

Testimony of Sandy Phillips

Before the Committee on the Judiciary of the United State Senate

**On the Nomination of the Honorable Neil M. Gorsuch
to be an Associate Justice of the Supreme Court of the United States**

March 22, 2017

Thank you, Chairman Grassley, Ranking Member Feinstein, and the members of the Judiciary Committee for the opportunity to speak with you today. My name is Sandy Phillips. My husband Lonnie and I are residents of Boerne, Texas, but we spend much of our time traveling around the country to advocate for gun violence prevention.

I am grateful for the opportunity to speak with you today about my efforts to protect our country from gun violence, and about the Second Amendment. In recent years, a small number of extremists have been pushing courts across the country to endorse a radical version of the Second Amendment that would call into question basic public safety laws throughout the nation. It is vitally important that anyone who replaces Justice Antonin Scalia on the Supreme Court reject this extremist view and understand—as explained in the landmark opinion in *District of Columbia v. Heller* authored by Scalia himself—that the Second Amendment is not unlimited and that it is entirely constitutional to prevent the most dangerous members of our society from inflicting carnage with deadly weapons.¹

In the summer of 2012, my daughter Jessica was 24 years old. She was living in Denver, finishing up a college degree in journalism and sports broadcasting. That July, her best childhood friend from our hometown in San Antonio was visiting Jessi, and because he was a huge fan, they decided to go to a midnight showing of the latest Batman movie in Aurora, Colorado. About 30 minutes into the film, a deranged shooter stole Jessi's life, and changed my life forever.

Suffering from severe mental illness and armed with multiple high-powered firearms, Jessi's killer burst into the theater and fired several rounds from a tactical shotgun and a .40-caliber handgun into the crowded theater. He inflicted the most damage with a semi-automatic rifle originally designed for military and police use, which he'd equipped with a 100-round ammunition drum. We later learned that was able to purchase 4,000 rounds of green-tipped .223 high-velocity ammunition—over the Internet—without so much as showing a driver's license.

In a matter of seconds, the shooter sprayed the theater with more than 60 bullets from the assault weapon, and he would've fired dozens more if the weapon hadn't jammed. Within minutes, Jessi and 11 others were dead. Our little girl had been hit with six bullets. One tore through her leg; three more ripped through her abdomen; one shattered her clavicle; and the last tore through her left eye and left a five inch hole in her head. I live with that image every day of my life.

Besides the dozens killed, the rampage left more than six-dozen other movie-goers injured—some critically, and some with wounds that will shorten their lives and permanently affect their quality of life. And it forever and irrevocably changed the lives of countless mothers, fathers, brothers, sisters, boyfriends, girlfriends, friends and other family members.

Jessi is dead because the system failed. Jessi died because even though he repeatedly showed clear signs of severe mental illness that made him a danger to himself and the public, the shooter was easily able to amass an arsenal and thousands of rounds of ammunition. Jessi died because, in a matter of seconds, an unhinged man was able to use a weapon of war to fire dozens of bullets at a crowd of Coloradans who had gone out simply looking for a few hours of entertainment.

I am not against guns. My husband Lonnie and are proud supporters of the Second Amendment, and I am a gun owner myself.

I do not blame Jessi's death only on a gun. I blame her death, and the deaths hundreds of others killed in Sandy Hook, Columbine, Virginia Tech, Tucson, Orlando, and so many other places, on a system that allows people known to pose serious risks to the public to arm themselves with weapons that allow them to kill a maximum number of people in a minimum amount of time. But I also believe that nothing in the Second Amendment stops us from fixing the problem. I believe that we, as Americans, have the power to change the system and strengthen the laws that protect us and keep our communities safe.

After Jessi was killed, the Colorado legislature restricted access to the type of magazine that would have allowed Jessi's killer to fire 100 bullets without reloading if it hadn't jammed.² It closed loopholes in the state's background check system to keep guns out of dangerous hands.³ Other legislatures, from Delaware to Oregon and 16 states in between, have done the same, strengthening background checks to make sure people like Jessi's killer can't slip through the cracks, evade a check, and acquire deadly weapons.⁴

These kinds of commonsense gun laws do not violate the Second Amendment. Throughout our country's history, robust rules to protect the public have always coexisted with the right to keep and bear arms. And they have always been recognized as constitutional.⁵

The Supreme Court's landmark opinion in *District of Columbia v. Heller* said so explicitly. In the majority opinion, the Court emphasized that the Second Amendment right is "not unlimited" and that "[i]t is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."⁶ In *Heller*, the majority said directly that laws aimed at keeping dangerous people like Jessi's killer from possessing guns do not offend the Constitution.⁷

