

The Next Big Gun Case: The Resurrection of the Second Amendment at the New Roberts Court

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THE NEXT BIG GUN CASE: THE RESURRECTION OF THE SECOND AMENDMENT AT THE NEW ROBERTS COURT

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*The Supreme Court has denied certiorari in around one hundred Second Amendment cases since deciding *District of Columbia v. Heller* in 2008. Since then, the Justices have issued only one bona fide firearms decision, which brought state and local laws within the Second Amendment's scope. At the same time, the right to keep and bear arms continues to loom in thousands of lawsuits either recently decided or docketed in the lower courts. The facts of these cases stray from *Heller*'s now-blackletter rule that handguns may be kept and used in the home for self-defense. And so, the lack of applicable guidance places lawmakers and judges in a predicament.*

Unsure of how to proceed, legislatures pass firearms laws which are both over- and under-inclusive. These are immediately challenged in court, often before enactment. Presiding judges from all twelve relevant circuit courts express their confusion on how to proceed in written opinions. Some statements are not-so-subtle prods at the Justices to show more courage and accept the next big gun case. The irony is that the Roberts Court typically acts courageously. Over the past five years, the Justices have decided many tough cases revolving around six of the ten vaguely written Bill of Rights guarantees and plenty more involving the equally ambiguous Fourteenth Amendment. Of the four neglected provisions—the Second, Third, Ninth, and Tenth Amendments—the latter three are rarely invoked in a petition for certiorari. The Second Amendment, on the only hand, often plays a starring role.

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Therefore, the Court should show similar courage and further elaborate on Heller's meaning. This Article formulates a framework which demonstrates that the Court should expeditiously grant certiorari when four factors coalesce: (1) lawmakers are hamstrung in deciphering constitutional boundaries; (2) echoes of confusion ripple through lower courts lacking definitive guidance; (3) an appropriate case places the issue squarely on the table; and (4) the Supreme Court is the best/only authoritative referee able to settle the matter.

Most Second Amendment cases easily surmount this high hurdle. The Article identifies two areas in greatest need of clarity: prohibitions or restrictions on assault weapons/large capacity magazines and public carry. Each continue to produce cases that are ripe for the Court's consideration. When the newly configured Roberts Court takes its next big gun case, it should come from these areas of unsettled law. In the end, it is past time for the Supreme Court to fulfill its promise in Heller to further elaborate on the Second Amendment's individual right to keep and bear arms.

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I. INTRODUCTION: RESURRECTION OF SECOND AMENDMENT CANON

“[T]he scope of the individual right that the Second Amendment protects—is crying out for resolution. . . . [T]he issue isn’t going away and there’s only so long that the Court will be able to bear the legal incongruity and uncertainty.”¹ -- ILYA SHAPIRO, CATO INSTITUTE / APRIL 15, 2013

The Supreme Court has denied certiorari in around one hundred Second Amendment cases since deciding *District of Columbia v. Heller*² in 2008.³ Its only other bona fide firearms case since the 1930s, *McDonald v. City of Chicago*,⁴ applied *Heller*’s right to use handguns for self-defense to state and local firearms laws.⁵ *McDonald* was a groundbreaking case to be sure. But, beyond reiterating *Heller*’s limited guidance, the controversial decision contributed little to the substantive interpretation of the Second Amendment.⁶ The bottom line is that the Court has issued only two *major* Second Amendment

1. Ilya Shapiro, *Supreme Court Ducks Key Second Amendment Issue—for Now*, CATO INST.: CATO AT LIBERTY (Apr. 15, 2013, 11:21 AM), <https://www.cato.org/blog/supreme-court-ducks-key-second-amendment-issue-now> [<https://perma.cc/ER5T-6RFL>].

2. 554 U.S. 570 (2008).

3. See *Post-Heller Litigation Summary*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (Dec. 2017), <http://lawcenter.giffords.org/wp-content/uploads/2017/12/PHLS-December-17-Update-Final.pdf> [<https://perma.cc/UYN4-FZ64>] (conducting research to find that the Supreme Court denied eighty-two such cases as of December 2017). Since that time, more Second Amendment cases, some notable, met the same fate. See, e.g., *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (en banc), *cert denied sub nom.* *Teixeira v. Alameda County*, 138 S. Ct. 1988 (2018) (asking whether the Second Amendment provides standalone rights to firearms dealers); *Silvester v. Harris*, 843 F.3d 816 (2016), *cert. denied sub nom.* *Silvester v. Becerra*, 138 S. Ct. 945 (2018) (asking whether California’s ten-day waiting period for gun purchases violates the Second Amendment).

4. 561 U.S. 742 (2010).

5. See *id.* at 791.

6. See, e.g., Adam Liptak, *Justices Extend Firearm Rights in 5-to-4 Ruling*, N.Y. TIMES (June 28, 2010), <https://www.nytimes.com/2010/06/29/us/29scotus.html> [<https://perma.cc/L775-WJ6F>] (stating that the “ruling is an enormous symbolic victory for supporters of gun rights, but its short-term practical effect is unclear. As in the *Heller* decision, the justices left for another day just what kinds of gun control laws can be reconciled with Second Amendment protection. The majority said little more than that there is a right to keep handguns in the home for self-defense.”).

decisions over the past eighty years.⁷ Few constitutional guarantees suffer from a lack of interpretative attention like the right to “keep and bear Arms.”⁸

This dearth of precedent illustrates that Second Amendment battles at the Supreme Court are like spotting a Javan rhino in the wild: a rare treat. Litigation over gun laws is certainly not a treat in the sense of something that “gives one great pleasure.”⁹ Instead, these disputes immerse the American public in an extraordinary fusion of mundane eighteenth century history with increasingly lethal technology, considerable human fervor with reams of dispassionate data, and agonizing tragedies with gnashing of teeth and lofty promises from government officials. Gun cases inevitably grab our attention and create a circus-like atmosphere in Washington D.C. and throughout the nation . . . at least on the extraordinary occasion that one hits the docket.¹⁰

This stagnant state of affairs is likely to change under the newly configured Roberts Court. In fact, credible predictions of a resurrected and increasingly

7. The Roberts Court did briefly reaffirm *Heller* in a short per curiam opinion vacating and remanding a case revolving around a Massachusetts law that prohibited stun guns; however, this case added very little guidance to the proper interpretation of the Second Amendment. See Caetano v. Massachusetts, 136 S. Ct. 1027 (2016).

8. The Second Amendment reads in full: “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.” U.S. CONST. amend. II. In *Silvester v. Becerra*, Justice Thomas lamented the lack of attention given to this enumerated right. See *Silvester v. Becerra*, 138 S. Ct. at 945 (Thomas, J., dissenting from the denial of certiorari) (writing that if “a lower court treated another [enumerated constitutional] right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court. Because I do not believe we should be in the business of choosing which constitutional rights are ‘really worth insisting upon,’ I would have granted certiorari in this case.”) (internal citation omitted). To be clear, this inattention applies only at the Supreme Court level. The lack of precedent from the Justices means that lower courts nationwide are forced to do the interpretive legwork (i.e., read between the lines of *Heller*) in search of workable interpretations and solutions. Along the way, these judges are certainly cognizant that their opinions and analysis may be overturned or rebuked in the Supreme Court’s next big Second Amendment case.

9. *Treat*, OXFORD LIVING DICTIONARIES: ENGLISH, <https://en.oxforddictionaries.com/definition/treat> [<https://perma.cc/7DNF-PQLP>] (last visited Oct. 17, 2018). These cases are more likely to give thoughtful observers indigestion rather than great pleasure.

10. See, e.g., *Supreme Court Considers “Right to Bear Arms,”* MSNBC.COM NEWS SERVICES (Mar. 18, 2008), http://www.nbcnews.com/id/23688073/ns/us_news-crime_and_courts/t/supreme-court-considers-right-bear-arms/#.Wz6Mq6kna34 [<https://perma.cc/7NJA-G2HU>] (reporting that while “the arguments raged inside, advocates of gun rights and opponents of gun violence demonstrated outside [the] court Members of the Brady Campaign to Prevent Gun Violence chanted ‘guns kill’ as followers of the Second Amendment Sisters and Maryland Shall Issue.Org shouted ‘more guns, less crime.’ A line to get into the court for the historic arguments began forming two days earlier and extended more than a block by early Tuesday.”).

invigorated Second Amendment canon now make national news.¹¹ The close of Justice Kennedy's thirty-year tenure brings with it a conservative shift in the Supreme Court.¹² This bump to the right will not only affect rulings in many controversial areas of the law but also the types of cases the Justices agree to hear. Speculation prior to Justice Kennedy's retirement suggested that neither the four conservative-leaning nor the four liberal-leaning Justices would vote to hear major gun cases because neither side could predict how Justice Kennedy would vote on the merits.¹³ So, the Justices perpetually punted gun cases out of their weekly conference—often after relisting the petition (i.e., tabling the decision for a future conference) for weeks.¹⁴ This string of denials occurred much to the dismay of a few members of the Court. Justice Thomas, in

11. See, e.g., Eric Segall, Opinion, *Goodbye Justice Kennedy and Goodbye Gun Control*, HUFFINGTON POST (June 27, 2018, 6:04 PM), https://www.huffingtonpost.com/entry/opinion-segall-kennedy-gun-control_us_5b33fc4ee4b0cb56051ec177 [<https://perma.cc/JVV5-43JP>] [hereinafter *Goodbye Justice Kennedy*] (discussing the changes at the Supreme Court and noting that, “we can expect the Supreme Court to start reviewing a few of the more important gun control cases now percolating in the lower courts. Whether the issue is the validity of bans on so-called assault rifles, the length of waiting periods before people can buy guns or requirements for people to receive concealed-carry permits, our nation’s highest court may well start imposing its will on the gun measures of all 50 states and many cities and towns.”); *With Kennedy Retirement, Trump Can Secure and Strengthen a Pro-Second Amendment Supreme Court*, NRA INST. FOR LEGIS. ACTION (June 29, 2018), <https://www.nra.org/articles/20180629/with-kennedy-retirement-trump-can-secure-and-strengthen-a-pro-second-amendment-supreme-court> [<https://perma.cc/RLA5-HPME>] (stating that Justice Kennedy’s retirement “creates the opportunity for President Trump to appoint a replacement who will help reinvigorate the stalled progress in Second Amendment jurisprudence.”).

12. See, e.g., Christopher Ingraham, *Chief Justice John Roberts Is Now the Supreme Court’s Swing Vote*, WASH. POST (June 27, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/06/27/chief-justice-john-roberts-is-now-the-supreme-courts-swing-vote/?utm_term=.dd72fbf0b429 [<https://perma.cc/XR7L-AEN3>] (stating that it is clear that “as long as Trump nominates a conservative to the right of [Chief Justice] Roberts, the balance of ideological power on the court is about to undergo a considerable shift.”).

13. See, e.g., *Goodbye Justice Kennedy*, *supra* note 11 (stating that there has been “a lot of speculation about why the five court conservatives, including Kennedy, have not reviewed any of the lower court cases upholding various gun restrictions. The most common theory is that neither the four conservatives other than Kennedy, nor the four liberals, knew how Kennedy was going to vote.”).

14. See, e.g., John Elwood, *Relist Watch*, SCOTUSBLOG (Dec. 10, 2015), <http://www.scotusblog.com/2015/12/relist-watch-75/> [<https://perma.cc/D9ND-UA4K>] (stating that a Second Amendment challenge to a Highland Park, Illinois city law banning assault rifles and high-capacity magazines, *Friedman v. City of Highland Park*, was relisted at the Justice’s weekly conference six times before the petition was denied). The Justices usually deal with cases at the conference in which the petition arises. However, the current Court has been relisting cases a few times before issuing any grants. See, e.g., Kimberly Robinson, *Supreme Court by the Numbers: Kicking Off the 2017 Term*, BLOOMBERG BNA (Sept. 13, 2017), <https://www.bna.com/scotus-numbers-kicking-n57982088117/> [<https://perma.cc/7H79-6Q4A>] (stating that the Justices “continued their practice of ‘relisting’ cases before granting them.”).

particular¹⁵ and joined by Justice Gorsuch in one instance, has repeatedly lamented the Court's passing up the opportunity to add clarity to the Second Amendment.¹⁶ At one point, he went as far as to describe the Second Amendment as "a disfavored right in this Court."¹⁷

The confirmation of Judge Brett Kavanaugh—by all accounts a more consistently conservative judge¹⁸—to join Justices Thomas, Alito, and Gorsuch on the conservative side of the Court increases the odds of more successful Second Amendment challenges. This may be accompanied by reaffirmations, clarifications, and potential expansions of *Heller*. The calculus changes primarily because the Court's middle ground moves towards Chief Justice Roberts—a jurist often to the right of Justice Kennedy politically¹⁹ and a critical

15. See *Silvester v. Becerra*, 138 S. Ct. 945, 945–52 (2018) (Thomas, J., dissenting from the denial of certiorari) (criticizing the rational-basis review-like standard applied by the Ninth Circuit to a California law requiring a ten-day wait to purchase a firearm and stating: "If a lower court treated another right so cavalierly, I have little doubt that this Court would intervene. But as evidenced by our continued inaction in this area, the Second Amendment is a disfavored right in this Court. Because I do not believe we should be in the business of choosing which constitutional rights are 'really worth insisting upon,' I would have granted certiorari in this case.") (internal citation omitted); *Jackson v. City and County of San Francisco*, 135 S. Ct. 2799, 2799–802 (2015) (Thomas, J., dissenting from the denial of certiorari) (stating that: "[d]espite the clarity with which we described the Second Amendment's core protection for the right of self-defense, lower courts, including the ones here, have failed to protect it. Because Second Amendment rights are no less protected by our Constitution than other rights enumerated in that document, I would have granted this petition.").

16. See *Peruta v. California*, 137 S. Ct. 1995, 1996 (2018) (Thomas, J., dissenting from the denial of certiorari) (showing that Justice Gorsuch joined Justice Thomas in a case challenging a series of California laws that basically ban the carrying of firearms in public without a license (which is difficult to obtain)). Justice Thomas wrote: "For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it. I respectfully dissent." *Id.* at 1999–2000.

17. *Silvester v. Becerra*, 138 S. Ct. at 945.

18. See Adam Liptak, *Moderating Force as a Lawyer, a Conservative Stalwart in Political Fights and on the Bench*, N.Y. TIMES (June 9, 2018), at A1, <https://www.nytimes.com/2018/07/09/us/politics/brett-kavanaugh-supreme-court-trump.html> [<https://perma.cc/FM7Z-NXCC>] (stating that Judge Kavanaugh "has been a conservative powerhouse, issuing around 300 opinions. . . . He has written countless decisions applauded by conservatives on topics including the Second Amendment, religious freedom and campaign finance. But they have particularly welcomed his vigorous opinions hostile to administrative agencies, a central concern of the modern conservative legal movement.").

19. See Ingraham, *supra* note 12 (citing a study on Supreme Court ideology that shows Chief Justice Roberts as slightly more conservative than Justice Kennedy, far below the most conservative Justice Thomas, and trending more towards neutral over time).

vote to vitalize the individual right to keep and bear arms in both *Heller* and *McDonald*.²⁰

In the midst of this transformation at the Supreme Court, thousands of cases alleging Second Amendment violations have been recently decided or are now looming in the lower federal courts.²¹ Lacking the discretion to avoid most of these appeals, trial and appellate court judges wrestle with the government's compelling interest in public safety and an individual's fundamental right to armed self-defense. These judges act with very little guidance from the nation's definitive authority on the Second Amendment—the Justices themselves. This is an inefficient and exasperating way to address an urgently important nationwide problem, especially when the benefits of clarity and authoritative interpretations rest one appeal up the chain.

With the rapid changes on the Court, however, it seems clear that important—and therefore controversial—Second Amendment cases are now poised to move from exile in the lower courts to the main stage. Accordingly, this Article ponders the next big gun case at the Supreme Court. It is key to recognize at the outset that it remains a fool's errand to predict virtually anything about how the Justices will act. Even the experts make faulty predictions.²² A prominent political blog studied the issue and wrote an article

20. See, e.g., Mark Sherman, *Roberts, Right of Kennedy, is New Center of the Supreme Court*, ASSOCIATED PRESS NEWS (June 29, 2018), <https://www.apnews.com/f799c72b81b64f5aa4e80b1edf17312d> [<https://perma.cc/39HR-WE83>] (stating that Chief Justice “Roberts voted in favor of gun rights in two cases that held that Americans have the right to have guns, at least for self-defense in their homes [*Heller* and *McDonald*]. But the court has since rejected repeated attempts to expand on the right of gun ownership, in part because Roberts and Kennedy would not join the other conservative justices to take on a new case.”). To be clear, Justice Kennedy also provided a critical vote in both *Heller* and *McDonald*. There is a chance that the Chief Justice does not want to embroil the Court in controversial gun cases. If that is true, the fifth vote that gun rights proponents foresee may not materialize. See Lawrence Friedman, *The Supreme Court and its Big Second Amendment Problem*, THE HILL (Mar. 1, 2018, 2:00 PM), <http://thehill.com/opinion/judiciary/376284-the-supreme-court-and-its-big-second-amendment-problem> [<https://perma.cc/BCN3-SRLQ>] (stating that Chief Justice “Roberts has an eye on how constitutional decisions may affect the court’s legitimacy, In light of [his] pragmatic approach[], one can see why Roberts . . . might be hesitant for the Supreme Court to further address the right to bear arms.”).

21. See, e.g., *Post-Heller Litigation Summary*, *supra* note 3 (counting 1,230 Second Amendment cases challenging firearms regulations since *Heller* was decided in 2008).

22. See, e.g., Elise Hu, *Recent Rulings Show How Hard it is to Predict High-Profile Court Decisions*, NPR (June 29, 2012), <https://www.npr.org/sections/itsallpolitics/2012/06/28/155925331/recent-rulings-show-how-hard-it-is-to-predict-high-profile-court-decisions> [<https://perma.cc/9LDN-Q8LT>] (highlighting a few faulty predictions and citing a study by a Washington University professor that showed “that experts did worse than computer models when it came to predicting [Supreme Court] rulings,”).

titled, *Why the Best Supreme Court Predictor in the World Is Some Random Guy in Queens*.²³ However, this type of predictive evaluation is increasingly critical in a nation desperately seeking effective gun policy in accord with the Constitution. The more minds pondering this dilemma in good faith, the better. Besides, these endeavors are also an awfully fun way to spend time in deep, productive thought.²⁴

In an effort to contribute to the conversation, this Article posits that the recently reconfigured Supreme Court both *should* and *will* hear more contentious Second Amendment cases (Parts I & II), introduces and applies a framework that identifies the types of firearms cases in desperate need of the Court's authoritative guidance (Parts II & III), identifies two areas in the gun regulation realm—assault weapons bans and limitations/bans on the public carry of weapons—that should win the race to become the next big gun case (Part IV), and concludes with a list of issues ripe for further academic and public thought (Part V). More specifically:

Part I sets the stage by contrasting the historical rarity of Second Amendment cases with the current political moment. Will a significantly transformed Supreme Court begin to strengthen precedent it finds favorable and dismantle precedent it deems wrongly decided? This Article posits that the newly formed majority will do more of the former and less of the latter. It is certainly a much easier doctrinal task to strengthen and clarify precedent, such as *Heller*, than it is to overrule cases upon which the public has relied for decades, such as *Roe v. Wade*.²⁵ Cue the next big Second Amendment case to elaborate on and clarify the meaning of the right to keep and bear arms.

Part II is about courage. More specifically, the courage of the Roberts Court to hear difficult and controversial cases over the past five years. The Court has tackled dozens of certiorari petitions invoking six of the ten amendments in the Bill of Rights and many others interpreting the often-ambiguous Fourteenth Amendment.²⁶ Of the amendments left untouched—the Second, Third, Ninth,

23. See, e.g., Oliver Roeder, *Why the Best Supreme Court Predictor in the World Is Some Random Guy in Queens*, FIVETHIRTYEIGHT (Nov. 17, 2014), <https://fivethirtyeight.com/features/why-the-best-supreme-court-predictor-in-the-world-is-some-random-guy-in-queens/> [<https://perma.cc/57BP-4HSC>].

24. Looking to become a Supreme Court nerd or just have a strong desire to try and predict how the Justices will rule? You should look at FantasyScotus.LexPredict.com—a site that allows people to predict the outcome of each of the merits cases on the Court's current docket and then compete against the crowd and a computer algorithm. See Bill Mears, *Frustrated with Fantasy Football? Try the Supreme Court*, CNN (Dec. 16, 2009), <http://www.cnn.com/2009/CRIME/12/16/scotus.journal/index.html> [<https://perma.cc/XT98-FZVK>].

25. 410 U.S. 113 (1973).

26. See *infra* Section II.A.

and Tenth—the latter three are rarely the basis of any Supreme Court decision. The Second Amendment, however, has been invoked in thousands of cases since *Heller* in 2008. At a time when the lower courts need them the most, the Justices have predictably denied petition after petition and, thereby, failed to offer meaningful guidance.

This neglect causes lower court judges to fret about the proper interpretation of the right to keep and bear arms and then come up with their own legal tests and conclusions. These opinions, of course, are subject to reversal by a Supreme Court with at least four members who believe the Second Amendment is as important as any other. This state of affairs need not exist and, therefore, this Part: (1) commends the Roberts Court for exhibiting the moxie to continually tackle this interpretative challenge outside of the Second Amendment. Over the past few years alone, the Justices have decided a great many cases involving complex, politically charged constitutional provisions; (2) presents a framework to signal when a particularly controversial area of the law calls for the Court's resolution, even absent a meaningful circuit-split; and (3) advocates that the Court apply this framework and show similar resolve towards an equally enigmatic, but no less significant, Second Amendment in desperate need of attention. This so-called HEAR framework is composed of four factors. When all are present, a case is in critical need of the Supreme Court's attention.

