

**GIFFORDS  
LAW CENTER**  
TO PREVENT GUN VIOLENCE

# GUN SAFETY UNDER THREAT

How Extremist Judges  
Are Undermining Gun Laws

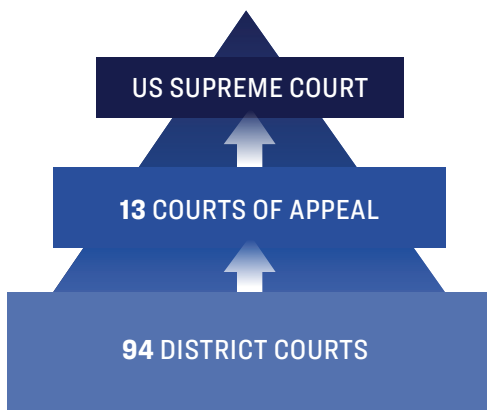
August 2020

# EXECUTIVE SUMMARY

Courts wield a tremendous amount of power over gun safety laws. For years, trial courts, courts of appeal, and even the Supreme Court have affirmed the constitutionality of lifesaving gun laws. More recently, extremist judges have thrown established legal precedent and the progress of the gun safety movement into jeopardy, threatening the safety of all Americans.

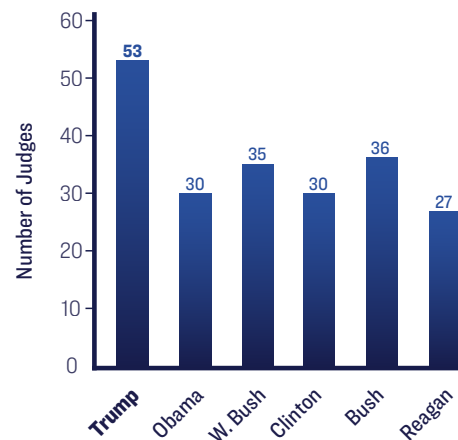
## HOW THE COURTS SHAPE GUN LAWS

A small number of judges can wield an outsized influence. Through opinions reversed on appeal and dissenting opinions, extremist judges on the lower courts can create the building blocks the Supreme Court needs to reshape Second Amendment law.



## A DANGEROUS OUTLIER

President Trump has appointed far more judges to the United States Courts of Appeals than other recent presidents in their first terms. Many of these judges have extremist views of the Second Amendment in line with those of the gun lobby.



## THE ROLE OF THE COURTS: ARGUMENTS FOR ADVOCATES

The gun lobby argues that gun violence prevention laws are incompatible with the Constitution. This is wrong. Gun safety advocates should understand these takeaways about the relationship between the courts and gun safety.

- 1 Gun safety laws are fully compatible with our Constitution.** The Constitution requires that rights be exercised responsibly. The right to bear arms does not trump every other right.
- 2 Gun rights extremism is an historical anomaly.** Gun safety laws are older than the Second Amendment, with more than 100 gun laws enacted between 1700 and 1790 alone. For decades, the NRA supported a wide range of gun safety laws, but in recent years, the organization has become much more extreme.
- 3 Gun safety laws work. Research shows that these laws reduce suicide, homicide, and gun injuries.** They reduce incidents of mass shootings, and they reduce casualties when mass shootings do occur.
- 4 The right to personal safety belongs to all Americans.** A view of self-defense that elevates gun ownership above all other rights—including the right to live—makes everyone less safe.

## INTRODUCTION

In courts across the country, gun safety is under attack. Gun rights extremists are on a perpetual offensive, peddling a radical, dangerous view of the Second Amendment and filing lawsuits to challenge almost every newly passed gun safety law, as well as others that have been on the books for years.

While in the past, most of these challenges have failed, the tide may be turning. More and more judges are receptive to extreme views on gun policy, due in no small part to the high numbers of judicial confirmations pushed through during the Trump administration. **This perfect storm could have devastating consequences for the gun violence prevention movement, and for the safety of all Americans.**

The vast majority of Americans support gun safety laws. Seventy-two percent think Congress should do more to address gun violence, 82% support firearms licensing requirements, and 93% support background checks (including 89% of Republican voters).<sup>1</sup> In the wake of federal inaction, states are increasingly taking up the mantle of gun safety, with 45 states and the District of Columbia enacting over 350 gun safety laws since the Sandy Hook massacre in December 2012.

As it loses ground in state legislatures, the gun lobby is increasingly turning to the courts, bringing an onslaught of meritless suits and persuading elected leaders like President Trump and Senate Majority Leader Mitch McConnell to nominate and confirm judges who view the Second Amendment as an absolute, unlimited right.

The text of the Second Amendment, ratified in 1791, reads as follows: “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.” Today judges play a crucial role in interpreting its meaning. In 2008, the United States Supreme Court case *District of Columbia v. Heller* defined the Second Amendment as we now know it, when the Court ruled that the Second Amendment protects an individual right to keep a handgun in the home for self-defense.

Justice Antonin Scalia’s majority opinion pointed out that the right protected by the Second Amendment comes with responsibilities—namely, the responsibility to obey gun regulations that the Court describes as consistent with the Constitution. Justice Scalia wrote, “like most rights, the right secured by the Second Amendment is not unlimited. **[It is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.**” Two years later, in *McDonald v. Chicago*, the Court explained that “state and local experimentation with reasonable firearms regulations will continue under the Second Amendment.”<sup>2</sup>

Although the Supreme Court has made it clear that a wide range of gun regulations are constitutional, in the more than ten years since *Heller* was decided, gun lobby groups like the NRA have tried to use the Second Amendment to strike down lifesaving gun laws that responsible gun owners and Americans of all political persuasions support. This is a departure from positions the NRA held in the decades before *Heller*, including support for license requirements and restrictions on firearm purchases.

Fortunately, on June 15, 2020, the Supreme Court announced that it would decline to hear ten gun cases it was considering, making it less likely that the highest court in the land will issue a ruling on gun safety in the immediate future.<sup>3</sup> But the gun lobby continues to bring cases, hoping to influence the courts.

“The right secured by the Second Amendment is not unlimited.”

- Justice Scalia in *Heller*



As this report will describe, the majority of judges have historically disagreed with the gun lobby's position, instead following the Supreme Court's guidance in *Heller* that a broad range of gun safety laws are constitutional. **But under the oversight of President Trump and Senate Majority Leader McConnell, open court seats are now being filled by judges who espouse the NRA's extremist view of the Second Amendment, jeopardizing much of the lifesaving progress made by the gun safety movement.** Gun safety advocates must protect lifesaving laws by demanding that elected leaders nominate and confirm judges who will defend long-standing constitutional precedent and our right to be safe from gun violence.

