

00:00;20;01 - 00:00;40;12

Stephen Gutowski

All right. Welcome, ladies and gentlemen, to another episode of the Weekly Reload Podcast. I'm your host, Stephen Gutowski. I'm also a CNN contributor and the founder of [thereload.com](http://thereload.com), where you can head over today and sign up for our free weekly newsletter. If you want to keep up to date with what's going on with guns in America from a sober, serious perspective that focuses on hard news and analysis.

00:00;40;14 - 00:01;02;04

Stephen Gutowski

This week we are talking about the Supreme Court, which really, I mean, they laid down all of their gun cases in one week. So we got a lot to talk about. They really they unloaded all of their con cases, so to speak. Yes. To do that, we have, with us. Special guest from SCOTUSblog, the new executive editor, Zach Shemtob to with us.

00:01;02;11 - 00:01;05;15

Stephen Gutowski

Welcome to the show, Zach. Thank you so much for joining us.

00:01;05;15 - 00:01;19;18

Zach Shemtob

It's great to be here. And by the way, I really respect The Reload and what it's trying to do by lending, you know, sometimes to rare sober, you know, independent analysis to, Second Amendment and gun issues in general.

00:01;19;20 - 00:01;34;26

Stephen Gutowski

Thank you. I really appreciate that is exactly what we are trying to to stick to doing here at The Reload. It's, what I think sets us apart a little bit from a lot of other publications out there. But, speaking of which, SCOTUSblog is, I think set apart from a lot of other publications out there for similar reasons.

00:01;34;26 - 00:01;55;02

Stephen Gutowski

One that I've followed for years is, kind of become the go to place anytime, you know, Thursday rolls around or, you know, there's an order list that comes out or whatever it is, it go sit at the live blog that, with experts there at the court, and get it, get a really good understanding of what's actually happening on the court.

00:01;55;02 - 00:02;00;18

Stephen Gutowski

So, speaking of which, could you just tell us a little bit more about yourself and and SCOTUSblog before we go?

00:02;00;19 - 00:02;27;02

Zach Shemtob

So I am executive editor of SCOTUSblog as of two and a half weeks ago. So I have just started in this position. Before that, I was a practicing lawyer, actually. Criminal defense. I dealt with mostly, white collar, you know, alleged crimes and things of that nature. Before that, I was actually in academia, and I got my PhD in criminology.

00:02;27;04 - 00:02;48;16

Zach Shemtob

So the, criminal law world is one I'm very familiar with and one you know, that I will bring a little more of to SCOTUSblog in terms of that background, but I'm extremely excited to be at SCOTUSblog, and especially during this time where the Supreme Court, for better or worse, has taken on so much importance.

00:02;48;18 - 00:03;11;01

Stephen Gutowski

Yeah. Yeah, absolutely. And so this blog was recently acquired by The Dispatch. Yes. Which is another publication that

I love and that I'm a contributing writer for. But also seems like you guys are investing into SCOTUSblog as well. Anyhow, who's been the longtime leader of the publication is still there. Still editor, right? Yeah. So nothing is changing in that regard.

00:03;11;01 - 00:03;15;10

Stephen Gutowski

But you guys seem to be, you know, kind of trying to expand things as well.

00:03;15;12 - 00:03;40;00

Zach Shemtob

Yeah. The goal is to have a lot more outside contributors, and the dispatch is giving us the resources to do that, which is wonderful. And also next term to cover every case rather than just the most quote unquote important cases. And to, you know, with spanned our coverage just in general and the dispatch is, as I said, giving us the resources.

00:03;40;02 - 00:03;59;11

Zach Shemtob

And we are, you know, also remaining as independent, and nonpartisan as possible, which Amy does so well, and we'll continue to, do it in that vein. And so we've got to know, you know, the dispatch has also been wonderful and very clear that they want Scotus blog to remain Scotus blog.

00:03;59;13 - 00:04;06;06

Stephen Gutowski

Right? Because, I mean, it is a very valued institution. So, people are going to be watching closely how you guys know that for sure.

00:04;06;12 - 00:04;08;15

Zach Shemtob

We don't want to lose that credibility.

00:04;08;17 - 00:04;24;27

Stephen Gutowski

Yeah, absolutely. And that's that's what really matters in this business is your credibility, your reputation. So I'm glad to see that you guys are still focused on that. And I've everything I've seen so far, I've been very happy with and I don't notice any, you know, shift in how you guys are covering, topics. Certainly.