(H) HAMSTRUNG GOVERNMENT ACTORS: Where other branches of government are hindered in their job duties because of unclear constitutional boundaries on their authority;

(E) ECHOES OF CONFUSION: Where confusion over how to interpret precedent reverberates throughout the appeals courts to the point where legal tests tiptoe around opaque Supreme Court rulings/dicta;

(A) APPROPRIATENESS: Where an appropriately postured case (one with a broadly applicable fact pattern, clear plaintiff standing, and no serious procedural errors) comes to the table; note: this case need not be part of a major circuit split; and

(R) REFEREE: Where a constitutional provision is at issue and the Court is the ultimate (or perhaps only) referee in position to provide authoritative guidance.

The Court's reluctance to hear Second Amendment cases even when the four HEAR factors are easily identified appears to be an amalgamation of ducking a controversial issue, the desire to avoid another bitterly divided case decided on ideological grounds, and the fact that gun cases are very difficult to adjudicate. The Second Amendment is as confusing as they come: "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.”²⁷ Therefore, delving into the history of this amendment and then providing a clear interpretation of such convoluted text is a major undertaking. This Part concludes, however, that these reasons are just not good enough and that these sticky jurisprudential situations are exactly why America has a Supreme Court.

Part III adopts the HEAR framework and digs in. Employing a recent assault weapons ban case from Highland Park, Illinois as a guide, the discussion shows how all four HEAR factors are in play in many Second Amendment cases. The analysis begins with hamstrung state and local legislators seeking to regulate firearms and protect their citizens. The regulations they pass inevitably lead to thousands of lawsuits, many of which invoke the Second Amendment. There is no doubt that the right to keep and bear arms provides a heightened level of protection for certain types of gun ownership below which federal, state, or local governments may not regulate. After *Heller* articulated the right to possess and use arms for self-defense, contemporary plaintiffs are foolish not to bring Second Amendment claims in their complaints. However, there is also no doubt that the government has a compelling interest in increasing safety and decreasing violence. Pleadings that invoke the Second Amendment force judges to use *Heller*'s minimal guidance to weigh these interests in cases far outside of *Heller*'s limited scope. Instead, the nation deserves an authoritative interpretation of the Second Amendment designed for circumstances other than the right to possess and use a firearm for self-defense in the home. This Part also codifies the confusion—from every relevant federal circuit—on how to extend *Heller* to all different types of Second Amendment challenges.

Part IV evaluates what *Heller* actually said on the potential regulation of arms and then arrives at a duo of Second Amendment cases overly ripe for the Court's consideration. These cases revolve around whether: (1) the Second Amendment allows for the banning or severe restriction of assault-style weapons and ammunition and (2) governments can impose burdens on public carrying of weapons either concealed or in the open. This Part briefly analyzes the structure of the typical case in each area and explains how more clarity will increase legislative and judicial efficiency and better serve the public. Part V reiterates the need for the Justices to hear the next big gun case and concludes with a list of issues ripe for further academic and public thought.

A final point is in order. This Article does not wrestle with whether the Second Amendment guarantees an individual right to keep and bear arms or a collective right to do so only when participating in an organized militia.

27. U.S. CONST. amend. II.

Spirited discussions of this battle abound and that ground has been covered.²⁸ Instead, this Article deals squarely with the fact that the Supreme Court clearly backed the individual right approach in *Heller*.²⁹ With that understanding, this article urges the Court to clarify *Heller*'s scope as the majority promised in 2008.³⁰ The best way to make this type of case is to deal squarely with the law as it exists (and likely will remain into the future) and not as some academics, politicians, concerned citizens, and others wish it to be. This is not to say that the debate over the individual versus collective meaning of the Second Amendment is trivial or unwarranted. There are very strong arguments on either side. However, a reversal of the individual rights approach by the newly composed Roberts Court appears very unlikely.³¹ This Article takes the more pragmatic approach in an effort to help the nation's leaders fight a more effective battle against gun violence and do so within constitutional boundaries.

II. THE COURAGE TO INTERPRET AMERICA'S PITHY CONSTITUTION

"You keep harping on the Constitution; I should like to point out that the meaning of the Constitution is what the Supreme Court says it is. Consequently, no powers are exercised by the . . . government except where such exercise is approved by the Supreme Court (lawyers) of the land."

-- President Dwight D. Eisenhower, LETTER TO EDGAR NEWTON EISENHOWER / 1954

The Constitution paints with a broad brush. Even a cursory glance at America's laconic founding document illustrates that the framers "focused not on particularities but on principles."³² Brevity is an uncommon approach to

28. Compare LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS, 133–49 (1999) (arguing for an individual rights view of the Second Amendment) with Carl T. Bogus, *The History and Politics of Second Amendment Scholarship: A Primer*, 76 CHI.-KENT L. REV. 3, 24 (2000) (taking the collective rights approach and demonstrating flaws in the literature arguing for an individual right).

29. *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008) (holding that the text of the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation").

30. *See id.* at 635.

31. *See infra* Section II.B.

32. Irving R. Kaufman, *What Did the Founding Fathers Intend?*, N.Y. TIMES MAG. (Feb. 23, 1986), <https://www.nytimes.com/1986/02/23/magazine/what-did-the-founding-fathers-intend.html> [<https://perma.cc/85DC-FHSS>].

chartering a government.³³ Most constitutions are long and dense.³⁴ By contrast, the United States Constitution weighs-in at just over 7,700 words.³⁵ The global average is three times longer, closer to 23,000 words or the length of a proper law review article.³⁶ The framers' succinct federal framework and summary of national values differs greatly from the lengthy tomes governing nations like India (over 146,000 words)³⁷ or even states like Alabama (nearly 389,000 words and over 850 pages!).³⁸ The durability of this four-page

33. See *Constitution Rankings*, COMP. CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org/ccp-rankings/> [<https://perma.cc/F9EL-TPS9>] (last updated Apr. 8, 2016) (displaying the extraordinary length of many of the world's constitutions). Compare George Tsebelis & Dominic J. Nardi, *A Long Constitution is a (Positively) Bad Constitution: Evidence from OECD Countries*, 46 BRIT. J. POL. SCI. 457, 474 (Nov. 17, 2014) (arguing that “longer constitutions in OECD countries undergo more frequent revisions, despite the fact that they are more difficult to revise. . . . [In addition,] the procedural hurdles for amendment included in a constitution require that any revisions to the constitution have the support of overwhelming majorities. . . . [and] that this simple fact implies that long constitutions are ‘bad’ because they are restrictive and impose objective costs on society that require redress.”) with Sarah Galer, Feature, *Finding what Makes Constitutions Endure*, U. CHI. (Sept. 20, 2010), https://www.uchicago.edu/features/20100920_constitution [<https://perma.cc/EDZ2-ZF64>] (interviewing University of Chicago law professor, Tom Ginsburg, and University of Texas political scientist, Zachary Elkins, and stating that “Americans tend to think the U.S. Constitution has survived because it consists of strong, broad principles, with few details on how government should be run. Yet Ginsburg and Elkins discovered that for most countries, such vagueness is actually a weakness.” To this end, Ginsburg claims, “What we found is that the more detailed constitutions are those that last longer, quite surprisingly . . .”).

34. The Constitution of the United States contains 7,762 words including amendments and signatures. Though not the shortest constitution in the world (our document ranks 25th), 165 countries have longer founding charters. See *Constitution Rankings*, *supra* note 33. In fact, all fifty state constitutions are longer than the United States Constitution. See Cal. Constitution Ctr., *California's Constitution Is not the Longest*, SCOCABLOG (June 24, 2017), <http://scocablog.com/californias-constitution-is-not-the-longest/> [<https://perma.cc/GJ9C-BJ9A>].

35. See *Constitution Rankings*, *supra* note 33.

36. See *id.* (providing data on 190 constitutions from which I calculated a “World Average” of 22,290 words).

37. See, e.g., CONST. OF INDIA, <https://www.india.gov.in/my-government/constitution-india/constitution-india-full-text> [<https://perma.cc/VDN5-WXF2>] (last visited July 11, 2018); see also Cal. Constitution Ctr., *supra* note 34.

38. See, e.g., ALA. CONST., <https://codes.findlaw.com/al/alabama-constitution-of-1901/> [<https://perma.cc/5MGB-QKTB>] (last visited July 10, 2018) (showing that this state constitution has 287 sections and 928 amendments). This would come out to over 850 single-spaced pages! See *Convert Words to Pages*, <http://wordstopages.com/> [<https://perma.cc/6ZAB-4774>] (last visited July 11, 2018). There is even an amendment in the Alabama Constitution titled the “Promotion of Economic and Industrial Development by County Commission,” which lays out the number of days prior to a public meeting of the Commission that public notice must be given “in the newspaper having the largest circulation in the county or municipality.” ALA. CONST. amend. 772. The United States

document is extraordinary. However, the Constitution's elegance and simplicity renders precise applications of its ambiguous provisions in *individual cases* a considerable challenge.

This is tricky because individual cases nourish enduring and reliance-inducing precedent—the backbone of American law. To apply broad constitutional principles conscientiously, the Justices carefully parse obscure text, evaluate caselaw, connect history and tradition to contemporary circumstances, and seek to gain consensus (to a cynic, obtain at least five votes). No one can force the Court to do this difficult and consequential work.³⁹ Instead, at least four Justices must desire to resolve thorny legal dilemmas and set abiding precedent. This inevitably means that taking tough cases must be very difficult—especially if your desired argument is unlikely to win the day. Clearly, sacrificing a subjectively undesirable policy result in favor of clarifying unsettled law takes uncommon courage. This is particularly true in our era of profound political discord where even the Supreme Court is accused of being “more polarized politically than it's ever been.”⁴⁰ Accordingly, this Part:

- (1) commends the Roberts Court for exhibiting the moxie to continually tackle this interpretative challenge. Over the past few years alone, the Justices have decided a great many cases involving complex, politically charged constitutional provisions;
- (2) presents a framework to signal when a particularly controversial area of the law calls for the Court's resolution, even absent a meaningful circuit split; and
- (3) advocates that the Court apply this framework and show similar resolve towards an equally enigmatic, but no less

Constitution takes the exact opposite approach to laying out the particulars of how the government must operate in that it avoids much detail.

39. The occasions where the Court must hear a case are few and far between. *See, e.g.*, 28 U.S.C. §§ 1253, 2284(a) (2012) (requiring the Supreme Court to hear appeals from redistricting cases coming from three-judge federal courts); *id.* § 1251 (stating that the Court has original and exclusive jurisdiction over cases between two or more states).

40. Jeffrey Segal, *Why We Have the Most Polarized Supreme Court in History*, THE CONVERSATION (Mar. 14, 2016), <https://theconversation.com/why-we-have-the-most-polarized-supreme-court-in-history-55015> [<https://perma.cc/QCJ5-4SY8>] (asserting that, “in recent times, unlike any time in our history, we are unlikely to see conservative Democrats or liberal Republicans on the Supreme Court.”); *see also* Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 36 (2012) (stating that the perceived “[p]oliticization of the Supreme Court causes the American public to lose faith in the Court, and when public confidence in the Court is low, the political branches are well positioned to disrupt the constitutional balance of power between the judiciary and the political branches.”).

significant, Second Amendment in desperate need of attention.

There is little doubt that further guidance on the Second Amendment's meaning would provide the greatest good for the greatest number of people. The current instability creates legislative and legal inefficiencies. Lawmakers regulate around uncertain constitutional parameters. Judges evaluate such laws without the benefit of definitive guidance. Like a slow-moving game of ping-pong, a district court often upholds a firearms regulation only to be reversed on appeal by a circuit court panel whose opinion is then overruled by an en banc court.⁴¹ Moreover, gun owners struggle to understand the scope of their right to keep and bear arms while most people go about their daily business wondering why their elected leaders are unable to adequately address the country's battle with gun violence. Frustrated with the lack of bona fide solutions, public attention drifts to other policy issues—at least until another mass shooting refocuses everyone's attention. This state of affairs causes far more pain than necessary.

Clarity from the Court surrounding guns, though no panacea, is likely to help state and local policymakers and lawmakers tackle this problem more efficiently and effectively. For example, a few clarifying firearms cases would allow officials to better understand whether assault rifles are protected arms when used properly for self-defense, for hunting, and/or for recreation. Officials would learn how to regulate the public carry of firearms and whether open and/or concealed carry may be banned altogether. And, officials would grasp more firmly whether universal background checks are constitutional. This new state of affairs would decrease confusion and allow people to focus in on whether these types of firearms regulations are effective or need to be tweaked and perhaps repealed. Viewed from this vantage point, the Court transparently meting out the boundaries of firearms regulation matters far more than who wins the next big gun case.

The thesis of this Part may be summed up like this: When the Constitution speaks in riddles, the Supreme Court should summon the courage to decipher its most vexing declarations.⁴² This includes the Second Amendment—particularly after the Court's interpretation of the right to keep and bear arms in *Heller*. Now that people have the right to possess and use handguns in the home for self-defense, the Justices should provide a blueprint to unravel the rest of the riddle. The Roberts Court solves these types of puzzles all the time outside the firearms context and this courage forms the focus of the next Section.

41. See, e.g., *Kolbe v. Hogan*, 849 F.3d 114, 120–21 (4th Cir. 2017) (en banc) (recounting the procedural history).

42. When properly presented of course.

A. *The Courage of the Roberts Court to Solve Constitutional Riddles*

Let us begin with a few constitutional riddles unrelated to firearms. The Bill of Rights broadly declares that Congress may not prohibit “the free exercise” of religion,⁴³ protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”⁴⁴ and forbids “cruel and unusual punishments.”⁴⁵ These freedoms foster a fair, free, and robust society and serve as models for foreign governments transitioning to democracy.⁴⁶ But, What do such soaring proclamations mean in the specific context of individual lawsuits? How expansive are these rights and what happens when they conflict with vital governmental interests? Such questions expose interpretative gaps illustrated by three (very recent) controversial cases:

1. What happens when a baker’s First Amendment right to “free exercise” of religion, embodied in his refusal to design a cake for a same-sex marriage, conflicts with a state public accommodation law?⁴⁷ Do sincere religious beliefs trump the civil rights of same-sex couples seeking to purchase a wedding cake from a small business?
2. What happens when a defendant’s Fourth Amendment right to privacy in his cell phone location data, allegedly tying him to a series of armed robberies, conflicts with a police investigation?⁴⁸ Does an individual’s right to be secure against “unreasonable searches” of his “papers” or “effects” include the right to shield *electronic* data from police officers operating without a warrant?

43. U.S. CONST. amend I, cl. 1.

44. *Id.* amend IV, cl. 1.

45. *Id.* amend VIII, cl. 3.

46. *See, e.g., Talk of the Nation: Should U.S. Constitution Be an International Model?*, NPR (Feb. 13, 2012, 1:00 PM), <https://www.npr.org/2012/02/13/146816817/is-the-u-s-constitution-an-international-model> [<https://perma.cc/SW5D-GFXQ>] (quoting Christina Murry, a constitutional law professor from the University of Cape Town, who, while debating the influence of the United States Constitution in other nations’ constitution-creation processes, said that there is “seldom a constitution-making process in the democratic world that isn’t informed [to some extent] by the fundamental principles that inform the U.S. Constitution.”).

47. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018) (holding that the Colorado Civil Rights Commission’s “treatment of [the baker’s] case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.”).

48. *See Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (holding that the Fourth Amendment protects against the warrantless search of a person’s cell phone location records collected by third parties—at least outside of emergency situations).

3. What happens when a death row inmate's Eighth Amendment right to be free from "cruel and unusual" punishment hinges upon an intellectual disability diagnosed using modern scientific methods?⁴⁹ Is it unconstitutional for a state court to ignore or discount the most up-to-date studies on mental illness before ordering the execution of a convicted murderer?

The infusion of broad constitutional rights into tough cases like these creates pressure points. There are no obvious answers, and the public raises the heat by clamoring for particular ideological results. Judges, on the other hand, must carefully dissect the Constitution's text, history, and tradition as a starting point to make rulings and set precedent.⁵⁰ This task requires a great deal of judicial energy and effort.⁵¹

Significant lifting in this area comes from the Justices themselves. The Supreme Court sits at the apex of the pyramid when it comes to interpreting the ambiguous Constitution. Like it or not, majority opinions become the law of the land. For example, when the Roberts Court decides that the First Amendment protects spending by corporations to advocate for the election or defeat of a political candidate,⁵² the only way to significantly change that meaning is: (1) via a subsequent Supreme Court opinion saying as much (possible with the right momentum and Court composition, but rare)⁵³ or (2) a constitutional amendment (virtually impossible given the current political

49. See *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (holding that lower courts cannot ignore current medical standards in determining whether a death row inmate is intellectually disabled and, therefore, ineligible for the death penalty under the Eighth Amendment).

50. Kaufman, *supra* note 32 (stating that judges "must focus on underlying principles when going about their delicate duty of applying the [Bill of Rights'] precepts to today's world").

51. See, e.g., Erwin Chemerinsky, *History, Tradition, the Supreme Court, and the First Amendment*, 44 HASTINGS L.J. 901, 901 (1993) (stating "[m]y advice to an attorney litigating a case before the current Supreme Court is to buy a copy of Blackstone's history of the common law In virtually every area of constitutional law, the Supreme Court increasingly is relying on tradition as its guide in decisionmaking."). Of course, if the Supreme Court uses history and tradition as its guide, so must lower courts when interpreting the same constitutional provisions.

52. See *Citizens United v. FEC*, 558 U.S. 310, 364 (2010) (holding, among other things, that the "First Amendment does not permit Congress to make these categorical distinctions [on who may contribute to political campaigns] based on the corporate identity of the speaker and the content of the political speech").

53. An interesting way to promote the change of a Supreme Court ruling is through political action, legislation, and momentum at the state level. This momentum would need to be similar to that gained by the same-sex marriage movement at the state level prior to the Supreme Court changing course. See, e.g., David Cole, *How to Reverse Citizens United*, THE ATLANTIC (Apr. 2016), <https://www.theatlantic.com/magazine/archive/2016/04/how-to-reverse-citizens-united/471504/> [<https://perma.cc/W9XE-URFA>].

climate).⁵⁴ Public outrage is irrelevant.⁵⁵ Legislation or agency action at the state and federal level may seek to narrow the decision's effect,⁵⁶ but anything contrary to the Court's interpretation will generally be challenged and struck down.⁵⁷ Aside from the power to impeach a Justice (something that has happened only once, unsuccessfully)⁵⁸ and the ability to control the nomination

54. See, e.g., *The Democracy for All Amendment*, FREE SPEECH PEOPLE, <https://freespeechforpeople.org/the-amendment/democracy-for-all-amendment/> [<https://perma.cc/6GTS-CDSJ>] (last visited July 18, 2018) (reprinting a proposal constitutional amendment to repeal the *Citizens United* decision introduced by Senator Tom Udall of New Mexico). This amendment received fifty-four votes in the Senate, six votes short of the required sixty vote threshold to invoke cloture on a filibuster. See Burgess Everett, *Campaign Finance Reform Blocked*, POLITICO (Sept. 12, 2014, 12:06 PM), <https://www.politico.com/story/2014/09/senate-block-campaign-finance-amendment-110864> [<https://perma.cc/X8D8-3RWT>]. It was re-introduced a few more times in the Senate and was most recently sent to the Judiciary Committee on January 24, 2017, where it stalled. See A Joint Resolution Proposing an Amendment to the Constitution of the United States Relating to Contributions and Expenditures Intended to Affect Elections, S.J. Res. 8, 115th Congress, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/senate-joint-resolution/8/all-actions?overview=closed#tabs> [<https://perma.cc/VQH6-FYEE>] (last visited July 18, 2018). The most recent re-introduced House version of the amendment was referred to the Subcommittee on the Constitution and Civil Justice on June 7, 2017 where it has apparently stalled as well. See Restore Democracy Resolution, H.R. Res. 343, 115th Congress, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-resolution/343/text> [<https://perma.cc/6SFY-DAEZ>] (last visited July 18, 2018).

55. See, e.g., Brian Montopoli, *Supreme Court Doubles Down on Citizens United*, CBS NEWS (June 25, 2012, 8:52 PM), <https://www.cbsnews.com/news/supreme-court-doubles-down-on-citizens-united/> [<https://perma.cc/Y3VT-R6YS>] (stating that the “Supreme Court’s 5-4 decision . . . to strike down a Montana law that limits corporate spending on elections made clear that the outrage generated by the 2010 *Citizens United* decision has done nothing to change the minds of the justices.”).

56. See, e.g., Sarah Kleiner, *Democrats Say Citizens United Should Die. Here’s why that won’t Happen*, CTR. FOR PUB. INTEGRITY (Sept. 5, 2017, 10:38 AM), <https://www.publicintegrity.org/2017/08/31/21144/democrats-say-citizens-united-should-die-here-s-why-won-t-happen> [<https://perma.cc/8CVV-GB27>] (discussing proposed federal legislation designed to minimize the impact of *Citizens United*).

57. See, e.g., *Am. Tradition P’ship, Inc. v. Bullock*, 567 U.S. 516, 516–17 (2012) (stating that the “question presented in this case is whether the holding of *Citizens United* applies to the Montana state law. There can be no serious doubt that it does. Montana’s arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.”) (internal citation omitted).