## HOW THE COURTS IMPACT GUN SAFETY

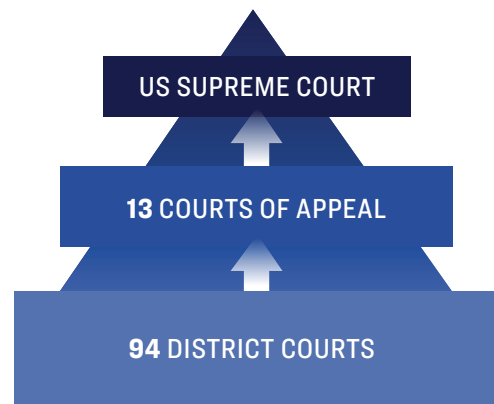
There are three levels of federal courts: district courts (trial courts), courts of appeals, and the Supreme Court. A typical federal Second Amendment lawsuit starts when a challenger to a gun safety law files a suit in district court. The challenger—or plaintiff—names a defendant, usually the government official or agency that enforces the law. After a district court issues a decision, the unsuccessful party can appeal to the federal Court of Appeals in their geographic region, where a three-judge panel reviews the district court ruling, and then to the Supreme Court. However, most appeals court rulings are final: the Supreme Court only reviews about 0.2% of appeals court rulings.<sup>4</sup>

Criminal prosecutions can also create Second Amendment law when the government charges someone with a firearms-related crime—say, illegal gun possession—and the criminal defendant argues that the firearms-related law violates the Second Amendment. The court then must issue a Second Amendment decision on the law at issue, in addition to the criminal charges underlying the case.

Under Article III of the US Constitution, all judges on these courts, from the Supreme Court all the way down to district courts, are nominated by the president and confirmed by the United States Senate. The Constitution provides that all Article III judges are appointed for life terms but does not otherwise set forth any specific requirements for judges. Once confirmed, aside from death or retirement, a judge can only be removed through impeachment, which has only occurred a handful of times in American history.<sup>5</sup>

Modern Second Amendment law has evolved in such a way that federal judges can have a tremendous impact on gun safety laws. **These judges are ultimately responsible for deciding not only if many gun safety laws are constitutional, but also for determining the relevant legal framework for making this decision in the first place.** Because the Court's decision in *Heller* expressed support for gun regulations but did not give much further guidance to the lower courts about how to decide Second Amendment cases, federal judges often must rule on whether a gun safety law is constitutional and even how to approach that question.

In the decade since *Heller*, judges have established a two-part test for reviewing Second Amendment challenges. First, judges ask whether the challenged law burdens conduct that the Second Amendment protects. Second, judges ask whether the challenged law is sufficiently tailored to a proper government interest to survive constitutional scrutiny.



### FEDERAL COURTS STRUCTURE

Yet uncertain guidance from the Supreme Court means that different judicial philosophies could lead judges to treat Second Amendment cases very differently. To date, most federal judges follow precedent establishing that gun safety laws are constitutional. These judges recognize that gun ownership is a right that comes with the responsibility to obey laws that protect all Americans from violence and injury.

But other judges have viewed any inconvenience, however minor, to gun owners with hostility, and as evidence that the given law is unconstitutional. These judges may reach a very different outcome in the same Second Amendment cases—such as by finding that the Constitution provides an absolute right to possess and use guns that the government can't restrict, even if this right harms others.

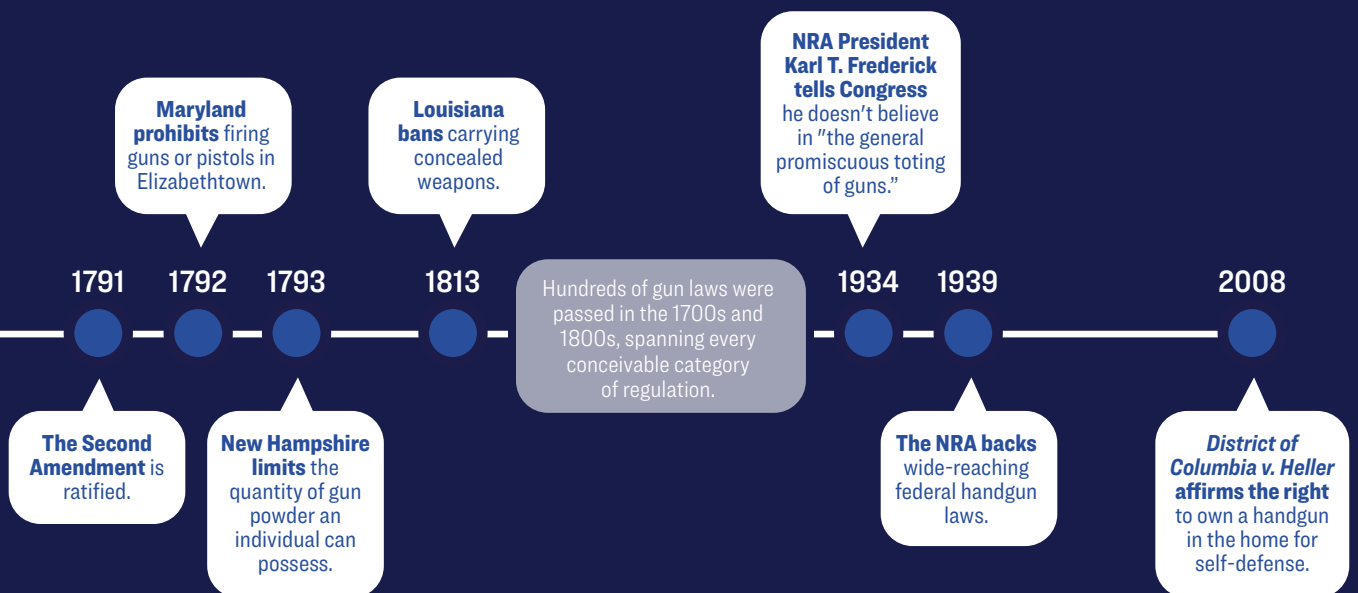
Through dissenting opinions and opinions reversed on appeal, extremist outlier judges on the lower courts can create the building blocks the Supreme Court needs to reshape Second Amendment law. **Even if formally rejected, these opinions can provide an analytical roadmap for majority rulings if and when the opportunity arises down the road.** If these views are adopted into majority rulings, they could upend Second Amendment precedent and expand gun rights far beyond Justice Scalia's interpretation in *Heller*.

## GUN SAFETY AT RISK

While gun rights litigation is a relatively new practice in the United States, American gun safety laws are older than the Second Amendment itself. When the Second Amendment was adopted in 1791, there was already a robust set of laws regulating storage of gunpowder, firearm licensing, and discharge of firearms in public places.<sup>6</sup> In fact, according to the Duke Center for Firearms Law, over 100 gun laws were enacted between 1700 and 1790 alone.

After the Second Amendment was passed, states continued to regulate firearms. In 1792, Maryland passed a law completely prohibiting the firing of guns or pistols in Elizabethtown.<sup>7</sup> In 1793, New Hampshire passed a law capping the quantity of gunpowder that an individual could possess.<sup>8</sup> In 1813, Louisiana banned the “carrying concealed weapons,” including pistols.<sup>9</sup> These are just a few examples of laws that scholars have observed were “comprehensive, ubiquitous, and extensive,” spanning “every conceivable category of regulation.”<sup>10</sup>

## Gun Laws Throughout US History



States continued to enact and refine gun safety laws for the next 200 years. Courts upheld these laws as fully consistent with the Second Amendment, which they interpreted as protecting a “collective right to self-defense.”<sup>11</sup> According to a study by law professor Carl T. Bogus, every single Second Amendment law review article between 1887 and 1960 “endorsed the collective right model,” which was “not only widely accepted but uncontroversial.”<sup>12</sup>

Indeed, the NRA’s own political activism long reflected this view: in the 1920s, the NRA supported license requirements for concealed carry and a waiting period for firearm purchases.<sup>13</sup> In 1934 and again in 1938, the NRA supported the enactment of wide-reaching federal handgun laws.<sup>14</sup> When the NRA president testified before Congress in 1934, he said, “I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses.”<sup>15</sup>

The NRA shifted its stance in the 1970s to reflect its pivot towards lobbying, arguing that the Second Amendment protects an expansive individual right rather than a collective one subject to regulation. The Black Panther Party had already been pushing this individual right frame, but outside of these two organizations, the view was radical.<sup>16</sup>

Notably, judges were unpersuaded. Courts rejected Second Amendment challenges to gun safety laws, continuing to rely on a landmark Supreme Court case from 1939.<sup>17</sup> **Meanwhile, the gun lobby spent millions buying influence in academia and the political sphere to popularize and legitimize the notion of a sweeping individual constitutional right to bear arms.**

In 2008, the gun lobby’s decades-long project culminated in the Supreme Court’s *Heller* ruling. Justice Scalia wrote the opinion in which the Court held that the Second Amendment protects an individual right to bear arms. However, as previously discussed, the Court cautioned that this right was “not unlimited.”

