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## Press Release

### **Sanctimonious Nonsense: Two Trump-appointed 9<sup>th</sup> Circuit Judges Rule that California's Age Limit for Purchasing Semi-Automatic Rifles Violates the Second Amendment**

**Sacramento, California, May 12, 2022:** In October of 2019, California Senate Bill 61 was signed into law, making it illegal to sell semi-automatic rifles to anyone under the age of 21 other than law enforcement officers or members of the armed forces.<sup>1</sup> The term, "semi-automatic," is used to describe a firearm in which a feeding device (usually a "magazine") delivers a new round into the firing chamber as quickly as the shooter can pull the trigger. Semi-automatic rifles that resemble the military M-16 in appearance, including the popular AR-15, have been referred to as "assault weapons," but any semi-automatic firearm can be used to kill and maim large numbers of people in a short period of time.

The gun lobby filed a lawsuit (*Jones v. Becerra*, which later became *Jones v. Bonta* after Rob Bonta replaced Xavier Becerra as California's Attorney General) claiming that SB 61 violated the Second Amendment, but a federal district court judge rejected the gun lobby's claim.<sup>2</sup> The gun lobby then appealed to the 9<sup>th</sup> Circuit Court of Appeals. On May 11, in a split 2-1 decision, a three judge panel of the 9<sup>th</sup> Circuit ruled that California's age limit for purchasing a semi-automatic rifle does in fact violate the Second Amendment.<sup>3</sup>

The two judges in the majority, Ryan Nelson and Kenneth Lee, are both Trump nominees. (The dissenting judge, Sidney Stein, is a Clinton nominee.) Judge Lee had previously authored a majority opinion a 2-1 decision of a panel of the 9<sup>th</sup> Circuit in the case of *Duncan v. Becerra*, (which also later became *Duncan v. Bonta*) in which he and Judge Consuelo Callahan (a George W. Bush nominee) ruled that California's large capacity magazine ban violated the Second Amendment.<sup>4</sup> That ruling was subsequently vacated in a 7-4 decision by an 11-judge *en banc* panel of the 9<sup>th</sup> Circuit.<sup>5</sup> Judge Nelson was one of the four dissenters on the *en banc* panel.

Judge Nelson wrote the majority opinion in *Jones v. Becerra*. His first two sentences, which can best be described as sanctimonious nonsense, set the tone for the rest of his 70 page majority opinion. Judge Nelson writes:

America would not exist without the heroism of the young adults who fought and died in our revolutionary army. Today we reaffirm that our Constitution still protects the right that enabled their sacrifice: the right of young adults to keep and bear arms.<sup>6</sup>

The Revolutionary War was won by a professional army equipped mainly with single shot flintlock muskets imported from Europe,<sup>7</sup> not by teenagers running around on their own with semi-automatic rifles. The ruling by Judges Nelson and Lee that California's age restriction on the sale of semi-automatic rifles violates the Second Amendment is absurd.

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.

The clearly stated purpose of the Second Amendment is to provide for the common defense. Today's equivalent of a "well regulated Militia" is the armed forces, including the National Guard, not teenage gangs and self-appointed insurrectionist militias. The term, "the people," was used in a collective sense throughout the Constitution, as in the first phrase of the first sentence, "We the people of the United States," and in the part of the First Amendment that refers to "the right of the people to peaceably assemble." And the term, "keep and bear arms" was used almost exclusively during the Founding Era to refer to possessing and carrying weapons of war in the setting of military service.<sup>8</sup>

Judge Nelson makes 26 references to the Supreme Court's rogue 2008 *Heller* decision in his majority opinion. In *Heller*, a narrow 5-4 majority of the Court ruled that the District of Columbia's partial handgun ban and safe firearm storage laws violated the Second Amendment.<sup>9</sup> Prior to the *Heller* decision, no U.S. firearm law had ever been overturned on a Second Amendment basis. In ruling for the first time in U.S. history that the Second Amendment conferred any kind of an individual right to own a gun unrelated to service in a "well regulated militia," the *Heller* majority reversed over two centuries of legal precedent, including four prior Supreme Court opinions,<sup>10</sup> and effectively declared "open season" for the gun lobby to challenge all kinds of firearm laws.