58. See, e.g., Elizabeth Nix, *Has a U.S. Supreme Court Justice Ever Been Impeached?*, HISTORY.COM (Dec. 2, 2016), <https://www.history.com/news/has-a-u-s-supreme-court-justice-ever-been-impeached> [<https://perma.cc/VZ2C-6YU7>] (discussing the House of Representatives’ impeachment of Associate Justice Samuel Chase—a signer of the Declaration of Independence—in 1804; Justice Chase was acquitted by the Senate in 1805 and served on the Court until his death in 1811.). It is important to note that the impeachment of judges should not be undertaken for political purposes as was alleged in the Chase impeachment and advocated for by some when it comes to *Citizens United* and other controversial decisions. See, e.g., Nathan Newman, *Let’s Talk About*

and selection process (too removed in time to be an effective check), the Executive and Legislative branches are far less impactful players in this realm. When it comes to constitutional interpretation, the Judicial Branch holds the strongest cards.

And, the Justices tend to play their hand well. Over the past few years alone, the Supreme Court has addressed and answered tough questions by applying broad constitutional principles to difficult facts in individual cases.⁵⁹ Their decisions interpreting the Bill of Rights, in particular, are generally controversial, rarely pedestrian, and almost always elicit stinging dissents.⁶⁰ But . . . the Court persists. There are circuit splits to remedy, unsettled issues that require an authoritative interpretation, and lower court opinions that disregard or lose sight of precedent.

The following chart details just a few of the major Roberts Court decisions interpreting controversial constitutional guarantees over the past five years. These examples tell a story of the Justices doing three things: (1) accepting difficult, politically charged cases involving ambiguous constitutional amendments (i.e., deciphering riddles), (2) clarifying unsettled law even in the face of public indignation (i.e., acting courageously), and (3) narrowing the scope of open questions in the field (i.e., helping other branches of government better solve policy dilemmas by clarifying the law).⁶¹ These actions stand starkly opposed to the way the Court deals with the Second Amendment, where difficult cases are regularly denied. This “approach” provides little to no clarity, allows open questions to proliferate, and causes the riddles to become more and more perplexing at just the wrong time.

Impeaching Supreme Court Justices, HUFFINGTON POST (June 5, 2012), https://www.huffingtonpost.com/nathan-newman/supreme-court-health-care-law_b_1405825.html [<https://perma.cc/W7H2-T2HG>] (discussing what was then the pending Supreme Court vote on the Affordable Health Care Act (ACA) and stating that the “right-wing Court may try to strike down [alternatives to the ACA for health care reform] but they will fear a backlash that could lead to actual impeachment if they block every democratic avenue to such a popular goal as health care reform.”).

59. See, e.g., Scott Chiusano, *Landmark Decisions During John Roberts’ Decade as Chief Justice*, N.Y. DAILY NEWS (Sept. 29, 2015, 2:35 PM), <http://www.nydailynews.com/news/national/landmark-cases-john-roberts-decade-chief-justice-article-1.2378637> [<https://perma.cc/KKS2-F5HP>] (summarizing key cases).

60. Proving this point, there were *six* dissents just in the *three cases* mentioned above. See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1748 (2018) (Ginsburg, J., dissenting); *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018) (Kennedy, J., dissenting); *id.* at 2235 (Thomas, J., dissenting); *id.* at 2246 (Alito, J., dissenting); *id.* at 2261 (Gorsuch, J., dissenting); *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (Roberts, C.J., dissenting).

61. It is important to note that all but one of these cases was decided in June. This is generally the last month of the Court’s annual term and most often when the Justices release their most noteworthy opinions.

AMENDMENT	ISSUE	VOTE	EXAMPLES OF THE COURT DECIDING TOUGH CASES INVOLVING CONSTITUTIONAL AMENDMENTS
First	Establishment Clause	7-2	<ul style="list-style-type: none"> ∞ <i>Trinity Lutheran Church v. Comer</i> (June 26, 2017)⁶² ∞ HOLDING: Denials of generally available government grants solely because of an entity's religious nature violate the Free Exercise Clause. ∞ CLARITY ADDED: Now, local governments understand when they may provide taxpayer money directly to houses of worship when it comes to generally available public benefits. ∞ STILL OPEN: Does this include vouchers to attend religious schools?⁶³ ∞ AND . . . PEOPLE WERE UPSET: "In <i>Trinity Lutheran</i>, the court held for the very first time that the Constitution mandates public funding of a church. The ruling will encourage more houses of worship to demand taxpayer money to enable religious exercise."⁶⁴
Second	-	-	<ul style="list-style-type: none"> ∞ No examples
Third	-	-	<ul style="list-style-type: none"> ∞ No examples ∞ However, the Third Amendment has never been the focus of a decided Supreme Court case. In fact, it is rarely the focus of a petition for certiorari.⁶⁵

62. 137 S. Ct. 2012, 2024–25 (2017).

63. *See id.* at 2029 n.2 (leaving open the vouchers question by stating that because "Missouri decides which Scrap Tire Program applicants receive state funding, this case does not implicate a line of decisions about indirect aid programs in which aid reaches religious institutions 'only as a result of the genuine and independent choices of private individuals.'" (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002)).

64. Perry Grossman & Mark Joseph Stern, *Goodbye, Establishment Clause*, SLATE (June 27, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/06/trinity_lutheran_threatens_to_obliterate_the_divide_between_church_and_state.html [<https://perma.cc/3U3C-G2ZE>].

65. *But see* *Mitchell v. City of Henderson*, No 2:13-cv-01154-APG-CWH, 2015 U.S. Dist. LEXIS 12645, *2–13 (D. Nev. Feb. 2, 2015) (arguing, unsuccessfully, that the uninvited presence of the Henderson, Nevada SWAT team, using plaintiffs' house for over nine hours without permission to

AMENDMENT	ISSUE	VOTE	EXAMPLES OF THE COURT DECIDING TOUGH CASES INVOLVING CONSTITUTIONAL AMENDMENTS
			<ul style="list-style-type: none"> ∞ This is much different from the thousands of certiorari petitions revolving around the Second Amendment.⁶⁶
Fourth	Warrantless Searches of Cell Phone Location Records	5-4	<ul style="list-style-type: none"> ∞ <i>Carpenter v. United States</i> (June 22, 2018)⁶⁷ ∞ HOLDING: Warrantless searches of a person’s cell phone location records (obtained from wireless carriers) violate the Fourth Amendment. ∞ CLARITY ADDED: Now, local governments understand that they must obtain a warrant before embarking on this type of investigation. Warrants, however, are relatively easy to obtain and, with a warrant, this revealing data is likely admissible at trial. ∞ STILL OPEN: Is a warrant needed when the government requests real-time cell site location information or a “tower dump” including all data from a cell tower?⁶⁸ ∞ AND . . . PEOPLE WERE UPSET: “Requiring state and federal government agents to get a warrant before obtaining and using cell-site location records for use as evidence in a criminal case is sound policy—but public-policy concerns are not the proper domain of judges. When the Court takes such concerns into consideration, it makes for bad law.”⁶⁹

surveil an emergency situation next door, constituted the “unlawful peacetime quartering of soldiers” in violation of the Third Amendment).

66. See *infra* Part III for a detailed discussion of this issue.

67. 138 S. Ct. 2206, 2223 (2018).

68. See *id.* at 2220.

69. Rafael Mangual, *Bad Reading, Bad Precedent*, CITY J. (June 29, 2018), <https://www.city-journal.org/html/supreme-court-carpenter-decision-15996.html> [<https://perma.cc/Z2CV-TCNG>].

AMENDMENT	ISSUE	VOTE	EXAMPLES OF THE COURT DECIDING TOUGH CASES INVOLVING CONSTITUTIONAL AMENDMENTS
Fifth	Right of Suspects to Remain Silent Prior to Arrest	5-4	<ul style="list-style-type: none"> ∞ <i>Salinas v. Texas</i> (June 17, 2013)⁷⁰ ∞ HOLDING: Silence may be used against a suspect at trial without violating the Fifth Amendment as long as the suspect: (1) was talking to police before being placed in custody and (2) failed to invoke the Fifth Amendment right to remain silent. ∞ CLARITY ADDED: Now, the police know more about the line between where a suspect's silence is admissible or inadmissible at trial. ∞ STILL OPEN: What would it take for police officers to deprive a suspect of the opportunity to assert the privilege against self-incrimination prior to arrest?⁷¹ ∞ AND . . . PEOPLE WERE UPSET: "The court's move to cut off the right to remain silent is wrong and also dangerous—because it encourages the kind of high-pressure questioning that can elicit false confessions."⁷²
Sixth	Right to Assistance of Counsel in Plea Bargaining	7-2	<ul style="list-style-type: none"> ∞ <i>Lee v. United States</i> (June 23, 2017)⁷³ ∞ HOLDING: A defendant who pleads guilty while facing very long odds of acquittal may still be able to show deficient performance by attorneys who give incorrect immigration advice. For example, defendants may want to take the 1% chance of prevailing at trial over the 100% chance of deportation if improperly advised to plead guilty.

70. 570 U.S. 178, 191 (2013).

71. *See id.*

72. Brandon L. Garrett, *You Don't Have the Right to Remain Silent*, SLATE (June 19, 2013, 6:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/06/salinas_v_texas_right_to_remain_silent_supreme_court_right_to_remain_silent.html [<https://perma.cc/4MLH-G4D8>].

73. 137 S. Ct. 1958, 1968–69 (2017).

AMENDMENT	ISSUE	VOTE	EXAMPLES OF THE COURT DECIDING TOUGH CASES INVOLVING CONSTITUTIONAL AMENDMENTS
			<ul style="list-style-type: none"> ∞ CLARITY ADDED: Now, attorneys better understand the nuances of when to stop protesting what seem to be irrational plea decisions by their clients. ∞ STILL OPEN: Does this case apply to plea bargains made outside the immigration context?⁷⁴ ∞ AND . . . PEOPLE WERE UPSET: “In the face of overwhelming evidence of guilt and in the absence of a bona fide defense, a reasonable court or jury applying the law to the facts of this case would find the defendant guilty. There is no reasonable probability of any other verdict. A defendant in petitioner’s shoes, therefore, would have suffered the same deportation consequences regardless of whether he accepted a plea or went to trial. He is thus plainly better off for having accepted his plea: had he gone to trial, he not only would have faced the same deportation consequences, he also likely would have received a higher prison sentence.”⁷⁵
Seventh	Right to a Jury Trial in a Patent Revocation Proceeding Run by the PTO	7-2	<ul style="list-style-type: none"> ∞ <i>Oil States Energy Services v. Greene’s Energy Group</i> (April 21, 2018)⁷⁶ ∞ HOLDING: A process that allows the Patent and Trademark Office to review and cancel an issued patent without a jury trial does not offend the Seventh Amendment. Patents are a public right revocable by the government as opposed to private rights, and Congress properly assigned these cases to a Non-Article III tribunal.

74. *See id.* at 1974 (Thomas, J., dissenting).

75. *Id.*

76. 138 S. Ct. 1365, 1379 (2018).

AMENDMENT	ISSUE	VOTE	EXAMPLES OF THE COURT DECIDING TOUGH CASES INVOLVING CONSTITUTIONAL AMENDMENTS
			<ul style="list-style-type: none"> ∞ CLARITY ADDED: Now, so-called inter partes review has been blessed by the Court and parties better understand how to: (1) challenge patents outside of court and (2) the Executive Branch power to revoke an invalid patent. ∞ STILL OPEN: What about patents granted before the law that created inter partes review was enacted? Are patent holders entitled to a jury trial for these proceedings?⁷⁷ ∞ AND . . . PEOPLE WERE UPSET: “While I am disappointed with the Supreme Court’s ruling in the Oil States case, I am not terribly surprised. The majority opinion, and the many others who are cheering the constitutionality of inter partes review, fall back on the trite horror story of ‘bad patents’ without considering the real effects on innovation. To the extent ‘bad patents’ exist, and by that phrase I mean patents that should not have been granted in the first place, it seems that the creation of a monstrous bureaucracy to attack these patents is the real horror story.”⁷⁸
Eighth	The Effectiveness of Drugs Administered During an Execution	5-4	<ul style="list-style-type: none"> ∞ <i>Glossip v. Gross</i> (June 29, 2015)⁷⁹ ∞ HOLDING: Defendants could not provide a “known and available” alternative method of execution that provides less pain and also did not meet their burden of proving that the particular drug in question failed to eliminate pain during an execution.

77. *See id.*

78. Gene Quinn & Renee C. Quinn, *Industry Reaction to Supreme Court Decision in Oil States v. Green Energy, IP WATCHDOG* (Apr. 24, 2018), <http://www.ipwatchdog.com/2018/04/24/industry-reaction-oil-states/id=96296/> [<https://perma.cc/R8E4-FEVH>].

79. 135 S. Ct. 2726, 2731 (2015).

AMENDMENT	ISSUE	VOTE	EXAMPLES OF THE COURT DECIDING TOUGH CASES INVOLVING CONSTITUTIONAL AMENDMENTS
			<ul style="list-style-type: none"> ∞ CLARITY ADDED: Now, governments know that this drug may be used in executions. ∞ STILL OPEN: What if a condemned inmate chooses an alternative method of execution that would be less painful but more visibly shocking to the public like a firing squad?⁸⁰ ∞ AND . . . PEOPLE WERE UPSET: “If there was a bright spot in yesterday’s regrettable Supreme Court decision in <i>Glossip v. Gross</i>, it’s that at least two current justices—Stephen G. Breyer and Ruth Bader Ginsburg—are open to the idea that the death penalty is unconstitutional. It seems at least possible that Sonia Sotomayor may move in that direction as well. Unfortunately, that bright spot was overwhelmed by opinions from Clarence Thomas, Antonin Scalia and Samuel A. Alito Jr. that indicate they are as adamant as ever about keeping capital punishment around”⁸¹
Ninth	-	-	<ul style="list-style-type: none"> ∞ No examples ∞ However, the Ninth Amendment is rarely the focus of a Supreme Court decision. In fact, it is rarely the focus of a petition for certiorari.⁸² ∞ This is much different from the thousands of certiorari petitions revolving around the

80. *See id.* at 2796 (Sotomayor, J., dissenting).

81. Radley Balko, *There’s Nothing ‘Enlightened’ about Executing the Innocent*, WASH. POST (June 30, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/06/30/theres-nothing-enlightened-about-executing-the-innocent/?utm_term=.be397828694c [https://perma.cc/R48A-TM4Z].

82. *But see* Juliana v. United States, 217 F. Supp. 3d 1224, 1233, 1248–50 (D. Or. 2016) (arguing, successfully, in response to the government’s motion to dismiss, that the United States government exacerbated climate change in violation of many constitutional amendments including the Ninth Amendment and its unenumerated fundamental rights).

AMENDMENT	ISSUE	VOTE	EXAMPLES OF THE COURT DECIDING TOUGH CASES INVOLVING CONSTITUTIONAL AMENDMENTS
			Second Amendment. ⁸³
Tenth	-	-	<ul style="list-style-type: none"> ∞ No examples ∞ However, the Tenth Amendment is rarely the focus of a Supreme Court decision. In fact, it is rarely the focus of a petition for certiorari.⁸⁴ ∞ This is much different from the thousands of certiorari petitions revolving around the Second Amendment.⁸⁵
Fourteenth	<ul style="list-style-type: none"> ∞ Same-Sex Marriage ∞ Affirmative Action ∞ Abortion 	<ul style="list-style-type: none"> 5-4 5-4 5-4 	<ul style="list-style-type: none"> ∞ Though it resides outside of the Bill of Rights, the Fourteenth Amendment is also very powerful, ambiguous, and up for debate. The Roberts Court has taken its share of very controversial cases in this area over the past five years such as: ∞ <i>Obergefell v. Hodges</i> (June 26, 2015)⁸⁶—the Court held that the Fourteenth Amendment guarantees a right to same-sex marriage. ∞ <i>Fisher v. University of Texas</i> (June 23, 2016)⁸⁷—the Court upheld a public university’s consideration of race as one part of a holistic admissions scheme. ∞ <i>Whole Woman’s Health v. Hellerstedt</i> (June 27, 2016)⁸⁸—the Court held that state laws mandating doctors who provide abortions have hospital admitting privileges and that abortion clinics meet the standards for a surgical center create an undue burden and thus violate the Fourteenth Amendment.

83. See *infra* Part III for a detailed discussion of this issue.

84. But see Glenn Fleishman, *States Sue to Block Downloads of 3D-Printed Gun Instructions*, FORTUNE (July 30, 2018), <http://fortune.com/2018/07/30/states-sue-to-block-downloads-of-3d-printed-gun-instructions/> [https://perma.cc/K9FH-9K76] (stating that a group of state attorneys general have sued the Federal Government making the argument that the Tenth Amendment leaves the regulation of firearms to the states and, therefore, the states should be able to stop the downloading of 3-D gun files).

85. See *infra* Part III for a detailed discussion of this issue.

86. 135 S. Ct. 2584, 2604–05 (2015).

87. 136 S. Ct. 2198, 2215 (2016).

88. 136 S. Ct. 2292, 2313 (2016) (admitting privileges); *id.* at 2318 (surgery center).

This brief sketch helps highlight that the Roberts Court has very recently tackled six of the ten amendments in the Bill of Rights—many multiple times. Perhaps unsurprisingly, the Third, Ninth, and Tenth Amendments are rarely invoked in Questions Presented to the Court. This makes the neglect of the Second Amendment stand out like a sore thumb because it consistently plays the role of the protagonist in lawsuits. Additionally, the controversial and politically charged nature of each of these tough cases is quite conspicuous. Accordingly, much ink has been spilled in response including high praise and deep condemnation. Some even argue that these decisions open up new cans of worms. A different, and perhaps more persuasive, argument is that the positives of these decisions (the updated guidance and narrowing of unsettled law that allows governments to function within constitutional boundaries) outweigh their negatives—even if one strongly disagrees with the outcome as a matter of public policy. These opinions clarify important legal issues for lawmakers, judges, government officials, businesses, and the public. They also create a more level playing field where people at least know the rules.

B. *The HEAR Framework: Revealing Critical Cases Ripe for the Court's Consideration*

Handing down decisions in tough cases is one of the Supreme Court's primary functions. At the end of the day, the Court exists to “say what the law is”⁸⁹ or, in layman's terms . . . to faithfully interpret America's pithy Constitution and guide, correct, empower, and limit federal and state governments where appropriate. The “where appropriate” language is key. The Court need not become an unelected legislature doing the job of inactive, politically timid, or deadlocked members of Congress/state legislatures. Neither should the Justices correct poorly written or ill-conceived statutes. Instead, the Court should continue to work faithfully within its self-imposed parameters for granting certiorari.⁹⁰ In addition to those parameters, however, this Article argues that the Supreme Court should more strongly consider clarifying unsettled law when the following four factors coexist:

89. *Marbury v. Madison*, 5 U.S. 137, 177–78 (1803) (stating in full: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty.*”) (emphasis added).

90. See SUP. CT. R. 10 (listing the proper considerations governing review on writ of certiorari).

(H) HAMSTRUNG GOVERNMENT ACTORS: Where other branches of government are hindered in their job duties because of unclear constitutional boundaries on their authority;

(E) ECHOES OF CONFUSION: Where confusion over how to interpret precedent reverberates throughout the appeals courts to the point where circuit-court-created legal tests tiptoe around opaque Supreme Court rulings/dicta;

(A) APPROPRIATENESS: Where an appropriately postured case (one with a broadly applicable fact pattern, clear plaintiff standing, and no serious procedural errors) comes to the table; note: this case need not be part of a major circuit split; and

(R) THE COURT IS THE BEST/ONLY AUTHORITATIVE REFEREE: Where the contours of a Constitutional provision are in the mix and the Court is in the best position (perhaps the only position) to add authoritative guidance.

Since the Supreme Court has the power to decide which cases to grant, adopting this HEAR framework, formally or informally, is fully within its discretion. In fact, the *Rules of the Supreme Court of the United States* contain a section styled, *Considerations Governing Review on Writ of Certiorari*, which could easily encompass these factors without revision. Rule 10 begins: “Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons.”⁹¹ The rule then enumerates three situations where the Court is most likely to hear a case: (1) circuit splits between federal courts or between a federal court and a state supreme court; (2) differing opinions on the same matter between state supreme courts; and (3) cases where “a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court.”⁹² The HEAR framework fits solidly within and even helps explain this third category because it *exclusively* includes questions of federal law that “ha[ve] not been, but should be, settled by” the Supreme Court. In the firearms context, the framework also often includes situations where a federal question on firearms regulation potentially conflicts “with relevant decisions” of the Supreme Court such as *Heller*.

In practice, the Roberts Court has been guided by these types of factors in the past. The best example comes from the same-sex marriage arena and the

91. *Id.*

92. *Id.*

Obergefell v. Hodges case.⁹³ Interestingly, in *Obergefell*, the Justices chose to grant certiorari only after each of the four HEAR factors materialized:

FACTOR	MET	APPLICATION TO SAME-SEX MARRIAGE
HAMSTRUNG OFFICIALS	✓	<p>QUESTION: Are government officials hindered in executing their job duties because of unclear constitutional boundaries on their authority?</p> <p>ANSWER: Yes! Prior to <i>Obergefell</i>, state officials were confused as to whether the Constitution allowed them to prohibit same-sex marriages, bless same-sex marriages, or recognize only same-sex marriages performed in states where the practice was legal.⁹⁴ There was no clear precedent on this issue and state officials were forced to seek guidance from Supreme Court cases on homosexual sodomy of all things.⁹⁵ At the time, an expert in the field stated that, though it was possible to break the upcoming Supreme Court decision on same-sex marriage “down into three neatly color-coded maps [of the United States], there is a complicated web of state laws at work, and it means outcomes could vary widely by state if the court decides bans <i>are</i> constitutional.”⁹⁶ Justice Kennedy touched on this issue as well: “After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage.”⁹⁷ State officials were hamstrung and it was time for the Justices to act. The Court’s decision that the Fourteenth Amendment requires states to license a marriage between two people of the same sex cleared up this confusion and freed officials to tailor their laws to comply with this</p>

93. 135 S. Ct. 2584 (2015).

