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As Mass Shootings Make Headlines, We Call on Courts to End Second Amendment Fraud

A Message from the President of Americans Against Gun Violence
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Mass shootings are once again front page news. On March 16, a lone gunman, 21 year old Robert Aaron Long, shot and killed eight people, including six Asian American women, and wounded one other person at three different spas in the Atlanta, Georgia area. On March 22, another gunman (allegedly 21 year old Ahmad Al Aliwi Alissa), shot and killed ten people, including the first responding police officer, at a supermarket in Boulder, Colorado.

In between these two horrific mass shootings, Americans Against Gun Violence filed an *amicus curiae* (friend of the court) brief in the Ninth Circuit Court of Appeals case, *Duncan v. Becerra* – a case that is highly relevant to both the Atlanta and Boulder mass shootings.¹ In our brief, we called on the Court to help stop the carnage by upholding a large capacity magazine ban and by ending the fraudulent misrepresentation of the Second Amendment – a fraud that was endorsed by a narrow five member majority of the U.S. Supreme Court in its rogue 2008 *Heller* decision² and that has since been amplified by lower courts.

In *Heller*, by a margin of a single justice's vote, the Supreme Court reversed over two centuries of legal precedent, including four prior Supreme Court decisions,³ in ruling for the first time in U.S. history that the Second Amendment conferred any kind of individual right to own a gun unrelated to service in a well regulated militia. Americans Against Gun Violence was the only national gun violence prevention (GVP) organization in the entire United States to file an *amicus* brief calling on the Supreme Court to overturn the *Heller* decision in the 2019 Second Amendment case of the *New York State Rifle and Pistol Association v. New York*;⁴ and we are again the only organization to make the point in the Second Amendment case of *Duncan v. Becerra* that *Heller* is worse than a rogue decision, worse even than what the late Supreme Court Chief Justice Warren Burger called, "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."⁵ By creating a constitutional obstacle, where none previously existed, to the adoption of stringent gun control laws in the United States comparable to the laws in other high income democratic countries – laws that almost certainly would have prevented both the Atlanta and Boulder mass shootings, as well as most of the other more than 100 fatal shootings that occur on an average day in our country⁶ – the *Heller* decision is literally a death sentence for tens of thousands of Americans annually.

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In the case of *Duncan v. Becerra*, a three judge panel of the 9th Circuit Court of Appeals ruled on August 14, 2020 in a 2-1 decision that California's ban on civilian ownership of large capacity magazines (defined as magazines that hold more than 10 rounds and abbreviated as "LCM's") violated the Second Amendment. The ban had been approved by almost a two to one margin by California voters in 2016 as part of Proposition 63, but the gun lobby challenged the constitutionality of the ban in *Duncan v. Becerra*. The gun lobby's challenge was based almost entirely upon the Supreme Court's interpretation of the Second Amendment in the 2008 *Heller* decision, in which the Court ruled that Washington DC's restrictive handgun licensing law was unconstitutional. Former California Attorney General Xavier Becerra appealed to the full Ninth Circuit Court of Appeals for "*en banc*" review of the panel's split decision, and the Court agreed for an eleven judge panel to rehear the case on June 22, 2021. We filed our *amicus* briefs in support of the LCM ban on March 18, the deadline to submit briefs to the *en banc* panel.

The majority opinion in the Supreme Court's 2008 *Heller* decision, written by the late Supreme Court Justice Antonin Scalia, has been appropriately called "gun rights propaganda passing as scholarship."⁷ Judge Lee's 64 page majority opinion in *Duncan v. Becerra* takes the courts' endorsement of gun rights propaganda to a new low.

The 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.

Among the many absurdities in Judge Lee's majority opinion in *Duncan v. Becerra* is the argument that LCM's were in common usage in 1791 when the Second Amendment was adopted.⁸ Of course, there is no mention of LCM's in the Second Amendment itself or in historical records concerning the writing and ratification of the Amendment. Nor, in fact, is there anything in these records to suggest that the founders who wrote, debated, revised, and later voted to ratify the Second Amendment ever intended or understood it to confer an individual right to own any kind of gun or gun-related paraphernalia unrelated to service in a well regulated militia. Prior to 2008, the Supreme Court had specifically ruled on four separate occasions⁹ that the Second Amendment **did not** confer an individual right to own guns. Specifically, in the 1939 *Miller* decision, the Court ruled unanimously:

"With obvious purpose to assure the continuation and render possible the effectiveness of [a well regulated militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."¹⁰

Quoting from another section of the *Miller* decision, Supreme Court Justice Harry Blackmun reiterated in his majority opinion in the 1980 case of *Lewis v. United States*:

