38. As the above examples demonstrate, the bill raises questions as to how what may be viewed as typical police activity might spur litigation. The success of such a potential lawsuit would depend on the nature of the particular police interaction and involve a highly fact intensive judicial inquiry.

H.R. 38’s Civil-Suit Provision and Sovereign Immunity

Sovereign immunity principles may inform how H.R. 38’s civil-suit provision may apply to suits brought against state governments and their subdivisions. Absent a relevant exception, these principles may constrain a state from being subject to suit in either federal or state court. Each of these forms of immunity is discussed below.

State Immunity from Suit in Federal Court

The Eleventh Amendment³² generally shields a state (including an “arm” of the state such as state agencies and state officials acting in their official capacities) from suit in federal court unless that state consents.³³ There are limited exceptions to this principle. Notably, Section Five of the Fourteenth Amendment enables Congress to abrogate a state’s Eleventh Amendment immunity through legislation designed to enforce the Fourteenth Amendment’s protections.³⁴

It is unclear from H.R. 38’s text, however, whether Congress is invoking its Section Five enforcement power. Moreover, even if Section Five is intended to be the constitutional basis for waiving state sovereign immunity to enforce the bill’s civil-suit provision, there is still uncertainty about whether Section Five is a viable basis to do so. H.R. 38 cites the Second Amendment³⁵ as the constitutional source of authority for the legislation.³⁶ The Second Amendment applies to the states via the Fourteenth

³¹ The Concealed Carry Reciprocity Act of 2017, H.R. 38, § 101, 115th Cong. (2017).

³² U.S. CONST. amend. XI. (“The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.”).

³³ See, e.g., *Sossamon v. Texas*, 563 U.S. 277, 284 (2011); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *Peirick v. Ind. Univ.-Perdue Univ. Indianapolis Athletics Dep’t*, 510 F.3d 681, 695 (7th Cir. 2007). *But see* *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 337 (7th Cir. 2000) (listing the exceptions to Eleventh Amendment immunity). Eleventh Amendment immunity does not extend to political subdivisions of a state, like counties or municipalities. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Pittman v. Or., Emp’t Dep’t*, 509 F.3d 1065, 1071 (9th Cir. 2007); *Kitchen v. Upshaw*, 286 F.3d 179, 183-84 (4th Cir. 2002).

³⁴ See, e.g., *Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 36 (2012); *United States v. Georgia*, 456 U.S. 151, 158-59 (2006); *Mich. Corr. Org. v. Mich. Dep’t of Corr.*, 774 F.3d 895, 900 (6th Cir. 2014).

³⁵ The Second Amendment states that “[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 infringed.” U.S. CONST. amend. II.

³⁶ 163 CONG. REC. H47 (daily ed. Jan. 3, 2017) (constitutional authority statement for H.R. 38). The text of H.R. 38 also invokes the Commerce Clause as additional constitutional authority. H.R. 38, § 101 (2017) (authorizing concealed carry reciprocity for a handgun “that has been shipped or transported in interstate or foreign commerce”) For further discussion of the use and legal significance of constitutional authority statements, see generally CRS Report R44729, *Constitutional Authority Statements and the Powers of Congress: An Overview*, by Andrew Nolan.

Amendment.³⁷ Thus, legislation designed to remedy or deter state violations of the Second Amendment arguably would be a permissible exercise of Congress's Section Five's enforcement power.³⁸

Still, when drafting legislation to enforce the Fourteenth Amendment's protections, Congress cannot "determine what constitutes a constitutional violation."³⁹ In other words, Congress, in carrying out its Section Five enforcement power, cannot define or modify the scope of the Second Amendment.⁴⁰ Complicating the matter, the Supreme Court has provided little guidance on the scope of the individual right protected by the Second Amendment, including whether the Second Amendment protects the right to carry a concealed firearm in public. To date, the Court has opined only that the Second Amendment provides an individual right to keep and bear arms for lawful purposes.⁴¹ That said, Section Five legislation is nevertheless lawful even if, in the course of addressing a protected constitutional right, the measure covers some "conduct which is not itself unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the states."⁴² Ultimately, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁴³

Applying these principles to H.R. 38, there appear to be two viable avenues for using Section Five to abrogate state sovereign immunity to suit to protect against violations of an individual's Second Amendment rights. First, Congress may avail itself of Section Five if a reviewing court were to conclude that the Second Amendment encompasses an individual right to carry a concealed handgun. Currently, though, lower courts are split on this issue.⁴⁴ Second, even if a reviewing court does not hold that the

³⁷ *McDonald v. City of Chicago*, 561 U.S. 742 (2010). In *McDonald*, a majority of the Court held that the Second Amendment applies to the states via the Fourteenth Amendment. *Id.* But there was not a controlling opinion as to whether the right was applicable through the Fourteenth Amendment's Due Process Clause or Privileges and Immunities Clause. *Id.* Four Justices held that the Due Process Clause provides the constitutional basis for applying the Second Amendment to the states. *Id.* at 791. Whereas another Justice, concurring in the judgment, concluded that the Privileges and Immunities Clause provides the constitutional support. *Id.* at 778 (Thomas, J., concurring).