94. See, e.g., Danielle Kurtzleben, *Maps: What the Supreme Court’s Ruling on Same-Sex Marriage Could Mean*, NPR (June 25, 2015, 5:03 AM), <https://www.npr.org/sections/itsallpolitics/2015/06/25/417112332/heres-how-the-supreme-court-could-rule-today-on-same-sex-marriage> [<https://perma.cc/PTS2-D34N>].

95. *Obergefell*, 135 S. Ct. at 2604.

96. Kurtzleben, *supra* note 94.

97. *Obergefell*, 135 S. Ct. at 2597.

FACTOR	MET	APPLICATION TO SAME-SEX MARRIAGE
		mandate. ⁹⁸ The battleground was narrowed and has since moved to the conflict between public accommodation laws protecting same-sex couples versus the First Amendment rights of sincerely religious business owners, for example. This is also an issue that would pass the HEAR framework and, appropriately, the Court has begun the clarification process in that realm. ⁹⁹
ECHOES OF CONFUSION	✓	<p>QUESTION: Does confusion by judges reverberate throughout the circuit courts of appeals to the point where legal tests are created that tiptoe around opaque rulings or dicta in Supreme Court caselaw?</p> <p>ANSWER: Yes! Before <i>Obergefell</i>, lower courts used various tests to determine whether a state’s ban or regulation of same-sex marriage was constitutional. In fact, in the “string of lower-court rulings that favored same-sex marriage in the wake of the <i>United States v. Windsor</i> decision, some . . . struck down state bans under rational basis, some under heightened scrutiny, and some under strict scrutiny.”¹⁰⁰ An Eighth Circuit court wrote about the confusion and then guessed as to a test: “As Supreme Court decisions attest, the level of judicial scrutiny to be applied in determining the validity of state legislative and constitutional enactments under the Fourteenth Amendment is a subject of continuing debate and disagreement among the Justices. Though the most relevant precedents are murky, we conclude for a number of reasons that [the state constitutional amendment] should receive rational-basis review under the Equal Protection Clause, rather than a</p>

98. *See id.* at 2604–05.

99. *See* Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n, 138 S. Ct. 1719 (2018).

100. Lyle Denniston, *Same-Sex Marriage: The Decisive Questions*, SCOTUSBLOG (Apr. 26, 2015, 3:22 PM), <http://www.scotusblog.com/2015/04/same-sex-marriage-the-decisive-questions/> [<https://perma.cc/AY53-HRVQ>].

FACTOR	MET	APPLICATION TO SAME-SEX MARRIAGE
		<p>heightened level of judicial scrutiny.”¹⁰¹ The court went on to claim that, since the Supreme Court has never “ruled that sexual orientation is a suspect classification for equal protection purposes,” the rational basis test applies.¹⁰² This confusion reverberated throughout the lower courts until the <i>Obergefell</i> decision (which ironically cleared up the issue without clearly endorsing any of these tests). It is important to note that the HEAR framework is ambivalent as to which test (if any) the Court selects or which way a case comes out. Instead, the sole focus is on the added clarity and narrowing of open issues that often occur with a decision from the Court. Think of this like the strategy of advancing the runner in a baseball game; each additional base gets the team closer to home.</p>
APPROPRIATENESS	✓	<p>QUESTION: Has an appropriately postured case (one with a broadly applicable fact pattern, clear standing, and no serious procedural errors) made its way to a petition for certiorari?</p> <p>ANSWER: Yes! The <i>Obergefell</i> case was an ideal vehicle within which the Court could decide this issue. The plaintiffs presented different and very compelling examples of how a ban on same-sex marriage negatively impacted the core of their lives.¹⁰³ There were no major procedural errors or standing issues in the lower courts which the Justices were forced to clean up or dance around. The case was appropriately postured to create an enduring precedent and, thus, satisfied this factor.</p>
REFEREE	✓	<p>QUESTION: Are the contours of a Constitutional guarantee in the mix, and is the Court in the best position (perhaps the only position) to add authoritative guidance?</p>

101. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (2006), *overruled by Obergefell*, 135 S. Ct. at 2584 (2015) (upholding, under the rational basis test, an amendment to the Nebraska Constitution that limited “valid” and “recognized” marriages to “a man and a woman”).

102. *Id.*

103. *Obergefell*, 135 S. Ct. at 2594–95.

FACTOR	MET	APPLICATION TO SAME-SEX MARRIAGE
		<p>ANSWER: Yes! Resolution of whether the Equal Protection Clause mandates states to license same-sex marriages required an opinion from the Supreme Court—the only entity able to offer definitive guidance on a constitutional guarantee. Congress could not legislatively require the states to bless same-sex marriages.¹⁰⁴ President Obama was powerless to issue binding executive orders overturning state same-sex marriage bans.¹⁰⁵ On a related note, the dissenters in <i>Obergefell</i> made a strong argument that the states (through the people) were eventually going to decide this issue for themselves in the same way as the Court.¹⁰⁶ By allowing the political process to work itself out, unelected judges could stay out of the mix, and the voters could voice their opinions in upcoming elections. In that sense, the Chief Justice was almost certainly correct. The national momentum in favor of same-sex marriage was rapidly gaining speed. However, the plaintiffs in these cases argued that their Equal Protection guarantees were being infringed . . . at present.¹⁰⁷ Win or lose, matters where plaintiffs allege the deprivation of a fundamental right require the Supreme Court to be the final arbiter. People should not have to wait for the political process to find consensus under these circumstances. They deserve a court proceeding to make that determination. Therefore, at least in the same-sex marriage arena and considering the circumstances in which this issue evolved in America, the Justices were the only referees constitutionally capable of solving the problem. This is much different from the legalization of</p>

104. See *New York v. United States*, 505 U.S. 144 (1992).

105. See, e.g., *United States v. Windsor*, 570 U.S. 744, 762 (2013).

106. See *Obergefell*, 135 S. Ct. at 2611–12 (Roberts, C.J., dissenting).

107. See *id.* at 2593 (majority opinion).

FACTOR	MET	APPLICATION TO SAME-SEX MARRIAGE
		marijuana for recreational use, for example. There, the Supreme Court is <i>not</i> the only actor able to authoritatively address the clear violation of the Controlled Substances Act (CSA) by the nine states that have pursued legalization. ¹⁰⁸ Congress (or the Drug Enforcement Agency) could amend the law (or revise the CSA regulations) to legalize recreational use of the drug or, on the other hand, strengthen the law to push states to eliminate the recreational use of marijuana. ¹⁰⁹ The Department of Justice could limit the enforcement of marijuana violations or, conversely, enforce violations more strenuously (an idea bandied about recently by Attorney General Sessions). ¹¹⁰ Therefore, a legal case challenging state marijuana laws would not pass the fourth factor of the HEAR framework. ¹¹¹

108. See, e.g., *State Marijuana Laws in 2018 Map*, GOVERNING, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> [<https://perma.cc/JNR6-DPHJ>].

109. See, e.g., Christine Emba, *Is it Time to Revise our Federal Drug Laws?*, WASH. POST (Apr. 25, 2016), https://www.washingtonpost.com/news/in-theory/wp/2016/04/25/is-it-time-to-revise-our-federal-drug-laws/?utm_term=.154f1796e03c [<https://perma.cc/7ZA8-J8K7>].

110. Compare Tim Dickinson, *Obama Administration won't Fight State Marijuana Laws*, ROLLING STONE (Aug. 30, 2013, 3:40 PM), <https://www.rollingstone.com/politics/politics-news/obama-administration-wont-fight-state-marijuana-laws-180094/> [<https://perma.cc/KN29-FCHK>], with *AG's Conflicting Marijuana Policy Comments Leave Some Dazed and Confused*, FISHER PHILIPS LLP (Dec. 4, 2017), <https://www.fisherphillips.com/resources-alerts-ags-conflicting-marijuana-policy-comments-leave-some> [<https://perma.cc/L3VF-KE8D>] (stating that Attorney General Jeffrey Sessions “seemed to suggest that his Justice Department might soon take a tougher enforcement stance on recreational marijuana—something of particular interest to the growing list of states that have legalized recreational marijuana.”).

111. This analysis says little about whether the case is worth hearing for other reasons. In fact, the Court could certainly still take a case like this under its discretionary authority (especially if it met the criteria of Rule 10) or if the case fell under the Court’s original jurisdiction (i.e., a lawsuit between states). Interestingly, an original jurisdiction case on this issue did come to the Court; the Justices denied Nebraska and Oklahoma request for leave to file a Bill of Complaint. See *Nebraska v. Colorado*, 136 S. Ct. 1034, 1035–36 (2016) (Thomas, J., dissenting from the denial of the motion for leave to file a complaint) (arguing that the Court should revisit its decisions to apply discretion in avoiding original jurisdiction cases like this and discussing the facts of this case where Nebraska and Oklahoma sued Colorado alleging that Colorado’s permissive marijuana laws were negatively impacting neighboring states in terms of drug trafficking and government resources spent combating the influx of drugs).

Interestingly, the Roberts Court has seemed to apply a version of this framework to decide cases and create clarity in the affirmative action (Fourteenth Amendment)¹¹² and healthcare (Commerce Clause and Tax Power)¹¹³ arenas as well. Major cases covering these topics were accepted only after each of the four factors were satisfied. But, this has not been true for the Second Amendment. The next Section illustrates how the Court has ignored the HEAR framework's advice and potentially its own duty to "say what the law is" in the context of firearms regulation.

C. Where Courage Fails the Roberts Court: The Neglected Second Amendment

The Court's courage to hear tough cases need not recede because the interpretive exercise is difficult, controversial, intimidating, or unpopular. Yet, issue avoidance has become the Court's status quo when it comes to the Second Amendment. Outside of articulating an individual right to keep and bear arms in the home for self-defense¹¹⁴ and incorporating that right to bind state and local governments,¹¹⁵ the Court has yet to provide much definitive guidance on when firearms regulations cross a constitutional line. So, lawmakers and judges are forced to play a guessing game without sufficient data points. This situation is reminiscent of the board game BATTLESHIP where players randomly guess where opponents are hiding their fleet and then attempt to shoot each ship down with pinpoint coordinates. Lacking much in the form of guidance or clarity (a screen blocks the opponent's board and there are many locations to hide a ship), most shots are off-target. A weary nation trying to balance a constitutional right to keep and bear arms with a rash of gut-wrenching firearms violence should not be forced to condone such an arcane state of affairs.¹¹⁶

112. In *Fisher v. University of Texas*, the Justices scolded the seemingly confused Fifth Circuit for applying an overly deferential strict scrutiny standard to an affirmative action case. See *Fisher v. Univ. of Tex.*, 570 U.S. 297, 314–15 (2013). The application of the Equal Protection Clause to affirmative action programs in the educational space is a matter only the Court can definitively resolve. It did so very clearly in the second iteration of the *Fisher* case or *Fisher II*. See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210–14 (2016) (describing steps educational institutions should follow to comply with the required strict scrutiny applied to affirmative action cases).

113. In the famous Affordable Care Act case, the Court decided that the law was constitutional under the Tax and Spend power of Congress as opposed to its Commerce Clause power. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012). Again, this is a decision required the Supreme Court to provide clarity in a confusing area of the law.

114. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

115. *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

116. See, e.g., Adam Carrington, Opinion, *Supreme Court Needs to Clarify Gun Rights Under the Second Amendment*, FOX NEWS (Mar. 3, 2018),

Setting aside any frustration caused by the Justices' inaction, no legitimate reason exists for the Second Amendment to dwell in the Supreme Court as an *insignificant constitutional guarantee* (an oxymoron at best). This is especially true after the *Heller* decision and the Court's resurrection of the individual right to keep and bear arms.¹¹⁷ This opinion thrilled many on the gun-rights front while disappointing many in favor of stronger gun control.¹¹⁸ Regardless, *Heller* happened and remains the law of the land. The decision must now be carefully parsed before enacting local, state, or federal gun regulations. Because the opinion is purposefully evasive on the specifics of the Second Amendment guarantee, it is well past time for the Court to fulfill its promises in *Heller* to eventually interpret the individual right to keep and bear arms more definitively, "say what the law is," and decide at least one clarifying firearms case.

This is the proper course regardless of any objectionable political and public policy outcomes that may stem from this new precedent. Contributing clarity, honoring judicial duty to interpret a confusing area of the law, and creating definitive regulatory guidance should trump politics, especially on the Supreme Court. This is especially appropriate in the somber realm of the Second Amendment where lives literally are at stake. The current legal morass bogs down needed legislation in court and increases tensions as parties entrench on their sides of the ideological gun culture divide. In the absence of Supreme Court authority, there is no referee. The next Part illustrates more specifically how the HEAR factors call for an expeditious certiorari grant in one or more significant Second Amendment cases. Then, Part IV points out two areas in the firearms realm which are ripe for the Court's consideration.

<http://www.foxnews.com/opinion/2018/03/03/supreme-court-needs-to-clarify-gun-rights-under-second-amendment.html> [<https://perma.cc/V5HQ-HCDY>] (stating that the "nation's highest court should seek to further describe what it believes the Second Amendment protects regarding gun ownership and what the amendment allows for gun regulations. . . . In so doing, the Supreme Court can make its own needed contribution to the present conversation.").

117. *Heller*, 554 U.S. at 592.

118. See, e.g., *Supreme Court Gun Ruling Reactions*, HUFFINGTON POST (July 4, 2008, 5:12AM), https://www.huffingtonpost.com/2008/06/26/politicians-pundits-react_n_109373.html [<https://perma.cc/FEJ3-N9NE>] (gathering quotes on the *Heller* case from influential people including former Senator Frank Lautenberg who stated that the "radical Supreme Court justices [in *Heller*] put rigid ideology ahead of the safety of communities in New Jersey and across the country. This decision illustrates why I have strongly opposed extremist judicial nominees and will continue to do so in the future.").

III. *HELLER*'S PROMISE: WHY THE NEW ROBERTS COURT SHOULD (AND LIKELY WILL) SOON DECIDE A MEANINGFUL SECOND AMENDMENT CASE

Part II pondered the courage of the Roberts Court and demonstrated quite clearly that the Justices consistently decide controversial cases. Also evident was the Court's tendency to shy away from the Second Amendment far more than other tough-to-interpret constitutional guarantees. The only other Bill of Rights provisions more thoroughly neglected are the rarely invoked Third, Ninth, and Tenth Amendments. The big difference is that the Second Amendment continues to play a starring role in thousands of lawsuits across the land. With only *Heller*'s thin guidance available to evaluate a multitude of state and local firearms regulations, however, presiding lower court judges are left up a creek with little choice but to design their own paddles. This Part uses the HEAR framework to furnish a few key reasons why this state of affairs is inefficient, stifles effective policy, and necessitates that the Court decide at least one clarifying Second Amendment case.

First, the Court should clarify the right to keep and bear arms because the Second Amendment looms menacingly over thousands of state and federal lawsuits since *Heller*.¹¹⁹ Plaintiffs attack regulations alleged to tread too deeply upon the right to keep and bear arms. Generally, these litigants employ the strong language of a *fundamental rights violation* and then ask a court to declare a law unconstitutional and issue an injunction to stop its operation.¹²⁰ These are serious remedies that require specific interpretations of the Second Amendment that the Supreme Court has yet to provide. Until the Justices provide more clarity, legislators will wrestle with *Heller*'s potential limits on their authority and keep guessing about how to regulate within constitutional boundaries. Officials are unnecessarily hamstrung according to HEAR factor #1.

Second, courts charged with evaluating such legislation are perplexed about *Heller*'s application outside of the "self-defense in the home" context. Judges from every relevant federal circuit have expressed this frustration in their Second Amendment decisions.¹²¹ They complain that *Heller* is too opaque, too vague. Then, they muddle forward as they must under various forms of intermediate scrutiny tests of their own creation. This legal framework is workable and widely accepted. Problematically, however, it resembles a balancing test where the benefits of gun regulations to society are weighed

119. See cases cited *supra* note 15.

120. See, e.g., *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 684 (6th Cir. 2016) (en banc).

121. See *infra* Section III.A.2 (table detailing circuit court confusion).

against the individual harms to gun owners. This is a no-no according to *Heller*¹²² and such balancing may lead to dozens of regulations being overruled or neutered when the Court decides its next big gun case.

To this end, there is little doubt that at least three Justices on the current Roberts Court (Alito, Gorsuch, and Thomas) believe the Second Amendment to be every bit as important as the other provisions in the Bill of Rights. Early predictions place Justice Kavanaugh in the same boat.¹²³ If Chief Justice Roberts feels similarly, the Court's disapproval of this circuit-court-created balancing test could upset expectations about firearms and their regulation throughout the United States. All the while, the Supreme Court could simply, accurately, and somewhat ironically respond, "We know we have been silent for years on this issue. But, we told you in *Heller* not to balance the interests when constitutional guarantees are involved, and you did it anyway. The decision on appeal is vacated, and the case is remanded for further proceedings not inconsistent with this opinion."¹²⁴ But, until the Justices provide more clarity, trial and appellate judges will continue to wrestle with *Heller*'s application to the facts of their cases. Courts are unnecessarily confused according to HEAR factor #2.

Third, the denial of petitions for certiorari in firearms cases makes little sense when the Supreme Court stands as the only referee able to make a definitive interpretation of the Second Amendment. The Court should end the guessing game and fulfill its promise in *Heller* to "expound upon the historical justifications for the exceptions [to the Second Amendment] *if and when those exceptions come before us*."¹²⁵ These exceptions have certainly come before the Court on close to one hundred occasions since 2008,¹²⁶ and many of these cases are both procedurally and factually appropriate vehicles for the Court's consideration. A new decision or two on the breadth and scope of the Second Amendment should reduce the "guess and hope" approach to firearms regulation and lead to more effective policies and results. Success on this front

122. See *infra* p. 374.

123. See, e.g., Nina Totenberg, *Kavanaugh Could Tip Supreme Court Against Gun Control Laws*, NPR (July 23, 2018, 7:25 AM), <https://www.npr.org/2018/07/23/630286216/kavanaugh-could-tip-supreme-court-against-gun-control-laws> [<https://perma.cc/PXW5-BA5V>] (stating that on the D.C. Circuit, "Kavanaugh has staked out an unusually strong position in favor of gun rights. In 2011, he wrote a 52-page dissent from a decision that upheld a D.C. ban on 'assault weapons' and magazines of more than 10 rounds of bullets, plus broad registration requirements. . . . In his dissent, Kavanaugh argued that the Second Amendment, like the First Amendment guarantee of free speech, is a fundamental right that can be limited only in the narrowest of circumstances.").

124. See *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028 (2016).

125. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (emphasis added).

126. See *Post-Heller Litigation Summary*, *supra* note 3.

requires the only referee capable of solving this legal dilemma to act in an appropriate case according to HEAR factors #3 and #4.

Subsequently, Part IV designates two firearms-related issues that cry out for legal clarity—assault weapons bans and public carry regulations—from which the Court should select the next big gun case. These types of cases easily pass all four factors of the HEAR Framework. But, it is important to begin more generally with the Court’s need to address the looming Second Amendment.

A. A Looming Second Amendment Requires Legislators to Guess & See

The Supreme Court should expeditiously decide a clarifying firearms case because the Second Amendment plays an unsettled role in thousands of lawsuits post-*Heller*.¹²⁷ These cases stem from state and local gun laws that ban or restrict firearms purchase, possession, and use. Legislators, unclear on the constitutional boundaries of the right to keep and bear arms, often enact laws which are over-inclusive or under-inclusive. In the absence of a clear set of guidelines, lawmakers sometimes fail to introduce into the record much substantive evidence as to why the law was necessary in the first place.¹²⁸ The federal courts bear the greatest burden in the inevitable lawsuits to follow. Judges there have been forced to deconstruct the Court’s ambiguous stance on firearms regulations in over 1,100 cases since June 2008.¹²⁹ The controversial amendment also looms over 700 or so state firearms cases since that time.¹³⁰

127. A Lexis Advance search for the terms “Second Amendment” and “*Heller*” in federal and state caselaw since June 26, 2008 (the date of the *Heller* decision) returned 1,819 cases [hereinafter *Lexis Search*]. Many of these cases are certainly appeals from district court decisions where the Second Amendment was in play. This double counting of cases in the 1,819 total is appropriate as a new set of judges must struggle in every case to interpret the Second Amendment—in light of *Heller*—to reach a decision. A few of these cases certainly invoke the Second Amendment for other reasons—to help interpret statutes with prefatory clauses similar to the Second Amendment’s prefatory clause, for instance. But, these off-point cases arise far less frequently than cases where the Second Amendment is squarely in play. Regardless, a precise total is not relevant here as an approximation still underscores the point that the unsettled Second Amendment is invoked far too often.

128. See, e.g., *Teixeira v. County of Alameda*, 822 F.3d 1047, 1062 (9th Cir. 2016), *superseded by a ruling en banc by* *Teixeira v. County of Alameda*, 873 F.3d 670 (9th Cir. 2017) (stating that the “district court should have followed our approach in [other Second Amendment cases] and required at least some evidentiary showing that gun stores increase crime around their locations. Likewise, the record lacks any explanation as to how a gun store might negatively impact the aesthetics of a neighborhood.”).