But in recent years, lawyers pushing an extreme gun-lobby agenda have advanced an unlimited view of the Second Amendment that not only conflicts with our history and tradition, but also

presents an acute threat to public safety. They advocate a view of the Second Amendment that would severely weaken laws that prohibit convicted criminals and those who pose a danger to themselves or others because of mental illness from possessing guns.⁸ Their extreme version of the Second Amendment would seriously undermine government's ability to keep guns out of dangerous hands through comprehensive background checks,⁹ or to regulate weapons designed for military use or regulate high capacity magazines.¹⁰ If the Supreme Court embraced their radical views, government could no longer prohibit guns in schools¹¹ or other sensitive places,¹² and could no longer regulate who can carry concealed handguns¹³—or openly visible assault weapons¹⁴—on public streets across the country.

Cases pushing these radical views are making their way through the lower courts, and several of them could make their way to the Supreme Court in the months and years to come. If the Supreme Court embraced the extremist vision pushed in this litigation, the implications would, quite literally, be measured in lives.

That is why it is crucially important that this Committee ensures that Judge Gorsuch or any other nominee the President puts forward understands that the Second Amendment is not unlimited. The committee must ensure that any nominee to our highest court recognizes the Second Amendment does not override other constitutional rights, like the right to decide whether to allow guns on one's property, or the right to peaceably assemble and engage in political debate free from armed intimidation, or, ultimately, the right to live in a safe community.

I believe the cornerstone for understanding the Second Amendment properly is the *Heller* decision. *Heller* recognized—appropriately, in my view—that law-abiding Americans have an individual right to use a handgun for defense of “hearth and home.”¹⁵ That is the same right that millions of law-abiding, responsible gun owners exercise every day. But there are two key points about *Heller* that gun extremists ignore.

First, *Heller* recognized that laws designed to keep guns from people who pose a threat because of mental illness or criminal history are consistent with centuries of efforts to protect public safety—and do not violate the Second Amendment. That is why the majority plainly recognized that nothing in the opinion should be taken to “cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”¹⁶ And that is why, after *Heller*, when convicted criminals charged with illegal gun possession have argued that it violates the Second Amendment to prevent them from owning guns, courts have rejected their arguments time and again.¹⁷

Courts across the country have also turned aside Second Amendment challenges to laws prohibiting gun possession by fugitives from the law,¹⁸ illegal drug users,¹⁹ and people convicted of domestic violence crimes.²⁰ Indeed, the Supreme Court itself has recognized the importance of keeping guns out of the hands of domestic abusers: No fewer than three times in the nine years since *Heller* was decided, the Court has rejected attempts by convicted domestic abusers to chip away at the federal law that bars them from possessing guns.²¹

Laws prohibiting gun possession by criminals and those who pose a threat to public safety because of mental illness do not threaten our democracy or Constitution—but they do save lives. If my daughter’s killer had been prevented from amassing his arsenal based on the clear signs that he posed a danger because of his mental illness, for example, Jessi and the many others killed or injured at Aurora may have been spared.

But despite the consensus that keeping guns out of dangerous hands is constitutional, pro-gun zealots are filing an increasing number of lawsuits across the country arguing that criminals and the mentally ill have the same Second Amendment rights as law-abiding citizens, and that barring them from owning guns violates the Constitution. These far-fetched claims would not be cause for concern except for the fact that some judges in the lower courts have found them persuasive, and have issued rulings that are chipping away at the federal prohibitions on gun

ownership by dangerous people.²² A petition in one of these decisions, from Third Circuit Court of Appeals, is currently pending before the Supreme Court.²³

If the Court takes the Third Circuit case (or another, similar case), it could have significant implications for public safety. And it will present every justice on the Court with a clear choice: Do they agree with the *Heller* decision that nothing in the Second Amendment casts doubt on “longstanding prohibitions on the possession of firearms by felons and the mentally ill?”²⁴ Or do they side with the radical gun-lobby agenda, and invent a new right, at the public’s expense, for dangerous people to own guns.

Before Judge Gorsuch is confirmed, the American people deserve to know how he would approach this question. And I would respectfully submit that it is this Committee’s duty to demand that he give the American people an answer.

