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A Two-Word Summary of the Supreme Court's New One-Step Test for the Constitutionality of Gun Laws: "Blatant Hypocrisy"

A Message from the President of Americans Against Gun Violence

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Introduction

The Second Amendment to the U.S. Constitution 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.

For most of our nation's history, courts used a simple one-step test to determine whether a gun law violated the Second Amendment. If the law didn't interfere with the ability of a legitimate governmental body to maintain a "well regulated militia," it wasn't unconstitutional. As the Supreme Court stated succinctly in its 1980 *Lewis* decision, quoting a phrase from its earlier 1939 *Miller* decision:

> [T]he 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."[1]

Until the Supreme Court's rogue 2008 *Heller* decision, no U.S. gun law had ever been overturned on a Second Amendment basis. In the *Heller* case, though, a narrow 5-4 majority of the Supreme Court reversed over two centuries of legal precedent, including four prior Supreme Court decisions,[2] in ruling that Washington DC's partial handgun ban violated the Second Amendment.[3] The *Heller* decision signaled to the gun lobby that it was "open season" to challenge all sorts of other gun laws. But in the first decade after the *Heller* decision, nearly all of these challenges failed in lower courts; and with just two exceptions,[4] the Supreme Court declined to hear any new Second Amendment cases. Now, though, with three members of the original *Heller* majority still on the Court (Justices Roberts, Thomas, and Alito), and with three new Trump-nominated justices joining them (Justices Gorsuch, Kavanaugh, and Coney Barrett), the Supreme Court has effectively announced that it's once again "open season" for shooting down gun laws, and that this time around, the Court is applying a new one-step test for determining whether gun laws violate the Second Amendment. The new test can be summarized in two words: "blatant hypocrisy."

Expanding the Scope of *Heller* A Decade Later

The first indication that the Supreme Court gave that it would be inclined to radically expand the constitutional right to keep a handgun in the home that it had created a decade earlier in its 2008 *Heller* decision was in January of 2019 when the Court agreed to hear the case of the *New York State Rifle and Pistol Association v. New York City (NYSRPA v. NYC)*.[5] In this case, the gun lobby claimed that NYC's prohibition on carrying a handgun anywhere in the City except to and from a City approved firing range violated the Second Amendment.

At the time that the Supreme Court agreed to hear the *NYSRPA v. NYC* case, Trump nominees Neil Gorsuch and Brett Kavanaugh had replaced Justices Antonin Scalia and Anthony Kennedy, respectively, on the Supreme Court. Scalia had been the author of the majority opinion in *Heller,* and Kennedy had been the surprise swing vote in the *Heller* majority. Scalia died suddenly and unexpectedly in February of 2016 while Barack Obama was still President, but the Republican controlled Senate refused to even grant a hearing to President Obama's nominee, Merrick Garland, to replace Scalia. Had Garland joined the Court instead of Gorsuch, there would probably have been a 5-4 majority of justices on the Supreme Court in 2019 who would have been inclined to overturn the 2008 *Heller* decision. Instead, with Trump nominees Gorsuch and Kavanaugh both on the Court, it was feared that Court might have agreed to hear the *NYSRPA v. NYC* case in order to expand the right that it had created in *Heller.*

We filed an *amicus curiae* (friend of the court) brief in the 2019 *NYSRPA v. NYC* case on behalf of Americans Against Gun Violence in support of NYC's stringent restrictions on carrying handguns in the City. In our brief, we not only argued that NYC's current gun laws should be upheld, we also presented evidence that the *Heller* case had been egregiously wrongly decided; and moreover, that 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 all the other high income democratic countries of the world, the *Heller* decision was effectively a death sentence for tens of thousands of Americans annually. We argued that instead of expanding the new constitutional right that it had created in *Heller,* the Supreme Court should take the opportunity of the *NYSRPA v. NYC* case to overturn *Heller.*

I've written in previous Americans Against Gun Violence messages about some of the more egregious flaws in the *Heller* decision and the disastrous public health consequences of this decision. I won't go into great detail concerning the *Heller* decision in this message. Suffice it to say, though, that Scalia's majority opinion in *Heller* is rife with revisionist history, quotations cherry-picked out of context, circular reasoning, and bombastic and sarcastic rhetoric in place of objective analysis. The consistent pattern of errors and omissions in Scalia's majority opinion cannot be explained by accident or even by negligence. It can only be explained by intentional deceit. In the *Heller* decision, Scalia and the other four justices in the *Heller* majority endorsed an interpretation of the Second Amendment that the late Supreme Court Chief Justice Warren Burger had called, "one of the greatest pieces of fraud – I repeat the word, 'fraud' – on the American public by special interest groups" that that he had ever seen in his lifetime.[6] For a more specific and fully referenced discussion of some of the more egregious flaws in the *Heller* decision and the disastrous public health effects of this decision, please refer to my essay, "A Death

Sentence, Wrongly Decided," that is posted on the Americans Against Gun Violence website.

With three members of the *Heller* majority - Justices Roberts, Thomas, and Alito - still on the Supreme Court in 2019, and with two Trump nominees - Justices Gorsuch and Kavanaugh, both of whom had been enthusiastically endorsed by the gun lobby - now having joined them, we at Americans Against Gun Violence weren't under any illusion that a majority of the nine justices would actually seriously consider our *amicus* brief in the *NYSRPA v. NYC* case. We felt that it was important to put the Court on notice, nevertheless, that there was at least one organization in the United States that recognized that the *Heller* case was terribly wrongly decided. We also felt that although the five justices referenced above were probably lost causes as far as overturning *Heller* goes, it was important to remind the two dissenting justices in *Heller* who were still on the Court (Justices Breyer and Ginsburg) and to educate the two other justices who had joined the Court since *Heller* (Justices Sotomayor and Kagan) concerning just how bad the *Heller* decision really was, both from the jurisprudence and public health perspectives. And finally, we believed – and we still believe – that our *amicus* brief would stand as a sentinel document on the Supreme Court docket that would signal the beginning of the eventual end of the Court's fraudulent misrepresentation of the Second Amendment.

In the interval between the time that the Supreme Court agreed to hear the *NYSRPA v. NYC* case in January of 2019 and the deadline to file *amicus* briefs in August, I contacted a number of organizations that had filed *amicus* briefs in support of Washington DC's handgun laws in the original *Heller* case. I also contacted academicians in the fields of history, sociology, and constitutional law who had been involved in writing these briefs, and I urged them to join us at Americans Against Gun Violence in making the argument in briefs in the *NYSRPA v. NYC* case that *Heller* had been wrongly decided. Ultimately, though, of 23 briefs filed in support of NYC's handgun laws, only two – our brief and a brief submitted by a District of Columbia attorney on his own behalf – made the point that *Heller* was wrongly decided; and our brief was the only one that called on the Court to overturn *Heller.* Only two other gun violence prevention (GVP) organizations, Everytown and March for Our Lives, filed *amicus* briefs in support of NYC. Two other GVP organizations, Giffords and Brady, filed briefs in support of neither party. In their briefs, all four of these GVP organizations endorsed the *Heller* decision - tacitly at least - as being a legitimate binding precedent.

Following the Supreme Court's announcement that it would hear the *NYSRPA v. NYC* case, I also spoke by phone and corresponded by email with the lead attorney working on the case at the time in the NYC Law Department. I urged the attorney to join Americans Against Gun Violence in taking the position in defending this case that not only were NYC's current handgun laws constitutional, but that the Supreme Court should take the opportunity of this case to overturn the egregiously flawed and disastrously harmful *Heller* decision. The attorney indicated that the NYC Law Department was reluctant to do so for fear of antagonizing the current majority on the Court and prompting them to expand the right that the Court had created in *Heller*. I subsequently learned that NYC was planning to repeal its stringent regulations on transporting handguns in the City in order to make the *NYSRPA v. NYC* case moot. I sent an email to the NYC attorney on May 23, 2019, in which I indicated that we at Americans Against Gun Violence felt that capitulating to the gun lobby was not advisable. In that email, I wrote:

> Even if the *NYRPA v. NYC* case doesn't go to the Supreme Court, other cases

> involving challenges to bans on high capacity magazines, open carry, assault rifles, and the like probably will.

It's not considered polite to say, "I told you so," but…well, read on.

Like most "deals with the devil," NYC's decision to repeal its stringent handgun regulations did not work out well – not for NYC, not for New York State, and not for the rest of the country. After NYC repealed its law concerning transporting handguns in the City, the Supreme Court did in fact rule that the *NYRPA v. NYC* case had become moot, but the New York State Rifle and Pistol Association promptly filed another lawsuit, this time against Keith Corlett, the Superintendent of the New York State Police, claiming that New York State's requirement for a special permit to carry a concealed handgun violated the Second Amendment. This case became *NYSRPA v. Bruen* when Kevin Bruen succeed Keith Corlett as Superintendent of the State Police.

A district court judge dismissed the *NYSRPA v. Bruen* lawsuit, and a three judge panel of the Second Circuit Court of Appeals unanimously affirmed the dismissal. In April of 2021, though, the Supreme Court agreed to hear the case. By this time, the death of Justice Ginsburg in September of 2020, had given Trump the opportunity to nominate a third Supreme Court justice, Amy Coney Barrett, who like Gorsuch and Kavanaugh, was a favorite of the gun lobby. In contrast to President Obama's nomination of Merrick Garland in March of 2018, which the Republican controlled Senate blocked on the basis that it was just 10 months before the 2016 presidential election, the Senate – still under Republican control – rushed through Barrett's confirmation, even though Trump nominated her just eight days after Ginsburg's death and just 38 days before the 2020 presidential election.