00:04;24;27 - 00:04;46;08

Stephen Gutowski

So that's good. But speaking of which, let's let's get into, or, you know, the specific area of the Supreme Court jurisprudence that we are interested here at The Reload, which is their Second Amendment. And no, I mean, I guess not all Second Amendment, just gun related topics because, for instance, the first one I think we can get to is there unanimous holding of maybe that might have surprised some people.

00:04;46;08 - 00:05;10;11

Stephen Gutowski

That was unanimous in, Mexico. The Smith and Wesson case about, Mexico trying to hold Smith and Wesson and other American gun companies liable for, \$10 billion worth of damages, drawn from cartel violence in Mexico that's carried out with American made firearms. Right? What, what was the holding there? What?

00:05;10;13 - 00:05;37;10

Zach Shemtob

So the court unanimously ruled that the Mexican government couldn't bring a suit against American weapons manufacturers for aiding and abetting gun violence in that country. And, you know, you know this. But by way of background, Congress passed a federal law in 2005, to shield the gun industry from lawsuits in US courts, that we're dealing with, you know, others using weapons, using guns.

00;05;37;12 - 00;05;53;23

Zach Shemtob

It it passed in the Senate 65 to 31. So actually, a lot of Democrats joined, Biden and Obama were not among them. And that's the known as the Protection of Lawful Commerce in Arms Act or the APL. CAA.

00;05;53;25 - 00;05;55;29

Stephen Gutowski

And this is the first case that dealt with that.

00;05;56;02 - 00;06;35;11

Zach Shemtob

I believe. That's right. Right. Yeah. Yes, I believe that's right. And so in 2021, the Mexican government, filed a lawsuit in a Massachusetts federal court against seven, you know, major U.S. gunmakers. And this is all, by the way, covered on SCOTUSblog. So I'm just re going over that, but, and, and, one gun wholesaler, and the allegations from the Mexican government were that gun makers such as Smith and Wesson, Glock, Colt, etc., had designed and marketed their guns as military style weapons.

00;06;35;13 - 00;06;58;04

Zach Shemtob

Especially the, you know, AR 15, and knowing that doing so made them more attractive to drug cartels in Mexico. And so the allegation was essentially that they were these gun manufacturers are aiding and abetting, gun violence committed mostly by the cartels in Mexico.

00;06;58;07 - 00;07;20;11

Stephen Gutowski

And they also they also argued that gun makers could impose more restrictive means on gun sales by, you know, further down the chain, dealers, if they if they really wanted to and the not doing that and assists as well in this trafficking that occurs the illegal trap.

00;07;20;13 - 00;07;45;28

Zach Shemtob

Correct. They control a three tier distribution system, facilitating an equal illegal market for guns in Mexico. So gun makers will sell to wholesale distributors and then wholesale distributors will sell to retail dealers, and then those gun dealers will sell to others, in this case, the Mexican government allege they were selling to straw purchasers, buyers who were acting as fronts for someone else who couldn't legally own a handgun.

00;07;46;00 - 00;07;53;02

Zach Shemtob

So the Mexican government alleged that they were part of this whole system and knowingly engaging in these activities.

00;07;53;04 - 00;08;21;09

Stephen Gutowski

Right. But they didn't have any specific evidence of certainly the the, the the idea that the any they really didn't present any instead of that specific to somebody actually breaking the law here. They're kind of talking about like, well, guns get traffic to Mexico every year. A lot of gun traffic there at the gun companies know that's going to happen, and they don't do the certain things we want them to do, like stop making air fifteens or some of these guns with Spanish names.

00;08;21;14 - 00;08;22;07

Zach Shemtob

Or.

00;08;22;09 - 00;08;43;29

Stephen Gutowski

Impose more restrictive, sales policies for their dealers down, you know, for backing down dealers down the line, that go beyond what American law requires. That sort of like because the gun companies are doing this and they know that some of the guns they make are going to end up in Mexico. They should be liable for the violence that occurred.

00;08;44;04 - 00;09;09;04

Zach Shemtob

And the Mexican government's complaint wasn't a model of clarity. I will say, but ultimately it seemed to boil down to that. They were the gun manufacturers were aiding and abetting these crimes. And in its unanimous opinion, written by Justice Kagan, I may add. So I just want to take a side note. We had three very important opinions yesterday.

00;09;09;04 - 00;09;31;10

Zach Shemtob

Six and all. But three in particular were particularly impactful. Of those three, they were all unanimous and all written by a different liberal. And so this case, which in some senses was among the most controversial, the reverse discrimination case. Ames was also quite controversial in some, you know, to some. But but anyway, this one was written by Kagan.

