Supreme Court Justice Kennedy announced his retirement Wednesday, and President Trump plans to choose a replacement, likely from an existing list of nominees. The stakes of this nomination are higher than ever. Should a radical candidate aligned ideologically with the gun lobby be confirmed to the Court for life, the results could devastate elected officials’ ability to adopt the public safety measures Americans have repeatedly demanded after massacres like Parkland. An ideologically-motivated nominee, like several on the rumored shortlist, could negatively impact firearms policy at this critical moment for the gun safety movement—and for many years to come.

I. Background on Heller and the Second Amendment

Ten years ago this month, in a landmark 5–4 ruling in District of Columbia v. Heller, the U.S. Supreme Court held that the Second Amendment protects an individual right of law-abiding citizens to possess a handgun in the home for self-defense. The Court struck down an extreme handgun ban in place in Washington DC, but cautioned that, like all rights, the Second Amendment is “not unlimited”: it is not a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” The Court provided a non-exhaustive list of gun regulations it said were presumptively lawful, confirming that public safety laws and self-defense rights can be harmonized under the Second Amendment.

Heller ushered in a flood of litigation, including gun lobby-backed cases that sought to expand Heller to invalidate even moderate gun regulations. These cases saw little success: reflecting the Supreme Court’s recognition that many firearm laws pose no constitutional problem, lower courts have rejected post-Heller challenges about 93% of the time. To date, consistent with Heller’s middle-ground approach, gun policy hasn’t been an unusually partisan issue among lower courts. Judges appointed by both Democrats and Republicans voted to uphold key gun safety measures after Heller, including minimum age laws, state and local assault weapon bans, concealed carry permitting laws, and risk-based gun removal laws. Over the last ten years, the conservative-leaning Supreme Court declined nearly every chance to review Second Amendment cases or expand on the Heller ruling. During this time, political opposition driven by the NRA, not Heller or judges, was by far the biggest obstacle to addressing the gun violence epidemic.

Most lower-court judges to consider Second Amendment cases have taken seriously Heller’s instruction that the Second Amendment is “not unlimited” by overwhelmingly voting to uphold laws that protect the public from gun violence without infringing constitutional rights. But a few judges, mostly those writing in dissenting opinions, have departed from this consensus view by broadly rejecting public safety Justifications for firearm regulations and arguing that many more important measures are unconstitutional under the Second Amendment. Unfortunately,
some of these dissenting judges are on President Trump’s Supreme Court shortlist, and one of them, Justice Neil Gorsuch, has already been confirmed to the Court. The confirmation of a second justice with views on gun policy that are radically far from mainstream could result in the dangerous expansion of Heller gun lobby groups have not been able to achieve thus far.

II. Evaluating President Trump’s Likely Supreme Court Nominees

Because President Trump’s shortlist targets younger judges and includes some non-judges, not all of them have previously ruled on significant Second Amendment issues. However, five judges on the shortlist have an extremely troubling record—and two of these (Judge Hardiman and Judge Kavanaugh) are reportedly top contenders for the job. These five judges have expressed dangerously limited views of the government’s power to address gun violence, including by arguing that the Second Amendment prevents states from banning open carry and restricting assault weapons, and by questioning the constitutionality of laws prohibiting domestic abusers and other offenders from possessing guns.

A sixth judge on the list, Judge William Pryor, has not issued a major Second Amendment ruling. However, before becoming a judge, then-Attorney General Pryor delivered remarks criticizing lawsuits against the gun industry and supporting the debunked theory that weaker concealed carry laws deter crime. In 2001, the NRA awarded Pryor a legislative achievement award. Similarly, Judge Raymond Kethledge joined a sweeping concurring opinion criticizing the federal law prohibiting gun possession by people with prior mental health commitments, and made public remarks suggesting that lower courts are not reviewing gun regulations rigorously enough. Other nominees with no judicial record on the Second Amendment have been met with approval by the NRA, suggesting they may hold similar views.

Below is a summary of the five potential nominees with the most troubling records on guns.