The Court also rejected the position that most gun safety laws are unconstitutional, finding that the Second Amendment has the same reasonable public safety-based limits as other rights. Without providing an explicit test for reviewing gun laws’ constitutionality, the Court provided several examples of presumably valid regulations, including commercial firearm sales regulations, limitations on firearms in sensitive places like schools and government buildings, prohibitions against possession by individuals who pose a demonstrated threat to themselves or others, and restrictions on military-style weapons.

Ignoring *Heller*’s cautionary language, gun rights extremists touted *Heller* as vindication of their opposition to gun safety laws. Lower courts disagreed. Since *Heller*, lower courts have upheld the following:

- Restrictions on who can carry firearms in public
- Location-based restrictions on the public carrying of firearms
- Restrictions on firearm possession by children and teenagers, people with felony convictions, people with a history of serious mental illness, and people with demonstrable “extreme risk” factors
- Restrictions on large-capacity magazines and assault weapons
- Safety requirements for firearm design and sales
- Fees on firearm purchases and waiting periods
- Zoning, recordkeeping, and storage regulations for gun dealers and gun ranges
- Background check requirements for firearm purchases

Rather than concede that the Second Amendment is in fact consistent with gun safety laws, the gun lobby has argued that judges are treating the Second Amendment as a “second class right,” even as judges across the political spectrum dismiss their lawsuits and uphold gun violence prevention measures as constitutional.

Judge Frank Easterbrook, a highly respected, conservative-leaning judge and Reagan appointee, upheld an Illinois city's ban on assault weapons and large-capacity magazines; a George W. Bush appointee voted to uphold a similar assault weapons ban in Maryland (in an opinion authored by a Reagan appointee); and a Reagan appointee upheld handgun registration requirements in the District of Columbia, as well as bans on assault weapons and large-capacity magazines.<sup>18</sup>

One of the most eloquent advocates for the people's right to adopt gun safety laws is respected jurist Judge J. Harvie Wilkinson, a judge who typically aligns with conservatives on a number of issues. Voting to uphold the Maryland assault weapons ban, Judge Wilkinson wrote:

**Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation.**<sup>19</sup>

In order to delegitimize liberal, moderate, and conservative judges' broad consensus and justify its meritless challenges, the gun lobby pulls from a reliable rhetorical playbook: fear-mongering and victimization. It frames reasonable gun safety laws in extreme, misleading terms in order to fabricate a "slippery slope" of gun regulations. And when courts uphold these commonsense laws, the gun lobby accuses them of misapplying *Heller* and diluting the Second Amendment.

According to gun extremists, safe storage legislation "invades people's homes" and "severely restricts parental decisions about firearms in the home."<sup>20</sup> A fine for an owner's failure to promptly report a lost or stolen gun "victimizes gun owners."<sup>21</sup> A law restricting guns on school grounds "does nothing more than create another gun-free zone where criminals prey on helpless victims."<sup>22</sup> Over and over again, a gun safety law is a "ban," according to extremists: the domestic abuse restriction is a "ban" for domestic abusers. A requirement that firearms dealers only sell handguns to in-state residents is a "ban on interstate handgun purchases." A limitation on magazine capacity is a "magazine ban," which "would limit the ability of people to defend themselves."<sup>23</sup> And a registration requirement invites an ominous warning: "the only reason for the government to register your guns is to take your guns."<sup>24</sup>

**NRA-ILA**  
INSTITUTE for LEGISLATIVE ACTION

## **S. 150: The Biggest Proposed Gun and Magazine Ban in American History**

TUESDAY, FEBRUARY 5, 2013

**NRA-ILA**  
INSTITUTE for LEGISLATIVE ACTION

## **Virginia: "Red Flag" Gun Confiscation Vote Tomorrow in Senate**

TUESDAY, JANUARY 21, 2020

Justice Clarence Thomas has repeatedly echoed the gun lobby's extreme messaging. In 2015, he accused the Supreme Court of "relegating the Second Amendment to a second-class right."<sup>25</sup> In 2017, he noted the "distressing trend" wherein the Second Amendment is treated as a "disfavored right," compared with the Court's "preferred rights."<sup>26</sup> In 2018, he lamented, "The right to keep and bear arms is apparently this Court's constitutional orphan."<sup>27</sup>

## THE GUN LOBBY'S AGGRESSIVE LITIGATION TACTICS

As gun rights extremists push for judges who share their radical view of the Second Amendment, they advance these legal theories in an aggressive, nationwide offensive. They file lawsuits challenging nearly every category of gun safety law. They challenge laws prohibiting gun dealers from operating in school zones.<sup>28</sup> They challenge laws barring people from openly carrying firearms in public.<sup>29</sup> They challenge laws allowing churches to prohibit guns on their property.<sup>30</sup> They even challenged the federal prohibition on machine guns.<sup>31</sup>

Because a few wins in a handful of sympathetic courts are all that is necessary to begin to shift legal precedent, gun rights activists repeatedly challenge virtually identical laws across the country—sometimes even challenging the same law more than once.<sup>32</sup>

The gun lobby's absolutist position on gun safety laws came to a head after the tragic high school shooting in Parkland, Florida, in February 2018, when Floridians pushed their state legislators to enact stronger gun safety laws. Despite NRA opposition, the legislature quickly passed a package of commonsense safety measures, including a law raising the minimum purchasing age from 18 to 21. Governor Rick Scott signed the bill into law on March 9, 2018.

Hours later, the NRA filed a lawsuit in federal court in Tallahassee. In their complaint, plaintiffs argued that the Second Amendment guarantees 18-to-20-year-olds the right to possess a firearm, despite other plaintiffs having already lost three lawsuits with this argument, and despite the fact that the Parkland shooter was 19 years old when he committed his massacre. As of July 2020, the Florida challenge is still pending.

Through their kitchen-sink litigation approach to broadening gun rights, gun lobby groups have not merely ignored their own dismal track record; they have also ignored myriad unsuccessful Second Amendment challenges brought by individual, unaffiliated plaintiffs. Despite the ample case law upholding these laws as constitutional, the gun lobby will not stop suing.

