AMERICANS
AGAINST
GUN VIOLENCE

Americans Against Gun Violence
7862 Winding Way #151
Fair Oaks, CA 95628
(916) 668-4160
aagunv.org / info@aagunv.org

Judicial Commentary Concerning the Second Amendment in Supreme Court and Federal Appeals Court Cases

Supreme Court Cases prior to the 2008 *Heller* decision

***United States v. Cruikshank,* 1876**: "The right there specified [that Cruikshank and his co-defendants were accused of violating] is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress."[1]

***Presser v. Illinois*, 1886**: "We think it clear that the sections [of Illinois state law] under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this [Second] amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the National government, and not upon that of the States."[2]

***United States v. Miller*, 1939**: "In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' [the kind of firearm that Miller was convicted of transporting across state lines, in violation of the 1934 Firearms Act] at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument….The Constitution as originally adopted granted to the Congress power — 'To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.' With obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view."[3]

***Adams v. Williams,* 1972** (Opinion of Justice Douglas, dissenting on the issue of whether the defendant, Williams, had been subject to illegal search, in violation of his rights under the Fourth Amendment, but not on the issue of whether Williams had a constitutional right to possess a handgun under the Second Amendment): "A powerful lobby dins into the

ears of our citizenry that these gun purchases are constitutional rights protected by the Second Amendment, which reads, '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.' There is under our decisions no reason why stiff state laws governing the purchase and possession of pistols may not be enacted. There is no reason why pistols may not be barred from anyone with a police record. There is no reason why a State may not require a purchaser of a pistol to pass a psychiatric test. There is no reason why all pistols should not be barred to everyone except the police."[4]

***Lewis v. United States*, 1980** (in which Justice Blackmun, writing for the majority, quoted a phrase from *Miller*): "[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.'"[5]

Federal Appeals Court rulings in the interim between the 1939 *Miller* case and the 2008 *Heller* case

***United States v. McCutcheson,* (1971)**: "In like manner [citing *Miller*], we find no merit in the Second Amendment issue raised in the case at bar."[6]

***United States v. Synnes,* 1971**: "Although [Omnibus Crime Control and Safe Streets Act of 1968] is the broadest federal gun legislation to date, we see no conflict between it and the Second Amendment since there is no showing that prohibiting possession of firearms by felons obstructs the maintenance of a 'well regulated militia.'"[7]

***United States v. Decker,* 1971:** "Thus, in light of the defendant's failure to present any evidence indicating a conflict between the requirements of [the Gun Control Act of 1968] and the maintenance of a well regulated militia, we decline to hold that the statute violates the Second Amendment."[8]

***Stevens v. United States,* 1971:** "Since the Second Amendment right "to keep and bear Arms" applies only to the right of the State to maintain a militia and not to the individual's right to bear arms, there can be no serious claim to any express constitutional right of an individual to possess a firearm."[9]

***United States v. Johnson,* 1971:** "Appellant's remaining contention, that his constitutional right to bear arms has been infringed by the [1934 National Firearms] Act, misconstrues the Second Amendment…."[10]

***United States v. Cody*, 1972:** "Since [*Miller*], it has been settled that the Second Amendment is not an absolute bar to congressional regulation of the use or possession of firearms. The Second Amendment's guarantee extends only to use or possession which "has some reasonable relationship to the preservation or efficiency of a well regulated militia."[11]

***Eckert v. Philadelphia,* 1973:** "Appellant's theory in the district court which he now repeats is that by the Second Amendment to the United States Constitution he is entitled to bear arms. Appellant is completely wrong about that."[12]

***United States v. Johnson,* 1974:** "The courts have consistently held that the Second

Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well regulated militia.'"[13]

***United States v. Swinton,* 1975:** "These holdings [including *Miller*], when considered within the broad intent of the [1934 National Firearms] Act, highlight the established principle that there is no absolute constitutional right of an individual to possess a firearm."[14]

***United States v. Warin,* 1976:** "It would unduly extend this opinion to attempt to deal with every argument made by defendant and *amicus curiae,* Second Amendment Foundation, all of which are based on the erroneous supposition that the Second Amendment is concerned with the rights of individuals rather than those of the States or that defendant's automatic membership in the "sedentary militia" of Ohio brings him within the reach of its guarantees."[15]