1. Judge Charles Canady of the Florida Supreme Court has been described as an “NRA favorite” and dissented from a decision that upheld the constitutionality of Florida’s open carry ban. He argued that the Second Amendment protects “a specific right to carry arms openly” and that there was insufficient evidence that open carry jeopardizes public safety. In another case, he wrote a dissent arguing that whenever shooters invoke Florida’s “Stand Your Ground” law, the prosecution should bear the burden of disproving before trial that a shooter acted in self-defense.

   ○ Key quotes: “Because Florida’s generally applicable ban on the open carrying of firearms is unjustified on any ground that can withstand even intermediate scrutiny, I dissent.” Norman v. State, 215 So. 3d 18, 42 (Fla. 2017) (Canady, J., dissenting).

2. Judge Thomas Hardiman of the Third Circuit authored a dissent arguing that New Jersey’s “good cause” concealed carry permitting law is unconstitutional, rejecting the state’s public safety justification for the law. He also wrote an opinion stating that it violates the Second Amendment to prohibit gun possession by people convicted of nonviolent crimes, voting to restore gun rights to men convicted of serious misdemeanors he deemed nonviolent: illegal handgun possession and “corrupting a minor” (a sex offense involving the 41-year-old defendant’s 17-year-old employee).

   ○ Key quotes: Judge Hardiman wrote that historically, “[c]rimes of violence’ were commonly understood to include only those offenses ‘ordinarily committed with the aid of firearms’”; “a felon convicted of a minor, non-violent crime” might show he is entitled to possess guns. U.S. v. Barton, 633 F.3d 168, 173-74 (3d Cir. 2011) (Hardiman, J.).
3. Judge Brett Kavanaugh of the DC Circuit wrote a dissent arguing that DC's assault weapons ban and registration law violate the Second Amendment, and interpreted Heller to require judges to disregard compelling public safety justifications for gun regulations and consider only the text of the Second Amendment and the history and tradition of regulating in a certain area when deciding if a challenged law is constitutional.

- **Key quotes**: Under the Second Amendment, there is an “absence of a role for judicial interest balancing or assessment of costs and benefits of gun regulations.” Heller v. District of Columbia, 670 F.3d 1244, 1285 (2011) (Kavanaugh, J., dissenting)
- “Semi-automatic rifles have not traditionally been banned and are in common use today, and are thus protected” under the Second Amendment. Id. at 1286-87.

4. Judge Diane Sykes of the Seventh Circuit dissented from a decision that upheld the federal law prohibiting domestic abusers with misdemeanor convictions from possessing firearms (the federal law is 18 U.S.C. § 922(g)(9), also called the Lautenberg Amendment). The defendant bringing the Second Amendment challenge, Steven Skoien, had multiple domestic abuse convictions and was caught with guns after his second conviction. Judge Sykes also wrote decisions striking down Chicago’s gun range zoning rules and an ordinance prohibiting use of gun ranges by minors under 18.

- **Key quotes**: “The court’s understanding of the research on domestic violence might be mistaken,” so it is inappropriate to “prematurely end[] Skoien’s challenge and . . . immunize most applications of § 922(g)(9) from serious Second Amendment scrutiny.” United States v. Skoien, 614 F.3d 638, 652-54 (7th Cir. 2010) (Sykes, J., dissenting).

5. Judge Timothy Tymkovich of the Tenth Circuit wrote a concurring opinion to “express concern” with the Supreme Court’s statement that felon-possession laws remain constitutional after Heller. In another case, he argued that it is unconstitutional to prohibit guns in post office parking lots. As Colorado’s Solicitor General, Tymkovich intervened in a lawsuit to oppose Denver’s assault weapons ban.

- **Key quotes**: “The broad scope of 18 U.S.C. § 922(g)(1)—which permanently disqualifies all felons from possessing firearms—would conflict with the ‘core’ self-defense right embodied in the Second Amendment.” United States v. McCane, 573 F.3d 1037, 1048-49 (10th Cir. 2009) (Tymkovich, J., concurring).

