

seen this week, this country is still very unsettled about abortion doctrine.

However, among the American people there are some elements of abortion related policy that absolutely do provide common ground. Preeminent among these is a core American belief in the bonds between parent and child.

I have five children and the notion that my daughters might be taken for a surgical procedure without my knowledge is horrific. This common sense commitment to protect our children is overwhelmingly shared among all of those who identify themselves as pro-life and pro-choice, and yet it is precisely these kinds of common sense policies like parental notification that are threatened by this nomination.

In the Fund's brief in *Ohio v. Akron*, they argued that 'the court would also need to consider whether the state through giving the parents confidential information has enhanced these parents' ability to indoctrinate, control or punish their minor daughters who choose abortion.'

This is a viewpoint far outside the mainstream of American public opinion and it points to another truth about the Fund arguments in their world view which the evidence indicates Judge Sotomayor shares. While arguing to promote abortion to a fundamental right equivalent to the freedom of religion or speech, they actually wish to elevate it even further, placing it singularly alone among rights beyond the reach of the American public to regulate or even debate. Thank you very much.

Senator KLOBUCHAR. Thank you very much. Next we have Sandy Froman. Sandy Froman is the Past President of the National Rifle Association of America. Ms. Froman is also currently a member of the NRA Board of Directors where she has served since 1992 and in 2007 was unanimously elected to a lifetime appointment on the NRA Council.

A graduate of Stanford University and Harvard Law School, Ms. Froman is a practicing attorney and speaks and writes regularly on the Second Amendment. Welcome to the committee, we look forward to your testimony.

STATEMENT OF SANDY FROMAN, ESQ., ATTORNEY, GUN RIGHTS ADVOCATE, AND FORMER PRESIDENT OF THE NATIONAL RIFLE ASSOCIATION

Ms. FROMAN. Thank you, Madam Chair. Chairman Leahy, Ranking Member Sessions, Senator Hatch, thank you for the opportunity to appear before this committee today to comment on the nomination of Sonia Sotomayor as it relates to her views on the Second Amendment.

It is critical that a Supreme Court Justice understand and appreciate the origin and meaning of the right of the people to keep and bear arms, a right exercised and valued by almost 90 million American gun owners.

Yet Judge Sotomayor's record on the Second Amendment and her unwillingness or inability to engage in any meaningful analysis of this enumerated right when twice given the opportunity to do so suggests either a lack of understanding of Second Amendment jurisprudence or hostility to the right.

In 2004, Judge Sotomayor and two colleagues in *U.S. v. Sanchez Villar* discussed the Second Amendment claim in a one-sentence footnote holding without any analysis that the right to possess a gun is clearly not a fundamental right.

Judge Sotomayor reiterated her view earlier this year as part of a panel in *Maloney v. Cuomo* holding that the Second Amendment is not a fundamental right, does not apply to the states and that if an object is designed primarily as a weapon, that is a sufficient basis for total prohibition even in the home.

The *Maloney* court ignored directives and precedent from the Supreme Court in last year's landmark case, *District of Columbia v. Heller* which held that the Second Amendment guarantees to all law abiding, responsible citizens the individual right to arms, particularly for self-defense.

Although the Supreme Court in *Heller* warned against applying the Supreme Court incorporation cases from the late 1800's without conducting a proper Fourteenth Amendment inquiry, Judge Sotomayor's panel in *Maloney* did just that.

They cited the 1886 case of *Presser v. Illinois* decided under the Privileges or Immunities Clause of the Fourteenth Amendment for the position that the Second Amendment does not limit the states and they ignored the Supreme Court's 2008 directive to conduct a Fourteenth Amendment analysis under the modern doctrine of the Due Process Clause to determine if the right is fundamental and should be incorporated.

By contrast, the Ninth Circuit in *Nordyke v. King* when faced with the same incorporation question earlier this year did follow the Supreme Court's directive and correctly concluded that the Second Amendment is a fundamental right and does apply to the states through the Due Process Clause.

Our Second Amendment rights are no less deserving of protection against states and local governments than the First, Fourth and Fifth Amendments, all of which have been incorporated.

When faced with the most important question remaining after *Heller*, whether the right to keep and bear arms is fundamental and applies to the states, Judge Sotomayor dismissed the issue with no substantive analysis.

She and her colleagues also failed to follow Supreme Court precedent when they held that the New York statute could be upheld if the government had a rational basis for the law. They ignored that the Supreme Court in *Heller* rejected the rational basis test for Second Amendment claims.

By failing to conduct a proper Fourteenth Amendment analysis, the *Maloney* court evaded its judicial responsibilities, offered no guidance to lower courts and provided no assistance in framing the issue for resolution by the Supreme Court.

Whenever an appellate judge fails to provide supporting analysis for their conclusion or address serious constitutional issues presented by the case, it is legitimate to ask whether the judge reached that conclusion by application of the Constitution and statutes or based on a political or social agenda.

Judge Sotomayor's view robs the Second Amendment of any real meaning. Under her view, the city of New Orleans' door-to-door

confiscation of firearms from law-abiding peaceable citizens in the aftermath of Hurricane Katrina was constitutional.

Preventing an individual from exercising what the *Heller* court said was the Second Amendment's core lawful purpose of self-defense is no less dangerous when accomplished by a state law than by a Federal law.

The Second Amendment survives today by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningfully strict standard of review remain to be decided.

Judge Sotomayor has already revealed her views and they are contrary to the text, history and meaning of the Second and Fourteenth Amendments. As a Circuit Court judge, she is constrained by precedent. But as a Supreme Court Justice appointed for life, she would be making precedent.

A super majority of Americans believe in an individual personal right to arms. They deserve a Justice who will interpret the Second Amendment in a fair and impartial manner and write well crafted opinions worthy of respect from those of us who must live by their decisions.

The President who nominated Judge Sotomayor has expressed support for the city of Chicago's gun ban which is being challenged in *NRA v. Chicago*, a case headed to the Supreme Court.

Seating a Justice on the Supreme Court who does not treat the Second Amendment as a fundamental right deserving of protection against cities and states could do far more damage to the right to keep and bear arms than any legislation passed by Congress. Thank you.

Senator KLOBUCHAR. Thank you very much for your testimony, Ms. Froman.

Our next witness is David Kopel. He is currently the Research Director of the Independence Institute in Golden, Colorado and an Associate Policy Analyst at the CATO Institute.

He is also a contributor to the National Review Magazine. He graduated from the University of Michigan Law School. Thank you very much for being here. We look forward to your testimony.

STATEMENT OF DAVID KOPEL, ESQ., INDEPENDENCE INSTITUTE

Mr. KOPEL. The case of *Sonia Sotomayor v. the Second Amendment* is not yet found in the record of Supreme Court decisions. Yet if Judge Sotomayor is confirmed to the Supreme Court, the opinions of the newest Justice may soon begin to tell the story of a Justice with disregard for the exercise of constitutional rights by tens of millions of Americans.

New York state is the only state in the union which completely prohibits the peaceful possession of nunchaku, a xenophobic ban enacted after the opening to China in the early 1970s after the growth of interest in martial arts.

In a colloquy with Senator Hatch on July 14, Judge Sotomayor said that there was a rational basis for the ban because nunchaku could injure or kill someone. The same point could just as accurately be made about bows and arrows, swords or guns. All of them