***United States v. Oakes,* 1977:** "To apply the [Second] amendment so as to guarantee appellant's right to keep an unregistered firearm which has not been shown to have any connection to the militia, merely because he is technically a member of the Kansas militia, would be unjustifiable in terms of either logic or policy. This lack of justification is even more apparent when applied to appellant's membership in "Posse Comitatus," an apparently nongovernmental organization."[16]

***Quilici v. Morton Grove,* 1982:** "Under the controlling authority of *Miller* we conclude that the right to keep and bear handguns is not guaranteed by the second amendment."[17]

***Thomas v. Portland,* 1984:** "Established case law makes clear that the federal Constitution grants appellant no right to carry a concealed handgun."[18]

***United States v. Napier,* 2000:** "It is well-established that the Second Amendment does not create an individual right."[19]

***Sandidge v. United States,* 1987:** "The second amendment says nothing that would prohibit a state (or the legislature for the District of Columbia) from restricting the use or possession of weapons in derogation of the government's own right to enroll a body of militiamen "bearing arms supplied by themselves" as in bygone days."[20]

***United States v. Nelsen,* 1988:** "We also decline to hold that the Act violates the second amendment. Nelsen claims to find a fundamental right to keep and bear arms in that amendment, but this has not been the law for at least 100 years."[21]

***United States v. Hale,* 1992:** "The purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia."[22]

***United States v. Rybar,* 1996:** "We note first that however clear the Court's suggestion [in Miller] that the firearm before it lacked the necessary military character, it did not state that such character alone would be sufficient to secure Second Amendment protection. In fact, the *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its "possession or use" and militia-related activity."[23]

***Hickman v. Block,* 1996:** "We follow our sister circuits in holding that the Second Amendment is a right held by the states, and does not protect the possession of a weapon by a private citizen."[24]

***United States v. Wright,* 1997:** "The concerns motivating the creation of the Second Amendment convince us that the amendment was intended to protect only the use or possession of weapons that is reasonably related to a militia actively maintained and trained by the states."[25]

***Gillespie v. Indianapolis*, 1999:** "Whatever questions remain unanswered, *Miller* and its progeny do confirm that the Second Amendment establishes no right to possess a firearm apart from the role possession of the gun might play in maintaining a state militia."[26]

***United States v. Haney*, 2001:** "Consistent with these [*Miller* and subsequent appeals court] cases, we hold that a federal criminal gun-control law does not violate the Second Amendment unless it impairs the state's ability to maintain a well-regulated militia. This is simply a straightforward reading of the text of the Second Amendment."[27]

***United States v. Emerson,* 2001:**

> Judges Garwood and DeMoss: "We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with *Miller,* that it protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller.*"[28]
>
> Judge Parker concurring on the judgement but not the discussion of the Second Amendment: "I choose not to join Section V, which concludes that the right to keep and bear arms under the Second Amendment is an individual right, because it is dicta and is therefore not binding on us or on any other court. The determination whether the rights bestowed by the Second Amendment are collective or individual is entirely unnecessary to resolve this case and has no bearing on the judgment we dictate by this opinion. The fact that the 84 pages of dicta contained in Section V are interesting, scholarly, and well written does not change the fact that they are dicta and amount to at best an advisory treatise on this long-running debate."[29]

***United States v. Milheron,* 2002:** "In the instant case, Defendant has presented no evidence that he is a member of the National Guard or some other military organization that would validate his possession of a firearm. Consequently, Defendant has no individual right to possess a firearm under the United States Constitution and has failed to establish a liberty interest based on the Second Amendment."[30]

***Silveira v. Lockyer,* 2002:** "Because the Second Amendment does not confer an individual right to own or possess arms, we affirm the dismissal of all claims brought pursuant to that constitutional provision."[31]

***Bach v. Pataki,* 2003:** "In view of the weight of authority, including the present state of Supreme Court and Second Circuit jurisprudence, the Court adopts the view that the

Second Amendment is not a source of individual rights."[32]

***United States v. Lippman,* 2004**: "Since Lippman has not shown that his firearm possession was reasonably related to a well regulated militia, his Second Amendment argument cannot succeed."[33]