We filed another *amicus* brief in the *NSYRPA v. Bruen* case in which we again made the point that the *Heller* decision, upon which the gun lobby's *Bruen* case was based, was wrongly decided and should be overturned. And I again contacted other GVP organizations and urged them to join us in filing briefs that not only supported New York's current concealed weapon laws but that also included a call for the Supreme Court to overturn *Heller.* Once again, though, Americans Against Gun Violence was the only organization in the entire country to file an *amicus* brief that addressed the egregious flaws in *Heller*, and once again, several of the other well known GVP organizations filed *amicus* briefs in which they endorsed the *Heller* majority's fraudulent misrepresentation of the Second Amendment as conferring an individual right to own guns unrelated to service in a "well regulated militia." I sent out an Americans Against Gun Violence president's message concerning these briefs in December of 2021. The message was entitled, "Are you unknowingly contributing to 'the other big lie?'"

It came as no surprise on June 23, 2022, when the Supreme Court issued its decision in the *NYSRPA v. Bruen* case, that a 6-3 majority of justices ruled that New York's requirement for a special permit to carry a concealed handgun violated the Second Amendment. And it was also no surprise that the six justices in the *Bruen* majority were the three remaining justices from the *Heller* majority (Roberts, Alito, and Thomas) and the three new Trump nominees (Gorsuch, Kavanaugh, and Coney Barrett). Clarence Thomas wrote the majority opinion in *Bruen,* and Alito, Kavanaugh, and Barrett wrote separate concurring opinions. Justice Breyer, the sole remaining justice on the Court who had dissented in *Heller,* wrote a dissenting opinion, joined by Justices Sotomayor and Kagan.

The opinions written by Thomas, Alito, and Kavanaugh made reference the *Heller*

decision more than 130 times in total, quoting demonstrably false statements from Scalia's majority opinion in *Heller* as if they were undisputed facts. In his majority opinion, Thomas claimed that in rejecting gun lobby attempts to overturn existing gun laws following the *Heller* decision, lower courts had inappropriately applied "a 'two-step' framework for analyzing Second Amendment challenges that combines history with means-end scrutiny."[7] With regard to "step one," Thomas explained:

> Step one of the predominant framework is broadly consistent with *Heller,* which demands a test rooted in the Second Amendment's text, as informed by history.[8]

With regard to "means-end scrutiny" in "step two," Thomas explained that the lower courts had been taking into account whether the law in question "promotes an important interest."[9] Typically, as in the *NYSRPA v. Bruen* case, when appeals courts had rejected gun lobby challenges to existing gun laws, they had done so on the basis that the laws in question did, indeed, promote an "important interest" – i.e., preventing gun related deaths and injuries; and that the 2008 *Heller* decision was vague as to exactly what kinds of laws were or were not prohibited under the *Heller* majority's view of the Second Amendment. Lower courts often referred to the statement in Scalia's majority opinion that, "Like most rights, the right secured by the Second Amendment is not unlimited."[10]

In his majority opinion in *Bruen,* though, Thomas claimed that that, "Despite the popularity of this two-step approach, it is one step too many."[11] He argued:

> *Heller* and *McDonald* do not support applying means-end scrutiny in the Second Amendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms.[12]

It is sheer hypocrisy for Thomas to claim that he and the other members of the *Bruen* majority applied a one-step test, "rooted in the Second Amendment's text, as informed by history," as the basis for their ruling in *Bruen* that New York's requirement for a special permit to carry a concealed handgun violates the Second Amendment. The *Heller* decision and its progeny, including the 2010 *McDonald* decision and now the 2022 *Bruen* decision, are patently incompatible with the text and history of the Second Amendment.

The fact that the *Heller* decision is incompatible with the text of the Second Amendment is made obvious by combining the first half of the Second Amendment with a direct quote of the principal holding in *Heller* in a single sentence. Such a sentence would read:

> "A well regulated militia, being necessary to the security of a free state,"[13] "[t]he Second Amendment protects an individual right to possess a firearm unconnected with service in a militia."[14]

The Founders couldn't possibly have intended to include such nonsense in the Bill of Rights. As I discuss in my essay, "A Death Sentence, Wrongly Decided," Professors of English and Linguistics filed an *amicus* brief in the *Heller* case in which they noted the inextricable relationship between the "well regulated militia" clause in the first half of the Second Amendment and the "right of the people to keep and bear arms" clause in the second half of the Amendment. The professors wrote:

> Under longstanding linguistic principles that were well understood and recognized

> at the time that the Second Amendment was adopted, the "well regulated Militia" clause necessarily adds meaning to the "keep and bear Arms" clause by furnishing the reason for the latter's existence....On its face, the language of the Amendment tells us that the reason why the right of the people to keep and bear arms shall not be infringed is because a well regulated militia is necessary to the security of a free state. The purpose of the Second Amendment, therefore, is to perpetuate "a well regulated militia."[15]

The Supreme Court came to this same conclusion in its unanimous 1939 *Miller* decision,[16] and as noted above, it reiterated this conclusion in its 1980 *Lewis* decision.

As I also discuss in my "Death Sentence" essay, the claim that the Second Amendment was intended to confer an individual right to own or carry weapons unrelated to military service is also incompatible with the "keep and bear arms" phrase in the second half of the Amendment. Both the District of Columbia and the Professors of Linguistics and English[17] provided extensive evidence in their briefs in the *Heller* case that the terms "keep arms" and "bear arms" were used almost exclusively during the Founding Era to describe possessing and carrying weapons of war in the setting of military service. Since the 2008 *Heller* decision, an overwhelming body of additional evidence has been amassed in support of this interpretation of the phrase, "keep and bear arms."[18]

It is also blatantly hypocritical for Justice Thomas to criticize lower courts for applying a "means-end" test – in other words, a test of whether a law "promotes an important interest" – as one of the criteria for judging whether a gun law violates the Second Amendment. The *Heller* decision and its progeny, which now includes the *Bruen* decision, all rest upon – and promote – a means-end test, but one that is flagrantly rigged in favor of the gun lobby.

As I discuss in my "Death Sentence" essay, Scalia's majority opinion in *Heller* includes more than 50 references to the purported use of (or need for) guns for self-defense or personal protection.[19] Scalia makes no reference whatsoever, though, to the overwhelming body of evidence – evidence that was already available in 2008 and that was presented in *amicus* briefs in the *Heller* case - that widespread civilian gun ownership creates far greater harm than benefit. Similarly, Thomas makes 52 references to the use of (or need for) guns for self-defense in his majority opinion in *Bruen,* and Alito and Kavanaugh add another 18 references in their concurring opinions. Like Scalia, though, none of the justices in the *Bruen* majority even mention the other side of the "means-end" analysis - the overwhelming body of evidence that was already available in at the time of the 2008 *Heller* decision and the additional evidence that has been accumulated since *Heller* and that was presented in the *Bruen* case - including in our Americans Against Gun Violence *amicus* brief - that widespread civilian gun ownership in a democratic society confers far greater risk than benefit to honest, law-abiding people and that stringent gun control laws reduce rates of gun related deaths and injuries.

One of the more flagrant examples of the *Bruen* majority's biased "means-end" analysis is the statement in the concurring opinion by Justice Alito:

> Ordinary citizens frequently use firearms to protect themselves from criminal attack. According to survey data, defensive firearm use occurs up to 2.5 million times per year.[20]

The only source that Alito cites for this statistic is an *amicus* brief submitted on behalf of "Law Enforcement Groups." As I discuss in my "Death Sentence" essay, this same absurd claim was cited as fact in an *amicus* brief in the *Heller* decision. The original source of this claim is an article published in 1995 in an obscure criminology journal describing the results of a telephone survey in which white males in southern states were over-represented.[21] The estimate of 2.5 million defensive gun uses annually is an extrapolation from the fact that 66 out of 4,977 respondents (1.3%) reported over the telephone that they had used a gun defensively in the past year. Not a single one of these alleged defensive gun uses was confirmed through follow-up with law enforcement agencies or by any other means. It's been noted that using the same type of telephone survey methodology, more Americans report having had contact with space aliens in the past year than having used a gun defensively.[22]

The true annual incidence of defensive gun uses in the United States is unknown. It is well documented, though, that successful defensive use of a firearm by an honest, law abiding person is rare as compared with the criminal use of a gun. An analysis of FBI data by the Violence Policy Center showed that for every one time a gun was used to kill someone in self-defense, there were 35 criminal gun related homicides.[23]

Another example of the *Bruen* majority's extreme "means-end" bias – and of the tendency to parrot Scalia – is the repeated use of the term, "quintessential self-defense weapon," to describe handguns.[24] Scalia coined the term, "quintessential self-defense weapon," when he opined at length in his majority opinion in *Heller*, with no supporting evidence whatsoever, about why it was so useful to have a handgun in the home.[25] For example, according to Scalia, a handgun "can be pointed at a burglar with one hand while the other hand dials the police." Justice Thomas, like Scalia, provides no credible evidence in his majority opinion in *Bruen* that owning or carrying a handgun confers any net protective value. Nor can he. The objective evidence shows that guns are used in most homicides and suicides in the United States;[26] and that handguns are the kind of guns used in the vast majority of firearm related suicides and homicides[27] (including mass shootings).[28] Far from being the "quintessential self-defense weapon," handguns can be accurately described as being the "quintessential" weapon for committing suicide and murder, including mass murder. (See my "Death Sentence" essay for further discussion of the particular risks posed by handguns and the proven benefits of strictly regulating or completely banning civilian handgun ownership. Also see the post, "Concealed Carry Killers," on the Violence Policy Center website for a discussion of the specific risks posed by allowing concealed carry of handguns.)