³⁸ Congress has previously cited Section Five of the Fourteenth Amendment to support a law designed to protect Second Amendment rights. The Protection of Lawful Commerce in Arms Act, for example, shields firearm manufacturers and sellers from certain civil liability suits. Pub. L. No. 109-92, 119 Stat. 2096, §§ 2(b)(3), 3, 4 (2005). One of the Act's purposes is "[t]o guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment." *Id.* § 2(b)(3). In ruling on the constitutionality of the Act, a district court assessed the various constitutional bases Congress had cited for its authority to enact the law, including enforcing the Second Amendment through Section Five of the Fourteenth Amendment. *See City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005), *partially reversed on other grounds*, 524 F.3d 384 (2d Cir. 2008). The district court ultimately concluded that there was a constitutional basis for the law, but unlikely through Section Five of the Fourteenth Amendment. *Beretta*, 401 F. Supp. 2d at 295-97. This is so because, the court concluded, Congress had shown "no history or pattern of constitutional violations to remedy, and a blanket statement of Congress' intent to regulate under Section 5 does not suffice for it to exercise that power." *Id.* at 297. The Second Circuit ultimately upheld the law as a valid exercise of Congress's power under the Commerce Clause. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d at 392-95 (2d Cir. 2008).

³⁹ *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

⁴⁰ *See id.*

⁴¹ *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) ("[O]ur central holding in *Heller* [is] that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."); *see also* CRS Report R44618, *Post-Heller Second Amendment Jurisprudence*, by Sarah Herman Peck.

⁴² *Boerne*, 521 U.S. at 518 (internal quotations marks and citation omitted).

⁴³ *Id.* at 520.

⁴⁴ *Compare* *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc) (concluding that the Second Amendment "does not extend to the carrying of concealed firearms in public by members of the general public"), *denied cert.*, 137 S. Ct. 1995 (2017), *with* *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017) (striking D.C.'s concealed carry regime after concluding that the right to carry a concealed firearm is a core Second Amendment right), *and* *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d Cir. 2012) (assuming that the Second Amendment protects a right to carry a concealed firearm and, after applying intermediate scrutiny, upholding New York's "good cause" requirement for obtaining a concealed carry permit).

Second Amendment encompasses the right to carry a concealed handgun in public, the bill arguably may be permissible under Section Five if a court concludes (1) that it remedies or deters state conduct that violates the individual right to keep and bear arms for lawful purposes and (2) there is a congruence and proportionality between the Second Amendment right being protected and the remedy of concealed carry reciprocity.

Still, even without lawful abrogation of Eleventh Amendment immunity, there is a judicially created exception—the *Ex Parte Young* doctrine, based on the eponymous Supreme Court case⁴⁵—which allows individuals seeking prospective relief (i.e., in the future) to sue state *officials* in their official capacity “to require them to comply with federal law on an ongoing basis.”⁴⁶ Accordingly, even if sovereign immunity considerations were found to preclude plaintiffs from suing a state government for violations of H.R. 38, those considerations may not extend to suits seeking injunctive relief that are brought against state government officials.

State Immunity from Suit in Its Own Courts

Another relevant principle of immunity is based on a state’s own sovereign immunity—independent of the immunity granted by the Eleventh Amendment—which may bar aggrieved persons from bringing a lawsuit against a state in its own court system.⁴⁷ The Supreme Court has declared that “the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.”⁴⁸ The Court has further stated that “the immunity of a sovereign in its own courts has always been understood to be within the *sole control* of the sovereign itself.”⁴⁹ But Congress may not use its Article I powers—like the Commerce Clause⁵⁰—to abrogate state immunity to private suit in its own courts.⁵¹ Thus, civil action against states brought under H.R. 38 might not be permissibly brought in the defendant-state’s courts without the state’s consent.⁵²

Liability under H.R. 38 versus 42 U.S.C. § 1983

Current law, namely, 42 U.S.C. § 1983 (Section 1983), allows civil-suits against state and local law enforcement personnel alleging constitutional violations, including for conducting searches and seizures that violate the Fourth Amendment.⁵³ Under the statute:

⁴⁵ *Ex Parte Young*, 209 U.S. 123 (1908).