***United States v. Parker,* 2004:** "Parker's reliance on *Emerson* is foreclosed by this court's rulings in *Bayles, Graham,* and *Haney,* where we held that absent a showing that a person is part of a well-regulated state-run militia, the Second Amendment does not establish a citizen's right to possess a firearm. Second, the Fifth Circuit stands alone in its interpretation of the Second Amendment as conferring an individual right to bear arms."[34]

***Parker v. District of Columbia,* 2007:**

> Judges Silberman and Griffith: "To summarize, we conclude that the Second Amendment protects an individual right to keep and bear arms."[35]
>
> Judge Henderson, dissenting: "However the Second Amendment right has been subsequently labeled by others — whether collective, individual or a modified version of either — *Miller*'s label is the only one that matters. And until and unless the Supreme Court revisits *Miller,* its reading of the Second Amendment is the one we are obliged to follow."[36]

The Supreme Court's 2008 *Heller* decision and its progeny

***District of Columbia v. Heller*, 2008:**

> Justice Scalia, writing for the five-justice majority: "In sum, we hold that the District's [District of Columbia's] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense [the safe storage component of the DC law]."[37]
>
> Justice Stevens, writing for the four justices in the minority: "The view of the Amendment we took in *Miller*—that it protects the right to keep and bear arms for certain military purposes, but that it does not curtail the Legislature's power to regulate the nonmilitary use and ownership of weapons—is both the most natural reading of the Amendment's text and the interpretation most faithful to the history of its adoption."[38]

***McDonald v. Chicago*, 2010** (in which the same five justices in the *Heller* majority ruled that Chicago's partial handgun ban also violated the Second Amendment):

> Justice Alito, writing for the five-justice majority: "Two years ago, in [the *Heller* decision], we held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense, and we struck down a District of Columbia law that banned the possession of handguns in the home. The city of Chicago (City) and the village of Oak Park, a Chicago suburb, have laws that are similar to the District of Columbia's, but Chicago and Oak Park argue that their laws are constitutional because the Second Amendment has no application to the States.

> We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States."[39]
>
> Justice Stevens, writing in dissent for the four-justice minority: "Recognizing a new liberty right is a momentous step. It takes that right, to a considerable extent, 'outside the arena of public debate and legislative action [quoting a previous Supreme Court decision concerning assisted suicide].' Sometimes that momentous step must be taken; some fundamental aspects of personhood, dignity, and the like do not vary from State to State, and demand a baseline level of protection. But sensitivity to the interaction between the intrinsic aspects of liberty and the practical realities of contemporary society provides an important tool for guiding judicial discretion…Even accepting the Court's holding in *Heller,* it remains entirely possible that the right to keep and bear arms identified in that opinion is not judicially enforceable against the States, or that only part of the right is so enforceable. It is likewise possible for the Court to find in this case that some part of the *Heller* right applies to the States, and then to find in later cases that other parts of the right also apply, or apply on different terms.[40]

***New York State Rifle and Pistol Association v. New York City*, 2020:** The Supreme Court declared this case moot after New York City capitulated to the gun lobby's demand that it repeal its law prohibiting transporting firearms in the city anywhere other than to and from city-approved practice ranges.[41] Prior to New York City repealing its law restricting carrying handguns in the City, Americans Against Gun Violence filed an *amicus* brief in this case urging the Court to not only uphold the constitutionality of New York's law, but to also take the opportunity of this case to overturn the *Heller* and *McDonald* decisions.

***New York State Rifle and Pistol Association v. Bruen*, June 23, 2022** (in which the Supreme Court struck down New York State's restrictions on carrying a concealed handgun and in which Americans Against Gun Violence again filed an *amicus* brief urging the Court to not only uphold the constitutionality of New York's concealed carry law, but to also take the opportunity of this case to overturn the *Heller* and *McDonald* decisions):

> Justice Thomas, writing for the six-justice majority: "In [the *Heller and* McDonald decision], we recognized that the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense. In this case, petitioners and respondents agree that ordinary, law-abiding citizens have a similar right to carry handguns publicly for their self-defense. We too agree, and now hold, consistent with *Heller* and *McDonald,* that the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."[42]
>
> Justice Breyer, writing in dissent for the three-justice minority: "The *Heller* majority relied heavily on its interpretation of the English Bill of Rights….The majority interpreted that language to mean a private right to bear arms for self-defense, 'having nothing whatever to do with service in a militia.' Two years later, however, 21 English and early American historians (including experts at top universities) told us in [*McDonald v. Chicago,* citing the *amicus* brief for English/Early American