Comparing Back to Back Supreme Court Decisions: The Hypocrisy of the Majority's 180 Degree Reversal in Reasoning in the *Bruen* and *Dobbs* Decisions

The media attention given to the Supreme Court's announcement of the *Bruen* decision on June 23, 2022, was short-lived, for on June 24, 2022, the Court issued its decision in the case of *Dobbs v. Jackson,*[29] in which the same six justices in the *Bruen* majority overturned the Court's 1973 *Roe v. Wade* decision[30] - along with the 1992 *Planned Parenthood v. Casey* decision,[31] which had upheld *Roe* - thereby eliminating the constitutional right of a woman to terminate an unwanted pregnancy.

Americans Against Gun Violence doesn't have an official position on abortion. During the

more than 30 years that I worked as an emergency physician, though, in addition to treating innumerable gunshot victims, I also treated innumerable patients with pregnancy-related complications. Even though safe medical abortions were legal and generally accessible where I practiced, I vividly recall the case of a young pregnant woman who, for reasons beyond the scope of this discussion, resorted to desperate measures – with disastrous consequences – to avoid having a child she didn't feel prepared to care for. There's no doubt in my mind that the *Dobbs* decision and its progeny, like the *Heller* decision and its progeny, will have disastrous public health consequences. And I'm not alone in this concern. A recent editorial in the Journal of the American Medical Association noted that a complete ban on safe, medical abortion in the United States would be expected to increase maternal mortality rates by more than 20%.[32]

Regardless of one's personal views concerning abortion, the public health consequences of the *Dobbs* and *Bruen* decisions, or the constitutional issues involved, the 180 degree reversal in the reasoning of the same six justices who comprised both the *Bruen* and *Dobbs* majorities is further evidence of their hypocrisy. Here are some of the more blatant examples of this complete turnabout in reasoning by the *Bruen/Dobbs* majority:

Example 1. Moral arguments

> The *Bruen* decision was issued almost exactly one month after the mass shooting at Robb Elementary School in Uvalde, Texas, on May 24, 2022, in which 19 students, ages 9-11, and two teachers were killed and 17 other children and teachers were wounded.[33] Probably the most glaring example of hypocrisy on the part of the *Bruen/Dobbs* majority is the "holier than thou" position that the majority claims for protecting intra-uterine "fetal life" in *Dobbs* while the same six justices ignore the fact that the interpretation of the Second Amendment that they endorse in *Bruen* prevents the adoption of stringent gun control laws in our country that would protect living, breathing children and youth from the excruciating terror and pain of being massacred in their classrooms.
>
> The *Dobbs* majority makes at least 20 references to abortion being a "moral" issue and at least 16 other references to the need to protect "fetal life." The *Dobbs* majority claims that in *Roe,* the Court "usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people."[34] And with regard to the three justices who dissented in *Dobbs,* the majority claims, "The most striking feature of the dissent is the absence of any serious discussion of the legitimacy of the States' interest in protecting fetal life."[35]
>
> In fact, however, the dissenting justices in *Dobbs* did specifically address the balance between the relative interests that states might have in protecting "fetal life" as opposed to the interests that pregnant women might have in terminating unwanted pregnancies. In solidarity with the *Roe* and *Casey* majorities*,* the three dissenting justices in *Dobbs* concluded that the decision of whether to terminate a pregnancy prior to the point at which the fetus might be able to survive outside the uterus was best left to the woman carrying the pregnancy in consultation with medical professionals, not to state legislators; and to the extent that state legislators might choose to prohibit abortions after the point at which a fetus might be able to survive outside the uterus, there must be exceptions for cases in which continuing to carry the pregnancy might jeopardize the pregnant woman's life.[36]

The same six justices who make at least 20 references in *Dobbs* to abortion being a moral issue and at least 16 other references to the obligation of governmental bodies to protect "fetal life" don't make a single reference in *Bruen* to any moral obligation of governmental bodies to protect children and youth from being gunned down in their schools. On the contrary, after Justice Breyer pointed out in his dissenting opinion in *Bruen* that gunshot wounds now surpass motor vehicle crashes as the leading cause of death in children and adolescents in the United States; and after Breyer listed the mass shootings at the Robb Elementary School in Uvalde, Texas, and at Sandy Hook Elementary School in Newtown, Connecticut, as examples of the toll that gun violence is taking on our children,[37] Justice Alito, the author of the *Dobbs* majority opinion, responded by asking the rhetorical questions:

> Why, for example, does the dissent think it is relevant to recount the mass shootings that have occurred in recent years?... The dissent cites statistics on children and adolescents killed by guns… but what does this have to do with the question whether an adult who is licensed to possess a handgun may be prohibited from carrying it outside the home?[38]

Alito's callous and flippant response to Breyer's dissent is appalling, but not surprising. As I've discussed above, Alito was one of the five justices in the original *Heller* majority, and in his concurring opinion in *Bruen,* Alito cited the gun lobby's absurd claim that there are 2.5 million defensive gun uses annually as if this claim were an undisputed fact.

We anticipated that Alito would ignore the *amicus* brief that we submitted on behalf of Americans Against Gun Violence in the *Bruen* case. If he had seriously considered our brief, he would have realized that he bore some of the responsibility for the mass shootings in recent years, including shootings on school campuses. If he'd seriously considered our brief, he would have understood that in *Heller,* by endorsing the gun lobby's fraudulent misrepresentation of the Second Amendment, he and the other four justices in the majority had created a constitutional obstacle, where none previously existed, to the adoption of stringent gun control laws in the United States comparable to the laws in all the other high income democratic countries of the world – countries in which mass shootings, including shootings on school campuses, occur rarely, if ever; countries in which children under the age of 15 are killed by guns at a rate that is 1/12th the rate in our country;[39] and countries in which high school age youth are murdered by guns at a rate that is 1/82nd the rate in our country.[40] The laws in these other advanced democracies include stringent restrictions - and in some cases, complete bans - on civilian ownership of handguns.

If Alito had seriously considered our *amicus* brief in *Bruen,* he would have also understood that by taking the opportunity of the *Bruen* decision to expand the fraudulent misrepresentation of the Second Amendment that he and his four fellow justices had endorsed in *Heller,* he and his fellow members of the *Bruen* majority were fueling the epidemic of gun violence in our country, including the epidemic of mass shootings. And if he'd seriously considered the *amicus* brief submitted by the Violence Policy Center, [41] he wouldn't have asked what carrying a concealed handgun has to do with our country's extraordinarily high rate of gun violence. He would have realized that individuals who legally carried concealed handguns have

used these weapons to commit thousands of killings in recent years, including mass murders.

Example 2: "*Stare decisis"*

The literal English translation of the Latin term, *stare decisis,* is "to stand by things decided." In the field of jurisprudence, it means that courts usually respect prior decisions as binding precedent, provided, of course, that the prior decisions were made in a scrupulous and objective manner. In the *Dobbs* case, the majority stated:

> The critical question is whether the Constitution, properly understood, confers a right to obtain an abortion. *Casey*'s controlling opinion skipped over that question and reaffirmed *Roe* solely on the basis of *stare decisis.* A proper application of *stare decisis,* however, requires an assessment of the strength of the grounds on which *Roe* was based….[42] *Stare decisis* plays an important role and protects the interests of those who have taken action in reliance on a past decision. It "reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation…." But *stare decisis* is not an inexorable command….Some of the Court's most important constitutional decisions have overruled prior precedents.[43]

Prior to the Supreme Court's 1973 decision in *Roe v.* Wade, the High Court had never issued an opinion concerning whether a woman had a constitutional right to terminate an unwanted pregnancy. As I've discussed above, though, in the *Bruen* case, the same six justices who condemn the 1992 *Casey* decision for upholding *Roe* "solely on the basis of *stare decisis*" uncritically endorse the egregiously flawed 2008 *Heller* decision and its progeny, the 2010 *McDonald* decision, as constituting *stare decisis,* even though the *Heller* and *McDonald* decisions themselves were inconsistent with 217 years of prior legal precedent, including four prior Supreme Court opinions and scores of lower court decisions. I won't proffer an opinion myself as to whether *Roe* and *Casey* were rightly or wrongly decided. Had the majority applied the same reasoning in *Bruen* as it did in *Dobbs,* though, it would have concluded that the affirmation of the *Heller* decision in *McDonald* "skipped over" the question of "whether the Constitution, properly understood," confers an individual right to own or carry a gun unrelated to service in a well regulated militia; and consistent with the tradition of "[s]ome of the Court's most important constitutional decisions" being ones that "overruled prior precedents," the Court would have taken the opportunity of the *Bruen* case to unanimously overturn the *Heller* and *McDonald* decisions.