⁴⁶ *McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1049 (7th Cir. 2013); *see Antrican v. Odom*, 290 F.3d 178, 184 (4th Cir. 2002) (explaining that *Ex parte Young* “allows private citizens, in proper cases, to petition a federal court to enjoin State officials in their official capacities from engaging in future conduct that would violate the Constitution or a federal statute”).

⁴⁷ *See Alden v. Maine*, 527 U.S. 706, 713 (1999).

⁴⁸ *Id.*

⁴⁹ *Id.* at 749 (emphasis added). However, state control over immunity in its courts does not extend to suits in *other* state courts. *See Nevada v. Hall*, 440 U.S. 410, 414-27 (1979). Thus, citizens of California may sue Nevada in California state court. *See id.* (concluding that citizens of California could sue Nevada in California state court for violations of California law).

⁵⁰ H.R. 38 invokes the Commerce Clause by limiting concealed-carry reciprocity to handguns “that ha[ve] been shipped or transported in interstate or foreign commerce.” The Concealed Carry Reciprocity Act of 2017, H.R. 38, § 101, 115th Cong. (2017).

⁵¹ *Alden*, 527 U.S. at 754.

⁵² *See James P. Hanlon & James J. Powers, States as Defendants in Employment Litigation: Beyond Alden v. Maine*, 88 ILL. B.J. 280 (2000) (describing the practical implications of *Alden v. Maine*, 527 U.S. 706 (1999)).

⁵³ 42 U.S.C. § 1983. Suits for damages must be brought against an officer in his or her individual capacity. *See Hafer v. Melo*, (continued...)

[e]very *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁵⁴

Thus, a relevant question is to what extent H.R. 38 may expose states and their law enforcement to civil liability for engaging in conduct beyond that for which Section 1983 may impose liability. Civil liability for law enforcement under H.R. 38 may be somewhat broader than liability under Section 1983 based on differences in the provisions concerning the categories of people and entities that may be sued, and the type of conduct that may create liability.

One principal difference between H.R. 38's civil-suit provision and Section 1983 is that Section 1983 does not abrogate a state's sovereign immunity and thus states and their political subdivisions cannot be sued for constitutional infractions.⁵⁵ Further, the Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983."⁵⁶ Accordingly, a state law enforcement officer may be sued under Section 1983 only if the suit is brought against the officer in her "individual capacity." Municipalities and other local governmental units, though, are not protected by Eleventh Amendment immunity and *are* considered "persons" for the purposes of Section 1983 and, thus, may be sued.⁵⁷ Conversely, H.R. 38 expressly authorizes lawsuits against "a State or political subdivision thereof."⁵⁸ Thus, more persons and entities may be subject to liability under H.R. 38, as opposed to Section 1983.

H.R. 38 also may bring a broader range of conduct within the scope of its civil-suit provision than that which may create liability under Section 1983. For instance, a person may invoke Section 1983 to sue a state police officer (in her individual capacity) for violating the person's Fourth Amendment rights (made applicable to the states through the Fourteenth Amendment),⁵⁹ for example, by committing an unlawful search or seizure.⁶⁰ But to be actionable under Section 1983, the search or seizure must be unreasonable.⁶¹ Thus, liability under Section 1983 would not attach if, for example, a seizure is supported by probable cause.⁶² Likewise, liability under H.R. 38 would not attach if a seizure of a handgun, or the arrest or detention of a person for unlawful firearm possession is made with probable cause.

(...continued)

502 U.S. 21, 27, 30-31 (1991); *Brown v. Montoya*, 662 F.3d 1152, 1161 n.5 (10th Cir. 2011).

⁵⁴ 42 U.S.C. § 1983 (emphasis added).

⁵⁵ *Quern v. Jordan*, 440 U.S. 332, 345 (1979).

⁵⁶ *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989).

⁵⁷ *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 690 (1978) ("Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies."); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979) ("[T]he [Supreme] Court has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'"). To bring a 1983 suit against a municipality or local government, the plaintiff must show that "'action pursuant to official municipal policy' caused their injury." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Monell*, 436 U.S. at 691)).

⁵⁸ The Concealed Carry Reciprocity Act of 2017, H.R. 38, § 101, 115th Cong. (2017).

⁵⁹ See *Wolf v. Colorado*, 338 U.S. 25 (1949).

⁶⁰ See U.S. CONST. amend. IV (The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); *Carter v. Butts County, Ga.*, 821 F.3d 1310, 1319 (11th Cir. 2016).

⁶¹ See *Tapley v. Chambers*, 840 F.3d 370, 376 (7th Cir. 2016); *United States v. Ganas*, 824 F.3d 199, 210 (2d Cir. 2016).

⁶² See, e.g., *Doornbos v. City of Chicago*, 868 F.3d 572, 581 (7th Cir. 2017) ("For a search or seizure to be reasonable, probable (continued...)

