DEFYING THE SUPREME COURT:
FEDERAL COURTS AND THE NULLIFICATION
OF THE SECOND AMENDMENT

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“We warned in Heller that ‘[a] constitutional guarantee subject to
future judges’ assessments of its usefulness is no constitutional
guarantee at all.’”

554 U.S., at 634 Justice Thomas with whom Justice Scalia
joined, dissenting from denial of certiorari, Espanola Jackson v.
City and County of San Francisco, California, no. 14-704,
decided June 8, 2015.

THE PROBLEM

Although the Supreme Court accepts a mere 2.8 percent of
petitions for certiorari, published dissents when the Court declines
to grant it are rare. ¹ Yet Justices Thomas and Scalia, Thomas and
Justice Gorsuch and Thomas alone, repeatedly and vehemently
dissented when the Court rejected major Second Amendment
petitions. Their increasingly angry dissents about the casual

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¹ Success Rate of a Petition for Writ of Certiori to the Supreme Court, SUPREME
infringement of the Second Amendment right in the lower courts and their colleagues’ refusals to hear these cases are indicative of a revolt taking place against the Court’s Second Amendment rulings, District of Columbia v. Heller (2008) and McDonald v. City of Chicago (2010), and pose a serious problem for our jurisprudence. It is fair to ask whether these infringements are sufficiently troubling since the Court in Heller did outline a list of exceptions to the right--long standing restrictions on weapons in sensitive places and prohibitions against possession of arms by felons and persons mentally disturbed and dangerous to themselves and others. In fact the Court made clear it did not intend to intrude into the working out of these exceptions often when it added, “[t]here will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.” But since the Heller and McDonald opinions the Court has been unwilling to permit exceptions to come before it. Have the intrusions on the fundament right been egregious enough to justify angry dissents when the Court refused to hear exceptions? Perhaps these lower court decisions merely stem from understandable confusion among lower court justices and were not that central to the core constitutional right. Regrettably that is not the case. Even a cursory reading of cases that provoked dissents when cert was denied, makes clear that this is not the explanation. In these instances justices are ignoring the Supreme Court’s plain language and defying its intent, presumably to suit their own policy preferences. The egregious infringement of Second Amendment rights expounded and incorporated by the Supreme Court is troubling and poses a challenge to Supreme Court rulings more generally. What is to be done? First the dissents.

THE DISSENTS

In February, 2018, Justice Thomas, exasperated with his colleagues’ denial of certiorari in a California Second Amendment case, wrote: “If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced

by our continued inaction in this area, the Second Amendment is a disfavored right in this Court.” Thomas complained the refusal to hear the case allowing California’s 10-day waiting period for a purchased firearm to stand was “based solely on . . . [the Appeals Court’s] own `common sense.’” The Court of Appeals, he argued, purported to apply intermediate scrutiny “without requiring California to submit relevant evidence” that the waiting period was an important safety measure; “without addressing petitioners’ arguments to the contrary, and without acknowledging the District Court’s factual findings.” This standard, he found, indistinguishable from rational-basis review, which was explicitly rejected in *Heller* and “symptomatic of the lower courts’ general failure to afford the Second Amendment the respect due an enumerated constitutional right.”

A year earlier, in *Peruta v. California*, Thomas, joined by Justice Gorsuch, dissented from a refusal to grant certiorari in another Second Amendment case from the Ninth Circuit, this time one in which 26 states had joined as *amicis curiae* in support of petitioners. The case focused on the right of law-abiding citizens to bear arms in public. California, Thomas wrote, “prohibits the average citizen from carrying a firearm in public spaces, either openly or concealed.” No firearm was allowed to be carried openly and to carry a concealed firearm a resident needed a license showing “good cause,” among other criteria and authorized counties to set rules for when an applicant has shown good cause. For “good cause” the sheriff in petitioners’ county decreed that the applicant must show a particularized need, substantiated by documentary evidence to obtain a license to carry a firearm for self-defense. The sheriff specified that “concern for one’s personal

4. Id.
5. Id.
6. Id.
8. Id. at 1996.
10. Id. At 1996.
“safety” does not “alone” satisfy this requirement. Since the applicant must show a set of circumstances that distinguish him from the mainstream and cause him to be placed in harm’s way, “fearing for his personal safety—by definition—cannot distinguish himself from the mainstream.” The upshot is that an ordinary, law-abiding California citizen is barred from carrying a firearm openly and for all practical purposes precluded from carrying a gun concealed. Gone is any right to bear arms for self-defense and other lawful purposes.