00;09;31;13 - 00;09;58;06

Zach Shemtob

And so Kagan explained that to hold someone liable for aiding and abetting a crime, the person or entity has to take an affirmative that to advance the offense and intend to facilitate the commission of the crime. And I think the key for Kagan, the key passage is she wrote that the Mexican government had only alleged indifference by the gun makers as opposed to assistance.

00;09;58;08 - 00;10;11;17

Zach Shemtob

So since they hadn't provided assistance to the cartels or to this three tier system, as opposed to just being indifferent to it, they couldn't be held liable for aiding and abetting, and therefore they couldn't get past the statute.

00;10;11;19 - 00;10;32;05

Stephen Gutowski

Yeah. And so their suit is not allowed under the Protection of Lawful Commerce and Arms Act as the the conclusion of the unanimous court, which I think some people were surprised to see unanimous court in a gun case like this. Although I will say it's not the first time they've been unanimous. Right. True that the Lou was the NRA and also not neither one of these is Second Amendment case.

00;10;32;05 - 00;10;38;03

Stephen Gutowski

Technically. Yeah. The you know, the appeals case. Yeah. Right there there's sort of Second Amendment implications.

00;10;38;03 - 00;10;39;06

Zach Shemtob

Yes.

00;10;39;08 - 00;10;50;10

Stephen Gutowski

The NRA case was a First Amendment case. But you saw, as a unanimous ruling in a gun case. And then a lot of people, you know, people watching the court would not.

00;10;50;13 - 00;10;50;29

Zach Shemtob

Yeah.

00;10;51;02 - 00;11;09;17

Stephen Gutowski

See that kind of a lot of there's a reputation for being A63, five four court. But that's not really that true. And, and I, you know, if you watch the oral arguments in this case, you know, I predict at the time it was probably going to be pretty lopsided. And so I wasn't surprised to see that it came out this way.

00;11;09;17 - 00;11;10;05

Stephen Gutowski

It's not very.

00;11;10;05 - 00;11;33;10

Zach Shemtob

Clear from the oral arguments, and Kagan writing it. Kagan, everything she does is deliberate and intentional. I would say she's the most they're all very careful, but she's the most careful, you know, next to Roberts, probably. And so every line, every word Kagan writes, she is thinking about, and she has given a great deal of thought. So there's nothing here that was sloppy.

00;11;33;15 - 00;11;52;22

Zach Shemtob

This was entirely intended. Could it be part of a larger strategy to kind of find common ground with the conservative court? Yes, absolutely. And I think that's why you saw in all three cases, a different liberal kind of writing unanimously. But in any event, what was written here every word Kagan meant.

00;11;52;25 - 00;12;05;23

Stephen Gutowski

Yeah, I mean, I saw, it was the wall door, Chris. China's, independent, you know, publication that follows the court as well was was noting similarly that, like, you know, there may be some strategic.

00;12;05;28 - 00;12;07;05

Zach Shemtob

Yeah.

00;12;07;08 - 00;12;24;06

Stephen Gutowski

You thought behind what the liberals are doing in some of these cases, like, they're just they're trying to find ways to be unified with the rest of the court. It's and probably I would imagine Roberts is also. Yeah, like the whole court is trying to find common ground on some of these bigger cases. It seems like.

00;12;24;14 - 00;12;35;22

Zach Shemtob

I'm sure that out of everyone on the court, Roberts was the happiest. Yeah, because there's nothing he likes more than unanimous opinions, which he sees as lending credibility to the institution.

00;12;35;24 - 00;12;48;29

Stephen Gutowski

Right. And not for no reason. Right. That is something that absolutely. People looking at nine. Oh Supreme Court ruling and I think they do feel like whatever the outcome was that it was the right, you know, that it has.

00;12;48;29 - 00;12;49;22

Zach Shemtob

Absolutely. Was it.

00;12;49;22 - 00;12;50;27

Stephen Gutowski

Cross Partizan.

00;12;51;01 - 00;13;11;00

Zach Shemtob

Credibility now the the lower court, the first circuit had found differently. So it was actually a reversal of the lower court. I will say though that the first circuit is five zero, Democrat appointees. I think at this point one can safely say it's the most liberal of all the circuits and just used to always point to the Ninth Circuit.

00;13;11;03 - 00;13;24;26

Zach Shemtob

That is no longer the case. The Ninth Circuit is actually quite balanced in many ways these days, and has some fascinating opinions. But yeah, the first circuit, if you're going to go predict a liberal outcome, that's the, that's your top choice.