"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.'"¹¹

In his majority opinion in *Duncan v. Becerra*, Judge Lee regurgitates much of the circular reasoning, revisionist history, and bombastic rhetoric that characterize Scalia's majority opinion in the *Heller* decision. Lee goes further, though, to imply that because AR-15 style

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assault rifles – like the one used in the Boulder mass shooting¹² and in numerous other horrific mass shootings in the United States over the past several decades - are now “the most popular rifle in American history,”¹³ the Second Amendment confers a constitutional right of civilian ownership of such weapons as well as the LCM’s that facilitate their being used to kill and maim large numbers of people in a short period of time. Lee also pays sanctimonious homage to semi-automatic handguns – the type of weapon used in the Atlanta mass shooting,¹⁴ in most other mass shootings,¹⁵ and in approximately 80% of all gun related deaths in our country¹⁶ - describing the Glock handgun (made by an Austrian company), which comes with a standard 17 round LCM, as “America’s gun.”¹⁷

Like Justice Scalia, Judge Lee ignored the overwhelming evidence that guns in the homes and communities of honest, law abiding people are far more likely to be used to harm them than to protect them;¹⁸ and the fact that the main reasons why the rate of gun related deaths in the United States is ten times higher than the average for the other high income democratic countries of the world¹⁹ – and why the United States is the only economically advanced country in the world in which mass shootings occur on a regular basis²⁰ – are our extraordinarily lax gun control laws, the related ease with which almost anyone can acquire a gun, and the extraordinarily high number of privately owned guns in circulation as compared with all other advanced democratic countries.²¹ Perhaps the most shocking and irresponsible aspect of Lee’s majority opinion in *Duncan v. Heller*, however, is his statement:

Our country’s history has shown that communities of color have a particularly compelling interest in exercising their Second Amendment rights. The Second Amendment provides one last line of defense for people of color when the state cannot — or will not — step in to protect them. This remains true today across all communities of color. For example, amid the COVID-19 pandemic, Asian-Americans have become the target of physical attacks by those who scapegoat them for the virus....In response to these assaults and threats to their lives, Asian-Americans have begun arming themselves.²²

While the motive in the Atlanta spa mass shootings remains uncertain, the fact that six of the eight people killed were Asian American women obviously raises the possibility that the shootings were racially motivated. The motive in the Boulder mass shooting is also unclear at this time. There’s no doubt, however, concerning the racial motivation in the mass shooting at the Emanuel African Methodist Episcopal Church in Charleston, South Carolina in 2015, in which the white supremacist, Dylan Roof, intent on starting a “race war,” murdered nine African American parishioners and wounded two others.²³

Apparently, Judge Lee’s vision of the problem with tragedies like the Charleston, Atlanta, and Boulder mass shootings is not that individuals like Dylan Roof, Robert Long, and Ahmad Alissa are able to easily procure highly lethal weapons (“America’s gun,” in the case of Roof; a 9 mm semi-automatic handgun of as yet unspecified make and model in the case of Long; and a modified AR-15 in the case of Alissa) for the specific purpose of committing their horrific crimes; rather, the problem is that people like the shoppers at the Boulder supermarket, like the employees and patrons at the Atlanta-area spas, and like the parishioners at the Charleston church do not routinely arm themselves with firearms equipped with LCM’s and are not prepared to use them at a moment’s notice in self defense. The fact that the first responding police officer was also killed in the Boulder mass shooting is further evidence of the absurdity of Judge Lee’s implication that ordinary citizens would be able to effectively protect themselves if they carried semi-automatic

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firearms equipped with LCM's when they went to church, the grocery store, or for a massage.

At Americans Against Gun Violence, we have a very different vision for the future of our country. We believe that we have both the ability and the moral responsibility to reduce rates of gun violence in the United States to levels at or below the rates in the other high income democratic countries of the world, and that in order to do so, we must adopt equally stringent gun control laws, including a complete ban on civilian ownership of handguns, comparable to the ban that Great Britain adopted after the 1996 Dunblane Primary School mass shooting, and a complete ban on civilian ownership of all automatic and semi-automatic long guns, comparable to the bans that Great Britain, Australia, and New Zealand adopted after the 1987 Hungerford mass shooting, the 1996 Port Arthur mass shooting, and the 2019 Christchurch mass shooting, respectively. And in order to adopt such laws, we must overturn the rogue *Heller* decision and the progeny of *Heller*, including the Ninth Circuit Court panel's ruling in *Duncan v. Becerra*.

Of course, an appeals court cannot legally overturn a Supreme Court ruling. In our *amicus* brief in *Duncan v. Heller*, though, we make the point that given the multiple egregious flaws in the *Heller* decision, lower courts should apply *Heller* in as limited a manner as possible until such time as it is overturned by another Supreme Court decision or a new constitutional amendment; and that lower courts should certainly refrain from compounding the damage done by *Heller*. In the case of *Duncan v. Becerra*, as terrible as the *Heller* decision is, it does not state that the Second Amendment confers a right for civilians to possess LCM's. The *en banc* panel of the Ninth Circuit Court of Appeals should overturn the three judge panel's split decision and rule instead that California's LCM ban does not violate the Second Amendment or any other part of the U.S. Constitution.