A panel of the Ninth Circuit had agreed that carrying an operable handgun outside the home for self-defense was “bearing Arms” within the meaning of the Second Amendment and was indeed a right. However, the case was then reheard en banc and a divided court reversed the panel decision. The en banc majority refused to consider whether, or to what degree, the Second Amendment protected the right of a member of the public to carry firearms outside the home or the impact of California’s restrictions on both open and concealed carry. Instead, they confined themselves to whether the Second Amendment protected a right to carry a concealed firearm in public. Justices Thomas and Gorsuch found this blinkered approach “indefensible” and argued that the petition raised important questions the Supreme Court needed to address. The District Court had recognized that “the heart of the parties’ dispute” is whether the Second Amendment protects “the right to carry a loaded handgun in public, either openly or in a concealed manner” and found that, as petitioners argued, “the San Diego County policy in light of the California licensing scheme as a whole violates the Second Amendment because it precludes a responsible, law-abiding citizen from carrying a weapon in public for the purpose of lawful self-defense in any manner.” Thomas and Gorsuch posit that had the en banc Ninth Circuit “answered the question actually at issue in this case,

11. Id.
12. Id.
13. Id. at 1997.
14. Id.
15. Id. at 1997.
16. Id. at 1997-98.
it likely would have been compelled to reach the opposite result.”  

The Supreme Court’s Second Amendment opinions find a right to carry firearms in public in some fashion outside the home. “I find it extremely improbable,” Thomas writes, “that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.”  

Although some regulation of public carry is permissible, “an effective ban on all forms of public carry is not.”  

While twenty-six states asked the Court to hear the issue, it declined, leading Thomas and Gorsuch to protest: “[t]he Court’s decision to deny certiorari in this case reflects a distressing trend: the treatment of the Second Amendment as a disfavored right.”  

They note that while the Court had not, at that time, heard a Second Amendment case in seven years, during the same period it had heard arguments in some 35 cases turning on the meaning of the First Amendment and 25 cases turning on the meaning of the fourth Amendment. “This discrepancy is inexcusable” Thomas writes, “especially given how much less developed our jurisprudence is with respect to the Second Amendment as compared to the First and fourth Amendments.”  

He and Gorsuch conclude:

For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.

Three years earlier, in 2015, the Court had denied certiorari in two other Second Amendment cases. Justice Antonin Scalia

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17. Id. at 1998.
18. Id.
19. Id. at 1998.
20. Id.
21. Id. at 1999.
22. Id.
23. Id.
24. Id.
25. Id. at 1999-2000
joined Thomas to dissent against each. 27 The first, on June 8, 2015, was in response to the refusal to hear Espanola Jackson, et al. v. City and County of San Francisco, California. 28 That statute, similar to those of the District of Columbia and Chicago that the Supreme Court overturned, forbid anyone keeping a handgun “within a residence owned or controlled by that person unless” (1) “the handgun is stored in a locked container or disabled with a trigger lock that has been approved by the California Department of Justice” or (2) “[t]he handgun is carried on someone over the age of 18 or under the control of a person who is a peace officer under [California law].” 29 As noted above, it is a crime in California to carry a firearm in public openly or concealed, loaded or unloaded, without obtaining a permit which is extraordinarily difficult. 30 Justices Thomas and Scalia begin their dissent with the reminder that “Self-defense is a basic right” and “the central component” of the Second Amendment’s guarantee of an individual’s right to keep and bear arms.” 31 Less than a decade ago, they had found “that an ordinance requiring firearms in the home to be kept inoperable, without an exception for self-defense, conflicted with the Second Amendment because it ‘ma[de] it impossible for citizens to use [their firearms] for the core lawful purpose of self-defense.’” 32 “There is consequently no question that San Francisco’s law burdens the core of the Second Amendment right. That burden