**The gun lobby even uses its own loss numbers to its advantage,** arguing that courts are wrongly dismissing its suits and treating the Second Amendment as "second class"—when actually, many of the suits are meritless on their face. Scholars who have examined win and loss rates for Second Amendment cases have found no evidence that courts are treating the Second Amendment as a "second class right."<sup>33</sup>

## The Unprecedented Immunity Enjoyed by Gun Manufacturers

It is expensive to mount a perpetual barrage of doomed lawsuits. Gun rights extremists have enjoyed many forms of support from the gun industry, which stands to profit from radical Second Amendment rulings by putting more guns in more places. Yet even as they fuel an onslaught of challenges to lifesaving gun laws, gun industry executives rarely find themselves on the other side of the "v": the Protection of Lawful Commerce in Arms Act (PLCAA) shields gun manufacturers from legal liability for gun violence, including mass shootings, despite their obvious contributions to this crisis. While there are a few exceptions to the law, PLCAA stands as a barrier to the vast majority of lawsuits seeking to hold the gun industry accountable.



President Trump poses with NRA head executive Wayne LaPierre at the White House after the NRA spent \$30 million to elect him.



## GUN RIGHTS EXTREMISM ON THE SUPREME COURT

Donald Trump has used his presidency to nominate judges whose ideologies are to the far right on gun safety. Nowhere is President Trump's impact on the federal judiciary more obvious than on the Supreme Court. When the president had the rare opportunity to fill two Supreme Court seats in the first two years of his presidency, the gun lobby celebrated his selections and funded a marketing blitz in support of his nominees, resulting in the confirmation of two justices whose demonstrated views on the Second Amendment are dangerous and extreme.

### Justice Neil Gorsuch

When President Trump announced his nomination of Neil Gorsuch to the Supreme Court, the NRA applauded his selection as an "outstanding choice to fill Justice Scalia's seat," and spent \$1 million on advertising to support Gorsuch in advance of his confirmation hearings.<sup>34</sup> During those hearings, Gorsuch refused to agree or disagree with Justice Scalia's statement in *Heller* that the Second Amendment allows for bans on military-style rifles. Instead, Gorsuch said that a military-style rifle ban's validity depends on "whether it's a gun in common use for self-defense, and that may be subject to reasonable regulation."<sup>35</sup>

Two months after Gorsuch's confirmation, the Supreme Court declined to hear a Second Amendment challenge to a state law requiring a "good cause" in order to get a permit to carry a concealed handgun within the state.<sup>36</sup> Justice Thomas disagreed with the Court's refusal to review the case, writing a dissenting opinion that Justice Gorsuch joined. In the Thomas-Gorsuch dissent, the justices claimed that the Supreme Court has treated the Second Amendment as a "disfavored right."<sup>37</sup> They also said they believed California's good cause law to be unconstitutional, and that the Second Amendment requires allowing more guns in public places.

Justice Gorsuch doubled down on this extreme position in the Court's recent ruling in *New York State Rifle & Pistol Association v. City of New York (NYSRPA)*, a challenge to handgun transport restrictions in New York City. New York City had repealed the restrictions at issue (and was precluded by New York State from reinstating them), and the Court appropriately dismissed the case as moot. But Justice Gorsuch rejected this ruling, joining Justice Alito's dissenting opinion arguing that the case was not moot and that the repealed restrictions violated the Second Amendment.

Referring to the lower appeals court decision, the dissenters expressed "concern" over rulings coming out of the lower courts, and spoke skeptically about "what we are told is the framework for reviewing Second Amendment claims." This critique is consistent with Justice Gorsuch's prior positions suggesting that he favors a new, broader Second Amendment framework, rather than the consensus framework that the Courts of Appeals have reached and which the appellate court used in *NYSRPA*.

### Justice Brett Kavanaugh

Justice Kavanaugh sent a similar signal in *NYSRPA*. Though, unlike Gorsuch, he agreed that the case was moot, he wrote a separate concurring opinion to express concern that some federal and state courts were not properly applying *Heller* and *McDonald*. Like Gorsuch, Justice Kavanaugh appeared eager to issue a decision that upends Second Amendment law in favor of gun rights extremism. "The Court should address that issue soon," Justice Kavanaugh wrote, "perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court."<sup>38</sup>



This NRA ad criticizing the Supreme Court fails to explain that conservative Justice Scalia wrote that the Second Amendment is "not unlimited" and reasonable gun safety laws are constitutional.



The NRA's lobbying arm, the Institute for Legislative Action, urged supporters to advocate for the confirmation of Brett Kavanaugh, who opposes any restriction of assault weapons.

Justice Kavanaugh, along with Justice Thomas, objected to the Court's decision in early June not to hear a new Second Amendment case.<sup>39</sup>

This is not surprising, given that Justice Kavanaugh has been especially explicit about his radical, alternative reading of *Heller* and the Second Amendment. Like Justice Gorsuch, he has argued that the Second Amendment absolutely protects any arms that are “in common use by law-abiding citizens,” which he interprets to include assault weapons.

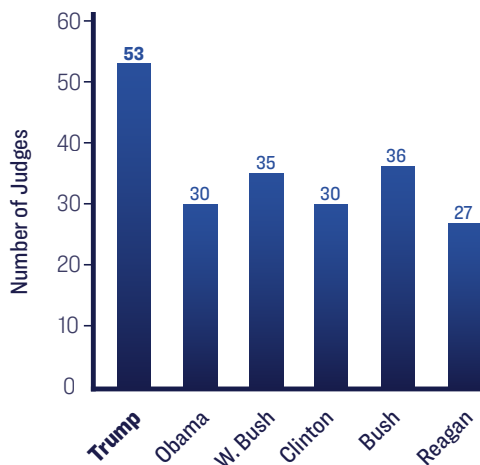
Justice Kavanaugh outlined his views while he was on the DC Circuit Court of Appeals, in a lawsuit challenging two aspects of the District of Columbia's gun safety regulations: a ban on assault weapons and a requirement that people register their handguns. A three-judge panel upheld both regulations, holding that they did not violate the Second Amendment. In a lengthy dissenting opinion, Justice Kavanaugh wrote that he would have struck down both provisions as inconsistent with the Second Amendment. Recognizing no distinction between the lethality of semiautomatic assault rifles and handguns, Justice Kavanaugh wrote: “The government may not generally ban semi-automatic guns, whether semi-automatic rifles, shotguns, or handguns.”<sup>40</sup>

The NRA spent \$1.2 million on advertising to promote Justice Kavanaugh's confirmation.<sup>41</sup> “Judge Kavanaugh has demonstrated his clear belief that the Constitution should be applied as the Framers intended,” the NRA said in a statement. “To that end, he has supported the fundamental, individual right to self-defense embraced by Justice Scalia in the *Heller* decision.”<sup>42</sup> With the confirmations of these justices, the NRA got exactly what it wanted.

## GUN RIGHTS EXTREMISM IN THE LOWER COURTS

Because the rulings of lower court judges form the bulk of guidance for future litigants and future judges, lower court judges wield enormous influence on the direction of Second Amendment law. A minority of persuasive lower court judges can kickstart major legal changes. President Trump has appointed many extremist judges who could prove to be this impactful minority, reworking Second Amendment law in dangerous and unprecedented ways.