> Historians] that the *Heller* Court had gotten the history wrong: The English Bill of Rights 'did not ... protect an individual's right to possess, own, or use arms for private purposes such as to defend a home against burglars.'…And that was not the *Heller* Court's only questionable judgment. The majority rejected Justice Stevens' argument that the Second Amendment's use of the words "bear Arms" drew on an idiomatic meaning that, at the time of the founding, commonly referred to military service. Linguistics experts now tell us that the majority was wrong to do so [with references to *amicus* briefs filed by Linguistics Professors and Experts, attorney Neal Goldfarb, and Americans Against Gun Violence]."[43]

Supreme Court "GVR" orders 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 by issuing what are known as "GVR" orders (an acronym for **g**rant *writ of certiori*, **v**acate the lower court's ruling, and **r**emand the case for further consideration) without ever actually hearing the four cases in which it issued the orders. The four cases in which the Supreme Court issued GVR orders one week after its *Bruen* decision included *Duncan v. Bonta* (challenging California's LCM ban);[44] *Association of New Jersey Rifle, et al. v. Bruck (*challenging *New Jersey's LCM ban);*[45] *Young v. Hawaii (*challenging *Hawaii's open carry ban); and Bianchi v, Frosh (challenging Maryland's assault weapons ban)*.[46] 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.

United States v. Rahimi **(Supreme Court ruling pending)**: Zackey Rahimi, a drug dealer who had been involved in five shootings in Texas in a two-month period and who was under a domestic violence restraining order (DVRO), was convicted of being in possession of a firearm in violation of federal law that prohibits persons under a DVRO from possessing guns. Rahimi appealed his conviction on the basis that the federal statute prohibiting someone under a DVRO from possessing a firearm violated his Second Amendment rights. A district court judge and a three-judge panel of the Fifth Circuit Court of Appeals upheld Rahimi's conviction. Following the Supreme Court's 2022 *Bruen* decision, however, the Fifth Circuit Court of Appeals vacated Rahimi's conviction, stating:

> Considering the issue afresh, we conclude that *Bruen* requires us to re-evaluate our Second Amendment jurisprudence and that under *Bruen,* § 922(g)(8) [the federal statute prohibiting someone under a DVRO from possessing a firearm] fails to pass constitutional muster. We therefore reverse the district court's ruling to the contrary and vacate Rahimi's conviction.[47]

The Supreme Court agreed to review the case, and the Court heard oral arguments on November 7, 2023. A decision is pending. Americans Against Gun Violence filed an *amicus* brief in this case calling on the Court to not only uphold the constitutionality of the federal statute prohibiting someone under a DVRO from possessing a firearm, but to take the opportunity of this case to overturn the *Heller* decision and its progeny, including the *Bruen* decision.