27 Id.
28 Id. on petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, No. 14-704, decided June 8 2015.
29 Id. at 1-2.
30 You are of good moral character; Good cause exists for issuance of the license because you or a member of your family is in immediate danger; you meet certain residency requirements; and you have completed an acceptable course of firearms training.
Under the recently enacted AB 2103, the training course must be a minimum of 8 hours and include live-fire shooting exercises where the person demonstrates an ability to handle and shoot the gun safely. Note the requirement that the danger must be immediate.
31 Id., Justice Thomas, with whom Justice Scalia joins, dissenting from the denial of certiorari, No. 14-704, decided June 8, 2015.
is significant.” The justices added, “something was seriously amiss in the decision below. In that decision, the Court of Appeals recognized that the law ‘burdens the core of the Second Amendment right,’ yet concluded that, because the law’s burden was not as ‘severe’ as the one at issue in *Heller*, it was ‘not a substantial burden on the Second Amendment right itself.’”

“When a law burdens a constitutionally protected right, we have generally required a higher showing than the court of appeals demanded here.” After comparing treatment of the Second Amendment protection to that of the First and Fourth Amendments they concluded:

We warned in *Heller* that ‘[a] constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.’ . . . The Court of Appeals in this case recognized that San Francisco’s law burdened the core component of the Second amendment guarantee, yet upheld the law. Because of the importance of the constitutional right at stake and the questionable nature of the Court of Appeals’ judgment, I would have granted a writ of certiorari.

The second case that year that provoked their dissent, *Arie S. Friedman, et. al., v. City of Highland Park, Illinois* was on petition from the Seventh Circuit. In 2009, the Seventh Circuit Court of Appeals, then led by Justice Easterbrook, upheld the constitutionality of a Chicago gun ban virtually identical to the Washington D.C. act the Court had just overturned a year earlier in *Heller*. In 2010, that Seventh Circuit ruling would be reversed by the Supreme Court in *McDonald v. City of Chicago*. In deciding whether to incorporate the Second Amendment throughout the country the majority in *McDonald v. Chicago* found unconstitutional the Chicago law banning handguns in the

33. Id., p. 3.
34. Id. at 2.
35. Id., pp. 4-5.
37. Friedman v. Highland Park, 784 F.3d 406 (7th Cir. 2015).
38. McDonald v. Chicago, 567 F.3d 856 (7th Cir. 2009).
39. Id.
home.\textsuperscript{40} *McDonald* incorporated the Second Amendment right of the people to keep and bear those weapons in common use for self-defense and other lawful purposes—a right—the Supreme Court judged, “fundamental to our scheme of ordered liberty and system of justice.”\textsuperscript{41} The Second Amendment right was incorporated under the due process clause of the Fourteenth Amendment.\textsuperscript{42}

Despite this landmark incorporation in *Friedman and Illinois State Rifle Association v. City of Highland Park* Judge Easterbrook, writing again for the Seventh Circuit Court of Appeals in a 2-1 decision, defied the rulings in *Heller* and *McDonald* and upheld the Highland Park, Illinois ban of weapons the city defined as “assault weapons” that included any semi-automatic rifle taking a large capacity magazine and sporting certain cosmetic features.\textsuperscript{43} Although these banned firearms are among the most popular hunting rifles in the country and used safely by millions of Americans, Highland Park branded them “dangerous and unusual.”\textsuperscript{44} Writing for the Appeals Court, Judge Easterbrook took the opportunity to substitute his preference on gun rights for the Supreme Court’s. In *Friedman*, he side-stepped the Supreme Court standard of the constitutionality of guns in common use for self-defense and other lawful purposes instead claiming it is “better to ask whether the [Highland Park] regulation bans weapons that were common at the time of ratification and relying on the 1939 case *United States v. Miller* were weapons that have some reasonable relationship to the preservation or efficiency of a well regulated militia.”\textsuperscript{45} For good measure he argued that all other questions about the Second Amendment should be defined by “the political process and scholarly debate.”\textsuperscript{46}