129. See *Lexis Search*, *supra* note 127.

130. The search showed cases filed in forty-one states as well as the District of Columbia, Puerto Rico, and the Virgin Islands. See *id.* The only states without a case that referenced the Second Amendment and the *Heller* case are: Arkansas, Kentucky, Nebraska, Oklahoma, Rhode Island, South

It is telling that a multitude of plaintiffs continue to invoke the Second Amendment even though: (1) it is the poster child for unsettled law and (2) lower courts uphold most gun regulations—even after *Heller*.¹³¹ Perhaps these litigants harbor the hope that a lower court, and eventually the Supreme Court, will adopt the strong version of *Heller*'s individual right to keep and bear arms. There, the majority found a clear Second Amendment violation and claimed that the District of Columbia law would fail *any* judicial test.¹³² Regardless of why the Second Amendment makes it into these complaints, its invocation places the Court's limited interpretation of the right to keep and bear arms squarely on the table, an unwelcome gift for lower court judges to unpack. Judge Harvie Wilkinson of the Fourth Circuit aptly articulated the dilemma:

There may or may not be a Second Amendment right in some places beyond the home, but we have no idea what those places are, what the criteria for selecting them should be, what sliding scales of scrutiny might apply to them, or any one of a number of other questions. It is not clear in what places public authorities may ban firearms altogether without shouldering the burdens of litigation. The notion that “self-defense has to take place wherever [a] person happens to be,” appears to us to portend all sorts of litigation over schools, airports, parks, public thoroughfares, and various additional government facilities. And even that may not address the place of any right

Dakota, Utah, Vermont, and West Virginia. Interestingly, all these states except for Rhode Island and Vermont voted for the Republican candidate (Donald Trump) in the 2016 election and Republican candidate (Mitt Romney) in the 2012 election. See *2016 Presidential Election Results*, 270 TO WIN (July 20, 2017, 2:15 PM), <https://www.270towin.com/maps/2016-actual-electoral-map> [<https://perma.cc/HNM7-C5ZF>] (illustrating the 2016 Presidential election results); *Historical Timeline: 2012 Map*, 270 TO WIN, <https://www.270towin.com/historical-presidential-elections/timeline/> [<https://perma.cc/G98R-7UYU>] (last visited Dec. 26, 2018) (illustrating the 2012 Presidential election results). Perhaps this political affinity indicates that these states are less likely to pass controversial gun regulations that stir lawsuits or perhaps it is just a very interesting random occurrence. See Gretchen Frazee, *Why States, Not Congress, Are Passing More Gun Laws*, PBS NEWS HOUR (Mar. 23, 2018, 3:26 PM), <https://www.pbs.org/newshour/nation/why-states-not-congress-are-passing-more-gun-laws> [<https://perma.cc/NC6B-WEJ7>] (stating that at “the state level, the gun control debate is largely breaking down along party lines. Democrats have focused their efforts on banning bump stocks and high capacity magazines, raising the minimum age to buy a gun to 21, and ‘red flag’ laws that allow police to temporarily confiscate firearms from people deemed to be a threat to others or themselves. Republicans have introduced legislation that would arm teachers and allow guns in school parking lots and in places of worship.”).

131. See, e.g., Eric Tirschwell & Mark Frassetto, Opinion, *10 Years After Heller: Fiery Gun Rights Rhetoric, but Courts Back Second Amendment Limits*, USA TODAY (June 25, 2018, 11:18 PM), <https://www.usatoday.com/story/opinion/2018/06/25/heller-ruling-courts-uphold-gun-control-second-amendment-limits-column/729202002/> [<https://perma.cc/3XZF-UUEE>].

132. *District of Columbia v. Heller*, 554 U.S. 570, 628–29 (2008).

in a private facility where a public officer effects an arrest. The whole matter strikes us as a vast *terra incognita* that courts should enter only upon necessity and only then by small degree.¹³³

To place the looming Second Amendment in the proper context, it is critical to enter the *terra incognita* and analyze the archetypal gun lawsuit in America today. To do so, we walk through a case from the enactment of a gun regulation to certiorari denial at the Supreme Court. This example demonstrates the legitimate questions surrounding gun cases outside of the “self-defense-in-the-home” context decided in *Heller*. It also quickly becomes clear why legislators are hamstrung (HEAR Factor #1) and judges battle confusion (HEAR Factor #2) in reaching decisions when the Second Amendment is in play.

1. Firearms Regulations & Their Justifications

Firearms cases begin when a city, county, or state (and seldomly Congress) passes a law regulating the: (1) purchase, (2) possession, or (3) use of a firearm.¹³⁴ Purchase restrictions generally range from bans on assault weapons and dangerous ammunition¹³⁵ to zoning rules on the location of new gun stores.¹³⁶ Possession restrictions typically stem from bans on public carry of firearms (concealed/open)¹³⁷ to reasonable licensing and permitting requirements.¹³⁸ Use restrictions commonly stem from prohibitions on firing ranges in urban cities¹³⁹ to lifetime firearm bans for convicted felons or the

133. *United States v. Masciandaro*, 638 F.3d 458, 475 (4th Cir. 2011) (Wilkinson, J., concurring in part and in the judgment) (quoting Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1515 (2009)). In this case, the court upheld a challenge to a law prohibiting the carrying a loaded handgun in a vehicle within a national park area using a circuit-court-created intermediate scrutiny standard for the Second Amendment. *See id.* at 474.

134. *See, e.g., Gun Laws by State: The Complete Guide—2018*, GUNS TO CARRY, <https://www.gunstocarry.com/gun-laws-state/> [<https://perma.cc/9QGD-F8U9>] (last updated 2018) (listing gun laws state by state).

135. *See, e.g., N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015) (evaluating an assault weapons and large capacity magazine ban).

136. *See, e.g., Teixeira v. County of Alameda*, 873 F.3d 670, 673–76 (9th Cir. 2017) (en banc) (evaluating zoning regulations on firearms dealers).

137. *See, e.g., Kachalsky v. Cacace*, 817 F. Supp. 2d 235, 268 (S.D.N.Y. 2011) (evaluating concealed carry requirements).

138. *See, e.g., Gould v. O’Leary*, No. 16-10181-FDS, 2017 U.S. Dist. LEXIS 199400, *3–4 (D. Mass. Dec. 5, 2017) (evaluating firearms licensing).

139. *See, e.g., Ezell v. City of Chicago*, 651 F.3d 684, 689–90 (7th Cir. 2011) (evaluating city ban on firing ranges).

mentally ill.¹⁴⁰ Some of these laws are strict while others are more mundane. The government's stated reasons for these laws are almost always to: (1) protect public safety (especially the safety of children), (2) fight crime, and (3) decrease gun violence.¹⁴¹ These are certainly compelling interests—a fact that complicates matters greatly for gun rights advocates when any legal test is applied.

To shepherd the analysis, this Section evaluates a 2014 firearms case from the Seventh Circuit—*Friedman v. Highland Park*—that resembles the garden-variety firearms challenge in both process and result.¹⁴² In *Friedman*, the plaintiffs challenged a Highland Park, Illinois assault weapons/large capacity magazine ban that declares: “No person shall manufacture, sell, offer or display for sale, give, lend, transfer ownership of, acquire or possess any Assault Weapon or Large Capacity Magazine, unless expressly exempted [by city law . . . and such exemptions are exceedingly rare].”¹⁴³

Highland Park Mayor Nancy Roterling detailed the purpose of the ban in an interview:

No parent sending a child to school, to the park or to the movies should have to worry about whether they will come home or not. Banning assault weapons and high-capacity magazines is one common-sense action to reduce gun violence and protect our children and our communities from potential mass violence and grief.¹⁴⁴

The three justifications for gun regulations—increased safety, reduced crime, decreased violence—are each wrapped up in the Mayor's comments. It is important to note that the City of Highland Park was sort of flying blind when enacting this law. There is no Supreme Court case on the topic and *Heller* says little about non-handguns used for self-defense either inside or outside of the home. This case illustrates the first HEAR factor at work—government

140. See, e.g., *Jefferies v. Sessions*, 278 F. Supp. 3d 831, 833 (E.D. Pa. 2017) (evaluating mental illness and firearms).

141. See, e.g., Gun Violence Prevention and Children's Safety Act of 2013, 2013 CONN. ACTS 47 (Reg. Sess.); *Kachalsky*, 817 F. Supp. 2d at 268 (citing New York state government officials who stated that the state's public carry licensing regulation “serves to *promote public safety and prevent crime*”) (emphasis added).

142. 68 F. Supp. 3d 895 (N.D. Ill. 2014).

143. HIGHLAND PARK, ILL., ORDINANCES § 136.005 (2016).

144. Dahleen Glanton & Karen Berkowitz, *Supreme Court Rejection of Gun Case Considered a Victory by Highland Park*, CHIC. TRIB. (Dec. 7, 2015, 9:57 PM), <http://www.chicagotribune.com/news/nationworld/ct-supreme-court-highland-park-assault-weapons-ban-20151207-story.html> [<https://perma.cc/MH6V-9PQY>].

officials guessing as to which laws will pass constitutional muster. Hold tight because the enactment of the law is merely step one.

2. The Inevitable Lawsuits

Step two begins as the law generates press and affects the ability of individuals to purchase, possess, or use their firearm of choice. At this point, a group of gun owners, prospective gun owners, and/or firearms dealers will challenge new firearms legislation in court and invoke the Second Amendment.¹⁴⁵ Their main argument is generally that the law in question is an “impermissible violation” of their “right to keep and bear arms.”¹⁴⁶ Often, these plaintiffs are aided by state or national gun rights groups like the Illinois State Rifle Association or the National Rifle Association, who join the suit fearing their members’ Second Amendment rights are at risk.¹⁴⁷ The language from the Highland Park complaint is typical and prays for both a declaratory judgment and injunctive relief as follows:

- ∞ Ownership of firearms that are commonly possessed by law-abiding citizens [i.e., assault rifles], for lawful purposes, including self-defense in the home against a criminal intruder, is a fundamental right under the Second Amendment to the United States Constitution.
- ∞ Defendant has infringed the fundamental Second Amendment right of Plaintiff Friedman and Plaintiff [the Illinois State Rifle Association’s members] to keep and bear arms by prohibiting his ownership and of possession of firearms in his home that are commonly possessed by law-abiding citizens [i.e., assault rifles] for lawful purposes, including self-defense in the home.
- ∞ Defendant does not have a compelling governmental interest in depriving Plaintiff of his Second Amendment right to own and possess firearms that are commonly possessed by law-abiding citizens for lawful purposes [i.e., assault rifles], including self-defense in the home.
- ∞ WHEREFORE, Plaintiffs respectfully request that City of Highland Park City Code [banning assault weapons and

145. *See, e.g.*, Jackson v. City of San Francisco, 746 F.3d 953, 958 (9th Cir. 2014) (showing that on “May 15, 2009, Espanola Jackson, Paul Colvin, Thomas Boyer, Larry Barsetti, David Golden, Noemi Margaret Robinson, the National Rifle Association, and the San Francisco Veteran Police Officers Association brought suit against the City and County of San Francisco . . .”).

146. *See, e.g., id.*

147. *See, e.g., id.* (stating that the NRA and Police Officers Association “have brought this suit on behalf of their members, who have an interest in keeping handguns within their home for self-defense.”).

large capacity magazines] . . . be declared unconstitutional and that judgment be entered in their favor and against the Defendant, including an award of costs. . . .

. . . .

∞ . . . WHEREFORE, Plaintiffs respectfully request that an order be entered permanently enjoining the Defendant from enforcing City of Highland Park City Code [banning assault weapons and large capacity magazines] and that judgment be entered in their favor and against the Defendant, including an award of costs.¹⁴⁸

These complaints generally use the strong language of *fundamental rights* and *lack of a compelling governmental interest* and then ask the court to declare the law unconstitutional and issue an injunction to stop its operation. These are serious remedies that require specific interpretations of the Second Amendment that the Supreme Court has yet to provide. And, until legislators better grasp the constitutional boundaries of their authority to limit the right to keep and bear arms, the Second Amendment will continue to loom awkwardly in future cases. This leads to the second HEAR factor to be discussed next—great confusion by lower court judges and circuit-court-crafted legal tests that tiptoe around ambiguous Supreme Court precedent and dicta.

B. *Judges Are Perplexed by Heller As Applied to Their Cases*

There must be a moment in every contemporary firearms case when lower court judges put their heads in their hands, perplexed and frustrated as to what comes next. The issues in gun cases are controversial enough to begin with and each judge’s rulings will no doubt have serious legal and public policy consequences. Add to that the fact that all the work in the case may be wasted if the Supreme Court finally takes an appeal and says that the “honorable yet confused” lower court judge “misinterpreted the Second Amendment and *Heller*.” This Section evaluates the second HEAR factor—the scope of judicial confusion that begins after these types of complaints are filed—in real-world cases. We pick up where we left off—step three or the battle of motions stage of a firearms lawsuit.

1. The Motions for Dismissal and Summary Judgment

The next critical steps in the typical firearms case entail motions for dismissal and summary judgment. At this point, the district court judge or

148. Verified Complaint for Declaratory Judgment and Injunctive Relief at 7–8, *Friedman v. City of Highland Park*, 68 F. Supp. 3d 895 (N.D. Ill. 2014) (No. 1:13-cv-9073).

appellate panel hearing the case is forced to look to *Heller* for guidance. Ruling on these motions is a brutal endeavor when these judges lack a definitive opinion from the Court on the specific issue in front of them. In fact, judges often express this confusion/frustration in their opinions.¹⁴⁹ The following chart presents a taste of this confusion, from all twelve relevant circuit courts, which also includes some not-so-subtle nudges designed to prod the Supreme Court into clarifying the Second Amendment. This is not a circuit split in the traditional sense. Rather, this confusion is more of a consensus plea from the lower courts for clearer guidance—a “Uniform Circuit Struggle” so to speak.

CIRCUIT	ISSUE	STATEMENT OF CONFUSION
First	Firearms Bans Based on Misdemeanor Convictions	“The full significance of [the Court’s] pronouncements [in <i>Heller</i>] is far from self-evident. Indeed, the Court itself acknowledged that it had not left the law ‘in a state of utter certainty.’ We thus find ourselves in agreement with the Seventh Circuit’s observation . . . of the relative futility of ‘pars[ing] these passages of <i>Heller</i> as if they contain an answer to the question whether [the law at issue in this case] is valid.’” ¹⁵⁰
Second	Assault Weapon and Large Capacity Magazine Bans	“Aside from these broad guidelines, <i>Heller</i> offered little guidance for resolving future Second Amendment challenges. The Court did imply that such challenges are subject to one of ‘the standards of scrutiny that we have applied to enumerated constitutional rights,’ though it declined to say which, accepting that many applications of the Second Amendment would remain ‘in doubt.’” ¹⁵¹
Third	Firearms Bans Based on Misdemeanor Convictions	“As to cases involving burdens on Second Amendment rights, <i>Heller</i> did not announce which level of scrutiny applies but cautioned that challenges based on those rights are not beaten

149. See, e.g., *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 681 (6th Cir. 2016) (en banc) (remarking that, since 2008, “the lower courts have struggled to delineate the boundaries of the right recognized by the Supreme Court in [*Heller*].”).

150. *United States v. Booker*, 644 F.3d 12, 23 (1st Cir. 2011) (internal citations omitted).

151. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 253 (2d Cir. 2015) (footnotes omitted).

CIRCUIT	ISSUE	STATEMENT OF CONFUSION
		back by the Government supplying a rational basis for limiting them. . . . Some judges . . . have interpreted <i>Heller</i> to mean that any law barring persons with Second Amendment rights from possessing lawful firearms in the home even for self-defense is per se unconstitutional; that is, no scrutiny is needed. But neither the Supreme Court nor any court of appeals has held that laws burdening Second Amendment rights evade constitutional scrutiny.” ¹⁵²
Fourth	Assault Weapon and Large Capacity Magazine Bans	“We conclude . . . that the banned assault weapons and large-capacity magazines are not protected by the Second Amendment. That is, we are convinced that the banned assault weapons and large-capacity magazines are among those arms that are ‘like’ ‘M-16 rifles’—‘weapons that are most useful in military service’—which the <i>Heller</i> Court singled out as being beyond the Second Amendment’s reach. Put simply, we have no power to extend Second Amendment protection to the weapons of war that the <i>Heller</i> decision explicitly excluded from such coverage. Nevertheless, we also find it prudent to rule that—even if the banned assault weapons and large-capacity magazines are somehow entitled to Second Amendment protection—the district court properly subjected the FSA to intermediate scrutiny and correctly upheld it as constitutional under that standard of review.” ¹⁵³

152. *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336, 344 (3d Cir. 2016) (en banc) (internal citations omitted), *cert. denied sub nom. Sessions v. Binderup*, 137 S. Ct. 2323, 198 L. Ed. 2d 746 (2017), and *cert. denied sub nom. Binderup v. Sessions*, 137 S. Ct. 2323, 198 L. Ed. 2d 746 (2017).

153. *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc) (emphasis omitted) (internal citations omitted); *see also United States v. Chester*, 628 F.3d 673, 678 (4th Cir. 2010) (stating that to the “extent *Heller* provides an answer to [the question at issue in this case], it would be found in the Court’s truncated discussion of the limitations on the right to bear arms preserved by the Second Amendment.”).

CIRCUIT	ISSUE	STATEMENT OF CONFUSION
Fifth	Age Limits on Firearms Purchases	“ <i>Heller</i> did not set forth an analytical framework with which to evaluate firearms regulations in future cases. Nor has this court, since <i>Heller</i> , explained how to determine whether the federal laws at bar comport with the Second Amendment. But our fellow courts of appeals have filled the analytical vacuum.” ¹⁵⁴
Sixth	Mental Fitness to Possess Firearms	Since 2008, “the lower courts have struggled to delineate the boundaries of the right recognized by the Supreme Court” in <i>Heller</i> . ¹⁵⁵
Seventh	Ban on Firing Ranges	“Beyond [hinting in <i>Heller</i> that some form of heightened scrutiny is required], the Court was not explicit about how Second Amendment challenges should be adjudicated now that the historic debate about the Amendment’s status as an individual-rights guarantee has been settled.” ¹⁵⁶
Eighth	Unlawful Possession of Firearms While Under Court Order	“The analytical basis for the presumptive constitutionality of these regulatory measures [covering felons and the mentally ill, guns in sensitive places, and the commercial sale of arms] was not thoroughly explained [in <i>Heller</i>], but we

154. Nat’l Rifle Ass’n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 194 (5th Cir. 2012) (footnote omitted).

155. Tyler v. Hillsdale Cty. Sheriff’s Dep’t, 837 F.3d 678, 681 (6th Cir. 2016) (en banc).

156. Ezell v. City of Chicago, 651 F.3d 684, 701 (7th Cir. 2011). This issue culminated in a 2017 case by the same name. See Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017). In the 2017 *Ezell* opinion, the court struck down major restrictions on firing ranges in the city of Chicago on the belief that the laws hindered the ability of Chicago residents to become proficient in firearms use. See *id.* at 890. On the issue of *Heller*’s ambiguity, Judge Easterbrook of the Seventh Circuit commented in a different case: “We do not think it profitable to parse these passages of *Heller* as if they contained an answer to the question [in this case]. They are precautionary language. Instead of resolving questions such as the one we must confront, the Justices have told us that the matters have been left open. . . . The [*Heller*] opinion is not a comprehensive code; it is just an explanation for the Court’s disposition.” United States v. Skoien, 614 F.3d 638, 640 (7th Cir. 2010) (en banc). Judge Easterbrook was defending *Heller* in this case through his warning that people should not expect too much from a Supreme Court case outside of deciding the question presented. He wrote, that judicial opinions “must not be confused with [comprehensive] statutes, and general expressions must be read in light of the subject under consideration.” *Id.*

CIRCUIT	ISSUE	STATEMENT OF CONFUSION
		know [from an opinion of a sister circuit] at least that ‘statutory prohibitions on the possession of weapons by some persons are proper,’ and ‘exclusions need not mirror limits that were on the books in 1791.’” ¹⁵⁷
Ninth	Second Amendment Right to Sell Firearms	“‘In <i>Heller</i> , the Supreme Court did not specify what level of scrutiny courts must apply to a statute challenged under the Second Amendment,’ although the Court did ‘indicate that rational basis review is not appropriate.’” “Whatever the standard governing the Second Amendment protection accorded the acquisition of firearms, these vague allegations cannot possibly state a claim for relief” ¹⁵⁸
Tenth	Public Carry of Firearms	“In response to the paucity of authority on point from this court or the Supreme Court, [the defendant here] directs us to Justice Thomas’s dissent from the denial of certiorari in [a case from the Ninth Circuit]. . . . The Court declined to hear the case. Justice Thomas and Justice Gorsuch dissented, with Justice Thomas writing that he believes ‘[t]he most natural reading of [the Second Amendment] encompasses public carry’ Yet, a dissent from a denial of certiorari is not binding authority that would create clearly established law.” ¹⁵⁹
Eleventh	Gun Restrictions on Army Corps of Engineers Property	“However, the extent to which the Second Amendment protects individuals seeking to carry firearms outside the home, and the framework by which courts are to evaluate laws regulating

157. *United States v. Bena*, 664 F.3d 1180, 1182 (8th Cir. 2011) (quoting a Seventh Circuit case, *Skoien*, 614 F.3d at 640–41, instead of the Supreme Court, to make the assertions about the propriety of “statutory prohibitions on the possession of weapons by some persons” and exclusions from Second Amendment protection not having to mirror “limits . . . on the books in 1791.”).

158. *Teixeira v. County of Alameda*, 873 F.3d 670, 679, 679 n.10 (9th Cir. 2017) (en banc) (quoting *United States v. Chovan*, 735 F.3d 1127, 1137 (9th Cir. 2013)).