Example 3: "Times have changed"

In the *Dobbs* decision, the majority claimed that a "glaring deficiency" in the *Roe* decision was the "failure to justify the critical distinction it drew between pre- and post-viability abortions."[44] The majority elaborated:

> The most obvious problem with any such argument is that viability has

> changed over time and is heavily dependent on factors—such as medical advances and the availability of quality medical care—that have nothing to do with the characteristics of a fetus.[45]

In the context of pregnancy, the term, "viability" is used to describe the point at which a fetus is likely to have a chance of surviving outside the uterus. In 1973, when *Roe* was decided, it was rare for a fetus born earlier than 28 weeks gestational age to survive, even with the best medical care available.[46] By the time that *Casey* was decided in 1992, as a result of advances in neonatology, it was possible for fetuses born as early as 24 weeks gestation to survive. The Mississippi law in question in *Dobbs* banned abortion after 15 weeks gestation, which, according to the brief of the American College of Obstetricians and Gynecologists *et al*, "is months away from when [a fetus] could survive delivery, even with the latest advances in technology and medical care."[47]

The same six justice in the *Dobbs* majority who claim that the *Roe* majority failed to take into account advances in medical science and systems for the delivery of medical care over time – and that this alleged failure constituted a "glaring deficiency" - take exactly the opposite approach in their reasoning in *Bruen.* The *Bruen* majority, like the *Heller* and *McDonald* majorities before it, completely ignores the facts that we no longer depend on a volunteer militia for the common defense; that advances in weapons technology have made firearms exponentially more lethal today than they were in 1791; and that in contrast to the rate of death from medical abortions, which is near zero,[48] the rate of death from gunshot wounds has steadily increased in recent years to levels that are currently at least 10 times higher than the average rate in other high income democratic countries for all ages combined,[49] and 82 times higher for American high school age youth.[50] Had the *Bruen/Dobbs* majority applied the same reasoning in *Bruen* that it applied in *Dobbs*, it would have concluded that the failure of the Court to consider these changes over time in the *Heller* and *McDonald* decisions constituted a "glaring deficiency;" and that this deficiency alone was reason enough for the Court to reverse those prior decisions.

Example 4. "in common use"

The "in common use" term is used repeatedly throughout *Bruen* decision in support of the majority's argument that individual citizens have a constitutional right to own guns as a matter of common law.[51] While guns are certainly commonly owned in the United States today, as discussed above, the *Bruen* majority's claim that they are commonly used for the purpose of self defense is demonstrably false.

In contrast to the gun lobby's absurd claim that there are 2.5 million cases of defensive gun use annually in the United States,[52] it is well documented that women seek help from health care professionals to terminate unwanted pregnancies nearly a million times a year in our country.[53] The same six justices who place great emphasis in *Bruen* on the claim that handguns are "in common use today" as evidence in support of their view that owning and carrying guns is a constitutional right attribute no significance whatsoever in *Dobbs* to the fact that procedures to terminate unwanted pregnancies are in common use today as evidence in support of the view access to safe, medical abortions should be

> considered a constitutional right. On the contrary, the majority states that it is "devastating to [their] position" for Justices Breyer, Sotomayor, and Kagan to argue in their dissenting opinion in *Dobbs* that the fact that medical abortions are in common use today is a reason for upholding *Roe* and *Casey*.[54]

Another Take Home Lesson from the Comparison Between the *Bruen* and *Dobbs* Decisions

In addition to demonstrating the hypocrisy of the same six justices who comprised both the *Bruen* and *Dobbs* majorities, I believe that there's at least one other important lesson to be learned from comparing the *Bruen* and *Dobbs* decisions. The main question that the Supreme Court agreed to consider when it granted *writ of certiorari*[1] in the *Dobbs* case was whether all pre-viability prohibitions on elective abortions are unconstitutional.[55] The law that prompted the case was the 2018 Mississippi Gestational Age Act that banned abortions after 15 weeks gestation except in medical emergencies or in the case of severe fetal abnormalities.[56] The day after the Act was passed, the Jackson Women's Health Organization, which was Mississippi's only abortion provider, sued the state health officer, Thomas Dobbs, asking Mississippi's Southern District Court to rule that the Gestational Age Act was unconstitutional based on the *Roe v. Wade* decision. The District Court granted summary judgement in favor of Jackson Women's Health, and a three judge panel of the Fifth Circuit Court of Appeals upheld the District Court ruling.[57] The Appeals Court denied Dobb's request for a review of the panel's ruling by the full Fifth Circuit, at which point Dobbs appealed the case to the Supreme Court. The Supreme Court granted *writ* on May 17, 2021.

It's noteworthy that in the initial petition for *writ of certiorari* filed by the Mississippi State Attorney General on behalf of Dobbs, the petition stated that the main question that Dobbs was asking the Supreme Court to decide in his favor did not require the Court to overturn *Roe* or *Casey.*[58] The Court could rule that a ban on abortions, with certain exceptions, after 15 weeks gestation was constitutional, but that bans on abortions at earlier stages of pregnancy, or bans on abortions at later stages that did not include certain exceptions, violated the constitutional right established in *Roe* and affirmed in *Casey*. After the Supreme Court had granted *writ* in the case, though, Dobbs and the Attorney General changed their tune. In their subsequent Brief for Petitioners, they stated:

> So the question becomes whether this Court should overrule [*Roe* and *Casey*]. It should….*Roe* and *Casey* are egregiously wrong.[59]

Within a little over a month of the Supreme Court granting *writ* in *Dobbs*, a total of 78 *amicus* briefs were filed in support of Mississippi's Gestational Age Act on behalf of more than 90 different organizations, 24 state legislatures, and more than 1,700 individuals, including 231 members of Congress and 12 governors.[60] Nearly all of these briefs repeated the claim in the Brief for Petitioners that *Roe* and *Casey* had been egregiously wrongly decided and should be completely overturned.

The approach taken by the parties defending New York's requirement for a special permit

[1] Technically, a *writ of certiorari* is an order by the Supreme Court to for a lower court to send up the case for review. From the practical standpoint, a grant of *writ of certiorari* is equivalent to the Supreme Court agreeing to hear the case.

to carry a concealed handgun in the *Bruen* case was dramatically different than the approach taken by the defenders of Mississippi's Gestational Age Act. When the New York State Rifle and Pistol Association petitioned the Supreme Court for *writ of certiorari* after the Second Circuit Court of Appeals had affirmed the district court's dismissal of its lawsuit, the State of New York filed a brief in opposition to the gun lobby's petition. In the brief, the New York Attorney General took a somewhat similar approach to that taken by the Mississippi Attorney General in *Dobbs,* arguing that New York's handgun law was constitutional even under the assumption that the *Heller* decision was the basis for *stare decisis.*[61] After the Supreme Court granted *writ,* though, unlike Dobbs and the Mississippi Attorney General who shifted tactics and claimed that *Roe* was "egregiously wrong" and should be overturned, the New York Attorney General continued to accept the *Heller* decision as being a legitimate binding precedent. In the very first sentence of New York's Brief for Respondents, the Attorney General endorsed one of the many false claims made by Justice Scalia in his majority opinion in *Heller.* Quoting Scalia, the brief stated:

> Because the Second Amendment 'codified a preexisting right' to keep and bear arms [citing Scalia's majority opinion], its contours follow 'the historical understanding of the scope of the right.'

As we discussed in our *amicus* brief in *Bruen*, and as I discuss in my "Death Sentence, Wrongly Decided" essay, Scalia's claim in the *Heller* majority opinion that the Second Amendment codified a pre-existing right to individual firearm ownership inherited from the Founders' British ancestors is patently false. It's also one of many examples of Scalia cherry-picking portions of a documents out of context when it suits his purpose, while omitting other portions of the document that directly contradict his argument. In the case of the "pre-existing right" claim, Scalia quotes "St. George Tucker," who he describes as an "important founding-era scholar," as writing that the Second Amendment was "the true palladium of liberty."[62] Scalia fails to note, though, that in the same paragraph, Tucker wrote, with regard to the Founders' British ancestors:

> …[T]he right of bearing arms is confined to protestants, and the words suitable to their condition and degree, have been interpreted to authorise the prohibition of keeping a gun or other engine for the destruction of game, to any farmer, or inferior tradesman, or other persons not qualified to kill game. So that not one man in five hundred can keep a gun in his house without being subject to a penalty."[63]

Given the willingness of the State of New York to not only tacitly accept, but to actively endorse the *Heller* decision as legitimate *stare decisis*, it's probably not surprising that most individuals and organizations that filed *amicus* briefs in support of New York's concealed handgun law followed suit. In all, thirty-seven *amicus* briefs were filed in *Bruen* in support of New York's handgun laws on behalf of 84 organizations, 13 cities, 18 states, and more than 600 individuals, including 152 members of Congress.[64] But only two of these *amicus* briefs – ours and a brief filed by an individual attorney in Washington State[65]- made the point that *Heller* was wrongly decided and should be overturned. Even the other organizations that specifically focus on gun violence prevention either ignored the *Heller* decision or endorsed it in their briefs. For example, one well known GVP organization stated in its brief, "*Heller* reaffirmed longstanding constitutional guardrails on the Second Amendment."[66] As I noted in my "Other Big Lie" president's message in 2021, stating that Scalia's majority opinion in *Heller* "reaffirmed longstanding constitutional guardrails on the Second Amendment" is like stating that Donald Trump "reaffirmed longstanding constitutional guardrails" on free and fair elections. Another prominent GVP

organization, quoting excerpts from Scalia's majority opinion in *Heller*, wrote in its *amicus* brief in *Bruen*, "As *Heller* observed, self-defense is 'the central component' and 'core lawful purpose' of the Second Amendment right."[67] This brief makes a total of 112 references to the use of or need for guns for "self-defense" without once mentioning the overwhelming evidence that guns in the homes and in the communities of honest, law-abiding people are far more likely to be used to harm them than to protect them.