The second point I want to make about *Heller* is that it made clear that the Second Amendment does not stop government from responding to changing conditions by adopting rules and regulations that address evolving threats of gun violence. Besides making clear that keeping guns from criminals and individuals with severe mental health conditions passes constitutional muster, *Heller* also emphasized that throughout our history, courts have concluded that “prohibitions on carrying concealed weapons were lawful under the Second Amendment,” and that it does not violate the constitution for government to prohibit guns from sensitive places like schools and government buildings, or to impose conditions on gun sales—like background checks.²⁵

Since the Founding Era, local and state governments across the country have used the room granted them under the Second Amendment to adopt these types of laws to protect public safety.²⁶ And because local conditions and traditions differ across this great country of ours, these laws have varied from place to place, and they have evolved over time.²⁷ The types of gun regulations that make sense in rural communities in northwest or southeast Colorado, for

example, may differ dramatically from those that are appropriate for downtown Denver. The Second Amendment gives policy makers in these different communities leeway to regulate appropriately. And as conditions in our society—and developments in firearms technology—have changed, the types of laws needed to protect against gun violence have changed alongside them. The Supreme Court has made clear that this evolution is constitutionally permissible, ruling in the follow-up case to *Heller*, *McDonald v. City of Chicago*, that “[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment.”²⁸

This Committee must ensure that any nominee to the high court appreciates that the Second Amendment does not preclude the laboratories of democracy from developing new approaches as the threats of gun violence evolve.²⁹

Respected conservative Judge Frank H. Easterbrook underscored this important lesson from *Heller* and *McDonald* when, rejecting a challenge to restrictions on assault weapons passed by elected officials in suburban Chicago, he emphasized that “[t]he central role of representative democracy is no less part of the Constitution than is the Second Amendment.”³⁰ Admired judge J. Harvie Wilkinson likewise embraced this critical constitutional value when he concurred that the Second Amendment did not prevent the state of Maryland from restricting access the types of military-style weapons my daughter’s killer used in Aurora, and that more recently have claimed scores of lives in Sandy Hook, Orlando, and elsewhere.³¹ Judge Wilkinson concluded, consistent with *Heller* and *McDonald*, that courts should not preempt democratically elected legislatures from grappling with solutions to the serious problems of gun violence. His powerful words rejecting the idea that the judges should constitutionalize subjects better addressed through the people’s representatives are worth noting at length. He wrote:

Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and

watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation.

....

As *Heller* recognized, there is a balance to be struck here. While courts exist to protect individual rights, we are not the instruments of anyone’s political agenda, we are not empowered to court mass consequences we cannot predict, and we are not impaneled to add indefinitely to the growing list of subjects on which the states of our Union and the citizens of our country no longer have any meaningful say.³²

Our democracy is well served when our unelected judiciary, in evaluating the bounds of the Second Amendment and the role of our elected representatives, heeds Judge Wilkinson’s wise call for judicial modesty on the issue of guns.

I urge this Committee not to advance Judge Gorsuch’s nomination until it is convinced that he shares this approach and recognizes that reasonable regulations enacted to protect communities from gun violence do not violate the Constitution.

Thank you for the opportunity to speak with you today; I am happy to answer any questions.

¹ See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (affirming that the Second Amendment is “not unlimited,” and does not confer a “right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose”).

² See Colo. Rev. Stat. § 18-12-301 *et seq.*

³ See *id.* § 18-12-112.

⁴ See generally Law Center to Prevent Gun Violence, *Universal Background Checks*, at <http://smartgunlaws.org/gun-laws/policy-areas/background-checks/universal-background-checks/> (collecting and summarizing state universal background check laws).

⁵ See generally Robert Spitzer, *Guns Across America: Reconciling Gun Rules and Rights* (Oxford Univ. Press 2015); Adam Winkler, *Gun Fight: The Battle Over the Right to Bear Arms in America* (Norton 2011); Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (Oxford Univ. Press 2006).

⁶ *Heller*, 554 U.S. at 626.

⁷ *Id.* at 626-627 (noting that nothing in the Second Amendment calls into question “longstanding prohibitions on the possession of firearms by felons and the mentally ill”).

⁸ See, e.g., *Binderup v. Att’y Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016) (en banc); *Tyler v. Hillsdale Cnty. Sheriff’s Dep’t*, 837 F.3d 678, 692 (6th Cir. 2016) (en banc).

⁹ See, e.g., *Colo. Outfitters Ass’n v. Hickenlooper*, 2014 U.S. Dist. LEXIS 87021 (D. Colo. June 26, 2014), *vacated on jurisdictional grounds*, 2016 U.S. App. LEXIS 5238 (10th Cir. 2016).

¹⁰ See, e.g., *Kolbe v. Hogan*, 2017 U.S. App. LEXIS 2930, *46 (4th Cir. Feb. 21, 2017) (en banc); *New York State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244, 1260-64 (D.C. Cir. 2011).

¹¹ See, e.g., *United States v. Redwood*, 2016 U.S. Dist. LEXIS 109735 (N.D. Ill. Aug. 18, 2016).

¹² See, e.g., *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012).

¹³ See, e.g., *Wrenn v. District of Columbia*, 2015 U.S. Dist. LEXIS 71383 (D.D.C. May 18, 2015).