Both of Judge Easterbrook’s arguments—that the Second Amendment protects only weapons in use at the time of ratification and those weapons related to militia use—were

\begin{itemize}
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id. at 764.
\item \textsuperscript{42} McDonald v. City of Chicago, 561 U.S. (2010), at 16, 44-45.
\item \textsuperscript{43} Friedman v. City of Highland Park, 789 F.3d 406, 407 (7th Cir. 2015)
\item \textsuperscript{44} Id. at 409.
\item \textsuperscript{45} Id. at 410.
\item \textsuperscript{46} Id. at 412.
\end{itemize}
explicitly and emphatically rejected by the Supreme Court in *Heller* and *McDonald*. Justice Scalia, writing for the majority, found the argument that only eighteenth-century weapons were protected “bordering on the frivolous” insisting “[w]e do not interpret constitutional rights that way,” and characterized the interpretation of *Miller* Easterbrook employs as a “startling reading.” Judge Manion, the dissenter in *Friedman*, was amazed his two colleagues came “not to bury *Miller* but to exhume it.” To that end, he wrote, their opinion “surveys the landscape of firearm regulations as if *Miller* were still the controlling authority and *Heller* were a mere gloss on it.” Judge Manion added that both the Highland Park ordinance and the Seventh Circuit’s opinion upholding it “are directly at odds with the central holdings of *Heller* and *McDonald*.”

Since the Supreme Court refused to hear the case on Highland Park’s ban, the Seventh Circuit Court of Appeals holding stands, but that refusal to grant cert provoked a vigorous dissent from Justices Thomas and Scalia. The justices were deeply frustrated by the blatant nullification of their Second Amendment rulings, insisting “noncompliance with our Second Amendment precedents warrants this Court’s attention as much as any of our precedents.”

There was one exception to the general refusal of the Court to consider a Second Amendment case that year. *Caetano v. Massachusetts* concerned the constitutionality of the Massachusetts law banning stun guns. In 2014 in a unanimous ruling the justices of the Supreme Judicial Court of Massachusetts defied the Supreme Court so brazenly that the Court acted. MS Caetano was arrested for brandishing a stun gun to protect

47. Id. at 417
49. Friedman, 789 F.3d at 413.
50. Id.
52. Id. at 447, Thomas J., dissenting, joined by Justice Scalia.
53. Id. at 447
The Massachusetts justices claimed that because stun guns did not exist when the Second Amendment was ratified, it was not constitutionally protected. If they had somehow overlooked Justice Scalia’s dismissal of that interpretation in *Heller*, Justice Alito writing for the majority in *McDonald v. City of Chicago* was clear: “The Court has held that ‘the Second Amendment extends, [prima facie], to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.’”

Yet district and appeals court judges in a continuing series of cases have found no constitutional problem with state and municipal laws that blatantly ignored that ruling, and have been upheld when the Supreme Court refused to overturn, or even hear the cases. In short the individual right laid out by the Supreme Court has become not only problematic but illusionary, what Justice Thomas termed the “Court’s constitutional orphan.”

**NEW CASES ON APPEAL DENYING SECOND AMENDMENT RIGHTS**

With this background we turn to the present. Not surprisingly, the Supreme Court’s continuing reluctance to hear appeals when states and local authorities ride roughshod over Second Amendment rights has led to ever more egregious denial of those rights. Recent Second Amendment cases display this increasingly dismissive approach but offer hope the Court may finally agree to at last grant certiorari in one or both. The first, *Pena v. Lindley*, decided by a panel of the Ninth Circuit Court of Appeals on August 13th, upheld the constitutionality of three challenged provisions of California’s Unsafe Handgun Act. California maintains a roster of guns that can legally be purchased in the state. The Unsafe Handgun Act now mandates that all new handguns must indicate when a bullet is loaded in the chamber. Second, new guns must

