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GUEST COLUMN

Gun rights are not 2nd class

By C.D. Michel

The U.S. Supreme Court ruled in 2008 (*District of Columbia v. Heller*) and 2010 (*McDonald v. Chicago*) that the Second Amendment protects the right of individuals to keep and bear arms to defend their families, and that federal, state and local governments are limited in infringing on that individual right. Those cases clarified that the right belonged to individuals, but left many questions about the scope of the right and the appropriate standard of review unanswered.

Since then, a litigation free for all has played out across the country as lawyers of all skill levels have chal

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lenged various gun control laws. Billionaire Michael Bloomberg and other deep pockets have lined up on the other side, coordinating lawyers across the country to urge lower courts to limit the scope of the Supreme Court's rulings. There have been mixed results, and frequent dissents. The jurisprudential lines have been drawn, and judges are philosophically split on the appropriate standard of review, and whether the Second Amendment has teeth.

A dozen or so of those cases made their way back to the Supreme Court, with all except one being rejected. But some of those rejections came with strong pro-Second Amendment dissents by Justices Clarence Thomas, Antonin Scalia and Samuel Alito (*Jackson v. San Francisco, Friedman v. Highland Park*). The one per curiam Second Amendment decision that was issued by the court, striking down a ban on possessing tear gas and less-lethal weapons (*Commonwealth v. Caetano*) did not resolve one of the biggest outstanding issues: whether the right to bear arms extends outside the home. One June 25, the Supreme Court declined to review a case that could have answered that question, *Peruta v. California*.

In 2014, the *Peruta* case made history when a three-judge panel of the 9th U.S. Circuit Court of Appeals held that the San Diego County Sheriff's restrictive policy of requiring applicants to demonstrate a special need beyond self-defense to get a concealed carry license violates the Second Amendment.

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The gun ban lobby, anti-gun-owner Attorney General Kamala Harris (who declined to participate in the case beforehand), and certain 9th Circuit judges went apoplectic. At the urging of one of those judges, the 9th Circuit took the rare step of deciding on its own to rehear the case en banc. In 2016, the 11-judge en banc panel overturned the three-judge panel opinion by a 7-4 vote.

Even though the three-judge decision was overturned, it changed the firearm licensing landscape in California. Conservative thinking sheriffs and police chiefs in charge of issuing these licenses realized they thought more like the judges on the three-judge panel than the seven en banc judges who reversed the decision. Dozens of counties and cities are now issuing public carry licenses that hadn't before. Tens of thousands of new licenses have been issued.

The en banc decision in *Peruta* was presented to the Supreme Court for review, and the case was rescheduled 12 times before the cert petition was ultimately rejected on the last day of the court's 2017 term. But Justice Thomas, tellingly joined this time by newly appointed Justice Neil Gorsuch, authored another dissenting opinion from the denial. Their dissent points out how the en banc panel improperly declined to answer the core question presented in *Peruta*: whether the Second Amendment protects a right to carry a firearm in public, and instead only ruled specifically that concealed carry is not protected. Those type of mental gymnastics, which were also called out by the dissenters on the en banc *Peruta* panel, are "indefensible Justice Thomas wrote, because tl en banc ruling refused to addre "the State's regulatory scheme a whole," which generally prohibi the average citizen from carrying firearm either openly or conceal in public. As poignantly noted Justices Thomas and Gorsuch: is "extremely improbable that tl Framers understood the Secor Amendment to protect little mo than carrying a gun from the be room to the kitchen."

More generally, and perha more significantly, the dissente noted that the en banc decisio "reflects a distressing trend" in th lower courts of treating the Se ond Amendment as a disfavore right. "For those of us who work i marbled halls, guarded constantl by a vigilant and dedicated polic force, the guarantees of the Secon Amendment might seem antiquate and superfluous." But the Constitu tion "does not rank certain right above others," and the Supreme Court should not impose a hierar chy of constitutional guarantees b "selectively enforcing its preferre rights."

And there it is.

Most recently on June 29, Distric Judge Roger T. Benitez in San Di ego bucked the "distressing trend" and issued a preliminary injunction blocking the new state law that would have banned the possession of magazines that can hold over ten rounds. In his meticulously thorough ruling, he scrutinized the state's evidence, insisted on "hard facts and reasonable inferences drawn from convincing analysis," and not only pointed out the lack

of evidentiary support for the law, but also bravely questioned the appropriateness of the trend of lower courts to apply a convoluted, multi-step standard of review in Second Amendment cases. It's a subjective test that the Supreme Court expressly warned against in 2008, because it allows judges to put their fingers on the scales.

The Second Amendment will come before the Supreme Court again next session. And with President Donald Trump making appointments, it's likely the court will take a case, and make it clear to recalcitrant lower courts that it meant what it said in the *Heller* and *McDonald* cases, and that the Second Amendment is not a second-class right.

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New York Times News Service

Open-carry activists gather in Austin, Texas, Jan. 1, 2016. The Supreme Court declined to hear a Second Amendment challenge to a California law that places strict limits on carrying guns in public.