As of the end of July 2020, Trump has appointed 201 federal judges and could be on track to exceed the number of first-term judicial appointments by any president in 40 years.<sup>43</sup> Of Trump's 201 confirmed appointments to these lifetime posts, 53 were for judgeships on the United States Courts of Appeals, outpacing appellate appointments by every president since Jimmy Carter. In fact, Trump appointed more judges to the US Courts of Appeals in his first year—12— than any other president in his first year.<sup>44</sup> Trump appointees now comprise 30% of active appellate judges.<sup>45</sup>



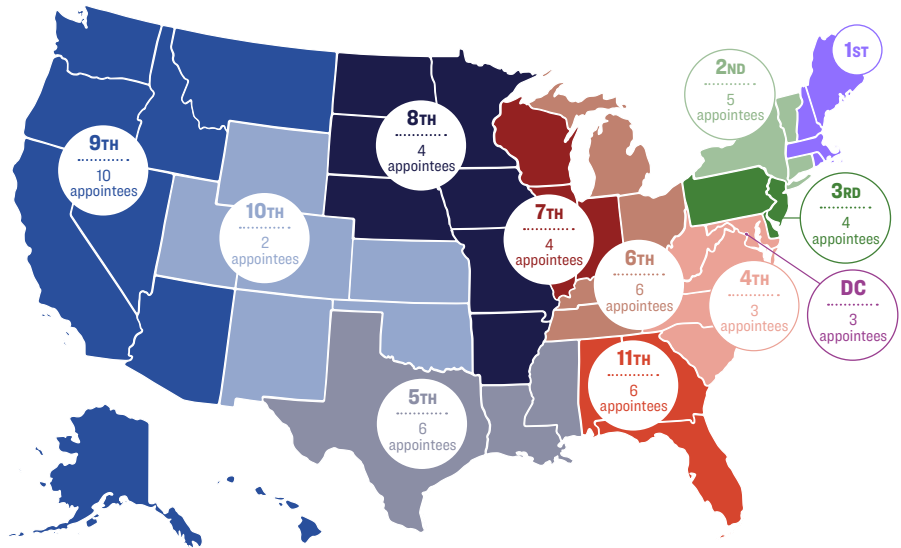
While he has appointed judges to all but two of the country's 13 courts of appeals, Trump's impact has been particularly strong in three appellate Circuits—the Second, Third, and Eleventh— where his appointments flipped the Circuit's compositions to a majority of judges appointed by Republican presidents. These Circuit-wide flips increase the odds that a three-judge panel will take extreme stances on the Second Amendment.

These flips are especially impactful when a party challenges a three-judge panel's ruling on an appeal, by asking the Circuit to rehear the case “*en banc*,” or before the entire bench. An *en banc* rehearing is likelier in highly controversial or important cases. With Trump's appointments, a plaintiff challenging a gun safety law who is seeking *en banc* rehearing in the Second, Third or

### JUDGES CONFIRMED TO US COURT OF APPEALS

As of July 7 of each president's fourth year in office

Eleventh Circuits now has more promising odds. In terms of raw numbers, Trump's impact on appellate judgeships has been biggest in the Ninth Circuit, where he has appointed 10 judges. The Ninth Circuit, which covers eight western states and Hawaii, is often perceived as a liberal-leaning Circuit. Yet in roughly one of nine Ninth Circuit appeals today, two judges on the three-judge panel will be Trump appointees. These odds matter for Second Amendment challenges, which proliferate in the Ninth Circuit—particularly in California and Washington. In the last three years alone, there have been over 40 Second Amendment decisions in the Ninth Circuit.<sup>46</sup>



## TRUMP'S JUDICIAL APPOINTEES TO US COURTS OF APPEALS

As of July 2020

President Trump's selections are historically unqualified for these lifetime appointments. The American Bar Association has rated nine of Trump's nominees "not qualified," more unqualified ratings than any other president's nominees.<sup>47</sup>

This includes Lawrence VanDyke, a recent confirmation to the Ninth Circuit. Judge VanDyke was a longtime member of the NRA. He suspended his membership only because, as he said, "I didn't want to risk recusal if a lawsuit came before me where the NRA was involved."<sup>48</sup> When he ran for the Montana Supreme Court, he aced the NRA's candidate questionnaire: all gun control laws, he agreed, are misdirected. He has said that he opposes laws requiring safe storage of firearms and closing the gun show loophole, through which buyers can acquire firearms without a background check. He opposes regulating guns on college campuses, in government buildings, and in bars. He opposes any restrictions on large-capacity magazines or semiautomatic weapons, and has joked that semiautomatic weapons are "more fun to hunt elk with." He has also lamented that his rifle is "unfortunately" only semiautomatic, rather than fully automatic.<sup>49</sup>

While working for the solicitor general's office in Montana, VanDyke wrote that Montana should "be on the record as on the side of gun rights (and the NRA)." He led the office's legal opposition to gun safety, arguing that federal firearms laws did not apply in Montana, and arguing that a state background check law was invalid.<sup>50</sup> VanDyke was one of the several Trump nominees whom the ABA deemed "unqualified" for a federal judgeship, based on his lack of experience "in the most fundamental activities of litigation."

William M. Ray II is another prime example of Trump's dangerous judicial legacy. Ray was one of Trump's earliest judicial nominations, to the Northern District of Georgia. Before his judicial career, Ray served as a state senator in Georgia, where the NRA rated him an "A+" for his pro-gun lobby activism. As a state senator, Ray voted to dilute state background check requirements and voted against a law that would have made it a misdemeanor to negligently leave firearms within a child's reach. He also voted for a state law preventing localities from passing their own firearms regulations.

Another nominee, Justin Walker, was confirmed to the District Court for the Western District of Kentucky on October 24, 2019, at just 37 years old. Walker is a longtime member of the Federalist Society, a conservative legal organization that has been an outspoken opponent of gun safety laws, which Trump has famously consulted for judicial nominations.<sup>51</sup>

On May 6, 2020, the Senate confirmed the elevation of Justin Walker to a vacancy on the DC Circuit Court of Appeals. The DC Circuit is the most prestigious federal bench after the Supreme Court, with alumni including Chief Justice Roberts, Justices Thomas, Ginsburg, and Kavanaugh, and the late Justice Scalia. When Trump announced Judge Walker's elevation to the DC Circuit on April 3, Walker had been a practicing judge for five months. Senate Majority Leader McConnell called Walker a "judicial all-star" when his nomination was announced. Walker, a Kentucky native, interned for Leader McConnell after being introduced by his grandfather.<sup>52</sup>

Leader McConnell has been an industrious ally when it comes to pushing through Trump's nominations, describing his approach for filling judicial seats as "leave no vacancy behind." President Trump and Leader McConnell have continued to pursue judicial confirmations at the height of the COVID pandemic, an unprecedented global crisis that has shut down the US economy and killed more than 160,000 Americans, as of the publication of this report.

**In 2016, Senate Majority Leader Mitch McConnell said he could not "imagine" a Republican-majority Senate confirming a Supreme Court nominee whom the NRA did not endorse.<sup>53</sup>**

Outlier rulings from Trump's judicial choices are already popping up in courts around the country. On March 30, 2020, Judge Brantley Starr, District Judge for the Northern District of Texas, denied dismissal of a challenge to the federal rule classifying bump stocks as machine guns. Judge Starr found that the government had failed to persuade the court of the basic and widely accepted federal power to regulate firearms. His decision ignored decades of American case law upholding federal authority to govern interstate firearms commerce, but cited Wikipedia to support the finding that states alone have the "police power" to regulate firearms.<sup>54</sup>

**While these kinds of radical rulings are harmful enough on their own, many district courts have a "related cases" rule that magnifies their risk.** Under this rule, lawsuits that are "related" to each other often get assigned to the same judge in order to maximize efficiency and consistency. However, "relatedness" can be interpreted very broadly, in ways that threaten the impartiality of the judiciary. When a related cases rule is misused, important legal questions end up in one judge's hands over and over again—giving the judge a disproportionate influence in that area of law.