Each of the above judges has written opinions or dissents concluding that an important and widely upheld gun regulation violates the Second Amendment or is constitutionally suspect. These rulings should concern anyone who believes our leaders must remain empowered to take action to stem America’s gun violence crisis. But President Trump’s selection of judges with outlier views is no coincidence: it reflects the clout of the NRA and its influence over the Administration’s policies and judicial nomination strategies. In early 2017, the NRA spent $1 million to support the nomination of Neil Gorsuch—and once Justice Gorsuch joined the Court, he joined a dissenting opinion arguing that California’s strong concealed carry laws violate the Second Amendment. The fact that it appears that President Trump has taken no steps to modify his list of Supreme Court nominees to exclude radical candidates—and in fact added NRA-aligned candidates to his list in November—seems a clear demonstration that the President is still letting the gun lobby dictate his policies, contradicting his own call for meaningful action after the massacre in Parkland.

### III. Impact on Critical Firearm Policy Issues

While applying Heller’s holding that individuals have a constitutional right to use a handgun for self-defense in the home, lower courts have generally exercised caution when confronting issues not yet addressed by the Supreme
Court. This means some substantive Second Amendment questions lack definitive answers—and a new justice could play a key role in shaping the Court’s rulings on these and other areas of gun policy.

Concealed Carry. *Heller* recognized that “the majority of the 19th-century courts to consider” the issue of concealed carry of firearms upheld restrictions that were far more stringent than the moderate concealed carry regulations states have adopted today. While numerous federal courts, including the Second, Third, Fourth, Ninth, and Tenth Circuits, have interpreted *Heller* to allow for appropriately strong concealed carry regulations in public, one outlier court struck down a good-cause concealed carry permitting law in the District of Columbia. Seeking to capitalize on that decision, the NRA recently backed a series of lawsuits challenging strong concealed carry permitting systems in New Jersey, Maryland, and New York, and filed a brief arguing that Massachusetts’ concealed carry standards are unconstitutional. One or more of these cases may be taken up by the US Supreme Court after Justice Kennedy’s replacement is confirmed.

Assault Weapon and Large-Capacity Magazine Restrictions. *Heller* stated that the Second Amendment is not a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose” and recognized that dangerous and unusual weapons, like those “most useful in military service,” may be prohibited. Many courts, including the Second, Fourth, Seventh, and DC Circuits, and district courts in Colorado and California, have applied this reasoning to uphold assault weapon or large-capacity magazine (LCM) restrictions. However, one outlier trial court recently sided with the NRA in a challenge to California’s LCM possession ban, holding that the ban was likely unconstitutional and suggesting that magazine limits of any size pose a constitutional problem (that decision is being appealed). The California case—as well as gun lobby-backed suits challenging LCM laws in Vermont and New Jersey—may, in the near future, be appealed and eventually presented for Supreme Court review.

Post-Parkland Gun Safety Legislation. States have adopted 52 new gun safety laws since the school shooting in Parkland, FL. Gun lobby groups have responded to this renewed political and legislative energy by filing new court challenges to block gun safety laws. Lawsuits challenging Florida’s new minimum age law, Maryland and Florida’s trigger activator bans, and local gun safety ordinances may tee up new Second Amendment issues for intermediate appellate courts, and possibly the US Supreme Court, in the years to come.

The Supreme Court has declined to weigh in on any of the above issues in the ten years since *Heller*, leaving it unclear how some members of the current Court would resolve these cases. Some justices, including Justices Thomas and Scalia and, recently, Justice Gorsuch, have revealed their views by dissenting from the decision to deny review in Second Amendment cases, expressing that they would prefer to grant review and strike down gun regulations in key policy areas. Because it only takes 4 votes for the Supreme Court to grant review, the four more reliably conservative justices could have granted review in Second Amendment challenges without Justice Kennedy. It is possible the Court declined to do so because Justice Kennedy was a moderating force on Second Amendment issues who was unlikely to strike down the reasonable gun regulations Justices Gorsuch and Thomas disfavor. If true, Kennedy’s retirement presents a disturbing possibility that a new coalition of justices will vote to hear more firearm cases and strike down more lifesaving laws under a radically broad conception of the Second Amendment.

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