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56. Id. at 690.
57. Id. at 692, 95.
58. Caetano, 136 S. Ct. at 1027.
60. Pena v. Lindley, 898 F.3d 969, 973 (9th Cir. 2018).
61. Id.
have a detachable mechanism to prevent the gun from discharging when a magazine is not in it.\textsuperscript{62} Lastly, new handguns must stamp “microscopically the handgun’s make, model, and serial number onto each fired shell casing.”\textsuperscript{63} The judges conceded that “no handguns were available in the United States that met the microstamping requirements,”\textsuperscript{64} but added that “simply because no gun manufacturer is ‘even considering trying’ to implement the technology, it does not follow that microstamping is technologically infeasible.”\textsuperscript{65} In short, Californians are free to buy handguns that do not exist. In addition the roster of legal firearms, which, by the way, manufacturers must pay to have their weapons on, is shrinking. In the four years from 2013 to 2017 more than 500 models, including some of the most popular, vanished from the list. The judges did not see that as a problem arguing it is not “the number of handguns on the roster that matter, it is the impact on self-defense in the home.”\textsuperscript{66}

But what of the \textit{Heller} opinion’s explicit right to “keep and bear those guns in common use for self-defense and other lawful purposes?”\textsuperscript{67} The panel responds that they did not “reach the question of whether the challenged provisions fell within the scope of the Second Amendment’s right to bear arms because, even assuming coverage, the provisions passed constitutional muster,” since “the Act only regulates commercial sales, not possession, and does so in a way that does not impose a substantial burden on purchasers.”\textsuperscript{68} Apparently, as long as there are some guns to purchase—possession is not involved-- and new handguns meeting futuristic requirements might be manufactured some day, the constitutional right of Californians to keep and bear arms for self-defense is not infringed.

In California, the Second Amendment is being ignored as a “right” altogether. The only hope for residents is that the Supreme Court grants certiorari. However, the Court has been reluctant to

\begin{footnotes}
\item[62] Id.
\item[63] Id.
\item[64] Id. at 974, n.4.
\item[65] Id. at 983.
\item[66] Id. at 978, n.9.
\item[67] Id. at 975.
\item[68] Id. at 973.
\end{footnotes}
hear these cases and as the late Ninth Circuit Judge Stephen Reinhardt famously responded about his circuits’ decisions being overturned, “They can’t catch `em all.”69 Let’s hope they catch this one.

The second case, New York State Rifle & Pistol Assoc. v. City of New York and New York Police Dept.-License Division (Sept. 2018), involves a New York City licensing regulation (Rule 5-23) for guns kept on the premises.70 In the years before, Heller recognized the fundamental right to keep and bear arms.71 New York City put this regulation in place prohibiting handguns kept in the home from being taken outside even if unloaded and locked in a container separate from the ammunition.72 Although a gun could be taken to a shooting range, it had to be within city limits.73 It could not be taken to a second home elsewhere in the state for self-defense or for participating in a shooting competition. New York City has kept this regulation in place even after Heller explicitly spelled out the right of law-abiding Americans to not only keep but bear those weapons in common use for self-defense and other lawful purposes, and McDonald applied that ruling throughout the country, including New York City.74 While the Supreme Court recognized that the right to have a gun for self-defense is especially acute within the home, it never limited that use to the home.75 On the contrary, the right to bear arms makes no sense if limited to the home. Nevertheless, it is the right of bearing arms for self-defense and other lawful purposes that the New York City regulation eliminates. A gun outside the home, but locked in a compartment separate from the ammunition, is clearly useless for self-defense. As Heller explained, “[a] statute which, under the pretense of regulating, amounts to a destruction of the

70. NY State Rifle & Pistol Ass’n v. City of NY, 883 F.3d 45 (2nd Cir. 2018), petition for cert. filed, (U.S. Sept. 4, 2018)(No. 18-280).
71. Id. at 1.
72. Id.
73. Id.
74. Id. at 45.
75. Id.
right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense [is] clearly unconstitutional.” 76 Plaintiffs also claimed the regulation violated their right to travel and interfered with interstate commerce. 77 These last two arguments failed to persuade, but more crucially, the judges sidestepped the fundamental right to carry a weapon for self-defense in public.

