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## **Open Carry is Coming Soon...Unless We Act Now**

### **A Message from the President of Americans Against Gun Violence**

**July 26, 2018**

Unless we act now, open carry of loaded guns is coming soon to a theater near you – and to restaurants, grocery stores, parks, sidewalks, streets, and other public places.

If you live in a state like Alaska, Alabama, Louisiana, or Texas that already allows open carry of loaded firearms in most public places,<sup>1</sup> you may have become accustomed to bumping into someone with a loaded handgun on his or her hip as you're pushing your grocery cart down the cereal aisle or standing in line for a cup of coffee. You may also be aware that states with permissive open carry laws have, in general, some of the weakest gun control regulations and some of the highest rates of gun related deaths in our country.<sup>2</sup>

If you live in Hawaii, though, which has some of the toughest gun control laws and one of the lowest rates of gun related deaths in the country,<sup>3</sup> you'd never expect to see someone openly carrying a gun in a public place – at least, not until a couple of days ago, when two of three judges on a panel of the 9<sup>th</sup> Circuit Court of Appeals ruled in the case of *Young v. Hawaii* that denying someone the right to openly carry a loaded firearm in public violates the Second Amendment.<sup>4</sup> The judges didn't specify, though, to which version of the Second Amendment they were referring.

The original Second Amendment states, in its entirety:

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.

In rendering their opinion in *Young v. Hawaii*, the two judges who ruled in favor of the plaintiff cited the 2008 *Heller* decision as the basis for their ruling. *Heller*, which struck down Washington DC's ban on new handgun purchases, was the first time in U.S. history that the Supreme Court had

ever ruled that the Second Amendment conferred an individual right to own a gun. The Court had previously ruled in four previous cases that the Second Amendment **did not** confer an individual right to gun ownership.<sup>5</sup> Most recently, the Court ruled in 1939 in *U.S. v. Miller* and reiterated in 1980 in *Lewis v. United States* that, “**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.’**”<sup>6</sup>

In the *Heller* decision, a narrow 5-4 majority of the Court effectively rewrote the Second Amendment to suit the gun lobby’s liking, rendering the first half of the Amendment irrelevant. The majority opinion in *Heller*, written by the late Supreme Court Justice Antonin Scalia, has been called “wrong and unprincipled,”<sup>7</sup> a “rogue decision,” and “a snow job”<sup>8</sup> by legal experts. The late Supreme Court Chief Justice Warren Burger called the misrepresentation of the Second Amendment as conferring an individual right to own guns “**one of the greatest pieces of fraud - I repeat the word 'fraud' - on the American public by special interest groups that I have ever seen in my lifetime.**”<sup>9</sup>

When Justice Scalia died unexpectedly in February of 2016, President Obama nominated Judge Merrick Garland to replace him on the Supreme Court. Garland was sitting at the time on the Washington DC Circuit Court of Appeals. Garland had voted in favor of the entire DC Circuit Court reviewing the initial ruling by a three member panel in 2007 that Washington DC’s partial handgun ban violated the Second Amendment, but he was outvoted 6-4, and the case went directly to the Supreme Court.<sup>10</sup> Senate Majority Leader Mitch McConnell refused to even hold a hearing on Garland’s nomination. Had Garland received a fair hearing and been confirmed as a Supreme Court Justice, it’s likely that the *Heller* decision would have been overturned by now.

Similarly, during her presidential campaign, Secretary Hillary Clinton stated at a private fundraiser that the *Heller* decision was “wrong.”<sup>11</sup> When confronted with this statement during her third debate with Donald Trump, however, Clinton backed down, claiming that the portion of the *Heller* decision that she disagreed with was the repeal of the requirement for trigger locks to prevent toddlers from accidentally firing handguns (a relatively minor component of the DC handgun law). Nevertheless, had Clinton become President instead of Donald Trump, it’s likely that she would have nominated a justice to replace Scalia who, like Garland, would have tipped the balance on the Court in favor of overturning *Heller*.

Instead, Donald Trump became president and appointed Neal Gorsuch to replace Scalia. Gorsuch expressed deep admiration for Scalia in his acceptance speech after Trump’s nomination,<sup>12</sup> and he dodged questions about the *Heller* decision during questioning by California Senator Dianne Feinstein during his confirmation hearing. Gorsuch has already signaled his inclination to go beyond *Heller* and interpret the Second Amendment as guaranteeing an individual right to carry a concealed handgun by joining with Clarence Thomas in a dissenting opinion concerning the Supreme Court’s refusal to hear an appeal in the case of *Peruta v.*

*California.*

And now, with the unexpected abrupt retirement of Justice Anthony Kennedy, who cast the deciding fifth vote in the *Heller* decision, Trump has nominated Judge Brett Kavanaugh to fill Kennedy's vacancy. In written opinions, Kavanaugh has expressed the view that the Second Amendment confers an individual right to own not only handguns, but also assault rifles.<sup>13</sup>

The *Heller* decision is worse than "wrong and unprincipled;" worse than a "rogue decision;" worse than a "snow job;" and worse than "one of the greatest piece of fraud on the American public by special interest groups" that a highly respected Supreme Court chief justice ever saw in his lifetime. To the extent that the *Heller* decision prevents the enactment and enforcement of stringent gun control laws in the United States comparable to the laws that have long been in effect in every other high income democratic country of the world, ***Heller* is a death sentence.**