For example, in 2019, a federal judge in the Southern District of California ruled that the state's restrictions on large-capacity magazines (LCMs) violated the Second Amendment.<sup>55</sup> This decision, from Judge Roger T. Benitez, was inconsistent with rulings in six courts of appeals.<sup>56</sup> Citing Justice Kavanaugh's dissent in *Heller II*<sup>57</sup> as legal authority, Judge Benitez concluded that the Second Amendment protects LCMs since they "number in the millions" in the United States (they come standard with common firearms, though are not required to be used with them).<sup>58</sup> He flatly dismissed the State's interest in reducing mass shootings, which he described as "an exceedingly rare problem."<sup>59</sup>

Due to Judge Benitez's LCM ruling, it remains legal to possess large-capacity magazines in California. Just a few months before his ruling referencing the "exceedingly rare problem" of mass shootings, a gunman entered a bar in Thousand Oaks, California, with seven large-capacity magazines and a semi-automatic handgun. He fired 50 rounds of ammunition, killing 12 people. Judge Benitez has since been assigned two other Second Amendment challenges to different California gun safety laws.<sup>60</sup>

In a 120-page decision issued on April 23, 2020, Judge Benitez issued a preliminary injunction blocking enforcement of California's ammunition background check law, calling it the "severest burden" on Second Amendment rights, and "unconstitutional under any level of scrutiny."<sup>61</sup> He also questioned whether any background check law would be worth the infringement on individual rights. This is a radical proposition from a federal judge: the balance between individual rights and public safety is a central feature of the entire field of constitutional law, from free speech to voting.



Recent dissents from outlier judges similarly signal a dangerous pro-gun movement gaining momentum in Second Amendment law.

- Judge Don Willett, a Trump appointee to the Fifth Circuit, wrote that **the Second Amendment is “spurned as peripheral,” “snubbed as anachronistic,” and “scorned as fringe.”** In a familiar nod to the gun lobby’s overblown rhetoric, he framed the challenged federal law as a “ban on interstate handgun sales.”<sup>62</sup>
- Judge James Ho, another Trump appointee to the Fifth Circuit, similarly wrote, “the Second Amendment continues to be treated as a ‘second-class’ right.” **Judge Ho analogized a challenged gun law to a federal ban on the interstate sale of books.** “Whether the Government bans books or handguns,” he wrote, such “broad, categorical bans” cannot survive constitutional scrutiny.<sup>63</sup>
- Judge Stephanos Bibas, a Trump appointee to the Third Circuit, dissented from a decision upholding New Jersey’s large-capacity magazine ban, **accusing the panel’s majority of “subjecting the Second Amendment to different, watered-down rules and demanding little if any proof.”**<sup>64</sup>
- Judge Kyle Duncan, a Trump appointee to the Fifth Circuit, wrote in April 2020 that the Fifth Circuit should **“retire” the prevailing Second Amendment framework** in favor of Justice Kavanaugh’s approach.<sup>65</sup>

As Trump-appointed judges proliferate and gain majorities, their radical approach to Second Amendment law is poised to spread, threatening decades of progress made by gun safety advocates.

## DEFENDING GUN SAFETY IN THE COURTS

The gun lobby is incorrect that the Constitution is a barrier to gun violence prevention measures. In fact, both the Constitution and America’s democratic process support the people’s right to advocate for and pass gun safety laws. It’s time for advocates to truly understand why the courts matter for gun safety—and why gun safety should matter to the courts.

**First,** our Bill of Rights supports action on gun safety, and certainly doesn’t leave the government helpless when it comes to protecting Americans from gun violence. Courts have long recognized that the government may adopt reasonable laws placing restrictions on *all* fundamental rights in the interests of saving lives.<sup>66</sup> This is a feature of constitutional law, rather than an exception. There is no constitutional right that acts as a “trump card” to strike down a law that makes people safer. When a court determines that a law restricts a fundamental right, the law’s constitutionality hinges on the other *interests at stake* and how well the law addresses those other interests, as compared to the burdens it places on a right.

**Second,** gun rights extremism is an historical anomaly. Gun safety laws in the United States are older than the Second Amendment. The Founders who drafted the Second Amendment lived in states and cities with firearms restrictions, and firearms continued to be regulated sensibly for the next 200 years. The gun lobby’s push away from this reality—and towards higher profits for the firearm manufacturers it represents—centers on rewriting the American story in the interest of gun rights extremism. This retelling is simply wrong: gun safety laws are very well-established, as are the court rulings upholding them.

**Third,** gun safety laws work.<sup>67</sup> They reduce suicide, homicide, and gun injuries. They reduce incidents of mass shootings, and they reduce casualties when mass shootings do occur. All of this is based on careful research and the informed consensus of epidemiologists, social scientists, and physicians—and we would know even more about the effectiveness of gun safety laws if Congress had not effectively barred the CDC from studying gun violence for the past 20 years.<sup>68</sup> Gun lobbyists know that when the courts look at the science, gun safety wins. Constitutional law not only allows for including this evidence in Second Amendment analysis; it requires doing so.

Judges must be able to consider gun safety laws' effectiveness, just as they consider the effectiveness of laws related to any other constitutional right.

**Fourth,** the right to personal safety belongs to all Americans, not just a privileged few. A view of self-defense that elevates gun ownership will make everyone less safe, depriving those who are harmed by firearms. The recent murder of 25-year-old Ahmaud Arbery highlights how extreme interpretations of the Second Amendment, including those protecting vigilante justice and reckless firearm carriers in public, perpetuate racial inequity. If our Constitution permits a modern-day lynching—two white men shooting a Black man jogging in his neighborhood—then our constitutional theory failed Arbery, and by extension, is failing us all.

## CONCLUSION

The conflict in our courts today is not between Democratic and Republican appointees. It is between established constitutional precedent and the vast majority of sitting judges on the one hand, and, on the other, the gun lobby's prioritization of unlimited access to guns over the public's right to survival.

Voters who care about gun safety must look beyond a lawmaker's legislative record to her voting record on judicial confirmations, which reflects her commitment—or lack thereof—to judges who respect constitutional history and the rule of law. Our lawmakers should approve judges who will faithfully consider our entire Constitution when considering gun safety laws, including other rights and democratic values, instead of viewing gun access as an absolute right. **Voters must insist on judicial nominees who respect the constitutionality of lifesaving gun regulations, and who will consider everyone's right to protect ourselves and our families from gun violence.**

When it comes to the Second Amendment, the courts are at a crossroads: one road leads towards an unequal, revisionist view of gun rights that would endanger Americans for generations. Another road leads towards our Founders' actual values: safety, common sense, and laws that reflect majority views while protecting society's most vulnerable. If Americans want the courts to take the second road, towards a vision of the Constitution that protects everyone, then we need to fight for it.