I'll admit that even if the State of New York and all the other *amici curiae* (friends of the court) had joined us in making the case that *Heller* was wrongly decided and should be overturned, it's exceedingly unlikely, given the current composition of the Supreme Court, that a majority of justices would have voted to overturn *Heller* or even to rule that New York's requirement for a special permit to carry a concealed handgun met constitutional muster. On the other hand, I see no advantage - and I see great harm, as I've alluded to above and will discuss in more detail below - in perpetuating what is, in frank terms, the bold-faced lie that the Second Amendment was intended to confer an individual right to own and carry guns unrelated to service in a well regulated militia. I don't advocate filing briefs that directly accuse the six justices in the *Bruen* majority of being "hypocrites" and "liars," although returning to the comparison with the *Dobbs* case, anti-abortion *amici* had no reservations about accusing justices who supported *Roe* of being accomplices to "eugenics"[68] and "murder."[69] If we're ever going to reduce rates of firearm related deaths and injuries in our country to levels comparable to those in other high income democratic countries, though, we're going to need to adopt comparable gun control laws, and we can't do that without overturning *Heller* and its progeny. It's vitally important to lay the foundation for overturning *Heller* and its progeny by presenting the evidence in Second Amendment cases – especially at the Supreme Court level – that the *Heller* decision was egregiously wrongly decided, and that *Heller* and its progeny have are worse than bad decisions. They're literally death sentences for tens of thousands of Americans - including thousands of innocent children and youth - annually.[70]

Aftermath of the *Bruen* Decision: SCOTUS invalidates gun laws in four states without hearing the cases

If the State of New York and *amici curiae* believed that by striking a conciliatory tone concerning the *Heller* decision in their briefs in the *Bruen* case, they could somehow avoid provoking the three justices left over from the *Heller* majority (Roberts, Thomas, and Alito) and the three new Trump nominees (Gorsuch, Kavanaugh, and Barrett) from issuing even worse decisions in the future, they were badly mistaken.

As little media attention as the *Bruen* decision received after it was issued on June 23, 2022, hardly anyone noticed when on June 30, 2022, the Supreme Court effectively invalidated bans on large capacity magazines (LCM's) in California and New Jersey, a ban on openly carrying loaded guns in public in Hawaii, and a ban on assault weapons in Maryland. The Court did so by issuing what are known as "GVR" orders[2] without ever actually hearing the four cases in which it issued the orders. The four cases in which the Supreme Court issued GVR orders included *Duncan v. Bonta* (challenging California's LCM ban),[71] *Association of New Jersey Rifle, et al. v. Bruck (*challenging *New Jersey's LCM ban),*[72] *Young v. Hawaii (*challenging *Hawaii's open carry ban),*[73] *and Bianchi v.*

[2] "GVR" is an acronym for **G**rand *writ of certiorari,* **V**acate the prior decision, and **R**emand for further consideration.

*Frosh (*challenging *Maryland's assault weapons ban)*.[74] In all four cases, appeals courts had previously upheld the constitutionality of the laws in question, and in all four cases, the Supreme Court instructed the lower courts to reconsider their decisions "in light of" the *Bruen* decision. Although the GVR orders didn't specifically state that the laws in question were unconstitutional, in ordering lower courts to reconsider their earlier decisions "in light of *Bruen*," the Supreme Court was – pardon the expression – putting a gun to the heads of appeals courts judges, warning them that if they didn't rule that the laws in question were unconstitutional, the six justices in the *Bruen* majority would.

The Hypocrisy of *Nunn v. State*

Even though the Supreme Court issued GVR orders "in light of" the *Bruen* decision that effectively invalidated LCM and assault weapons bans in three states, the *Bruen* decision itself makes no specific mention of LCM's or assault weapons. With regard to the ban on the open carry of loaded firearms that the Court invalidated by issuing the GVR order in the case of *Young v. Hawaii*, though, Justice Thomas does specifically address "open carry" in his majority opinion in *Bruen*. Thomas cites the 1846 Georgia Supreme Court case of *Nunn v. State* as being "particularly instructive" and as demonstrating that "it was considered beyond the constitutional pale in antebellum America to altogether prohibit public carry."[75] Thomas also cites a reference to the *Nunn* decision in Scalia's majority opinion in *Heller*. The references to the *Nunn* decision by both Thomas and Scalia are instructive indeed. They are further evidence of the blatant hypocrisy in the majority opinions written by both of these justices.

Technically, the *Nunn* decision is irrelevant to the proper interpretation of the Second Amendment. In the *Nunn v. State* case, Hawkins H. Nunn, a white citizen of Georgia, was indicted by a grand jury for possession of a pistol in violation of an 1837 Georgia law entitled, "An Act to guard and protect the citizens of this State against the unwarrantable and too prevalent use of deadly weapons."[76] The act prohibited any resident of Georgia from selling, owning, or carrying not only pistols, but a wide variety of other potentially deadly weapons. Nunn appealed his indictment to the Georgia Supreme Court on the basis that the 1837 Georgia weapons act violated the Second Amendment. But state supreme courts don't have jurisdiction over federal constitutional issues, and state supreme court rulings don't serve as *stare decisis* for subsequent federal court rulings. This, however, is a relatively minor issue as compared with the other hypocrisy in the references that both Thomas and Scalia make to *Nunn v. State*.

It's of somewhat greater significance, from the point of view of hypocrisy, for Thomas to cite *Nunn* in support of the ruling in *Bruen* that New York's requirement for a special permit to carry a concealed handgun violated the Second Amendment. Although the Georgia Supreme Court ruled that the portion of the 1837 law that banned open carry of deadly weapons violated Nunn's Second Amendment rights, it specifically stated that the portion of the ban that prohibited carrying deadly weapons "secretly" was not unconstitutional.[77]

There is far more blatant hypocrisy, though, on the parts of both Thomas and Scalia in giving any credence whatsoever to the *Nunn* decision. The *Nunn* decision was issued by Georgia Supreme Court Justice Joseph Henry Lumpkin. In *Heller*, Scalia quotes[78] the following portion of Lumpkin's majority opinion:

> The right of the whole people, old and young, men, women, and boys, and not militia only, to keep and bear *arms* of every description, and not *such* as are merely used by the *militia,* shall not be *infringed,* curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this *right,* originally belonging to our forefathers, trampled under foot by Charles I. and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own *Magna Charta!*

Scalia states, with regard to the above absurdly over the top paragraph in Lumpkin's *Nunn* decision:

> Its opinion perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right.[79]

But while both Scalia and Thomas cite the *Nunn v. State* decision as supporting evidence for their own majority opinions, and while both try to put anti-slavery, pro-civil rights spins on their opinions,[80] neither Scalia nor Thomas acknowledge the fact that the author of the *Nunn v. State* opinion, Joseph Henry Lumpkin, was floridly racist, and that he exploited his position as a justice of the Georgia Supreme Court to become one of the South's most ardent and recognizable proponents of slavery.[81] For example, in an 1856 decision, Lumpkin referred to laws barring southern whites from bringing slaves with them when they visited northern states as a "fungus" that had been "engrafted upon their Codes by the foul and fell spirit of modern [abolitionist] fanaticism."[82] He expounded further in this case:

> Slavery is a cherished institution in Georgia - founded in the Constitution and laws of the United States; in her own Constitution and laws, and guarded, protected and defended by the whole spirit of her legislation; approved by her people; intimately interwoven with her present and permanent prosperity.[83]

It is only in the context of Lumpkin's own pro-slavery fanaticism, and with the knowledge that Black residents of Georgia, including freed slaves, were prohibited from owning or carrying deadly weapons, [84] that the excerpt that Scalia quotes from Lumpkin's majority opinion in *Nunn v. State* can be clearly understood. It obviously doesn't make sense for "the whole people, old and young, men, women, and boys, and not militia only, to keep and bear *arms* of every description," in order to maintain a well regulated militia suited for repelling invasions by foreign armies. Lumpkin's majority opinion makes perfect sense, though, if the purpose of "the whole people" – white people, that is - openly carrying lethal weapons was to intimidate free Blacks and keep slaves in subjugation.

The *Nunn* decision, and the fact that Thomas and Scalia both claim that it is directly relevant to the proper interpretation of the Second Amendment, raises the question of why the Second Amendment was adopted in the first place. Prior to the *Heller* decision, the "politically correct" answer to this question was that the Amendment was intended to provide for a volunteer militia that could obviate the need for a professional, standing army. But the Founders knew – or should have known – that volunteer militias had been

almost universally ineffective during the Revolutionary War, which was won by a professional army equipped mainly with firearms imported from Europe after the war began.[85] George Washington himself dismissed the idea of substituting a volunteer militia for a professional army as "chimerical," explaining, "I solemnly declare I never was witness to a single instance that can countenance an opinion of Militia or raw troops being fit for the real business of fighting."[86]

If the purpose of the Second Amendment wasn't to confer an individual right to own guns or to substitute a volunteer militia for a standing army, then what was its purpose? A thorough discussion of this question is beyond the scope of the current message, but I'll refer the reader to another essay I wrote for the Americans Against Gun Violence website that discusses this question in some detail. The essay is entitled "The Relationship Between the Second Amendment, Slavery, and the Decimation of the Native American Population." To summarize the essay in a single sentence, there is credible evidence that one of the reasons – if not the main reason – for the adoption of the Second Amendment was to reassure southern states that they could keep their slave patrols, which were one and the same as their militias. Those who find such an argument to be heretical should recall that four other sections of the original U.S. Constitution (Article I, Section 2; Article I, Section 9; Article IV, Section 2; and Article V) were indisputably included to perpetuate the institution of slavery. Whether the Second Amendment was adopted in a chimerical attempt to substitute a volunteer militia for a standing army or to perpetuate the institution of slavery, it clearly doesn't deserve the reverence that it is typically accorded today.

After the Supreme Court's *Bruen* Decision and GVR Orders, Where Do We Go From Here?