If the United States were to lower its rates of gun related deaths to rates similar to those in Canada through the adoption of comparable gun control laws, at least 26,000 lives would be saved every year. If we were to lower our rates of gun related deaths to rates similar to those in Australia through the adoption of similar gun control laws (including a ban on all semi-automatic rifles), at least 30,000 lives would be saved every year. And if we were to lower our rates of gun related deaths to rates similar to those in Great Britain through the adoption of comparable gun control laws (including a ban on all handguns), over 33,000 lives would be saved every year.<sup>14</sup>

The case of *Young v. Hawaii* is likely to be appealed to the full 9<sup>th</sup> Circuit Court, and the full court may well overturn the split decision of the three judge panel. If Kavanaugh is confirmed as a Supreme Court Justice, though, the case will almost certainly be appealed to the Supreme Court, and Justices Kavanaugh, Gorsuch, Thomas, Roberts, and Alito are likely to rule that allowing open carry of not only handguns but also of assault rifles is protected by the Second Amendment – or at least, protected by the 2008 rewrite of the Second Amendment in *Heller*.

Please contact your US senators today and urge them to oppose the confirmation of Brett Kavanaugh as a Supreme Court justice. And please let your senators and your U.S. representative know that you expect them to openly advocate and do everything within their power to overturn the *Heller* decision and to enact stringent gun control laws in the United States comparable to the laws that have long been in effect in every other high income democratic country of the world – countries in which mass shootings are rare or non-existent<sup>15</sup> and in which the rate of gun homicide is, on average, 25 times lower than in our country.<sup>16</sup>

Please also become a paid member of Americans Against Gun Violence, if you haven't done so already (the annual membership fee is just \$25), and

please make an additional donation, if you're able. And please talk to friends, family members, and colleagues about the need to overturn the *Heller* decision, and encourage them to join Americans Against Gun Violence as well. To the best of my knowledge, Americans Against Gun Violence remains the only national organization in our entire country that openly advocates overturning *Heller* and adopting stringent gun control laws comparable to the laws in other high income democratic countries. (If you know of other organizations that share our position, let me know so that we can join forces with them. If you support other organizations that don't share our position, please ask them why they don't.)

The thought of encountering bullies obsessed with guns who are carrying loaded semi-automatic pistols and assault rifles in public places to flaunt the fact that they've hijacked the Second Amendment reminds me of a statement by one of our 2018 Americans Against Gun Violence high school essay contest winners. The student wrote:

*People who deal with addiction say that they need to hit rock bottom in order to understand that they need to change. The question is, what is the rock bottom to have the US address its gun addiction?*

Thanks for helping address America's gun addiction problem now, before we sink to a new low.

Sincerely,



Bill Durston, MD  
President, Americans Against Gun Violence

Notes: Dr. Durston is a board certified emergency physician, a former expert marksman in the U.S. Marine Corps, and a combat veteran decorated for "courage and composure under fire" during the Vietnam War.

For more information about the Second Amendment and the myth of "guns for protection," see the Facts and FAQ's page of the Americans Against Gun Violence website.

The winning essays in the 2018 Americans Against Gun Violence National High School Essay Contest are posted on the In The News page of the Americans Against Gun Violence website.

## References

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- <sup>2</sup> “Giffords Law Center’s Annual Gun Law Scorecard,” Giffords Law Center, accessed July 25, 2018, <http://lawcenter.giffords.org/scorecard>.
- <sup>3</sup> “Giffords Law Center’s Annual Gun Law Scorecard.”
- <sup>4</sup> George K. Young, Jr., v. State of Hawaii, No. 12–17808 (9th Cir July 24, 2014).
- <sup>5</sup> *United States v. Cruikshank*, 92 US (Supreme Court 1876); *Presser v. Illinois*, 116 US (Supreme Court 1886); *U.S. v. Miller*, 307 U.S. 174 (1939) (n.d.); *Lewis v. United States*, No. 55 (U.S. 1980).
- <sup>6</sup> *Miller, Lewis*, 445.
- <sup>7</sup> Dennis A. Henigan The Conversation July 29 and 2008, “The Heller Majority: Wrong and Unprincipled,” Cato Unbound, accessed October 31, 2016, <https://www.cato-unbound.org/2008/07/29/dennis-henigan/heller-majority-wrong-unprincipled>.
- <sup>8</sup> Richard Posner, “In Defense of Looseness,” *The New Republic*, August 26, 2008, <https://newrepublic.com/article/62124/defense-looseness>.
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- <sup>14</sup> “Gun Law and Policy: Firearms and Armed Violence, Country by Country,” *GunPolicy.org*, accessed December 3, 2017, <http://www.gunpolicy.org/>.
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- <sup>16</sup> Erin Grinshteyn and David Hemenway, “Violent Death Rates: The US Compared with Other High-Income OECD Countries, 2010,” *The American Journal of Medicine* 129, no. 3 (March 1, 2016): 266–73, <https://doi.org/10.1016/j.amjmed.2015.10.025>.