## END NOTES

- <sup>1</sup> Quinnipiac University, “Majority Of Voters Say Climate Change Is An Emergency Quinnipiac University Poll Finds; 72% Say Congress Needs To Act To Reduce Gun Violence” August 29, 2019, <https://poll.qu.edu/national/release-detail?ReleaseID=3639>.
- <sup>2</sup> *McDonald v. City of Chicago*, 561 U.S. 742 (2010).
- <sup>3</sup> Bill Lucia, “Multiple Gun Cases Rejected by Supreme Court,” Route Fifty, June 15, 2020, <https://www.routefifty.com/public-safety/2020/06/supreme-court-rejects-second-amendment-gun-cases/166173/>.
- <sup>4</sup> Administrative Office of the United States Courts, “Appellate Courts and Cases - Journalist’s Guide,” accessed June 8 2020, <https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide>.
- <sup>5</sup> Federal Judicial Center, “Impeachment of Federal Judges,” accessed June 9, 2020, <https://www.fjc.gov/history/judges/impeachments-federal-judges>.
- <sup>6</sup> Duke Center for Firearms Law, “Repository of Historical Gun Laws,” 1715 Mass. Acts 311, An Act in Addition to an Act for Erecting of a Powder-house In Boston; Pennsylvania Archives 1713, The Act for the Better Government of the City of Philadelphia (1713); 1713 An Act To Prohibit Shooting Or Firing Off Guns Near The Road Or Highway On Boston Neck (Mass).
- <sup>7</sup> Duke Center for Firearms Law, “Repository of Historical Gun Laws,” 1792 Md. Laws 22, A Supplement To An Act Entitled, An Act to Improve and Repair the Streets in Elizabethtown, in Washington County, and For Other Purposes Therein Mentioned, chap. 52, § 4.
- <sup>8</sup> Duke Center for Firearms Law, “Repository of Historical Gun Laws,” 1793 N.H. Laws 464-65, An Act to Prevent the Keeping of Large Quantities of Gun-Powder in Private Houses in Portsmouth, and for Appointing a Keeper of the Magazine Belonging to Said Town.
- <sup>9</sup> Duke Center for Firearms Law, “Repository of Historical Gun Laws,” 1813 La. Acts 172, An Act Against Carrying Concealed Weapons, and Going Armed in Public Places in an Unnecessary Manner, § 1.
- <sup>10</sup> Robert J. Spitzer, *Guns Across America: Reconciling Gun Rules and Rights*, Oxford University Press, 2017.
- <sup>11</sup> See, e.g., *Lewis v. United States* (1980) (the Second Amendment guarantees no right to keep and bear a firearm that does not have “some reasonable relationship to the preservation or efficiency of a well regulated militia,” citing *United States v. Miller* (1939)).
- <sup>12</sup> Carl T. Bogus, “The History of Politics and Second Amendment Scholarship: A Primer,” *Chicago-Kent Law Review* Vol. 76 no. 1, October 2000, 4, <https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3286&context=cklawreview>.
- <sup>13</sup> Arica L. Coleman, “When the NRA Supported Gun Control,” TIME, July 31, 2016, <https://time.com/4431356/nra-gun-control-history/>.
- <sup>14</sup> Ron Elving, “The NRA Wasn’t Always Against Gun Restrictions,” National Public Radio, October 10, 2017, <https://www.npr.org/2017/10/10/556578593/the-nra-wasnt-always-against-gun-restrictions>.
- <sup>15</sup> Arica Coleman, *supra*.
- <sup>16</sup> *Id.*
- <sup>17</sup> *United States v. Miller*, 307 U.S. 174 (1939).
- <sup>18</sup> *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013).
- <sup>19</sup> *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (Wilkinson, J., concurring.)
- <sup>20</sup> The NRA-Institute for Legislative Action, “Arizona: NRA Stands Opposed to Gun Ban Legislation at Capitol,” February 9, 2020, <https://www.nraaila.org/articles/20200219/arizona-nra-stands-opposed-to-gun-ban-legislation-at-capitol>; The NRA-Institute for Legislative Action, “Virginia: Gov. Northam Signs Gun Control Bills,” April 11, 2020, <https://www.nraaila.org/articles/20200411/virginia-gov-northam-signs-gun-control-bills>.
- <sup>21</sup> The NRA-Institute for Legislative Action, “Virginia: Gov. Northam Signs Gun Control Bills,” April 11, 2020, <https://www.nraaila.org/articles/20200411/virginia-gov-northam-signs-gun-control-bills>.
- <sup>22</sup> The NRA-Institute for Legislative Action, “Rhode Island: Gun Bill Night Scheduled for Wednesday in House Judiciary,” March 6, 2020, <https://www.nraaila.org/articles/20200306/rhode-island-gun-bill-night-scheduled-for-wednesday-in-house-judiciary>.
- <sup>23</sup> The NRA-Institute for Legislative Action, “S. 150: The Biggest Proposed Gun and Magazine Ban in American History,” February 5, 2013, <https://www.nraaila.org/articles/20130205/s-150-the-biggest-proposed-gun-and-magazine-ban-in-american-history>.
- <sup>24</sup> The NRA-Institute for Legislative Action, “Florida Alert! Are You Ready For Gun Registration?” September 5, 2019, <https://www.nraaila.org/articles/20190905/florida-alert-are-you-ready-for-gun-registration>.
- <sup>25</sup> *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015).
- <sup>26</sup> *Peruta v. California*, 137 S. Ct. 1995 (2017) (Thomas, dissenting from denial of certiorari).
- <sup>27</sup> *Silvester v. Becerra*, 138 S. Ct. 945, 952 (2018) (Thomas, dissenting from denial of certiorari).
- <sup>28</sup> *Teixeira v. Cty. of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc).
- <sup>29</sup> *Flanagan v. Harris*, 2018 U.S. Dist. LEXIS 82844 (C.D. Cal. May 7, 2018).