159. *Sandberg v. Englewood, Colo.*, No. 17-1147, 2018 U.S. App. LEXIS 5718, *21 (10th Cir. Mar. 7, 2018).

CIRCUIT	ISSUE	STATEMENT OF CONFUSION
		firearm possession, remains unclear. Despite this lack of guidance from the Supreme Court, the Eleventh Circuit, along with most other circuits to address the issue, has adopted a two step approach to evaluating Second Amendment challenges.” ¹⁶⁰
D.C.	Public Carry of Firearms	“Constitutional challenges to gun laws create peculiar puzzles for courts. In other areas, after all, a law’s validity might turn on the value of its goals and the efficiency of its means. But gun laws almost always aim at the most compelling goal—saving lives—while evidence of their effects is almost always deeply contested. On top of that, the Supreme Court has offered little guidance. Its ‘first in-depth examination of the Second Amendment’ is younger than the first iPhone. And by its own admission, that first treatment manages to be mute on how to review gun laws in a range of other cases.” ¹⁶¹

There was also confusion in the *Friedman* case from the Seventh Circuit. The plaintiffs were careful to refer to the ability to keep and bear arms as a fundamental right. The *Heller* majority did not use that term to describe the Second Amendment guarantee, though it was likely implied.¹⁶² This may be because fundamental rights are accompanied by the strict scrutiny test. And, in *Heller*, the Court did not lay out any test to evaluate firearms regulations, particularly for weapons more dangerous than handguns.¹⁶³ Seeking to ferret out such a test, Judge Easterbrook wrote:

160. *Georgiacarry.org, Inc. v. U.S. Army Corps of Eng’rs*, 212 F. Supp. 3d 1348, 1359 (N.D. Ga. 2016) (internal citation omitted) (citing Justice Breyer’s dissent in *Heller* that lamented that the majority did not provide more guidance).

161. *Wrenn v. District of Columbia*, 864 F.3d 650, 655 (D.C. Cir. 2017) (internal citation omitted).

162. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (disagreeing with Justice Breyer’s proposed interest-balancing test for the Second Amendment and stating that the majority knew of “no other enumerated constitutional right whose core protection has been subjected to a freestanding ‘interest-balancing’ approach.”).

163. *See id.* at 628–29 (stating that under “any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home ‘the most preferred firearm in the nation to “keep” and use for protection of one’s home and family,’ would fail constitutional muster.”) (internal citation and footnote omitted).

So far, however, the Justices have declined to specify how much substantive review the Second Amendment requires. . . .

. . . .

. . . *Heller* and *McDonald* set limits on the regulation of firearms; but within those limits, they leave matters open. The best way to evaluate the relation among assault weapons, crime, and self-defense is through the political process and scholarly debate, not by parsing ambiguous passages in the Supreme Court's opinions. The central role of representative democracy is no less part of the Constitution than is the Second Amendment: when there is no definitive constitutional rule, matters are left to the legislative process.¹⁶⁴

This is a very interesting point. The other branches are designed to do most of the governing when not prohibited from doing so by a constitutional rule. And, this is exactly what has been happening on the firearms front. The biggest counterargument this Article makes is that their efforts may be for naught if the new Roberts Court strengthens *Heller*. For example, the assault weapons ban in *Friedman* may be struck down as prohibiting residents to use their weapon of choice to defend themselves—at least in their homes. The public carry bans throughout the country could be struck down as violating the right to keep and bear arms—bearing arms being something that people do in public. So, Judge Easterbrook is surely correct on the idea of legislators going to work on firearms policy when the Court is silent. However, the Court may not be silent for long and it would have been appropriate to have this guidance years ago. This would have allowed Highland Park to tailor the assault weapons law within the boundaries of the Second Amendment.

Forced to rule on cases just like this, courts tend to run the law at issue through a watered-down form of intermediate scrutiny. This test asks whether the law governs conduct protected by the Second Amendment and, if so, whether the law is tailored to an important governmental interest.¹⁶⁵ Under this test, the regulation is generally upheld.¹⁶⁶ The following chart illustrates how the cases detailed above (where judges wrote in the opinions about their confusion/frustration) were resolved:

164. *Friedman v. City of Highland Park*, 784 F.3d 406, 410–12 (7th Cir. 2015).

165. *Jackson v. City of San Francisco*, 746 F.3d 953, 965 (9th Cir. 2014).

166. *See, e.g., id.* at 970 (denying the plaintiffs' preliminary injunction request).

CIRCUIT	ISSUE	WINNER	TEST USED & REASONING OF THE COURT
First	Firearms Bans Based on Misdemeanor Convictions	Gov't.	The court held that a federal law banning firearm possession by those convicted of a crime punishable by more than one year in prison passed the circuit-court-created intermediate scrutiny standard because it “promotes an important government interest in preventing domestic gun violence.” ¹⁶⁷
Second	Assault Weapon and Large Capacity Magazine Bans	Gov't	The court upheld, in most aspects, New York and Connecticut assault weapons and large capacity magazine regulations using the circuit-court-created intermediate scrutiny standard. ¹⁶⁸
Third	Firearms Bans Based on Misdemeanor Convictions	Plaintiffs	The Third Circuit held that a federal law banning firearm possession by those convicted of a crime punishable by more than one year in prison did not apply to the plaintiffs in this case; the opinion stated, “isolated, decades-old, non-violent misdemeanors do not permit the inference that disarming people like [the two defendants in these cases] will promote the responsible use of firearms.” ¹⁶⁹
Fourth	Assault Weapon and Large Capacity Magazine Bans	Gov't	The court upheld the assault weapons and large capacity magazine ban finding that they fall outside of the scope of the Second Amendment. ¹⁷⁰

167. *United States v. Booker*, 644 F.3d 12, 26 (1st Cir. 2011).

168. *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 247–48 (2d Cir. 2015).

169. *Binderup v. Att'y Gen. U.S.*, 836 F.3d 336, 351, 356 (3d Cir. 2016) (en banc), *cert. denied sub nom. Sessions v. Binderup*, 137 S. Ct. 2323, 198 L. Ed. 2d 746 (2017), and *cert. denied sub nom. Binderup v. Sessions*, 137 S. Ct. 2323, 198 L. Ed. 2d 746 (2017) (internal citations omitted).

170. *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017) (en banc).

CIRCUIT	ISSUE	WINNER	TEST USED & REASONING OF THE COURT
Fifth	Age Limits on Firearms Purchases	Gov't	The court upheld, under the circuit-court-created intermediate scrutiny standard, a series of federal laws prohibiting federally licensed firearms dealers from selling firearms to people under twenty-one years of age. ¹⁷¹
Sixth	Mental Fitness to Possess Firearms	Plaintiff	The court remanded to the district court to apply the circuit-court-created intermediate scrutiny test in a case where the plaintiff challenged a federal law placing a lifetime ban on gun possession for individuals who have been committed to a mental institution. ¹⁷²
Seventh	Ban on Firing Ranges	Plaintiff	The court granted a preliminary injunction of a ban on firing ranges in the city of Chicago as violative of the Second Amendment. ¹⁷³
Eighth	Unlawful Possession of Firearms While Under Court Order	Gov't	The court held that a law prohibiting people under no-contact court orders from possessing firearms does not violate the Second Amendment because the prohibition is “consistent with a common-law tradition that the right to bear arms is limited to peaceable or virtuous citizens” and that “ <i>Heller</i> characterized the Second Amendment as guaranteeing ‘the right of law-abiding, responsible citizens to use arms in defense of hearth and home.’” ¹⁷⁴

171. Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives, 700 F.3d 185, 211 (5th Cir. 2012).

172. Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 699 (6th Cir. 2016) (en banc).

173. Ezell v. City of Chicago, 651 F.3d 684, 710–11 (7th Cir. 2011).

174. United States v. Bena, 664 F.3d 1180, 1183, 1184 (8th Cir. 2011) (emphasis omitted) (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008)).

CIRCUIT	ISSUE	WINNER	TEST USED & REASONING OF THE COURT
Ninth	Second Amendment Right to Sell Firearms	Gov't	The court upheld the county's zoning requirements, "prohibiting firearm sales near residentially zoned districts, schools and day-care centers, other firearm retailers, and liquor stores" on the grounds that county residents may still obtain firearms absent plaintiff's store and the plaintiffs do not have an independent Second Amendment right to sell firearms. ¹⁷⁵
Tenth	Public Carry of Firearms	Gov't	The panel upheld a grant of qualified immunity to police officers who detained, searched, and issued a citation to a man openly carrying a firearm in Colorado because "when the events at issue in this case occurred it was not clearly established that the Second Amendment guaranteed a citizen the right to openly carry a firearm in public without risk of facing police action." ¹⁷⁶
Eleventh	Gun Restrictions on Army Corps of Engineers Property	Gov't	The District Court denied each of the plaintiffs' as-applied and facial challenges to the restriction of gun use on Army Corps of Engineers property on the ground that the law does not impact the plaintiffs' Second Amendment rights and, even if it does, the law survives intermediate scrutiny. ¹⁷⁷

175. *Teixeira v. County of Alameda*, 873 F.3d 670, 673 (9th Cir. 2017) (en banc).

176. *Sandberg v. Englewood, Colo.*, No. 17-1147, 2018 U.S. App. LEXIS 5718, *20-23 (10th Cir. Mar. 7, 2018).

177. *Georgiacarry.org, Inc. v. U.S. Army Corps of Eng'rs*, 212 F. Supp. 3d 1348, 1374 (N.D. Ga. 2016).

CIRCUIT	ISSUE	WINNER	TEST USED & REASONING OF THE COURT
D.C.	Public Carry of Firearms	Plaintiff	In a divided opinion, the D.C. Circuit panel struck down District of Columbia regulations on concealed carry holding that “the law-abiding citizen’s right to bear common arms must enable the typical citizen to carry a gun.” ¹⁷⁸

In this random sampling of Second Amendment cases from across the United States, the government won in eight out of twelve. This means that plaintiffs invoking the Second Amendment lost their right to keep and bear arms arguments 66% of the time. In the *Friedman* case we’ve been tracking, the government also won, and the assault weapons ban was upheld. In lieu of the prominent circuit-court-created intermediate scrutiny test, the divided panel in *Friedman* created its own test. Yet again, this is the second HEAR factor at work. The majority asked whether a regulation “bans weapons that were common at the time of ratification or those that have ‘some reasonable relationship to the preservation or efficiency of a well regulated militia,’ and whether law-abiding citizens retain adequate means of self-defense.”¹⁷⁹ The panel found that the law passed this novel test and that citizens of Highland Park could use many other types of firearms to protect themselves.¹⁸⁰ Therefore, the court found that the ban did not infringe the right to keep and bear arms.¹⁸¹

The *Friedman* plaintiffs possessed only one more arrow in their quiver—an appeal to the Supreme Court. This petition for certiorari was predictably denied in late 2015.¹⁸² Justice Thomas filed yet another dissent to a denial of certiorari in a Second Amendment case arguing:

Based on its crabbed reading of *Heller*, the Seventh Circuit felt free to adopt a test for assessing firearm bans that eviscerates many of the protections recognized in *Heller* and *McDonald*. . . .

178. *Wrenn v. District of Columbia*, 864 F.3d 650, 668 (D.C. Cir. 2017).

179. *Friedman v. City of Highland Park*, 784 F.3d 406, 410 (7th Cir. 2015) (internal citations omitted).

180. *See id.* at 410–12.

181. *Id.* at 411.

182. *See Friedman v. City of Highland Park*, 136 S. Ct. 447 (2015).

...
 ... That analysis misreads *Heller*[,] . . .

... [and] I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right.¹⁸³

Now picture these sentences written in a majority opinion for the Supreme Court. Perhaps such an opinion would not be assigned to Justice Thomas who has staked out a position as the Court's strongest defender of the right to keep and bear arms. But, it is easy to envision these words being written by Justice Alito¹⁸⁴ or Justice Gorsuch (who has joined Justice Thomas in dissenting from denial of certiorari in a Second Amendment case).¹⁸⁵ Would the Chief Justice¹⁸⁶ and Justice Kavanaugh¹⁸⁷ write about the Second Amendment in this way, or perhaps more importantly, sign on to such an opinion? Who knows and that is the entire point. Laws like the Highland Park assault weapons ban are vulnerable unless and until the nation finds out. In the end, a better and broader question may be: Will the newly configured Roberts Court countenance a

183. *Id.* at 448–50 (Thomas, J., dissenting from the denial of certiorari).

184. *See, e.g.,* *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring in the judgment) (concurring, in a per curiam opinion about whether a stun gun is an arm protected by the Second Amendment and stating: “The lower court’s ill treatment of *Heller* cannot stand. . . [and] [i]f the fundamental right of self-defense does not protect *Caetano*, then the safety of all Americans is left to the mercy of state authorities who may be more concerned about disarming the people than about keeping them safe.”).

185. *Peruta v. California*, 137 S. Ct. 1995, 1996 (2017) (Thomas, J., dissenting from the denial of certiorari) (showing that Justice Gorsuch joined the dissent in this Second Amendment case about public carry of firearms); *see also* Eugene Volokh, Opinion, *Gorsuch Appointment Looks Like a Win for Gun-Rights Supporters*, WASH. POST (June 26, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/26/gorsuch-appointment-looks-like-a-win-for-gun-rights-supporters/?utm_term=.9d298df7be81 [https://perma.cc/YY69-JMGU].

186. This seems to be the big question as the newly-configured Roberts Court takes the stage. *See, e.g.,* Sherman, *supra* note 20 (stating that “Roberts voted in favor of gun rights in two cases that held that Americans have the right to have guns, at least for self-defense in their homes. But the court has since rejected repeated attempts to expand on the right of gun ownership, in part because Roberts and Kennedy would not join the other conservative justices to take on a new case.”).

187. *See, e.g.,* Totenberg, *supra* note 123 (stating that on the D.C. Circuit, “Kavanaugh has staked out an unusually strong position in favor of gun rights. In 2011, he wrote a 52-page dissent from a decision that upheld a D.C. ban on ‘assault weapons’ and magazines of more than 10 rounds of bullets, plus broad registration requirements. . . . In his dissent, Kavanaugh argued that the Second Amendment, like the First Amendment guarantee of free speech, is a fundamental right that can be limited only in the narrowest of circumstances.”).

constitutional guarantee that fails to protect the individual right to keep and bear arms at least two-thirds of the time? Only time will tell. Until then, confusion will continue to reign supreme.

C. Heller's Promise: The Court Is the Best Branch of Government to Make This Call

Finally, the Justices should take a clarifying firearms case because the Supreme Court is the only branch of government constitutionally capable of interpreting the individual right to keep and bear arms *definitively*. Other government officials have leeway to define and set policy affecting the right as well, to be sure. But, the Court has the final say on whether these efforts violate the Constitution. This presents an interesting mix of shared authority with a tie going to the judicial branch. An appropriate analogy is the National Football League and its instant replay review system.

An NFL game is controlled chaos with seven referees on the field keeping order and watching the players for rules infractions. These officials must adhere to the published NFL rules to make each call. They are not allowed to go rogue because a particular result seems more just. Everyone—the players, coaches, fans, management, and league employees—agrees on this role for the on-field officials. In a game, every score, turnover, and even some called penalties are subject to review by a team of NFL replay “technicians” (NFL employees) located in the NFL Headquarters in New York City.¹⁸⁸ Sometimes a team must challenge a call they feel is incorrect. Other situations, like scoring plays and turnovers, are automatically reviewed.¹⁸⁹ Amazingly, the on-field officials make the correct call 95%–97% of the time.¹⁹⁰ But, in those rare cases of error, they may be reversed from a higher authority. A reversal moves the ball back or forward on the field and often places the teams into an entirely different role in the game. Regardless, the call made by the offsite NFL crew is definitive and there is no appeal—even if the decision is wrong, seems subjective, or makes little sense.

The NFL replay process resembles the American constitutional law system in an interesting way. Government representatives, members of the public, and lower court judges are like the coaches, players, and officials on the field

188. See *NFL Instant Replay Process*, NAT'L FOOTBALL LEAGUE, <https://operations.nfl.com/the-officials/these-officials-are-really-good/nfl-instant-replay-process/> [<https://perma.cc/NBC4-NDGK>] (last visited Aug. 10, 2018).

189. See *id.*

190. See *These Officials Are Really Good*, NAT'L FOOTBALL LEAGUE, <https://operations.nfl.com/the-officials/these-officials-are-really-good/> [<https://perma.cc/SZ78-FNNL>] (last visited Aug. 10, 2018).

respectively. Legislative and executive officers at all levels of government are entitled to execute a strategy to improve safety and decrease gun violence (in football lingo “advance the ball”). Gun rights proponents are entitled to defend their individual right to keep and bear arms. Sometimes the plays the legislators call are effective and important policy goals are achieved. Other times, they stagnate or move backwards and important policy goals wither. Losing frustrates some of the fans (the public) who continually advocate for new coaches. Lower court judges are more like the officials on the field monitoring each play. They must follow the rules as closely as possible (in this case, Supreme Court precedent) to make calls and decide lawsuits. Like the NFL on-field officials, these judges do a very good job of enforcement because they are well-trained, and the Supreme Court has made many constitutional rules clear and transparent enough. In the end, however, everyone on the constitutional law field is also subject to an “instant replay review” by top officials in a distant place—in this case, the Supreme Court in Washington. And, like the NFL Headquarters, the Court’s call is definitive.

Regardless of the potential of seeing their statutes overturned, government actors should work diligently to adapt the contours of right to keep and bear arms to twenty-first century American problems like systemic gun violence. And they have . . . at least at the state and local level. There is evidence that many of these officials try mightily and in good faith to make their communities safer within the bounds of the Second Amendment.¹⁹¹ Congress . . . not so much.¹⁹² Regardless, even if Congress overcame its inertia and started to regulate firearms along with states and local jurisdictions, each of these laws could be immediately challenged in court and, eventually, subject to reversal by a majority of the Supreme Court. Each could disappear with the stroke of a pen on a majority opinion that finds their rules incompatible with *Heller*.

The same holds for the Executive Branch side of the equation. For example, President Obama signed an executive order that pushed the Social Security Administration and other federal agencies to disclose mental health records for the purpose of improving firearms background checks.¹⁹³ These types of

191. See *Gun Laws by State: The Complete Guide—2018*, *supra* note 134.

192. See Rebecca Shabad, *Why More Than 100 Gun Control Proposals in Congress Since 2011 Have Failed*, CBS NEWS (June 20, 2016, 6:00 AM), <https://www.cbsnews.com/news/how-many-gun-control-proposals-have-been-offered-since-2011/> [<https://perma.cc/C7LG-5EYA>].

193. See Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 91702, (Dec. 19, 2016) (codified at 20 C.F.R. pt. 421), *available at* <https://www.federalregister.gov/documents/2016/12/19/2016-30407/implementation-of-the-nics-improvement-amendments-act-of-2007> [<https://perma.cc/WT2X-6SP5>] (stating that the “final rules implement provisions of the NICS Improvement Amendments Act of 2007 (NIAA) that require

regulations are subject to nullification by Congress and a future President. In fact, President Trump nullified these mental health regulations via a joint congressional resolution just one month after his inauguration.¹⁹⁴ As with the federal, state, and local laws just described, however, these types of firearms regulations are also subject to the Supreme Court's approval when challenged.

And finally, lower court judges are the actual officials on the field keeping order and enforcing the rules. These courts get it right most of the time. This is why America's judicial branch remains strong. However, like NFL on-field officials, the calls of lower courts are always subject to a higher referee and, in this case, the players and most of the fans (members of the public with Second Amendment rights) can issue challenges in the form of a lawsuit. Even if lower court judges are correct 95% of the time on the right to keep and bear arms, one big decision from the Supreme Court could drastically alter the outcome of the game. Ironically, the NFL rules surrounding the game of football are much clearer than are the Court's rules surrounding the critical life and death issue of firearms. This lack of guidance hurts the people on the field who are actually taking part in the battle. It is time for the ultimate referee to step in and make a few important calls.

To be fair, uncertainty over the status of any firearm regulation would remain even if the Court issued a series of clarifying opinions in the firearms arena. The Justices will always be the most powerful players in this constitutional realm and their newest pronouncement will always trump older precedent. This does not mean, however, that new firearms cases from the Court are unimportant. Strong and clear precedent in this area would make overturning firearms laws and executive orders (which would assumedly be much more compliant with such precedent) much less likely. In the end, even considering the wide disagreement between the Justices over controversial issues like the Second Amendment, the Court tends to respect its own work product. Even precedent unpopular with some on the Court tends to persist.¹⁹⁵

All of this clarifies why firearms cases meet the fourth and final HEAR Factor which asks: "Are the contours of a Constitutional guarantee in the mix and is the Court in the best position (perhaps the only position) to add authoritative guidance?" Justice Breyer made this point powerfully in his *Heller* dissent:

Federal agencies to provide relevant records to the Attorney General for inclusion in the National Instant Criminal Background Check System (NICS).").

194. In February 2017, President Trump signed a Congressional Resolution nullifying these federal regulations. See H.R.J. Res. 40, 115th Cong. (2017) (enacted) (providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Social Security Administration relating to implementation of the NICS Improvement Amendments Act of 2007.

195. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

The [majority] decision will encourage legal challenges to gun regulation throughout the Nation. Because it says little about the standards used to evaluate regulatory decisions, it will leave the Nation without clear standards for resolving those challenges. And litigation over the course of many years, or the mere specter of such litigation, threatens to leave cities without effective protection against gun violence and accidents during that time. As important, the majority's decision threatens severely to limit the ability of more knowledgeable, democratically elected officials to deal with gun-related problems.¹⁹⁶

Justice Breyer's point may be paraphrased as follows:

We Justices are the only officials in the country with the power to definitively interpret the Second Amendment. And, by neglecting to do so more comprehensively in this case, we subject lower court judges and lawmakers across the land to unnecessary legal challenges and hamstringing their ability to make our communities safer from bad actors with guns.