Although the city regulation denied a constitutional right set out by the Supreme Court, the judges on the Second Circuit Court of Appeals saw no problem with the city regulation. 78 They unanimously upheld the 2015 District Court ruling by Judge Robert Sweet maintaining that the city regulation did not violate the Second Amendment right because the Supreme Court “analysis puts the focus where it belongs: on the core right of self-defense in the home.” 79 It is ironic the judges rest their analysis on that point since New York City’s draconian requirements for obtaining a gun for self-defense in a home has limited handgun licenses in the city to just 40,000 residents 80 of a population of 8,550,405. 81 Yet, after rubber-stamping the premises regulation, the panel seemed to distrust even those 40,000 licensees having based its approval of the restriction on a single affidavit from the former commander of the state licensing division that “premises license holders ‘are just as susceptible as anyone else to stressful situations,’ including driving situations that can lead to road rage, ‘crowd situations, demonstrations, family disputes,’ and other situations.” 82 The judges agreed with the City’s claim that limiting the geographic range in which firearms can be carried “allows the City to promote public safety by better regulating and minimizing the instances of unlicensed transport of firearms on city streets.” 83

76. Heller, 554 U.S. at 629.
77. NY State Rifle & Pistol Ass’n, 883 F.3d at 45.
78. Id.
79. City of NY, 86 F. Supp 3d at 260
80. Id. at 225.
83. Id.
In contrast to the City’s reliance on this affidavit they argue “the Plaintiffs have produced scant evidence demonstrating any burden placed on their protected rights, and nothing which describes a substantial burden on those rights.”

The opinion was issued on August 17, 2018 and on September 4, a petition for certiorari was submitted. The petitioners point out that ten years after the Supreme Court found in 

Heller

that the Second Amendment confers “an individual right to keep and bear arms,” and eight years after 

McDonald

found the “individual right is fundamental, applicable against state and local governments”

the news had not yet reached New York City. Instead, it is business as usual for

draconian restrictions in New York, and this court’s transformational rulings

remain theoretical for the City’s 8.5 million residents.”

New York City has left “this perverse one-of-a-kind prohibition on its books, and the Second Circuit has now given that prohibition its blessing in a decision that perfectly embodies how lower courts have applied heightened scrutiny in name only to laws restricting Second Amendment rights, notwithstanding this court’s express rejection of such an approach in 

Heller.

Although bearing the burden of proof under heightened scrutiny “the City has presented precisely zero empirical evidence that transporting an 

unloaded handgun locked up

in a container separate from its ammunition (an activity that federal law affirmatively protects) poses any material safety risk . . . .If this kind of showing satisfies heightened scrutiny,” petitioners insist, “then this court did not mean what it said in 

Heller.”

“A restriction that is expressly designed to make it harder to exercise core Second Amendment rights, cannot plausibly withstand any level of constitutional scrutiny.”

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84. New York State Rifle and Pistol Assoc. v. City of New York, p. 34.
85. US Supreme Court, New York State and Pistol Assoc. v. City of New York, on petition for Writ of Certiorari to US Court of Appeals for the Second Circuit (Sept. 4, 2018).
86. Id. at 2.
87. Id. at 2.
88. Id. at 2 (emphasis in original).
89. Id. at 11.
Petitioners go on to accuse the Second Circuit Appeal Court judges of “denying a fundamental individual right by applying a version of heightened scrutiny unrecognizable in any other constitutional context.”90 They find “little difference between denying a fundamental individual right by applying a collective-rights gloss on the text, and denying a fundamental individual right by applying a version of heightened scrutiny unrecognizable in any other constitutional context.”91 In fact, they argue the form of intermediate scrutiny the Appeals Court justices applied “would make the rejected interest-balancing approach look demanding.”92

Finally, petitioners see a larger threat to all constitutional rights in this lax sort of test:

But the threat to constitutional values posed by the decision below is not limited to the Second Amendment. A number of constitutional rights depend on heightened scrutiny for their protection. If courts get in the habit of applying heightened scrutiny in name only to the Second amendment, only one of two outcomes is possible. Either courts will cabin that mistaken approach to the Second Amendment, or `watering it down here w[ill] subvert its rigor in the other fields in which it is applied . . . The former is utterly inconsistent with this Court’s insistence in McDonald that the Second Amendment is not a second-class right. The latter is a threat to the entirety of the Bill of Rights.93