- <sup>30</sup> *GeorgiaCarry.Org, Inc. v. Georgia*, 764 F. Supp. 2d 1306 (M.D. Ga. 2011), *aff'd*, 687 F.3d 1244 (11th Cir. 2012).
- <sup>31</sup> *Hollis v. Lynch*, 827 F.3d 436, 451(5th Cir. 2016).
- <sup>32</sup> See, e.g., *Rogers v. Grewal*, No. 3:18-cv-01544, 2018 U.S. Dist. LEXIS 84443 (D.N.J. May 21, 2018), *aff'd*, No. 18-2366 (3d Cir. 2018); *Drake v. Filko*, 724 F.3d 426 (3d Cir. 2013).
- <sup>33</sup> See Eric Ruben and Joseph Blocher, “From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After Heller,” *Duke Law Journal* Vol. 67 (2018), 1433, 1496.
- <sup>34</sup> Cristian Farias, “NRA Pours \$1 Million Into Senate Fight Over Supreme Court Nominee Neil Gorsuch,” *HuffPost*, March 28, 2017, [https://www.huffpost.com/entry/nra-ads-against-neil-gorsuch\\_n\\_58dab316e4b01ca7b4276ed5](https://www.huffpost.com/entry/nra-ads-against-neil-gorsuch_n_58dab316e4b01ca7b4276ed5).
- <sup>35</sup> United States Senate Hearing 115.208, “Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States,” March 20–23, 2017, <https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf>.
- <sup>36</sup> *Peruta v. California*, 137 S. Ct. 1995 (2017) (Thomas, dissenting from denial of certiorari).
- <sup>37</sup> *Id.* at 1999.
- <sup>38</sup> On June 15, the Supreme Court denied certiorari in all of the cases Justice Kavanaugh referenced.
- <sup>39</sup> Robert Barnes, “Supreme Court passes up challenges from gun groups on laws they say violate Second Amendment,” *The Washington Post*, June 15, 2020, [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-passes-up-challenges-from-gun-groups-on-laws-they-say-violate-second-amendment/2020/06/15/e18ea442-af0d-11ea-8758-bfd1d045525a\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-passes-up-challenges-from-gun-groups-on-laws-they-say-violate-second-amendment/2020/06/15/e18ea442-af0d-11ea-8758-bfd1d045525a_story.html).
- <sup>40</sup> *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1288 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
- <sup>41</sup> Laila Robbins, “Conservatives Bankrolled and Dominated Kavanaugh Confirmation Media Campaign,” *The Hill*, October 19, 2018, <https://thehill.com/opinion/judiciary/412178-conservatives-bankrolled-and-dominated-kavanaugh-confirmation-media>.
- <sup>42</sup> NRA-Institute for Legislative Action, “NRA Applauds Brett Kavanaugh’s Nomination to the U.S. Supreme Court,” July 9, 2018, <https://www.nra.org/articles/20180709/nra-applauds-brett-kavanaughs-nomination-to-the-us-supreme-court>.
- <sup>43</sup> This total does not include Trump’s confirmed nominations to Article I courts or the US Court of International Trade. See John Gramlich, “How Trump Compares with Other Recent Presidents in Appointing Federal Judges,” *Pew Research Center*, July 15, 2020, <https://www.pewresearch.org/fact-tank/2020/07/15/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/>.
- <sup>44</sup> Jennifer Bendery, “Trump’s Biggest Win in 2017? His Judicial Confirmations,” *HuffPost*, December 14, 2017, [https://www.huffpost.com/entry/trump-judicial-nominations\\_n\\_5a32ddd9e4b0ff955ad14bad](https://www.huffpost.com/entry/trump-judicial-nominations_n_5a32ddd9e4b0ff955ad14bad).
- <sup>45</sup> Calculated based on 179 active appeals court judges.
- <sup>46</sup> Count includes district courts and is based on internal Giffords Law Center tracking.
- <sup>47</sup> Patrick L. Gregory, “Trump Picks More ‘Not Qualified’ Judges,” *Bloomberg Law*, December 19, 2018, <https://news.bloomberglaw.com/us-law-week/trump-picks-more-not-qualified-judges-1>.
- <sup>48</sup> NRA Political Victory Fund, Lawrence Van Dyke 2014 Montana Candidate Questionnaire, September 8, 2014, <https://www.judiciary.senate.gov/imo/media/doc/VanDyke%20-%20NRA%20Questionnaire.pdf>.
- <sup>49</sup> *Id.*
- <sup>50</sup> *Montana Shooting Sports Ass’n v. Holder*, 727 F.3d 975 (9th Cir. 2013); *Zusi v. Sandoval*, No. 77035 (Nev. 2019).
- <sup>51</sup> David Montgomery, “Conquerors of the Courts: Forget Trump’s Supreme Court Picks. The Federalist Society’s Impact on the Law Goes Much Deeper,” *Washington Post Magazine*, January 2, 2019, <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/>.
- <sup>52</sup> Matt Ford, “The Amateurs and Yes-Men in Trump’s Army of Judges,” *The New Republic*, April 8, 2020, <https://newrepublic.com/article/157229/justin-walker-trump-mcconnell-judges>; Elizabeth Williamson and Rebecca Ruiz, “McConnell Protégé Takes Center Stage in Fight to Remake Judiciary,” *New York Times*, May 5, 2020, <https://www.nytimes.com/2020/05/05/us/politics/justin-walker-mcconnell-judicial-nomination.html>.
- <sup>53</sup> Ian Millhiser, “McConnell: No New Supreme Court Justice Until The NRA Approves Of The Nominee,” *ThinkProgress*, March 20, 2016, <https://archive.thinkprogress.org/mcconnell-no-new-supreme-court-justice-until-the-nra-approves-of-the-nominee-76ae0f40e064/>.
- <sup>54</sup> *Lane v. United States*, No. 3:19-CV-01492-X, 2020 U.S. Dist. LEXIS 54545 (N.D. Tex. Mar. 30, 2020).
- <sup>55</sup> *Duncan v. Becerra*, 366 F. Supp. 3d 1131 (S.D. Cal. Mar. 29, 2019).
- <sup>56</sup> Other circuits: *Worman v. Healey*, No. 18-1545, 2019 U.S. App. LEXIS 12588 (1st Cir. Apr. 26, 2019); *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Ass’n of N.J. Rifle & Pistol Clubs v. Grewal*, 910 F.3d 106 (3d Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114, 135 (4th Cir. 2017) (en banc); *Wilson v. Cook Cty.*, 937 F.3d 1028 (7th Cir. 2019), *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).
- <sup>57</sup> *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011). Dissents are not considered binding legal authority, since they do not reflect the actual outcome of the case. But judges sometimes reference them anyway, to support their decision and to push the law’s development in the direction of the dissent they are citing.



- <sup>58</sup> *Duncan v. Becerra*, 366 F. Supp. 3d 1137 (S.D. Cal. 2019).
- <sup>59</sup> *Id.* at 1131, 1143.
- <sup>60</sup> *Rhode v. Becerra*, No. 3:18CV802 (S.D. Cal., filed April 26, 2018); *Miller v. Becerra*, No. 3:19CV1437 (S.D. Cal., filed August 15, 2019).
- <sup>61</sup> *Rhode v. Becerra*, No. 18-cv-802-BEN, 2020 U.S. Dist. LEXIS 71893, at \*48 (S.D. Cal. Apr. 23, 2020).
- <sup>62</sup> *Mance v. Sessions*, 896 F.3d 390, 396 (5th Cir. 2018) (Willett, dissenting from denial en banc).
- <sup>63</sup> *Mance v. Sessions*, 896 F.3d 390, 398 (5th Cir. 2018) (Ho, dissenting from denial en banc).
- <sup>64</sup> *Ass'n of N.J. Rifle & Pistol Clubs v. AG N.J.*, 910 F.3d 106, 156 (3d Cir. 2018) (Bibas, dissenting).
- <sup>65</sup> *United States v. McGinnis*, 956 F.3d 747, 761 (5th Cir. 2020) (Duncan, concurring).
- <sup>66</sup> See Jonathan Lowy & Kelly Sampson, "The Right Not to Be Shot: Public Safety, Private Guns, and the Constellation of Constitutional Liberties," *Georgetown Journal of Law & Public Policy* 14 (2016) 187, 198–201 (discussing public safety limitations on Fifth Amendment and First Amendment rights, property rights, and habeas corpus rights).
- <sup>67</sup> See generally, e.g., *Reducing Gun Violence in America*, ed. Daniel W. Webster and Jon S. Vernick (Baltimore: The Johns Hopkins University Press, 2013); Julian Santaella-Tenorio, et al., "What Do We Know About the Association Between Firearm Legislation and Firearm-Related Injuries?," *Epidemiologic Reviews* 38, No. 1 (January 2016): 140-157, <https://doi.org/10.1093/epirev/mxv012>; German Lopez, "The Research is Clear: Gun Control Saves Lives," *Vox*, October 4, 2017.
- <sup>68</sup> Matt Laslo, "The CDC Could Totally Study Gun Violence—It Just Needs Money," *Wired*, August 2019, <https://www.wired.com/story/cdc-gun-violence-research-money/>.

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