We can be sure that the *Bruen* decision and the Supreme Court's subsequent GVR orders will launch a new round of gun lobby challenges to all sorts of existing gun laws, and that in contrast to the flood of lawsuits that followed the 2008 *Heller* decision, a large proportion of these new cases will be decided in the gun lobby's favor. Already, in the case of *Antonyuk v.* Hochul, the gun lobby has challenged a New York State law adopted as recently as July 1, 2022, that prohibited carrying concealed handguns in places like libraries, parks, modes of public transportation, entertainment venues, bars, restaurants, and polling places; and a district court judge has ruled that based on the *Bruen* decision, such prohibitions are unconstitutional.[87] The Second Circuit Court of Appeals has temporarily stayed the district court ruling, but if the case gets to the Supreme Court while the six justices in the *Bruen* majority are still on the bench, it's virtually certain that they'll uphold the district court ruling.

If current trends continue, we can also expect that it will soon become commonplace in every state in the country to encounter individuals carrying loaded firearms, including AR-15 style assault rifles equipped with large capacity magazines, almost everywhere we go. And we can also expect that the number of innocent people killed with guns will continue to rise to new record levels every year; and that mass shootings, including shootings on school campuses, will not only continue to occur, but will occur with ever-increasing regularity.

The main unresolved question in my mind is when will other individuals and organizations – including other organizations that purport to be focused on gun violence prevention - join us in calling for definitive measures to stop this insanity? When will they join us in calling

for a halt to the fraudulent and blatantly hypocritical misrepresentation of the Second Amendment not only by the gun lobby and its disciples, but by the majority of justices in our country's highest court? And when will they join us in calling for the adoption of stringent gun control laws in the United States comparable to the laws that have long been in effect in the other high income democratic countries of the world. Such laws include a restrictive guiding policy for gun ownership that places the burden of proof on the prospective gun buyer to prove that he or she has a legitimate need for a gun and can handle one safely, with "self-defense" - for the reasons discussed above and long understood by other high income democracies - not being automatically accepted as a legitimate reason for owning a gun. Such laws also include a complete ban on civilian ownership of all automatic and semi-automatic rifles, comparable to the bans that Britain, Australia, and New Zealand all promptly adopted after mass shootings in their countries in 1987,[88] 1996,[89] and 2019,[90] respectively; and a complete ban on civilian ownership of handguns comparable to the ban that Britain adopted after the 1996 Dunblane Primary School massacre; with no grandfather clauses for people who already own such weapons.[91] (For the sake of brevity, in the remainder of this message, I'll use the term, "definitive measures" to refer to overturning the *Heller* decision and its progeny, including the *Bruen* decision, and adopting the kinds of gun control measures described above.)

Since the Supreme Court issued its *Bruen* decision and GVR orders in June, I've spoken with lawyers involved in these cases in the attorney general (AG) offices of all the states that were directly affected by these rulings (California, Hawaii, Maryland, New Jersey, and New York). During these discussions, I explained why, for the reasons discussed above, it's our position at Americans Against Gun Violence that *Heller* and its progeny were egregiously wrongly decided. I also explained why we believe that it's futile, both in the short term and in the long term, to continue to argue that gun control laws like the ones that were invalidated in *Bruen* and the GVR orders, as well as other laws that are still in effect but that will almost certainly be challenged by the gun lobby in a manner similar to the *Hochul* case, should be considered to be constitutional even under *Heller* and its progeny, without at the same time making the argument that *Heller* and its progeny were wrongly decided and should be overturned. I acknowledged that it's exceedingly unlikely that any of the six justices in the *Bruen* majority will change their positions with regard to the proper interpretation of the Second Amendment; but at the same time, I made the point that it's critically important for attorneys general across the country to begin laying the foundation for a newly constituted Court to overturn *Heller.* I respectfully requested that the AG's join us in breaking the conspiracy of silence concerning the fact that *Heller* and its progeny are worse than wrongly decided; worse even than what Justice Burger called "one of the greatest pieces of fraud on the American public" that he had ever seen in his lifetime. I explained to the lawyers I talked with why, in creating constitutional obstacles 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, these decisions are literally death sentences for tens of thousands of Americans annually.

Most of the lawyers I spoke with in the AG's offices were receptive to our position. Many of them already had their own general concerns about the *Heller* decision and its progeny, although they weren't well informed about the specific details concerning the egregious flaws in these decisions and their devastating consequences on public health. They offered comments like, "I hear you," and, "You've given us a lot to think about." Some asked me to send them more information, which I did. None of the lawyers I spoke with could give me any assurance, though, that their bosses, the AG's themselves, would be willing to go so far as to join us in taking the position, either publicly or in legal briefs, that

the *Heller* decision and its progeny were wrongly decided; that they should be overturned; and that lower courts should interpret them as narrowly as possible until they are overturned. And unfortunately, up to this point, I haven't been able to speak directly with any of the AG's.

Even though I couldn't get any of the lawyers I contacted to assure me that their AG's would adopt our position at Americans Against Gun Violence concerning the need to overturn *Heller*, I don't think my efforts were futile. According to the "Transtheoretical Model of Health Behavior Change," the transition from unhealthy to healthy behavior happens in five stages: 1) precontemplation; 2) contemplation; 3) preparation; 4) action; and, 5) maintenance. Some authors also add a sixth stage: 6) termination, the point at which there is no chance of going back to previously unhealthy behavior.[92] I believe that at the very least, my conversations with the lawyers in the AG's offices helped them make the transition from "precontemplation" to "contemplation" concerning the need to assert both publicly and in legal briefs that the *Heller* decision and its progeny were wrongly decided and should be overturned. And hopefully, the follow-up materials I sent may have even helped some of them transition from "contemplation" to the third and fourth stages in the Transtheoretical Model: "preparation," and "action."

The lawyers in AG offices are appointed or hired through administrative processes, whereas the AG's themselves are elected. While I believe that the Transtheoretical Model may apply to the lawyers who, theoretically at least, can make decisions mainly on a rational basis, the AG's themselves are more influenced by the vagaries of political winds, for which climate change may be a better model. I'll discuss later in this message ways in which we are trying to change the political climate in our country as it relates to preventing gun violence.

In the aftermath of the *Bruen* decision, I also renewed my efforts to get other GVP organizations to join us in openly advocating and actively working toward definitive measures to stop our country's epidemic of gun violence. With one exception, the representatives of other GVP organizations who I contacted were far less receptive than the lawyers in the AG's offices.

In his book, *Every Handgun Is Aimed At You: The case for banning handguns,* Joshua Sugarmann, the executive director for the Washington DC based Violence Policy Center, described the baby steps advocated by these other GVP organizations as "nibbl[ing] around the edges of half-solutions and good intentions, dramatically out of sync with the reality of gun violence in America."[93] In one sense, "nibbling around the edges" is an appropriate analogy for the manner in which the other GVP organizations search for crumbs in *Heller* and its progeny after the Supreme Court has served up nearly the entire cake to the gun lobby.

An example of one such crumb is a loophole that allows the adoption of so-called "red flag laws" (also known as "extreme risk protection orders" or "gun violence restraining orders"). Such laws establish legal mechanisms for temporarily removing guns from the possession of individuals deemed to be at extreme risk of harming themselves or others. Some GVP organizations promote the adoption of red flag laws as being significant advances in reducing gun violence. In fact, though, rates of gun violence have continued to rise in states that have adopted such laws. For example, California has had a red flag law in effect since 2016. [94] From 2016 to 2020, the most recent year for which data are available,

the gun homicide rate in California went up by 21%.[95] This is not surprising. In the time it takes to use a red flag order to temporarily remove a gun from the possession of a person deemed to be at the most extreme, immediate risk of hurting someone with a firearm, thousands of other Americans who have no legitimate need for guns are able to legally purchase them after passing cursory instant background checks. Returning to the example of California, from 2016 through 2018, red flag laws were used to temporarily remove 52 guns from individuals deemed to meet "extreme risk" criteria.[96] During this period of time, more than two million guns were sold in California.[97]

The "nibbling around the edges" analogy, though, doesn't adequately address the harm done when other GVP organizations focus on limited measures like red flag orders and imply that such measures will have a significant effect in stopping our country's epidemic of gun violence. I believe that "Bandaid solutions" would be a better analogy. During my medical career, which now spans more than 40 years, I've been involved in the treatment of innumerable patients, including gunshot victims, who were on the verge of bleeding to death. The approach being taken by other GVP organizations in response to our country's gun violence epidemic is akin to members of an emergency medical team focusing on treating a minor shrapnel wound in a gunshot victim – and claiming to be doing the patient a service in the process - while they ignore the fact that the patient is bleeding to death from a major arterial injury.

And while "hypocritical" may be too strong a word, it is certainly disingenuous, at best, for other GVP organizations to keep sending appeals for donations[98] to support more comprehensive measures like banning assault weapons in the aftermath of the *Bruen* decision and related GVR orders when these same organizations wrote in their *amicus* briefs in *Bruen* that the *Heller* decision, upon which *Bruen* and the GVR orders are based, "reaffirmed longstanding constitutional guardrails on the Second Amendment"[99] and established that individual self-defense is the "core lawful purpose" of the Amendment.[100] In the first place, these organizations know that by issuing the GVR order in the *Bianchi v. Frosh case that effectively invalidated Maryland's assault weapons ban, the six Supreme Court justices in the Bruen majority served notice that they would declare any such assault weapons ban unconstitutional. In the second place,* these organizations also know that the kinds of "assault weapons bans" that they support[101] – unlike the complete bans on all automatic and semi-automatic firearms adopted by Great Britain,[102] Australia,[103] and New Zealand[104] - would only prohibit the new sale of a small proportion of the many varieties of semi-automatic firearms currently on the market; and that the "grandfather clauses" in these so-called "bans" would still allow everyone who already owns guns defined as "assault weapons" to keep them. And finally, it's disingenuous for these other GVP organizations to keep sending appeals for donations after every mass shooting[105] when they know – or should know – that most of these mass shootings wouldn't have been prevented by any of the measures that they support.