Seventeen states have joined in an amicus brief urging the Supreme Court to grant certiorari in the New York case and clarify the extent of Second Amendment rights outside the home. Amici write that their states have the right to experiment with different policy choices, but that the Second Amendment creates a right this Court has said ‘is exercised individually and belongs to all Americans’ and that Heller warned the cities and states “the enshrinement of constitutional rights necessarily takes certain policy choices off the table.”94 Heller rejected a “judge-empowering

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90. Id. at 10-11.
91. Id.
92. Id. at 11, 25.
93. Id. at 25 (citing Employment Div., Dept. of Human Resources of Or. v. Smith, 494 U.S. 872, 888 (1990)).
free-standing interest-balancing approach,” but has “left in its
wake a morass of conflicting lower court opinions regarding the
proper analysis to apply to challenged firearms regulations.”95 Not
only are circuits divided but some circuits “have deep divides
within their circuit so that the test used and the level of scrutiny
may differ depending on the panel.”96 Of the approach used by the
Second Circuit the amici conclude: “Under the Second Circuit’s
test, the right is a privilege granted by government, not a right
guaranteed by the Second Amendment.”97 Citing Justice Thomas
in *Peruta v. California* they call for clarity: “the time has come to
answer [these] important question[s] definitively.”98

Other federal courts have permitted bans on so-called assault
weapons despite these weapons fitting within the *Heller*
definition
of guns in common use for self-defense and other lawful purposes.
One such case, *Worman et. al., v. Baker*, filed in January 2017 in
the First Circuit challenges Massachusetts’ “assault weapon ban”
which the Massachusetts Attorney General’s pronouncement
expanded to include nearly all semiautomatic firearms and
magazines over 10 rounds.99 The suit challenges both moves.100
Although the proscribed firearms and magazines were in common
use as defined by *Heller*, District Judge William Young held that
the firearms and magazines Massachusetts banned were outside
the Second Amendment protection because they were in “most
useful in military service.”101 As for the right to carry a weapon, in
addition to California, Maryland also requires that the applicant
persuade the police that he or she has a “good reason” to carry a
concealed firearm, that there is a serious personal threat at that
particular time.102 Many cases appealing these and other state
regulations thwarting the Second Amendment rights spelled out
by the Supreme Court were not granted certiorari, but did not

95. Id. at 8 (citing *Heller* at 554 U.S. at 634).
96. Id. at 9 (citing a series of opinions where that is the case).
97. Id. at 13.
100. Id.
101. Id. at 264.
102. *Woollard v. Gallagher*, 712 F.3d 865 (4th Cir. 2013) (this was the first
challenge to a “may issue” state regulation).
Defying the Supreme Court

provoke a published dissent by the justices. Nevertheless, all were instrumental in allowing confusion and disparities to multiply and in the process eroding those rights.

It is long past time for the Supreme Court to hear these cases and to clarify the level of scrutiny to be applied and insisting the right of an individual to keep and bear arms is a constitutional right that must be protected. As Thomas wrote in conclusion to his dissent in *Peruta*, the Framers “reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.”

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Two questions arise from this judicial history, one specific, the other far more troubling. First, it takes four justices to agree to hear a case. Both *Heller* and *McDonald* were five to four decisions and at least two of the dissenting justices, Justice Stephens and Justice Ginsburg, have publicly called for reversing *Heller* and *McDonald*. Of the five justices in the majority, no more than two at any time were sufficiently troubled by the grave and sometimes blatant misinterpretations of their Second Amendment rulings to publish a dissent. Neither Alito, who wrote the *McDonald* opinion, nor Roberts, who joined the majority, agreed to grant cert or join with Justice Thomas in his published dissents. Justice Kennedy’s reticence seems less surprising. With Justice Kavanaugh now replacing Justice Kennedy the Court seems poised to take one or more of the pending Second Amendment appeals. Happily, for the first time in a decade, the Court has agreed to consider a Second Amendment case. In January, 2019 the Court announced it would hear the challenge to New York City’s restrictive ordinance on carrying a gun outside the home.