One difference between the ability to bring suit under H.R. 38 and Section 1983 appears to be the extent of liability that may be incurred for investigative stops, which, in the context of the Fourth Amendment, require less proof than probable cause to be lawful. A brief investigatory stop—like a traffic stop—is deemed reasonable (and thus constitutionally permissible) if the officer has reasonable suspicion to stop and question an individual, “‘justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.’”⁶³ In other words, a person could not successfully bring suit under Section 1983 against a law enforcement officer who, acting on reasonable suspicion, briefly stopped the individual to investigate a possible criminal violation. And it appears that H.R. 38’s rule of construction—declaring that “[n]othing in this [bill] prohibits a law enforcement officer with *reasonable suspicion* of a violation of *any law* from conducting a brief investigatory stop in accordance with the Constitution of the United States”⁶⁴—could be construed as precluding civil liability for officers conducting lawful *Terry* stops.

However, H.R. 38’s rule of construction does not definitely solve potential liability issues related to *Terry* stops. For instance, “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures.”⁶⁵ So if a police officer stops a car for speeding, the stop may become unreasonable under the Fourth Amendment if the officer prolongs the stop beyond the amount of time reasonably necessary to issue a ticket, *unless there is reasonable suspicion* to believe that there is other criminal activity to investigate.⁶⁶ If such reasonable suspicion exists, the continued holding of the person might be permitted, and a claim could not be brought under Section 1983 for a purported violation of the driver’s Fourth Amendment rights, even if the detention was not supported by probable cause.

Conversely, notwithstanding the bill’s rule of construction, it is possible that, because H.R. 38 requires an officer to have *probable cause* to believe that an individual is not complying with the bill’s concealed-carry requirements before arresting or detaining the person for a firearms-possession violation, an officer potentially may be required to have probable cause—rather than just reasonable suspicion—to *prolong* a traffic stop beyond the time necessary to resolve the traffic issue and to investigate whether the driver is carrying a concealed handgun in compliance with H.R. 38.⁶⁷ The stop perhaps might be prolonged, for example, to determine the validity of a driver’s concealed-carry permit or photo ID. Failure to support a continued detention with probable cause in such a case arguably could give rise to a legal claim under H.R. 38.

Accordingly, it appears that, at least in some ways, actions giving rise to civil liability under H.R. 38 would mirror those that could give rise to liability under Section 1983. But it is not apparent, however, whether any of the court-made defenses available to law enforcement in Section 1983 actions—such as

(...continued)

cause is generally required.”). *Fish v Brown*, 838 F.3d 1153, 1167 (11th Cir. 2016) (arrest); *United States v. Walker*, 840 F.3d 477, 483 (8th Cir. 2016) (traffic stop); *United States v. Church*, 823 F.3d 351, 354-55 (6th Cir. 2016) (search for contraband).

⁶³ See, e.g., *United States v. Thompson*, 842 F.3d 1002, 1007 (7th Cir. 2016) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)); see also *Navarette v. California*, 134 S. Ct. 1683, 1687 (2014); *Whren v. United States*, 517 U.S. 806, 810 (1996); *United States v. Pacheco*, 841 F.3d 384, 389-90 (6th Cir. 2016); *United States v. Stevenson*, 832 F.3d 412, 428-29 (3d Cir. 2016).

⁶⁴ The Concealed Carry Reciprocity Act of 2017, H.R. 38, § 102, 115th Cong. (2017) (emphasis added).

⁶⁵ *Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015).

⁶⁶ *Id.* at 1612, 1614, 1616-17; *United States v. Calvetti*, 836 F.3d 654, 665-66 (6th Cir. 2016).

⁶⁷ An officer does not violate the Fourth Amendment when a traffic stop is extended based on reasonable suspicion there is another crime (other than the traffic offense) to investigate. For instance, in *United States v. Fadiga*, the Seventh Circuit held that a traffic stop was not impermissibly extended by thirty minutes after the officer discovered from a consensual car search a bag full of gift cards, and then requested the dispatcher to send someone with a card reader to determine whether the gift cards had been tampered with in violation of 18 U.S.C. § 1029(a)(3). 858 F.3d 1061, (7th Cir. 2017).

qualified immunity—would be afforded to law enforcement sued under H.R. 38.⁶⁸ If not, plaintiffs may be more likely to prevail by bringing lawsuits under H.R. 38, rather than Section 1983, for similar police conduct related to inquiries into potential unlawful firearm activity.

⁶⁸ See *Wyatt v. Cole*, 504 U.S. 158, 163-64 (1992) (“Section 1983 creates a species of tort liability that on its face admits of no immunities. Nonetheless, we have accorded certain government officials either absolute or qualified immunity from suit if the tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that Congress would have specifically so provided had it wished to abolish the doctrine.” (internal quotation marks and citations omitted)).