Case Citations

[1] United States v. Cruikshank, 92 US 542 (Supreme Court 1876).
[2] Presser v. Illinois, 116 US (Supreme Court 1886).
[3] U.S. v. Miller, 307 U.S. 174 (1939) (n.d.).
[4] Adams v. Williams, 407 US 143 (Supreme Court 1972).
[5] Lewis v. United States, No. 55 (U.S. 1980).
[6] United States v. McCutcheon, 446 F. 2d 133, 136 (Court of Appeals, 7th Circuit 18862).
[7] United States v. Synnes, 438 F. 2d 764, 772 (Court of Appeals, 8th Circuit 20438).
[8] United States v. Decker, 446 F. 2d 164, 167 (Court of Appeals, 8th Circuit 20630).
[9] Stevens v. United States, 440 F.2d 144, 149 (6th Circuit Court of Appeals 1971).
[10] United States v. Johnson, 441 F. 2d 1134, 1136 (Court of Appeals, 5th Circuit 1971).
[11] Cody v. United States, 460 F. 2d 34, 36–37 (Court of Appeals, 8th Circuit 1971).
[12] Eckert v. City of Philadelphia, Pa., 477 F. 2d 610 (Court of Appeals, 3rd Circuit 1973).
[13] United States v. Johnson, 497 F. 2d 548, 550 (Court of Appeals, 4th Circuit 1974).
[14] United States v. Swinton, 521 F. 2d 1255, 1259 (Court of Appeals, 10th Circuit 1975).
[15] United States v. Warin, 530 F. 2d 103, 108 (Court of Appeals, 6th Circuit 1975).
[16] U.S. v. Oakes, 564 F.2d 384 (U.S. Court of Appeals for the10th Circuit 1977).
[17] Quilici v. Village of Morton Grove, 695 F. 2d 261, 270 (Court of Appeals, 7th Circuit 1982).
[18] Thomas v. Members of City Council of Portland, 730 F. 2d 41, 42 (Court of Appeals, 1st Circuit 1984).
[19] US v. Napier, 233 F. 3d 394, 403 (Court of Appeals, 6th Circuit 2000).
[20] Sandidge v. US, 520 A. 2d 1057, 1058 (Court of Appeals 1986).
[21] US v. Nelsen, 859 F. 2d 1318, 1320 (Court of Appeals, 8th Circuit 1988).
[22] United States v. Hale, 978 F. 2d 1016, 1020 (Court of Appeals, 8th Circuit 1992).
[23] US v. Rybar, 103 F. 3d 273, 286 (Court of Appeals, 3rd Circuit 1995).
[24] Hickman v. Block, 81 F. 3d 98, 101 (Court of Appeals, 9th Circuit 1995).
[25] US v. Wright, 117 F. 3d 1265, 1273 (Court of Appeals, 11th Circuit 1997).
[26] Gillespie v. City of Indianapolis, 185 F. 3d 693, 710 (Court of Appeals, 7th Circuit 1998).
[27] US v. Haney, 264 F. 3d 1161, 1165 (Court of Appeals, 10th Circuit 2001).
[28] US v. Emerson, 270 F. 3d 203, 260 (Court of Appeals, 5th Circuit 2001).
[29] US v. Emerson, 270 F. 3d at 272.
[30] US v. Milheron, 231 F. Supp. 2d 376, 378 (Dist. Court 2002).
[31] Silveira v. Lockyer, 312 F. 3d 1052, 1056 (Court of Appeals, 9th Circuit 2002).
[32] Bach v. Pataki, 289 F. Supp. 2d 217, 226 (Dist. Court 2003).
[33] US v. Lippman, 369 F. 3d 1039, 1044 (Court of Appeals, 8th Circuit 2004).
[34] US v. Parker, 362 F. 3d 1279, 1284 (Court of Appeals, 10th Circuit 2004).
[35] Parker v. District of Columbia, 478 F. 3d 370, 395 (Court of Appeals, Dist. of Columbia Circuit 2007).
[36] Parker v. District of Columbia, 478 F. 3d at 404.
[37] District of Columbia v. Heller, 554 US 2821–22 (Supreme Court 2008). Note: The District of Columbia law that the *Heller* decision struck down was not actually a complete ban on civilian handgun ownership. The law allowed individuals who already legally owned handguns at the time that the law went into effect in February of 1977 to keep them, provided that they registered them with the police department. The law banned the new acquisition of handguns. The *Heller* decision was the first time in U.S. history that any gun control law had been struck down by a federal court on a Second Amendment basis.
[38] *Heller*, 554 US at 2823.

[39] McDonald v. City of Chicago, No. 3020 (SCt 2010).
[40] *McDonald*, 130 at 3101–3.
[41] New York State Rifle & Pistol Association, Inc., et al., Petitioners v. City of New York, New York, et al., No. 18-280 (Supreme Court April 27, 2020).
[42] New York State Rifle and Pistol Association, Inc. et al v. Bruen, et al, 142 S. Ct. 2111, 2122 (Supreme Court 2022).
[43] New York State Rifle and Pistol Association, Inc. et al v. Bruen, et al, 142 S. Ct. at 2177–78.
[44] Duncan v. Bonta, 142 S. Ct. 2895 (Supreme Court 2022).
[45] Association of New Jersey Rifle & Pistol Clubs, Inc. v. Bruck, 142 S. Ct. 2894 (Supreme Court 2022).
[46] Bianchi v. Frosh, 142 S. Ct. 2898 (Supreme Court 2022).
[47] United States v. Rahimi, 61 F. 4th 443, 168 (Court of Appeals, 5th Circuit 2023).