People often ask me why other GVP organizations don't join Americans Against Gun Violence in advocating and actively working toward definitive measures to stop our country's epidemic of gun violence. As I wrote in my president's message concerning "the other Big Lie" a little over a year ago, I know a number of the people who have played key roles in these other organizations, and I've worked directly with them in the past. Those who I know the best are fine, intelligent, well-meaning and hard-working individuals. Many of them have lost loved ones to gun violence themselves. I'm reminded, though, of a quotation from a speech by the late Rev. Martin Luther King, Jr., who said:

> History will have to record that the greatest tragedy of this period of social transition was not the strident clamor of the bad people, but the appalling silence of the good people.[106]

Rev. King was speaking, of course, about the civil rights movement, but the above quotation is also germane to our country's epidemic of gun violence – an epidemic that took Rev. King's own life a decade after he gave the speech from which the above quotation was taken.

In my "other Big Lie" president's message last year, I speculated concerning possible reasons why the good people in other GVP organizations might be silent concerning the need to take definitive measures to stop our country's epidemic of gun violence. One reason may be that they've become victims of a form of "Stockholm Syndrome," also known as "capture bonding."[107] They may have been held captive by the gun lobby so long, in a psychological sense, that they've come to unconsciously sympathize with it. Another reason may be the phenomenon of "anchoring." "Anchoring" is the antithesis of the "termination" stage in the Transtheoretical Model of health behavioral change, and it's a significant source of medical errors. The term, "anchoring," is used to describe the paradoxical tendency of human beings to become increasingly fixated on their initial approach to a problem despite mounting evidence that this approach is failing.[108]

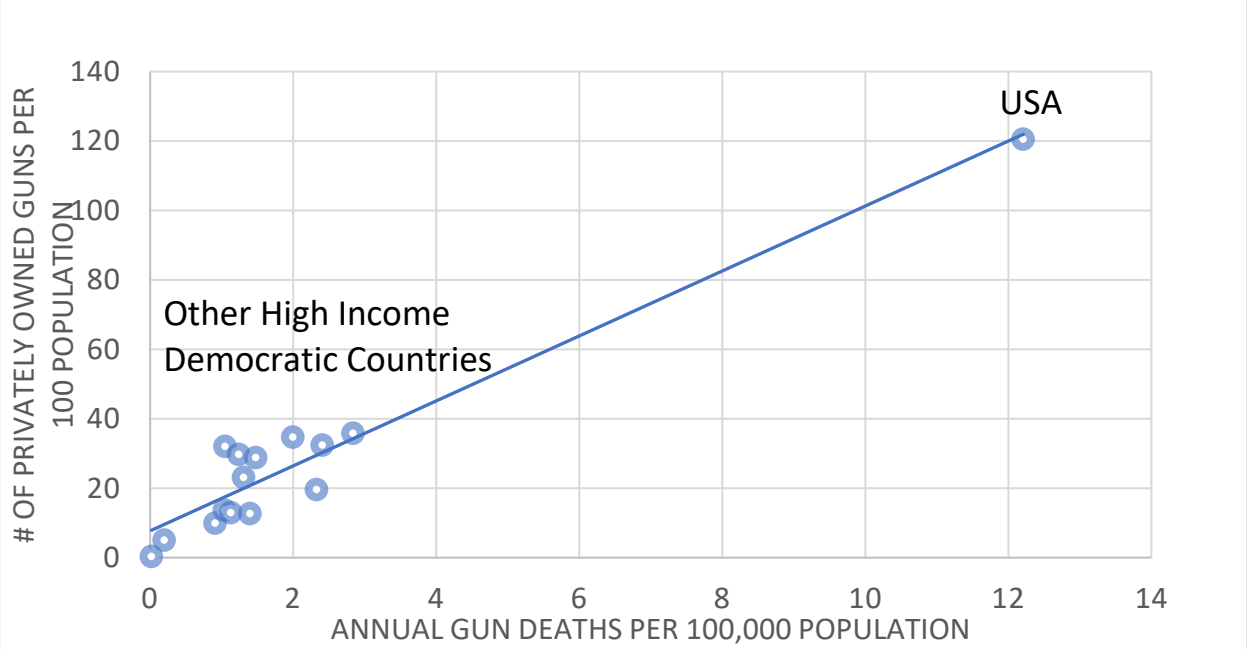
More than ever, though, I've become convinced that the silence of the current leaders of other GVP organizations concerning the need to take definitive measures to end our country's epidemic of gun violence can best be explained by the old adage, "Follow the money." The annual incomes of the GVP organizations that I've referenced above range from a low of $8 million[109] to a high of over $40 million.[110] The steadily rising rates of gun violence in our country clearly demonstrate that the strategies that these other organizations continue to employ in response to our country's epidemic of gun violence are not only ineffective, but, as discussed above, are potentially harmful in preventing firearm related deaths and injuries. On the other hand, the strategies that these other GVP organizations employ are highly effective in bringing in donations from concerned but naïve members of the public who want to believe that we can "stop gun violence" by pursuing limited measures like "red flag laws" and weak "assault weapons bans" without adopting definitive measures that would put the burden of proof on prospective gun purchasers to show that they have a legitimate need to own a gun and can handle one safely; that reject the myth of "self-defense" as being an automatic justification for owning a gun; and that would require millions of gun owners to surrender broad classes of guns to be destroyed.

I mentioned earlier in this message that there was one exception to the dismissive attitude that I encountered when I once again reached out to other GVP organizations after the *Bruen* decision. This exception was a young lawyer who had helped write one of the *amicus* briefs for a well known GVP organization in the *Bruen* case. During our conversation, which we conducted via "Zoom," I pointed out that the brief that she'd helped write not only endorsed the *Heller* decision as legitimate *stare decisis*, but that it also endorsed the myth of "guns for protection." Instead of reacting defensively, she asked if I'd noted any other problems with her organization's brief. I told her I'd send her a list. I explained to her why we at Americans Against Gun Violence felt that it was critically important to make the case in *amicus* briefs that *Heller* was not only wrongly decided, but that it is literally a death sentence for tens of thousands of Americans annually. She acknowledged that there was a need for some GVP organization to "lead on the left," but

she explained that the organization she worked for preferred to take a more "moderate" approach.

I replied that none of the "moderate" measures that her organization supports would be reasonably likely to prevent another massacre like the 2012 mass shooting in Newtown, Connecticut in which Adam Lanza first killed his mother and then used an AR-15 style rifle that his mother had legally owned to murder 20 first grade children and six female staff at the Sandy Hook Elementary School. The young lawyer didn't disagree with me on this point. I contrasted our country's failure to take definitive measures to prevent another massacre like Sandy Hook – and the resultant recent massacre of 19 fourth graders and two teachers at Robb Elementary School in Uvalde, Texas - with Great Britain's response to the 1996 mass shooting at the elementary school in Dunblane, Scotland, in which a man used a handgun that he legally owned to murder 16 five and six year-old students and their teacher. The young attorney wasn't familiar with the Dunblane massacre. I explained that the Dunblane victims accounted for nearly a quarter of all the gun related deaths in the entire country in 1996, and that Great Britain already had a complete ban on civilian ownership of all automatic and semi-automatic rifles, but that the British people decided that nothing short of a complete ban on civilian handgun ownership would suffice in response to the Dunblane massacre.[111] I noted that there have been no further school shootings since the handgun ban went into effect,[112] and that the rate of gun related deaths in the UK is currently 1/60th the rate in the United States.[113] I then referred back to the Sandy Hook and Uvalde mass shootings and asked the young attorney, "Instead of 19 or 20 grade school children being massacred in their classrooms, what would you think would be a 'moderate' number?" She replied, "I get it."

During the rest of our conversation, I made many of the points that I've discussed previously in this message. Although the young attorney offered counterpoints, she didn't fundamentally disagree with any of our positions at Americans Against Gun Violence. She also conceded that organizations like hers had a financial incentive to take what she had referred to as a "moderate" approach to gun violence prevention. When I suggested that she read the some of the essays of the winners of our annual high school essay contest to get a better understanding of the devastating effect that the threat of gun violence is having on our country's youth, she said she didn't need to – she'd been through the trauma of going through "lockdown drills" herself while she was a K-12 student. Because we were conducting our discussion via Zoom, I was able to share with her the graph that I'd prepared for my presentation at the American Public Health Association annual meeting in 2020 demonstrating the direct relationship between rates of private gun ownership and rates of gun related deaths at the international level and the fact that the United States is an extreme outlier in both categories:



I noted that this graph demonstrates better than words can describe that it's counterfactual to assert that we can reduce rates of gun violence in our country to levels comparable to the rates in other high income democratic countries without drastically reducing the number of privately owned guns. The young attorney agreed. When it came to the question of whether she'd take a position like ours in future *amicus* briefs in Second Amendment cases, though, she - like the attorneys I'd spoken with in the AG's offices - said that she was constrained by her organization's leadership. She told me, though, that she'd send me a link to a recent district court order that she thought I'd like.