**WHAT ARE A JUDGE’S RESPONSIBILITIES**

America’s federal judges sit for life tenure under “good behavior.” Although their decisions can be corrected by the

appeals process and Supreme Court considering and overruling them. Upon their elevation to the bench they are required take an oath to administer justice fairly and in accordance with the Constitution. The oath is derived from that English judges took for centuries in which they swore to do equal right to rich and poor notwithstanding the king’s letters, that is the king’s preferences were not to interfere with a true and impartial judgment. They were referred to as lions under the throne, yet relied upon to be independent and protect the law and the rights of subjects. Their current oath has the same thrust:

I, ___, do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of ___, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will.¹⁰⁶

For many years America’s federal judges swore to the following oath:

I, __ ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.¹⁰⁷

In December 1990, however, the Judicial Improvements Act of that year replaced the phrase “according to the best of my abilities and understanding, agreeably to the Constitution” with “under” the Constitution.¹⁰⁸ Apparently the mention of the judge’s abilities and understanding was thought either not necessary or unnecessarily raising the possibility that the new judge’s abilities and understanding might leave something wanting.

All federal officials take an oath to “support and defend the Constitution of the United States against all enemies, foreign and

domestic” and to “bear true faith and allegiance to the same.” Occasionally, Supreme Court justices take an oath that combines that promise with their traditional oath. Lower court judges do not take the combined oath.

That having been said, what can be done if a judge violates his oath and ignores what the Supreme Court has carefully spelled out as the Second Amendment rights of Americans?

While many state judges are elected and therefore subject to voter accountability, the US Constitution gives federal judges life tenure during “good behavior.” What constitutes good behavior? Black’s Law Dictionary defines good behavior as “orderly conduct.” The Founders had taken strong exception to British colonial judges serving at will where they could be removed if their decisions displeased Parliament or the Crown. But there was little discussion at the American Constitutional Convention on the subject. In Federalist 78, Hamilton praised the “good behavior” standard as

an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body . . . [I]t is the best expedient that can be devised in any government to secure a steady, upright, and impartial administration of the laws.” On the other hand, Jefferson denounced the good behavior standard as a “blundering way of removing Judges . . . an impracticable thing ____a mere scarecrow.”

Of course the Founders believed the judicial branch would be the weakest and if kept a separate branch, would not be a threat to the other branches or to the liberties of the people.

111. Id.
THE SUPREME COURT'S VERDICT ON THE SECOND AMENDMENT

The very last decision the US Supreme Court announced on the very last day of the 2008 term was District of Columbia v. Heller.\textsuperscript{115} It was a landmark opinion. For the first time the Court clarified the core meaning of the Second Amendment, focus of a debate growing since the 1970s over whether the amendment protected an individual right of Americans to keep and bear arms or merely a collective right for members of an organized militia to have weapons. In overturning the District of Columbia’s 1976 ban on residents owning handguns, the majority found a pre-existing individual right of the people “to keep and bear those weapons in common use for self-defense and other lawful purposes.”\textsuperscript{116} The opinion pointed out the right was “most acute” in the home, although Scalia, writing for the majority, carefully parsed the right to bear arms and was, of course, part of the text of the Second Amendment. The amendment reads “to keep and bear,” not merely to keep. The Washington D.C. law had not only prohibited residents having a handgun in their homes, but any long gun they had was to be kept disassembled, locked, and could not be reassembled even if an intruder broke into the dwelling or taken from one room to another within the home. The majority was careful to reassure the public that long-standing restrictions on ownership of firearms by felons, the dangerous mentally ill and against anyone carrying weapons in sensitive places remained constitutional. Apart from these rules opened to interpretation, the Court had spoken clearly and forcefully that the Second Amendment embodied the right for individuals to keep and bear those weapons in common use for self-defense and other lawful purposes. The case was decided by five to four, as many key constitutional cases have been. And there it should have rested. It is essential for both the right affirmed by the Supreme Court in two landmark cases to be respected and protected by the nation’s judiciary. The judges have sworn to uphold the Constitution. It is time the Supreme Court held them to that pledge.

\textsuperscript{115} McDonald v. City of Chicago, 561 U.S. 742 (2010).