¹⁴ See, e.g., *Norman v. State*, 2017 Fla. LEXIS 448, *35 (Fla. Mar. 2, 2017).

¹⁵ *Heller*, 554 U.S. at 635.

¹⁶ *Id.* at 626.

¹⁷ See, e.g., *Baer v. Lynch*, 2016 U.S. App. LEXIS 3390, (7th Cir. Feb. 22, 2016); *United States v. Shields*, 2015 U.S. App. LEXIS 10058 (7th Cir. Ill. June 15, 2015); *United States v. Pruess*, 703 F.3d 242 (4th Cir. 2012); *United States v. Moore*, 666 F.3d 313 (4th Cir. 2012); *United States v. Torres-Rosario*, 658 F.3d 110 (1st Cir. 2011); *United States v. Williams*, 616 F.3d 685 (7th Cir. 2010); *United States v. Anderson*, 559 F.3d 348 (5th Cir. 2009); *United States v. Berroth*, 2015 U.S. Dist. LEXIS 127750 (D. Kan. Sept 23, 2015); *United States v. Rhodes*, 2012 U.S. Dist. LEXIS 76363 (S.D. W. Va. June 1, 2012); *United States v. Edge*, 2012 U.S. Dist. LEXIS 15002 (W.D.N.C. Feb. 8, 2012); *United States v. Loveland*, 2011 U.S. Dist. LEXIS 119954 (W.D.N.C. 2011); *United States v. Kirkpatrick*, 2011 U.S. Dist. LEXIS 82801 (W.D.N.C. July 27, 2011); *Baer v. Lynch*, 2015 U.S. Dist. LEXIS 113663 (W.D. Wis. Aug. 27, 2015); *State v. Eberhardt*, 145 So. 3d 377 (La. 2014); *State v. Merritt*, 2015 Mo. LEXIS 148 (Aug. 18, 2015); *State v. Craig*, 826 N.W.2d 789 (Minn. Feb. 27, 2013); *United States v. Hughley*, 2015 U.S. Dist. LEXIS 137544 (W.D. Mo. Sept. 8, 2015, Recommendation and Report adopted on Oct. 7, 2015); *United States v. Berroth*, 2015 U.S. Dist. LEXIS 127750 (D. Kan. Sept 23, 2015); *Wisconsin v. Pocian*, 2012 WI App 58 (2012); *People v. Spencer*, 2012 IL App (1st) 102094 (2012); *Pohlabel v. Nevada*, 268 P.3d 1264 (Nev. 2012).

¹⁸ See, e.g., *United States v. Stegmeier*, 701 F.3d 574 (8th Cir. 2012).

¹⁹ See, e.g., *Wilson v. Lynch*, 2016 U.S. App. LEXIS 16108 (9th Cir. Aug. 31, 2016); *United States v. Emond*, 2012 U.S. Dist. LEXIS 149295 (D. Me. Oct. 17, 2012); *United States v. Carter*, 669 F.3d 411 (4th Cir. 2012).

²⁰ See, e.g., *Enos v. Holder*, 2014 U.S. App. LEXIS 19798 (9th Cir. Oct. 16, 2014); *United States v. Armstrong*, 706 F.3d 1 (1st Cir. 2013); *United States v. Chovan*, 735 F.3d 1127, 1139-41 (9th Cir. 2013) *United States v. Chester*, 847 F. Supp. 2d 902 (S.D. W. Va. 2012); *United States v. Staten*, 666 F.3d 154 (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010); *United States v. White*, 593 F.3d 1199 (11th Cir. 2010); *United States v. Booker*, 644 F.3d 12 (1st Cir. 2011).

²¹ See *Voisine v. United States*, 136 S. Ct. 2272 (2016); *United States v. Castleman*, 134 S. Ct. 1405 (2014); *United States v. Hayes*, 555 U. S. 415 (2009).

²² See, e.g., *Binderup*, 836 F.3d 336; *Tyler*, 837 F.3d 678.

²³ See *Sessions v. Binderup*, *Petition for Certiorari* (No. 16-847 Jan. 5, 2017).

²⁴ *Heller*, 554 U.S. at 626-27.

²⁵ *Id.* at 626.

²⁶ See *supra* n.5; see also Duke University School of Law, *Repository of Historical Gun Laws*, at <https://law.duke.edu/gunlaws/>.

²⁷ See Joseph Blocher, *Firearm Localism*, 123 *Yale Law Journal* 82 (2013).

²⁸ *McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

²⁹ See, e.g., *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (“[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.”); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

³⁰ *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015).

³¹ *Kolbe v. Hogan*, 2017 U.S. App. LEXIS 2930, *80 (4th Cir. Feb. 21, 2017) (en banc) (Wilkinson, J., concurring).

³² *Id.* at *81 -*85.