The link was to an order issued by a Mississippi district court judge, Carlton W. Reeves on October 27 in the case of *United States v. Bullock*.[114] The case concerns a man with a prior felony conviction who is challenging federal law prohibiting felons from owning guns. The felon cites the *Bruen* decision in support of his claim that the prohibition on his owning a gun violates his rights under the Second Amendment. Instead of issuing a decision in this case, Judge Reeves posed a question to both sides and ordered them to respond within 30 days.[115] In explaining this order, Judge Reeves came as close as he possibility could, without violating his obligation as a district court judge to honor decisions by the Supreme Court, to making the argument that both the *Bruen* and *Heller* decisions were blatantly hypocritical and egregiously wrongly decided. Judge Reeves wrote:

> *Bruen* instructs courts to undertake a comprehensive review of history to determine if Second Amendment restrictions are "consistent with the Nation's historical tradition of firearm regulation…." But historical consensus on this issue is elusive….The *Bruen* Court acknowledged only that "historical analysis can be difficult…." That is an understatement….The Justices of the Supreme Court, distinguished as they may be, are not trained historians. Perhaps the most glaring disagreement is whether the Second Amendment confers a broad, individual right to bear arms, or a more limited, collective right to bear arms. The Supreme Court decided in 2008 [in the *Heller* decision] that the individual right was more faithful to the Constitution.

Judge Reeves went on to explain that the gun lobby has adopted the moniker, "Standard Model," to represent its claim that the Second Amendment was intended to confer an individual right to own guns unrelated to service in a well regulated militia. As I've previously discussed, Chief Justice Burger had called this misrepresentation of the Second Amendment "one of the greatest pieces of fraud" on the American public by special interest groups that he had ever seen in his lifetime. Judge Reeves didn't cite the Burger quote in his analysis, but he referred to more recent criticisms that are nearly as damning. He quoted an essay by historian Patrick J. Charles as stating that "an overwhelming majority of historians remain unconvinced by the Standard Model's interpretation of the Second Amendment."[116] Judge Reeves then included a long excerpt from the article in which the historian wrote:

> The fact remains that since the arrival of the Standard Model Second Amendment in the 1970s, its scholars broke, and continue to break, virtually every norm of historical objectivity and methodology accepted within academia. Minority viewpoints are cast as majority viewpoints. Historical speakers' and writers' words are cast in terms outside the bounds of their intended context or audience. The intellectual and political thoughts of different historical eras are explained from modern vantage point. Historical presumptions or inferences are sold as historical facts. Even worse was that Standard Model scholars often built one unproven historical presumption or inference on another and another. And in many cases, Standard Model scholars fail to adhere to even the most basic norms of historical objectivity and methodology, such as conducting comprehensive research on each person, topic, or event, and reading and incorporating the seminal accepted works on the subject (or at least distinguishing one's conclusions from said works).

Reeves also quoted other historians who criticized the *Heller* and *Bruen* majority opinions as being "nothing but inconsistency and caprice," "ideological fantasy," "originalist distortions," and as "cherry-pick[ing]" portions of historical records to arrive at the justices' "ideologically-preferred outcome."[117]

Wisely, from the point of view of keeping his job as a federal district court judge, Reeves didn't overtly endorse any of the above criticisms. Instead, he concluded his analysis by playing "dumb like a fox," explaining:

> Not wanting to itself cherry-pick the history, the Court now asks the parties whether it should appoint a historian to serve as a consulting expert in this matter.[118]

The fact that a federal district court judge in Mississippi would be this bold – and this well-informed - and that a young attorney working for another GVP organization would send me a link to this case as recommended reading is encouraging. It gives me renewed hope that cracks are forming in what has been an almost inviolate conspiracy of silence over the past two decades concerning the egregious flaws in the *Heller* decision and its progeny and the disastrous public health consequences of these decisions. It also underscores the importance of Americans Against Gun Violence continuing to file *amicus* briefs in Second Amendment cases both at the Supreme Court level and in lower federal court cases. Unlike Judge Reeves, we don't have to be worried about losing our job if we're direct in pointing out that *Heller* and its progeny were wrongly decided. But we can help provide cover for district and appellate court jurists like Judge Reeves to interpret *Heller* and its progeny as narrowly as possible until a newly constituted Supreme Court

overturns *Heller*; and we can also help educate judges and justices who aren't already as well-informed as Judge Reeves concerning the egregious flaws in the *Heller* decision and its progeny and the disastrous public health consequences of these decisions.

There's also another court in which we need to prevail in order to adopt the kind of definitive gun control laws necessary to stop our country's shameful epidemic of gun violence, and that's the court of public opinion. As Abraham Lincoln said during one of his famous debates with Stephen Douglas:

> 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.[119]

In order to stop our country's epidemic of gun violence, we need to change public opinion concerning the Second Amendment and the need for definitive gun control laws. The gun lobby understands the truth of the Lincoln quote. Decades before the 2008 *Heller* decision, the gun lobby and its disciples began promoting the myths that the Second Amendment was intended to confer an individual right to own guns and that honest, law-abiding people should own and carry guns "for protection."[120] And just as Lincoln predicted, their disinformation campaign succeeded in changing not only public opinion, but in changing laws and court decisions. A Gallup poll conducted in 1993 showed that 42% of Americans mistakenly believed that having a gun in the home made the home safer.[121] By 2014, the percentage of Americans who held this mistaken belief had risen to 62%. Another Gallup poll in 1959 showed that 60% of Americans supported banning civilian ownership of handguns. By 2016, the percentage of Americans who supported banning handguns had dropped to 23%.[122] I couldn't find a public opinion poll concerning the proper interpretation of the Second Amendment prior to the 2008 *Heller* decision, but as Justice Stevens wrote in his dissenting opinion in *Heller*, there was virtual unanimity among judges and justices that the Second Amendment did not confer an individual right to own guns.[123] By 2008, though, a Gallup poll showed that 73% of Americans, including 63% of Americans who didn't even own guns, believed that the Second Amendment conferred an individual right to own firearms.[124]

The nearly universal conspiracy of silence that currently exists in our country concerning the need to take definitive measures to stop our country's epidemic of gun violence reminds me of the song, "We Don't Talk About Bruno," from the Disney animated film, *Encanto.* The song was written by Lin-Manuel Miranda, the creator of Hamilton. In the movie, Bruno is a member of the Madrigal family of Colombia, and he has the power to see into the future, but he's ostracized by other family members who have other magical powers of their own because he sees disaster looming. When Bruno's young niece, Mirabel (the only member of the Madrigal family who doesn't have some magical power), asks other family members why Bruno is being treated as an outcast, she's repeatedly told in song, "We don't talk about Bruno." Eventually, though, Mirabel – who refuses to be part of the conspiracy of silence concerning her uncle - brokers a reconciliation between Bruno and the rest of the family, and in the end, she and Bruno save the day.

In the United States today, very few people talk about the need for stringent gun control. Even other GVP organizations and our most "liberal" politicians rarely use the term, "gun control," at all. Instead, they talk about "common sense gun regulations" and go out of their way to reassure gun owners that they're not going to take away anyone's guns.

Clearly, for the reasons discussed above, common sense dictates that if we're serious about stopping our country's shameful epidemic of gun violence, many more of us are going to have to start talking about the need to overturn *Heller* and its progeny and to adopt stringent gun control laws in our country comparable to the laws that have long been in effect in the other high income democratic countries of the world – laws that would change the guiding policy for firearm ownership in our country from a permissive one to a restrictive one and that would not only ban the new sales of handguns and semi-automatic rifles, but that would also require millions of current gun owners who already own such weapons to surrender them to be destroyed.

I see Americans Against Gun Violence as the "Mirabel" and the need to take definitive measures as the "Bruno" of the story of the effort to end our country's shameful epidemic of gun violence. Like Mirabel, who didn't have any of the magic powers that other members of her family were blessed with, we don't have the millions of dollars that other GVP organizations have at their disposal. But we have truth and reason on our side. And we don't need to have Bruno's magical power of being able to see the future in order to know that rates of gun related deaths will continue to rise if we fail to take definitive measures to stop our country's epidemic of gun violence.

When people ask me what I've been up to lately, I tell them that I've been working on "gun control." That's right. "**GUN CONTROL.**" So far, no one's started singing to me, "We Don't Talk About Gun Control," but the expressions of shock and disapproval on some peoples' faces reminds me of the expressions on the animated faces of the members the Madrigal family in *Encanto* when Mirabel asks about Bruno. Some people turn and walk away. Others try to change the subject. But most people I talk with are interested in more information, and many share personal anecdotes about a friend or family member who has been killed or injured with a gun.

I'd like to encourage all of our Americans Against Gun Violence supporters to be like Mirabel. Don't be afraid to talk about Bruno – metaphorically speaking – with your elected officials; with colleagues, friends and family members; and with anyone else you may encounter when the opportunity arises.

For other suggestions on actions you can take right now to help in our effort to stop our country's epidemic of gun violence, please visit the Facts and FAQ's page of our Americans Against Gun Violence website. And of course, we'd appreciate it if you'd become an official paid member of Americans Against Gun Violence if you haven't already done so; if you'd encourage others to join as well; and if you'd make an additional donation, if you're able, to support our ongoing work, including the cost of submitting *amicus* briefs in important Second Amendment cases.

As I've said many times before, I'm confident that one day we will take the definitive measures necessary to stop our country's shameful epidemic of gun violence. The only question is, how many more innocent people will be killed with guns before that day arrives. Thanks for your help in making that day come sooner rather than later.

Yours truly,

Bill Durston, M.D.

President, Americans Against Gun Violence

Note: Dr. Durston is a board certified emergency physician and a former expert marksman in the U.S. Marine Corps, decorated for “courage under fire” during his service in combat in the Vietnam War.

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