Respected authorities have described the *Heller* decision as "gun rights propaganda passing as scholarship"<sup>11</sup> and as "evidence of the ability of well-staffed courts to produce snow jobs."<sup>12</sup> In his autobiography, *The Making of a Justice*, the late Supreme Court Justice John Paul Stevens, who wrote a dissenting opinion in *Heller*, described the *Heller* majority opinion as "unquestionably the most clearly incorrect decision that the Court announced during my [35 year] tenure on the bench."<sup>13</sup> Stevens also noted that the *Heller* majority endorsed an interpretation of the Second Amendment that the late

Supreme Court Chief Justice Warren Burger had called “[O]ne 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>14</sup> But the Supreme Court’s 2008 *Heller* decision is worse than even these harsh criticisms might indicate. In 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 the other high income democratic countries of the world – countries in which mass shootings occur rarely, if ever, and in which the average rate of gun related homicides is 1/25<sup>th</sup> the U.S. rate for all age groups combined<sup>15</sup> and 1/82<sup>nd</sup> the U.S. rate for high school age youth,<sup>16</sup> *Heller* is literally a death sentence for tens of thousands of Americans annually.

As terrible as the *Heller* decision is, it provides no basis for ruling that it is unconstitutional to ban the sale of semi-automatic rifles to persons under 21 years of age. We urge California Attorney General Bonta to appeal the ruling of Judges Nelson and Lee to the full 9<sup>th</sup> Circuit Court of Appeals, and we urge the other judges of the 9<sup>th</sup> Circuit to apply the *Heller* decision as narrowly as possible until such time as the decision is overturned.

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<sup>1</sup> “Bill Text - SB-61 Firearms: Transfers.,” 61, accessed May 12, 2022, [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201920200SB61](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB61).

<sup>2</sup> *Jones v. Becerra*, 498 F. Supp. 3d 1317 (Dist. Court 2020).

<sup>3</sup> *Jones v. Bonta*, No. 20-56174 (Ninth Circuit Court of Appeals May 11, 2022).

<sup>4</sup> *Duncan v. Becerra*, 970 F. 3d 1133 (Court of Appeals, 9th Circuit 2020).

<sup>5</sup> *Duncan v. Bonta*, Court of Appeals, 9th Circuit (November 30, 2021).

<sup>6</sup> *Jones v. Bonta* at 8.

<sup>7</sup> Mark Malloy, “Small Arms of the Revolution,” American Battlefield Trust, December 8, 2020, <https://www.battlefields.org/learn/articles/small-arms-revolution>.

<sup>8</sup> “BRIEF FOR PROFESSORS OF LINGUISTICS AND ENGLISH DENNIS E. BARON, Ph.D., RICHARD W. BAILEY, Ph.D. AND JEFFREY P. KAPLAN, Ph.D. IN SUPPORT OF PETITIONERS in the Case of District of Columbia v. Heller,” 2008.

<sup>9</sup> *District of Columbia v. Heller*, 554 US (Supreme Court 2008).

<sup>10</sup> *United States v. Cruikshank*, 92 US 542 (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>11</sup> Saul Cornell, “Originalism on Trial: The Use and Abuse of History in *District of Columbia v. Heller*,” *Ohio State Law Journal* 69 (2008): 629.

<sup>12</sup> Richard Posner, “In Defense of Looseness,” *The New Republic* 239, no. 3 (August 27, 2008): 35.

<sup>13</sup> John Paul Stevens, *The Making of a Justice: Reflections on My First 94 Years* (New York: Little, Brown, 2019), 482.

<sup>14</sup> Stevens, 483; Warren Burger, PBS News Hour, December 16, 1991, c.

<sup>15</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>.

<sup>16</sup> Ashish P. Thakrar et al., “Child Mortality In The US And 19 OECD Comparator Nations: A 50-Year Time-Trend Analysis,” *Health Affairs* 37, no. 1 (January 2018): 140–49, <https://doi.org/10.1377/hlthaff.2017.0767>.