The truth of the matter is that the only *authoritative* guidance on the Second Amendment's application to firearms regulations will be written by the Supreme Court in its next opinion concerning the right to keep and bear arms.

To conclude, Justice Scalia made a quasi-promise in *Heller* writing that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field, . . . [and] there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us."¹⁹⁷ No one can hold the Justices to these statements. But, the Court did give itself the power to "say what the law is" and the time has certainly come for the Justices to say more about the contours of the Second Amendment.

D. *Conclusions: The HEAR Factors Call for a Firearms Case at the Court*

This Part illustrates how the four HEAR factors coalesce into an actual firearms case ripe for the Supreme Court's consideration. In the beginning, lawmakers wrestle with how best to protect their communities from gun violence. They legislate fully aware that nearly every firearms regulation will be challenged under the ambiguous Second Amendment. Hamstrung by a lack of guidance from the Justices, some firearms regulations are over-inclusive

196. *District of Columbia v. Heller*, 554 U.S. 570, 718–19 (2008) (Breyer, J., dissenting) (internal citation omitted).

197. *Id.* at 635 (majority opinion).

while others are under-inclusive. Clarity from the Court would allow for more appropriately tailored laws less vulnerable to being struck down by the newly configured Roberts Court. This situation satisfies the first HEAR factor of hamstrung officials hindered in executing their job duties because of unclear constitutional boundaries on their authority.

The discussion then pivots to the legal challenges where plaintiffs consistently invoke the Second Amendment. Adjudicating the meaning of the Second Amendment in light of *Heller*'s limited guidance causes much confusion and frustration. This is often expressed by lower court judges across the United States as they muddle through their specific cases. This state of affairs satisfies the second HEAR factor which asks whether confusion reverberates through the circuit courts to the point where legal tests are created that tiptoe around opaque rulings or dicta of the Supreme Court. The circuit-court-created intermediate scrutiny test (found nowhere in the *Heller* majority) has been specifically designed by the lower courts to balance the government's compelling interest in increasing safety and decreasing violence and the Second Amendment right to keep and bear arms. This certainly tiptoes around *Heller*'s pronouncement that balancing tests should not be used in this context.

In the end, a random sampling of cases from each relevant circuit showed that the firearms regulations are upheld against Second Amendment challenges 66% of the time. The question as to whether the new Roberts Court will let this percentage stand—particularly after its strong view of the Second Amendment in *Heller* and *McDonald*—must be posed. This matters because the contours of a constitutional guarantee are in the mix and only the Court is in the position to add authoritative guidance. This satisfies the fourth HEAR factor of the ultimate referee stepping in to make the call.

The third HEAR factor—identifying an appropriately postured case to accept and decide—is all that remains to be discussed. And that factor forms the subject of the next Part which delves into the two types of firearms cases that present plenty of ripe certiorari petitions for a Supreme Court opinion.

IV. TWO FIREARMS TOPICS OVERLY RIPE FOR SUPREME COURT ADJUDICATION

I can't get inside [the Justices'] heads, but for now, it doesn't matter. States where politicians have the will should get to regulating! The Fourth Circuit says that, even under *Heller*, you can regulate weapons of war. LET'S DO THAT. If the courts won't stand in the way, all you have to do is overcome freaking crazy people who think you need an assault rifle to shoot ducks and intimidate counter-protesters at their Nazi rallies.¹⁹⁸

-- Elie Mystal, ABOVE THE LAW

The quote that begins this Part is extraordinary. It also advocates a legitimate position based on the Court's longstanding neglect of the Second Amendment. The author's basic point is that consistent certiorari denials are equivalent to the Court's tacit blessing to regulate away against the strong version of the right to keep and bear arms. As detailed above, however, many of these cross-your-fingers-and-hope regulations are risky propositions which may be threatened in the likely event that a more conservative Roberts Court reads *Heller* differently. Though the timing and substance of such an opinion is impossible to predict, the replacement of Justice Kennedy with Justice Kavanaugh combined with Justice Thomas's tenacity in this area certainly increase its odds.

A much better course is for the Justices to explain more clearly how the Second Amendment is properly applied to the contours of these laws. Then . . . eager state and local governments may "get to regulating" with respect to firearms. At this point, however, their enactments will be more consistent with precedent and, therefore, more likely to endure. If the goal is to effectively address the problem of gun violence in this country within constitutional boundaries, jurisdictions need to cultivate longstanding and effective laws as opposed to hyper-reactive laws that remain vulnerable on appeal. To be fair, if the Court stays the course and continues to ignore this area of the law, then the free-for-all described in the quote above will become par for the course. Few expect officials to sit on their hands awaiting the next big firearms case while gun violence tears apart communities. In fact, few would vote for such idle politicians. This situation represents yet another reason why the Court should act expeditiously.

198. Elie Mystal, *Supreme Court Declines Cert in 4th Circuit Gun Case, So... Let's Get to Regulating!*, ABOVE LAW (Nov. 29, 2017, 12:02 PM), <https://abovethelaw.com/2017/11/supreme-court-declines-cert-in-4th-circuit-gun-case-so-lets-get-to-regulating/> [<https://perma.cc/BMP9-4TJ9>].

Regardless of the future consequences, state and local governments are already regulating away when it comes to firearms. The most controversial among these laws are: regulations or bans on assault weapons and large-capacity magazines and public carry of firearms whether concealed or in the open. This Part argues that the next big Second Amendment case should come from one of these two areas because each are flagged as ripe by the HEAR Framework. This Part begins with the limited guidance provided by *Heller* and then uses these tidbits to evaluate each area under the four factors.

A. Tidbits from *Heller*

The Supreme Court has offered limited guidance on crafting firearms regulations outside of the rule that governments cannot ban possession or use of handguns for self-defense in the home.¹⁹⁹ Justice Scalia's opinion in *Heller* offers the most definitive (though still opaque) blueprint for future regulations and contains a few brief paragraphs that limit the right to keep and bear arms. He wrote:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on *longstanding prohibitions on the possession of firearms by felons and the mentally ill*, or *laws forbidding the carrying of firearms in sensitive places* such as schools and government buildings, or *laws imposing conditions and qualifications on the commercial sale of arms*.²⁰⁰

A footnote adds a bit more clarity to the mix: “We identify these *presumptively lawful regulatory measures* only as examples; our list does not purport to be exhaustive.”²⁰¹ Immediately thereafter, the opinion discusses potential limitations on the types of weapons protected by the Second Amendment:

We also recognize another important limitation on the right to keep and carry arms. . . . [T]he sorts of weapons protected [by the Second Amendment] were those “in common use at the time.” We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of “dangerous and unusual weapons.” It may be objected that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the Second Amendment right is

199. *Heller*, 554 U.S. at 635.

200. *Id.* at 626–27 (emphasis added).

201. *Id.* at 627 n.26 (emphasis added).

completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the Second Amendment's ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the prefatory clause and the protected right cannot change our interpretation of the right.²⁰²

Later in the opinion, Justice Scalia noted that no interest-balancing test should be used to adjudicate future Second Amendment cases. He writes:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding “interest-balancing” approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon.²⁰³

In a footnote, the Court also eliminates the rational basis test as a proper tool to evaluate alleged invasions of the right to keep and bear arms.²⁰⁴ With this guidance in mind, the following chart describes what we now know and what we wish we knew after *Heller*.

202. *Id.* at 627–28 (internal citations omitted).

203. *Id.* at 634 (emphasis omitted).

204. *Id.* at 628 n.27 (stating that “[i]f all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.”).

AFTER <i>HELLER</i> , THE GOVERNMENT MAY:	OPEN QUESTIONS AFTER <i>HELLER</i>
Prohibit felons from possessing firearms . . .	<ul style="list-style-type: none"> ∞ What about decades-old felonies? ∞ What did the Court mean by “longstanding prohibitions” on the possession of firearms? Are recently enacted laws restricting purchase, possession, and use by felons unconstitutional?
Prohibit the mentally ill from possessing firearms . . .	<ul style="list-style-type: none"> ∞ What about those whose mental illness has been remedied? ∞ What did the Court mean by “longstanding prohibitions” on the possession of firearms? Are recently enacted laws restricting purchase, possession, and use by those deemed mentally ill unconstitutional?
Forbid firearms in sensitive places like schools and government buildings . . .	<ul style="list-style-type: none"> ∞ What about armed security guards in schools to protect against mass shootings? ∞ Does the phrase “longstanding prohibitions on the possession of firearms” at the beginning of the paragraph apply to this category? ∞ Are the only sensitive places covered by this guidance those where firearms were prohibited in the seventeenth century? That, of course, would not include airports or the department of motor vehicles, for example.
Impose conditions and qualifications on the commercial sale of arms . . .	<ul style="list-style-type: none"> ∞ Do businesses have Second Amendment rights of their own? ∞ Does the phrase “longstanding prohibitions on the possession of firearms” at the beginning of the paragraph apply to this category? That, of course, would not include prohibitions on selling bump stocks and large capacity magazines, for example.
Consider the prohibitions mentioned above to be “presumptively lawful regulatory measures” . . .	<ul style="list-style-type: none"> ∞ Does that mean that laws governing these topics should fall outside of the Second Amendment and only require a rational basis to be upheld? ∞ Are such laws subject to any level of scrutiny beyond rational basis?
The Court’s list of presumptively lawful measures is not exhaustive . . .	<ul style="list-style-type: none"> ∞ What test may a lower court use to determine whether a law makes it onto this list? Is it intermediate scrutiny, strict scrutiny, or something else?

AFTER <i>HELLER</i> , THE GOVERNMENT MAY:	OPEN QUESTIONS AFTER <i>HELLER</i>
Prohibit “dangerous and unusual weapons” . . .	<ul style="list-style-type: none"> ∞ Does this include assault weapons and large-capacity magazines? These are the types of weapons that would give a state militia outside the national guard a chance in a battle against a tyrannical government. ∞ Is a handgun “dangerous and unusual” when carried openly on a public street? What if the firearm was concealed?
Not employ an interest-balancing or rational basis test to adjudicate alleged invasions of the individual right to keep and bear arms . . .	<ul style="list-style-type: none"> ∞ This means that rational basis review is out. But, what test then governs alleged invasions of the individual right to keep and bear arms?

There are many more open questions when it comes to the Second Amendment as interpreted in *Heller*. However, these are the most critical among them and constitute the group used to evaluate regulations on assault weapons and public carry in detail for the remainder of this Part.

B. Assault Rifle & Large Capacity Magazine Bans

Assault rifles are commonly defined as hand-held guns, similar to those used by a military force, capable of shooting many rounds very rapidly from a detachable magazine.²⁰⁵ These weapons tend to have military-style features such as “a pistol grip, folding stock, detachable stock, barrel shroud, or threaded barrel.”²⁰⁶ The automatic version continues to fire rounds as long as the trigger

205. *Assault Rifle*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/assault%20rifle> [<https://perma.cc/8DUK-S5D9>] (last updated Dec. 7, 2018). It is interesting to note that this definition was last updated in late 2018. Gun rights groups argue that gun control groups intentionally push a misleading definition of semi-automatic assault rifles to better fit them into existing weapons bans on fully automatic weapons. See, e.g., Bre Payton, *Merriam-Webster Online Dictionary Changes Definition of “Assault Rifle” to One That Matches Gun Control Pushers*, FEDERALIST (Mar. 31, 2018), <http://thefederalist.com/2018/03/31/merriam-webster-online-dictionary-changes-definition-assault-rifle/> [<https://perma.cc/29MZ-JRRQ>].

206. *Ban Assault Weapons and High-Capacity Ammunition Magazines*, AM. PROGRESS (Mar. 9, 2018), <https://www.americanprogress.org/issues/guns-crime/reports/2018/03/09/447720/ban-assault->

is pressed. These weapons are typically referred to as machine guns and some can discharge over 500 bullets per minute.²⁰⁷ The semi-automatic version rapidly fires bullets as well. But, each firing requires a separate trigger pull. This means that semi-automatic weapons fire fewer rounds per minute than machine guns but are still brutally effective. Additionally, current technology allows for semi-automatic weapons to be customized and function like machine guns.²⁰⁸

It should be noted that this broad definition is contentious. Many gun rights groups allege that the term “assault weapon” has been expanded by gun control groups to cover more weapons under state and local bans.²⁰⁹ Regardless of the definitional tiff, the general concept of an assault weapon is well known in American culture, and the weapon itself is perceived much differently than a handgun. This Section will use the common definition laid out here as it is helpful to navigate the cases which use it as well. A related piece of equipment—large capacity magazines or LCMs—also merits a definition at this point. LCMs are ammunition-feeding devices (magazines) capable of carrying at least ten bullets.²¹⁰ An assault weapon without a large capacity magazine would make little sense, sort of like “deafening silence” or “growing smaller.”

With such great firepower, assault weapons can do a great deal of damage in a very short period of time. In fact, over the past decade, “the five deadliest mass shooting incidents [occurring in Las Vegas, Orlando, Aurora, Sutherland Springs, and Parkland] involved the use of” assault weapons and some type of

weapons-high-capacity-ammunition-magazines/ [https://perma.cc/F7LH-G5RP] [hereinafter *Assault Weapons*].

207. See *Machine Gun*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/technology/machine-gun> [https://perma.cc/DYN5-M2AM] (last visited Aug. 7, 2018) (claiming that a typical machine gun can fire between 500 and 1,000 rounds per minute).

208. See, e.g., Ed Leefeldt, *Stephen Paddock Used a “Bump Stock” to Make His Guns Even Deadlier*, CBS NEWS (Oct. 4, 2017, 5:55 PM), <https://www.cbsnews.com/news/bump-fire-stock-ar-15-stephen-paddock-guns-deadlier/> [https://perma.cc/Q77A-SX3M] (stating that “some of the guns that Stephen Paddock used to shoot more than 500 people in Las Vegas had been modified to fire as automatic weapons, they were perfectly legal, according to rules established by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).”).

209. See, e.g., Jeff Daniels, *Definition of What’s Actually an “Assault Weapon” Is a Highly Contentious Issue*, CNBC (Feb. 21, 2018), <https://www.cnbc.com/2018/02/21/definition-of-whats-an-assault-weapon-is-a-very-contentious-issue.html> [https://perma.cc/55MJ-WFMX] (writing that “exactly what constitutes an ‘assault weapon’ is a contentious issue and something that riles up some gun advocates. In fact, many of the large gun groups consider ‘assault weapon’ a made up and ambiguous term invented by the anti-gun lobby in the 1980s, maintaining that guns don’t actually ‘assault’ people.”).

210. See *Assault Weapons*, *supra* note 206.

large capacity magazine.²¹¹ These were the weapons of choice to maximize casualties. Perhaps surprisingly, however, assault weapons and guns equipped with high-capacity magazines are only used in 36% of gun crimes overall; the bulk of firearms crime comes from handguns.²¹²

In the end, the potential for devastation at the hands of a bad actor firing an assault weapon leads legislators to restrict or ban their use. Even Congress got in the act and passed an assault weapons ban that ran from 1994 to 2004.²¹³ It was styled the Public Safety and Recreational Firearms Use Protection Act and prohibited the manufacture, possession, and transfer of semiautomatic assault weapons.²¹⁴ Also banned were large capacity magazines. This law contained some wide loopholes and a grandfather clause that exempted assault weapons and LCMs that were lawfully possessed on the date of its enactment.²¹⁵ It expired in 2004 and was not renewed.²¹⁶

1. The Fight Moves to the States: The Typical State/Local Assault Weapons Ban

Since 1994, Congress has been relatively silent on this issue²¹⁷ even though members of Congress have vociferously lobbied for another ban.²¹⁸ This leaves the heavy lifting to state and local governments desiring to regulate or ban these types of weapons. Contemporary laws from these jurisdictions that ban assault weapons and large capacity magazines are typically very thorough and “can be categorized according to: (1) the definition(s) of ‘assault weapon’; (2) the activities that are prohibited; (3) whether pre-ban weapons are grandfathered;

211. *High Capacity Magazines and Assault Weapons*, EVERYTOWN FOR GUN SAFETY (Apr. 25, 2018), <https://everytownresearch.org/high-capacity-magazines-assault-weapons/> [<https://perma.cc/A7Z6-XMFJ>].

212. *See Assault Weapons*, *supra* note 206.

213. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1994) (codified at 18 U.S.C. § 921).

214. *See id.*

215. *Id.*

216. *Id.*

217. *See, e.g.*, Shabad, *supra* note 192 (stating that in “just the past five years, lawmakers have introduced more than 100 gun control proposals in Congress, since Gabrielle Giffords and 18 other people were shot in Tucson, Arizona in January 2011. Not one of them has been passed into law, and very few of the proposals even made it to the House or Senate floor.”).

218. *See, e.g.*, Christopher Ingraham, *The Two Assault Weapons Bans Before Congress Are Co-Sponsored by 195 Democrats and 0 Republicans*, WASH. POST (Feb. 28, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/02/28/the-two-assault-weapons-bans-before-congress-are-co-sponsored-by-195-democrats-and-0-republicans/?utm_term=.bcf6ec2a81df [<https://perma.cc/2V7D-9NK3>].

(4) whether grandfathered weapons must be registered; and (5) how transportation, transfer, and possession of grandfathered weapons are treated.”²¹⁹ To date, seven states ban assault weapons and LCMs; Colorado’s ban only includes LCMs.²²⁰

Maryland’s assault weapons ban, for example, is based on the definition of assault weapons and prohibits the transport into the state as well as the possession, sale, offer of sale, transfer, purchase, or receipt of an assault weapon with the ability to hold more than ten bullets.²²¹ The types of guns on the prohibited list include automatic and semi-automatic rifles.²²² If the gun is not on the list, it may be considered a “copycat” assault rifle and similarly banned.²²³ The state’s large capacity magazine ban prohibits the manufacture, sale, offer for sale, purchase, receipt, or transfer (but not the possession) of a detachable ammunition feeding device for more than ten bullets.²²⁴ Violators are subject to a maximum of three years in prison and a \$5,000 fine unless the assault rifle was used in a felony or crime of violence and then the penalties increase.²²⁵

2. Let the Lawsuits Begin

As illustrated in Part II, most firearms laws are quickly challenged in court as violations of the Second Amendment to keep and bear arms, and the Maryland law was no exception. The governor signed the Maryland law on May 16, 2013, and it became effective on October 1, 2013.²²⁶ It was challenged in court on September 26, 2013—just over four months after signing and a week prior to its effective date!²²⁷ The complaint in the case of *Kolbe v. Hogan*, of course, invoked the Second Amendment along with Fourteenth Amendment Equal Protection and Due Process challenges.²²⁸ And, as typical in firearms cases, the lead plaintiffs were joined by various gun rights organizations such

219. *Assault Weapons: Summary of State Law*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <http://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#state> [<https://perma.cc/MFP3-M4KD>] (last visited Aug. 13, 2018).

220. *See id.*

221. *See* Md. Code Ann., Crim. Law § 4-303(a) (West 2018).

222. *Id.* Many of the weapons banned under Maryland law are on a list codified in another part of the Maryland code. *See id.* § 4-301(e)(2) (including guns from a list codified in a Maryland law on Public Safety).

223. *Id.* § 4-301(h).

224. *Id.* § 4-306(b)(1).

225. *Id.* § 4-306(a).

226. *See* *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017).

227. *See id.* at 121–23.

228. *See id.* at 123.

as the Maryland State Rifle and Pistol Association, the Maryland Licensed Firearms Dealers Association, and even a sporting goods store.²²⁹

In a rare and telling twist, the plaintiffs lost in the district court on summary judgment, won on appeal, and then lost again on rehearing en banc. The en banc court found that assault weapons and LCMs are not protected by the Second Amendment.²³⁰ The court then stated that, even if that decision is in error, the Maryland law passes a circuit-court-created intermediate scrutiny test.²³¹ The majority cited a famous line from *Heller* that read “the right secured by the Second Amendment is not unlimited [in that it is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”²³² The idea is that the types of weapons that would be effective against the United States military today are not necessarily the types contemplated by the framers.²³³ This excludes assault weapons and LCMs from protection. The Supreme Court then predictably denied certiorari in 2017.²³⁴

The following chart displays how easily *Kolbe* passes the HEAR Framework and, therefore, why the case merited the Court’s attention. However, since the certiorari petition was denied, the assault weapons and LCM ban remains in place subject, as always, to a probable narrowing or possible reversal under the newly configured Roberts Court:

FACTOR	MET	APPLICATION TO ASSAULT WEAPONS & LCM BANS
HAMSTRUNG OFFICIALS	✓	<p>QUESTION: Are government officials hindered in executing their job duties because of unclear constitutional boundaries on their authority?</p> <p>ANSWER: Yes! Justice Scalia noted in <i>Heller</i> that the right to keep and bear arms was “not unlimited” and the Second Amendment does not “protect the right of citizens to carry arms for any sort of confrontation.”²³⁵ The opinion then hints that the types of weapons in common use at the time of the founding and possessed by law-abiding citizens for lawful purposes are</p>

229. *See id.* at 123–24.

230. *See id.* at 130.

231. *See id.*

232. *Id.* at 131 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

233. *Id.*

234. *See Kolbe v. Hogan*, 138 S. Ct. 469 (2017).

235. *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (emphasis omitted).