At the time of this writing, Americans Against Gun Violence remains the only national gun violence prevention (GVP) organization in the United States that openly advocates overturning the *Heller* decision and adopting stringent gun control laws comparable to the laws in other high income democratic countries. You may wonder, as I do, why other GVP organizations don't join us. I've worked on the issue of gun violence prevention for more than two decades now. I know many of the leaders of other GVP organizations; I've worked with some of them in the past; I've contributed money to some of their organizations; and I continue to communicate with many of them regularly. I consider most of them to be fine, intelligent people. Many have lost loved ones to gun violence. The reason why I helped found Americans Against Gun Violence in 2016, though, was because I couldn't convince any of the leaders of the other GVP organizations to join me in openly advocating overturning the *Heller* decision and adopting stringent gun control laws in the United States comparable to the laws in other democratic countries like Great Britain, Australia, and New Zealand.

Joshua Sugarmann, executive director of the Violence Policy Center, wrote in his 2001 book, *Every Handgun is Aimed at You*:

America's gun lobby would be on the run, if only the gun control advocates would bother to chase them. Instead, trapped by their perception of the politically achievable, gun control advocates are always on the defensive²⁴....They nibble around the edges of half-solutions and good intentions dramatically out of sync with the reality of gun violence in America.²⁵

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I have my own theories about why the other GVP organizations are content to “nibble around the edges of half-solutions and good intentions.” If you wonder why these other GVP organizations don’t join Americans Against Gun Violence in advocating more stringent gun control laws, though, I suggest you ask them yourself – especially when they solicit donations from you.

Since the Atlanta and Boulder mass shootings, I’ve received innumerable emails from other GVP organizations asking me for contributions to “end gun violence.” None of the emails explain, though, just how the measures that these organizations advocate will prevent mass shootings like the ones committed in Atlanta and Boulder over the past week, much less the more than 100 gun related deaths that occur on an average day in our country.

Other GVP organizations are promoting H.R. 8, which is also known as the “Bipartisan Background Checks Act of 2021” (although the bill garnered only 8 Republican votes in the House of Representatives), as a definitive solution to ending gun violence in our country. If enacted into law, H. R. 8 would close the loophole in the original 1993 Brady Act that required background checks for gun sales done through federally licensed firearm dealers but not through private individuals. It’s been estimated that up to 40% of gun transfers are done through private parties.²⁶

Americans Against Gun Violence supports H.R. 8, but as a baby step forward in the right direction, not as a definitive solution to stopping the epidemic of gun violence in our country. The reason for our lack of enthusiasm is that background checks, as they are done in the United States, are extremely crude instruments for determining who should or should not be allowed to possess a gun. Even before the *Heller* decision created a constitutional right to keep a handgun in the home, our country’s guiding policy with regard to firearm ownership was a “permissive” one.²⁷ Anyone of a certain age who seeks to acquire a gun in the United States can legally do so unless the government can prove through a rudimentary background check that he or she falls into one or more relatively narrow categories of persons being prohibited from owning firearms.

Under current federal background check criteria, even most individuals who have gone on to commit mass shootings, including Dylan Roof,²⁸ Robert Aaron Long,²⁹ and Ahmad Alissa,³⁰ have been able to pass background checks and legally obtain the firearms that they used in their crimes.³¹ Most background checks are done instantly through a computer search of a federal database to see if the prospective gun buyer is on a list of individuals who fall into one or more categories of persons prohibited from owning a gun. The main categories are a history of conviction for a felony³² or a domestic violence misdemeanor; a history of involuntary commitment for mental illness; ongoing addiction to illicit drugs; or being subject to an active court restraining order for harassing, stalking, or threatening an intimate partner.³³ There have been several high profile cases in which even individuals who fell into one of these categories were still able to pass federal background checks because the responsible authorities did not report the individuals’ prohibited status to the national database.³⁴

In all other high income democratic countries, background checks are a secondary safeguard, not a primary one. Under the restrictive guiding policy of all other economically advanced democracies, the prospective gun purchaser must first prove that he or she has a legitimate reason for owning a gun and can handle one safely. Furthermore, recognizing that there is no net protective value in owning or carrying a gun, many other high income

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democratic countries don't accept "self defense" as a legitimate reason for acquiring a firearm.³⁵ If a person passes the initial screen for being eligible to purchase a gun, in countries like Australia and Great Britain, an extensive background check is then done by police who conduct in person interviews with the person seeking to acquire a gun and with other people who know the person, including past and present domestic partners.

Other GVP organizations are also promoting the new assault weapon ban that is being introduced by Senators Dianne Feinstein (D-California) and Congressman David Cicilline (D-Rhode Island) as a definitive way to "stop mass shootings." As with H.R. 8, Americans Against Gun Violence supports the new proposed assault weapon ban, but only as a baby step in the right direction.

Senator Feinstein authored the original federal assault weapons ban that was in effect from 1994 until it was allowed to sunset in 2004. Although there is clearly no legitimate reason for civilians to own automatic or semi-automatic firearms that are specifically designed to kill and maim large numbers of people in a short period of time, it is doubtful that the federal assault weapons ban had much effect during the 10 years that it was in force. The ban defined an assault weapon as a semi-automatic firearm that could accept a detachable magazine and that had at least two other features typically included on military weapons, such as a pistol grip, a thumb-hole in the stock, or a bayonet mount. The ban grandfathered in millions of assault weapons that were already in circulation, though, and it specifically exempted 86 different makes of semi-automatic firearms that did not meet the definition of an assault weapon, but that were potentially just as deadly. Moreover, U.S. gun manufacturers subsequently produced new models of firearms with minor modifications that eluded the definition of an assault weapon, mocking the ban by giving the new weapons prefixes like "AB" for "after ban" or "PCR" for "politically correct rifle." A U.S. Department of Justice report summarized the shortcomings of the assault weapons ban with the statement:

The [assault weapons] provision targets a relatively small number of weapons based on features that have little to do with the weapons' operation, and removing those features is sufficient to make the weapons legal.³⁶

It was not surprising, given the weak nature of the 1994 assault weapon ban, that neither the number of mass shootings nor the number of people killed in mass shootings declined during the 10 years that the ban was in effect.³⁷

The new assault weapon ban that is being introduced by Senator Feinstein and Representative Cicilline is somewhat more restrictive than the 1994 ban in that it defines an assault weapon as a semi-automatic firearm that can accept a detachable magazine and that has at least one, rather than two, other features typically included on military weapons. Like the 1994 ban, though, the new one grandfathers in all the legally owned assault weapons already in private hands at the time that the law goes into effect.

Other countries like Great Britain, Australia, and New Zealand reacted to mass shootings committed with so-called "assault weapons" by banning all automatic and semi-automatic long guns, regardless of whether they had other features typically included on military weapons, and by requiring everyone who already owned any of the newly banned weapons to surrender them to be destroyed in return for monetary compensation. While it is too soon after the adoption of the 2019 New Zealand ban to evaluate its efficacy, there were no mass shootings in Australia for 22 years following the adoption of its semi-

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automatic long gun ban in 1996,³⁸ and there has been just one mass shooting in Great Britain since 1998 when the handgun ban was adopted in addition to the 1987 semi-automatic long gun ban.³⁹ The rate of gun related deaths in Australia is currently 1/12th the rate in the United States, and the rate of gun related deaths in Great Britain is currently 1/60th the U.S. rate.⁴⁰

After bashing other GVP organizations for repeatedly sending me emails asking me to contribute to them to “end gun violence” and “stop mass shootings,” I now come to the point in this message in which I ask you to make a contribution to Americans Against Gun Violence. In making this ask, though, I can honestly claim what leaders of other GVP organizations cannot: the measures that Americans Against Gun Violence advocates, including overturning the *Heller* decision, changing the guiding policy for firearm ownership in our country from a “permissive” one to a “restrictive” one, and banning civilian ownership of all handguns and all automatic and semi-automatic long guns – measures that will drastically reduce the number of privately owned guns in circulation in our country – will not only prevent nearly all mass shootings, but will reduce the number of other gun related deaths in our country to one tenth or less the present rate, thereby saving more than 36,000 lives annually.

Along with asking you to make a contribution to Americans Against Gun Violence (and to become an official paid member, if you haven’t already done so), I’ll also ask you to encourage friends, family members, and colleagues to join our cause; to contact your elected representatives and urge them to support not only limited gun control measures like expanded background checks and a new assault weapons ban, but to also openly advocate overturning the rogue *Heller* decision and adopting stringent gun control laws in the United States comparable to the laws in Great Britain, Australia, New Zealand and other high income democratic countries.

And finally, I’ll ask you to never give up and never lose faith that we can accomplish our mission of stopping our country’s shameful epidemic of gun violence. I’ll support this final ask with two of my favorite quotes.

Public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can succeed. Consequently, he who molds public sentiment goes deeper than he who enacts statutes or pronounces decisions. He makes statutes and decisions possible or impossible to be executed. - Abraham Lincoln

It always seems impossible until it’s done. - Nelson Mandela

Sincerely,



Bill Durston, MD
President, Americans Against Gun Violence

Note: 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 under fire” during the Vietnam War.

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