FACTOR	MET	APPLICATION TO ASSAULT WEAPONS & LCM BANS
		<p>protected.²³⁶ This connects the militia clause to the right to keep and bear arms operative clause and the militias-of-old required people to bring the arms they kept at home to duty.²³⁷ Finally, the <i>Heller</i> court, citing Blackstone, noted historical prohibitions on carrying “dangerous and unusual” weapons.²³⁸ Problematically, lawmakers are faced with difficult questions based on this scattered and opaque guidance: For example, does <i>Heller</i> implicitly indicate that handguns are at the core of the Second Amendment and assault-style weapons are on the periphery because they are more “dangerous and unusual”? Are these the types of arms that law-abiding people keep at home for lawful purposes? If so, would that indicate that assault weapons are put to “common use”?</p> <p>States cannot divine these answers for certain and so they are hamstrung. Taking a leap of faith in the absence of further guidance, Maryland and six other states operate under the belief that assault weapons and LCMs are unprotected or perhaps only slightly protected by the Second Amendment—even when kept at home for self-defense. Accordingly, their bans are broad and certainly subject to being limited or even struck down by the newly configured Roberts Court.</p>
ECHOES OF CONFUSION	✓	<p>QUESTION: Does confusion by judges reverberate throughout the circuit courts of appeals to the point where legal tests are created that tiptoe around opaque rulings or dicta in Supreme Court caselaw?</p> <p>ANSWER: Yes! The <i>Kolbe</i> case involved an en banc court which reversed a panel which had just reversed a district court judge. This is a rare occurrence and indicates how fraught this issue is with confusion. Adding to the confusion, the en banc court refused to</p>

236. *See id.* at 624–25.

237. *See id.* at 627.

238. *Id.*

FACTOR	MET	APPLICATION TO ASSAULT WEAPONS & LCM BANS
		<p>concede—as had a few sister circuits—that these weapons are protected at all by the Second Amendment.²³⁹ In reaching that decision, the majority expressed its confusion with interpreting <i>Heller</i>:</p> <p>On the issue of whether the banned assault weapons and large-capacity magazines are protected by the Second Amendment, the <i>Heller</i> decision raises various questions. Those include: How many assault weapons and large-capacity magazines must there be to consider them “in common use at the time”? In resolving that issue, should we focus on how many assault weapons and large-capacity magazines are owned; or on how many owners there are; or on how many of the weapons and magazines are merely in circulation? Do we count the weapons and magazines in Maryland only, or in all of the United States? Is being “in common use at the time” coextensive with being “typically possessed by law-abiding citizens for lawful purposes”? Must the assault weapons and large-capacity magazines be possessed for any “lawful purpose” or, more particularly and importantly, the “protection of one’s home and family”? Is not being “in common use at the time” the same as being “dangerous and unusual”? Is the standard “dangerous and unusual,” or is it actually “dangerous or unusual”?²⁴⁰</p>

239. *Kolbe v. Hogan*, 849 F.3d 114, 136 (4th Cir. 2017).

240. *Id.* at 135–36 (emphasis omitted).

FACTOR	MET	APPLICATION TO ASSAULT WEAPONS & LCM BANS
		Finding the issue unclear, the court broke with other states that enacted these bans and upheld the Maryland laws under the rational basis test. ²⁴¹ This is a no-no if the Supreme Court later rules that the right to keep and bear arms does include these types of weapons and magazines.
APPROPRIATENESS	✓	QUESTION: Has an appropriately postured case (one with a broadly applicable fact pattern, clear standing, and no serious procedural errors) made its way to a petition for certiorari? ANSWER: Yes! The <i>Kolbe</i> case was an appropriate vehicle for a certiorari grant. There were no serious procedural bars that the en banc court had to clear up or sidestep around.
REFEREE	✓	QUESTION: Are the contours of a constitutional guarantee in the mix and is the Court in the best position (perhaps the only position) to add authoritative guidance? ANSWER: Yes! Only the Supreme Court can decide whether the individual right to keep and bear arms protects a person's right to purchase, possess, and use assault weapons and large capacity magazines. The Court is also the only actor that can define the scope of proper assault weapons regulations. This issue will only grow more divisive until the Court takes a case and clarifies the scope of how assault weapons and LCMs fit into the right to keep and bear arms.
A SAMPLE OF RECENT CERTIORARI DENIALS IN THE ASSAULT WEAPONS ARENA		<ul style="list-style-type: none"> • 2015 / <i>Friedman v. Highland Park</i> (city assault weapons ban upheld at the appellate court level)²⁴² • 2016 / <i>Shew v. Malloy</i> (Connecticut assault weapons ban upheld at the appellate court level)²⁴³ • 2017 / <i>Kolbe v. Hogan</i> (Maryland assault weapons ban upheld at the appellate court level)²⁴⁴

241. *See id.*

242. 136 S. Ct. 447, 447 (2015). Justice Thomas (joined by Justice Scalia) dissented from the denial of certiorari. *See id.* at 447–50.

243. 136 S. Ct. 2486 (2016).

244. 138 S. Ct. 469 (2016).

After the en banc court's reversal in *Kolbe*, a circuit split began to develop. The Ninth Circuit recently upheld a preliminary injunction on California's LCM ban.²⁴⁵ The court stated that these weapons and magazines have a "reasonable relationship to the preservation or efficiency of a well regulated militia."²⁴⁶ Therefore, the Second Amendment and its protection for the individual right to keep and bear arms is in play. This opinion from the Ninth Circuit is, of course, the opposite of the Fourth Circuit's decision in *Kolbe*. The emerging circuit split is yet another factor that should demonstrate to the Court that it is time to take an assault weapons case.

3. Public Carry Regulations

Recall that *Heller* covered the regulation of handguns *inside of the home*. The majority made clear that this was the only topic on the table.²⁴⁷ The case says very little about the right to keep and bear firearms *outside of the home*. There are two types of this so-called public carry: concealed carry and open carry. Concealed carry means that a carried firearm is not visible to the casual observer while open carry means that a carried firearm must be at least minimally visible to the casual observer.²⁴⁸ There are pros and cons to public carry of all types. Perhaps the largest benefit to possessing a gun away from home is the ability for people to defend themselves/others in places where they are more exposed to bad actors. Supporters of public carry also believe that the practice can potentially deter crime. For example, if someone tries to attack you in a public place and you have a weapon, the would-be attacker is likely to back off.²⁴⁹ This is particularly true in situations where things happen too quickly for law enforcement to arrive and help. On the other hand, opponents

245. See *Duncan v. Becerra*, No. 17-56081, 2018 U.S. App. LEXIS 19690, *7 (9th Cir. July 17, 2018).

246. *Id.* at *5 (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939)).

247. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (stating that "since this case represents this Court's first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field" and "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.").

248. See *Concealed Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (Dec. 2017), <https://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/concealed-carry/> [<https://perma.cc/VQ2C-ERFT>]; see also *Open Carry*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (Dec. 2017), <http://lawcenter.giffords.org/gun-laws/policy-areas/guns-in-public/open-carry/> [<https://perma.cc/MYK9-WBFC>].

249. Roey Hadar, *Caught on Video: Restaurant Worker Cold-cooked, Suspect Then Driven Away by Co-worker With a Gun*, ABC NEWS (July 6, 2018, 9:26 PM), <https://abcnews.go.com/US/caught-video-restaurant-worker-cold-cooked-suspect-driven/story?id=56418753> [<https://perma.cc/QSG5-QRCT>] (recounting the story of the attack and also the fact that another employee pulled out a concealed weapon which caused the attacker to back off).

of the practice argue that, if improperly trained or weaker than an opponent, these weapons are more likely to be taken and used against a victim.²⁵⁰ Carrying of weapons also makes the unarmed segment of the population feel uncomfortable and less safe. Another negative is that a confrontation is more likely to turn lethal when someone is armed. Finally, it is likely that criminals will carry firearms if they believe that their victims will be armed.

Most states have legislated in favor of public carry, particularly concealed carry. To date, no federal court of appeals has held that the Second Amendment does not extend beyond the home.²⁵¹ There are three types of laws regulating concealed carry: (1) Unrestricted, (2) Shall Issue, and (3) May Issue. Unrestricted jurisdictions do not require a permit to conceal a gun in public. Nine states are unrestricted jurisdictions.²⁵² Shall Issue jurisdictions require a permit to carry a firearm in public. Thirty-two states plus the District of Columbia are Shall Issue jurisdictions.²⁵³ Finally, May Issue jurisdictions make it much more difficult to carry a firearm in public; permits are still required but are often impossible to obtain absent a proven threat to one's safety or property.²⁵⁴ There are generally exceptions for traveling with firearms for hunting, gun repair, firearms range training, firearms shows, and to and from a firearms dealer.²⁵⁵ However, the firearm must be out of reach for immediate use and in an enclosed container.²⁵⁶ Nine states are May Issue jurisdictions and, of those, eight severely restrict the ability to obtain a permit.²⁵⁷ Open carry laws

250. See *Concealed Carry*, *supra* note 248.

251. *But see* *Williams v. State*, 10 A.3d 1167, 1169, 1177 (Md. 2011) (holding that a statute requiring a permit to carry a handgun outside the home “is outside of the scope of the Second Amendment” and stating that “[i]f the Supreme Court . . . meant its holding to extend beyond home possession, it will need to say so more plainly.”).

252. See *Guide to the Interstate Transportation of Firearms*, NRA INST. FOR LEGIS. ACTION, <https://www.nra.org/gun-laws/> [<https://perma.cc/Z74K-L6KV>] (last visited Aug. 9, 2018) (showing that these nine states include: Alaska, Arizona, Kansas, Maine, Mississippi, Missouri, New Hampshire, Vermont, and West Virginia).

253. See *id.* (showing that these thirty-two states include: Alabama, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin, and Wyoming).

254. See, e.g., HAW. REV. STAT. § 134-9 (2016).

255. See, e.g., *id.* § 134-23 to -27.

256. See, e.g., *id.* § 134-5.

257. See *Guide to the Interstate Transportation of Firearms*, *supra* note 252 (showing that the states which make it the most difficult to obtain a concealed carry permit include: California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York (with even stricter rules in New York City),

are not quite as regimented though the practice is also allowed in the majority of states.²⁵⁸

The Second Amendment plays a prominent role in lawsuits challenging restrictions on the public carry of firearms. Fierce battles are playing out in the circuit courts. This is particularly true in the Ninth Circuit where the issue ping pongs from district courts, to appellate panels, to en banc hearings and then back for another round on a slightly different topic that generates differing opinions. Here is a brief summary:

1. The state of California passed a law requiring an applicant for a concealed carry permit to show good cause beyond the interests of self-defense.²⁵⁹
2. A group of plaintiffs sued arguing that the law violates their right to self-defense protected by the Second Amendment.²⁶⁰ The District Court upheld the regulation in a case styled *Peruta v. County of San Diego*. The court zoomed passed whether concealed carry of firearms is a practice protected by the Second Amendment and upheld the law under the circuit-court-created intermediate scrutiny test.²⁶¹ The court partially justified its decision because people were still allowed to defend themselves via open carry in California if they met the legal requirements.²⁶²
3. A three-judge panel of the Ninth Circuit reversed the District Court.²⁶³ The decision was based on the fact that people have a right to keep and *bear* arms, and the bearing of arms is an act that is done in public.²⁶⁴
4. The Ninth Circuit then convened an en banc hearing and reversed the panel.²⁶⁵ The majority there held that “the Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.”²⁶⁶ This case answered the concealed carry

and Rhode Island). Connecticut is a May Issue state whose permitting restrictions are not as tough as the other eight states on the May Issue list. *See id.*

258. *See Open Carry, supra* note 248.

259. *See* CAL. PENAL CODE § 26150 (2016).

260. *See* *Peruta v. County of San Diego*, 758 F. Supp. 2d 1106, 1113 (S.D. Cal. 2010).

261. *See id.* at 1115.

262. *See id.* at 1114–15.

263. *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (*Peruta I*).

264. *See id.* at 1151–52.

265. *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (en banc) (*Peruta II*).

266. *Id.* at 924.

question, at least in the Ninth Circuit, but left open the question of whether the Second Amendment then required that open carry then be allowed. In other words, does the Constitution require that some form of public carry be lawful?

5. In 2012, a federal District Court in Hawaii decided a case on the question left open in *Peruta*—the legality of open carry restrictions when they are the only means of self-defense with a firearm in public.²⁶⁷ Here, a district court judge upheld Hawaii's severe legal restrictions on the open carry of firearms stating that the "right to carry a gun outside the home is not part of the core Second Amendment right."²⁶⁸
6. On July 24, 2018, a divided panel of Ninth Circuit judges in Hawaii reversed the lower court holding stating, "for better or for worse, the Second Amendment does protect a right to carry a firearm in public for self-defense."²⁶⁹

It will be interesting to see whether the game of Second Amendment ping pong will continue and whether the Ninth Circuit will take this case en banc and reverse. Looking back, it appears that at least seven of the eleven judges who heard the en banc *Peruta* appeal agreed that the Second Amendment allows for restrictions on any public carry of firearms.²⁷⁰ Judge Graber's concurrence, which was joined by two other judges, stated that California's regulations on concealed carry struck "a permissible balance between 'granting handgun permits to those persons known to be in need of self-protection and precluding a dangerous proliferation of handguns on the streets.'"²⁷¹ The idea being that the Second Amendment may well require some form of public carry but states may limit that right to people who can articulate a legitimate threat to their person or property. Four judges in the majority in this case seemed to agree stating, "if we were to reach that question, we would entirely agree with the answer the concurrence provides."²⁷² This was all dicta, of course, and legal experts await the Ninth Circuit's decision on whether to convene en banc yet again to decide a controversial Second Amendment case.

267. *See generally* Young v. Hawaii, 911 F. Supp. 2d 972 (D. Haw. 2012).

268. *See id.* at 989.

269. Young v. Hawaii, No. 12-17808, 2018 U.S. App. LEXIS 20525, at *64 (9th Cir. July 24, 2018).

270. *See id.* at *66 (Clifton, J., dissenting).

271. *Peruta II*, 824 F.3d at 942 (Graber, J., concurring).

272. *Id.* (majority opinion).

Though the HEAR framework does not require a circuit split, one exists on this issue. The District of Columbia Circuit recently ruled that the District's very restrictive ban on public carry (including a good cause requirement that is difficult to meet)²⁷³ violates the Second Amendment.²⁷⁴ The majority of the divided panel refused to apply any level of means/ends scrutiny and held:

We pause to draw together all the pieces of our analysis: At the Second Amendment's core lies the right of responsible citizens to carry firearms for personal self-defense beyond the home, subject to longstanding restrictions. These traditional limits include, for instance, licensing requirements, but not bans on carrying in urban areas like D.C. or bans on carrying absent a special need for self-defense. In fact, the Amendment's core at a minimum shields the typically situated citizen's ability to carry common arms generally. The District's good-reason law is necessarily a total ban on exercises of that constitutional right for most D.C. residents. That's enough to sink this law²⁷⁵

On the other side of the circuit split are the Second,²⁷⁶ Third,²⁷⁷ Fourth,²⁷⁸ and Ninth²⁷⁹ Circuits who have written that the Second Amendment may not even extend the right to keep and bear arms outside of the home. The idea is that, as the firearms discussion moves outside the home, "rights have always been more limited, because public safety interests often outweigh individual interests in self-defense."²⁸⁰ This issue is not going away as evidenced by the Hawaii case filed in late 2018. This legal drama clearly illustrates why the issue of public carry passes the four factors of the HEAR framework with flying colors. But, just to make the case more thoroughly:

FACTOR	MET	APPLICATION TO THE PUBLIC CARRY ARENA
HAMSTRUNG OFFICIALS	✓	<p>QUESTION: Are government officials hindered in executing their job duties because of unclear constitutional boundaries on their authority?</p> <p>ANSWER: Yes! Considering the different standards</p>

273. See D.C. CODE § 22-4506(a)–(b) (2018).

274. See *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017).

275. *Id.*

276. *Kachalsky v. County of Westchester*, 701 F.3d 81, 89 (2d Cir. 2012).

277. *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013).

278. *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013).

279. *Peruta v. County of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc).

280. *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011).

		<p>and interpretations across the nation on the issue of public carry, legislators are left in limbo. Is it constitutional to ban public carry altogether? This would mean that <i>Heller</i> only applied to firearms use in the home. Or, must lawmakers leave at least one means of firearms possession and use available for people to defend themselves in public? Do licensing requirements for public carry that require good cause past the need for self-defense violate the right to keep and bear arms? Possessing the answers to these questions would surely free lawmakers to do their jobs more efficiently and effectively.</p>
<p>ECHOES OF CONFUSION</p>	<p>✓</p>	<p>QUESTION: Does confusion by judges reverberate throughout the circuit courts of appeals to the point where legal tests are created that tiptoe around opaque rulings or dicta in Supreme Court case law? ANSWER: Yes! The dissent in the appellate panel hearing the <i>Young</i> case from Hawaii remarked: [T]he majority opinion has disregarded the fact that states and territories in a variety of regions have long allowed for extensive regulations of and limitations on the public carry of firearms. Many have taken the approach that Hawaii has taken for almost a century. Such regulations are presumptively lawful under <i>Heller</i> and do not undercut the core of the Second Amendment. In addition, the majority opinion misconceives the intermediate scrutiny test, assumes without support in the record that Hawaii's statute operates as a complete ban, and substitutes its own judgment about the efficacy of less restrictive regulatory schemes. This approach is in conflict with Supreme Court precedent, our own decisions, and decisions by other circuits.²⁸¹ Obviously, the majority on the Ninth Circuit panel read <i>Heller</i> differently. This confusion is also shown in the <i>Peruta</i> case from the Ninth Circuit where an en</p>

281. *Young v. Hawaii*, No. 12-17808, 2018 U.S. App. LEXIS 20525, at *85 (9th Cir. July 24, 2018) (Clifton, J., dissenting).

		banc panel was forced to reverse an appellate panel which had recently reversed a district court decision on public carry.
APPROPRIATENESS	✓	QUESTION: Has an appropriately postured case (one with a broadly applicable fact pattern, clear standing, and no serious procedural errors) made its way to a petition for certiorari? ANSWER: Yes! The <i>Peruta</i> case was a good vehicle to tackle this issue with few major procedural issues to trip up the Justices.
REFEREE	✓	QUESTION: Are the contours of a constitutional guarantee in the mix and is the Court in the best position (perhaps the only position) to add authoritative guidance? ANSWER: Yes! As with the assault weapons cases, the Second Amendment is squarely in play and the Court has to make the final call.
A SAMPLE OF RECENT CERTIORARI DENIALS IN THE PUBLIC CARRY ARENA		<ul style="list-style-type: none"> • 2017 / <i>Norman v. Florida</i> (Florida's law limiting the circumstances in which a person may openly carry a firearm in public upheld)²⁸² • 2017 / <i>Peruta v. California</i> (California concealed carry law upheld by an en banc court)²⁸³

These are just two of the subjects in the firearms regulation realm which call out for clarity. There are other important areas, to be sure, such as whether businesses have Second Amendment rights of their own and whether universal background checks are constitutional. Hopefully, the Court will pick at least one case from this list and begin to clarify *Heller*.

V. CONCLUSIONS: THE NEXT BIG GUN CASE IS COMING!

This Article is not designed to guilt the Justices into hearing another Second Amendment case. They already know they should. Rather, the primary purpose is to provide a framework for the Court and the public at large to consider anytime a controversial petition comes knocking. The HEAR framework concisely synthesizes the key components of what makes a tough

282. 138 S. Ct. 469 (2017).

283. 137 S. Ct. 1995, 1996 (2017). Justice Thomas (joined by Justice Gorsuch) dissented from the denial of certiorari. *See id.* at 1996–2000.

case ripe for the Court's attention. The factors identify legal disputes where the Court's absence creates inefficiencies for other governmental actors and stifles public policy. This is the most obvious today in the firearms realm where officials spin their wheels seeking answers that the Court could provide with the stroke of a pen.

Instead, imagine a world where lawmakers clearly understand the constitutional boundaries on their authority and ability to regulate firearms. Think of this as a roadmap to reversal-proof policy. This does not mean that every policy choice would be effective or popular, but only that fewer laws would be struck down by the Supreme Court as non-compliant with the right to keep and bear arms. Lawmakers would no longer be hamstrung by a decade-old case never intended to clarify an entire field. This Article argues that such a state would improve public policy around firearms.

Imagine next a judicial branch where lower court judges were not confused as to the basic test required to adjudicate cases alleging the violation of a constitutional guarantee. This does not mean that all cases would come out the same. Judges, however, would be able to apply their sensible discernment to the nuances of various firearms laws without having to create their own legal framework. In this world, fewer circuit splits and awkward en banc reversals would result. Echoes of confusion would no longer fill the halls of lower courthouses when it comes to the Second Amendment. This Article argues that such a state would improve public confidence surrounding the adjudication of controversial gun laws.

Finally, imagine a world when the Supreme Court acts decisively in cases where the Justices are the ultimate authority. This does not mean that the Court mimic a legislature and make law. Neither does it mean that the Justices should correct poorly written or even dumb statutes. It does mean, however, that when the contours of a constitutional right are at issue, the Court provide clear guidance.

This Article illustrated the courage of the Roberts Court in deciding tough constitutional cases. Though the results of these decisions are not always popular, they are critically important. The public can rest assured that, when an appropriate case that deals with the limits of the Fourth Amendment warrant requirement or the propriety of state grants awarded to houses of worship comes to the Court, the Justices tend to offer at least some clarity and guidance. The same must soon be said about the Second Amendment. Free to operate within clear constitutional boundaries, officials will stand a much better chance of prevailing in the winnable battle against gun violence.