00;13;24;28 - 00;13;44;00

Stephen Gutowski

Interesting. Yeah. And they they had ruled that the key finding here was for stability, that because these guns will get traffic through this system and and that it's foreseeable that will happen because it's happened in the past that the the lawsuit could go forward. That was basically the lower court.

00;13;44;04 - 00;13;45;19

Zach Shemtob

The Supreme Court wasn't having it.

00;13;45;26 - 00;13;47;24

Stephen Gutowski

No, not at all. None of them. Right.

00;13;47;27 - 00;13;50;10

Zach Shemtob

Not even an accident or Sotomayor.

00;13;50;12 - 00;14;10;12

Stephen Gutowski

Yeah. You know, Jackson. So there were two concurrence here. Yeah, there was Thomas and there was Jackson and Thomas. Unsurprisingly, perhaps, wanted the court to go further than what it did. You know, the court just basically said Mexico's case is pretty bad. They don't even claim, you know, specific crimes. They don't point to specific gun dealers.

00;14;10;12 - 00;14;29;21

Stephen Gutowski

Who are these bad apple dealers they're talking about. They just sort of generically describe the system, as being, you know, on the whole, the problem. And they don't point to, you know, anyone in particular that the gun companies have supposedly abated, aided and abetted here. Correct. And that was a big problem for the majority in this case.

00;14;29;21 - 00;14;30;21

Zach Shemtob

I.

00;14;30;24 - 00;14;47;01

Stephen Gutowski

And Thomas wanted further than that. He, he wanted to say, you know, in order to get pass Pielke is liability shield you you not only have to have like a plausible argument that somebody has committed a crime, you actually have to have them be convicted of a crime first.

00;14;47;02 - 00;15;01;12

Zach Shemtob

Right? Well, he he says there is an earlier finding of guilt, reliability and an adjudication regarding the violation. Right. So there needed to be fine of some finding of guilt or liability, in his view, for you to get past the PLC.

00;15;01;12 - 00;15;03;27

Stephen Gutowski

I yeah, I know nobody joined that one.

00;15;04;03 - 00;15;06;22

Zach Shemtob

No one doing that one. Not even not even Alito or Gorsuch.

00;15;06;22 - 00;15;21;09

Stephen Gutowski

Yeah. And and which which is something I want to get into later on in the show, which is where we're Thomas is with the court on Second Amendment stuff. And and because I want to get into and to get into some of that juicy like speculation. Yeah. Educated guessing. What, what some of these things they're.

00;15;21;09 - 00;15;24;12

Zach Shemtob

Doing, it's going to be a long interview that.

00;15;24;14 - 00;15;39;11

Stephen Gutowski

But, you know, we also had Jackson give a concurrence here, and hers was, I don't know, I went my reading. I was like, it's fairly redundant. Like, it kind of just re-emphasize is the same thing the court has said when I read it, I know what did you think of it?

00;15;39;16 - 00;16;01;07

Zach Shemtob

So I think Jackson was the most liberal in this regard. I think she was saying that a potential claim could be successful if brought by the Mexican government or another entity, but that it just not been met here, that this aiding in a bill aiding and abetting was, was not going to cut it. But she's not ruling out that other claims in the future.

00;16;01;08 - 00;16;10;09

Zach Shemtob

She didn't say this directly, but this is what I get from her concurrence that that other claims in the future might do the job, might satisfy the ability to get past the statute.

00;16;10;12 - 00;16;13;07

Stephen Gutowski

Yeah, but I feel like that's what the majority was saying.

00;16;13;09 - 00;16;29;11

Zach Shemtob

Yes and yes and no. I mean, I feel like Jackson really put a point on that and wanted to wanted to, you know, sometimes concurrence is or used to emphasize something that was already in the majority opinion and say, well, pay attention to this point.

00;16;29;18 - 00;16;49;04

Stephen Gutowski

Certainly, I don't know it just because even on that front, it was still felt like, a lot of times you'll see courts, if they rule against someone that they really want to win a case. Yeah. They'll just like lay out like, here's how you it could actually

do this case and have it work. And I don't know that I don't.

00;16;49;04 - 00;16;55;14

Stephen Gutowski

Do you feel like that's what she's trying to do there. Just didn't feel like there's specifics of how Mexico could refile this case.

00;16;55;19 - 00;17;14;24

Zach Shemtob

She either didn't know or wasn't ready to make that suggestion and to, you know, lay that out. So, so I think I think that's correct. I think she's just keeping it open, that there may be some possibility out there that a successful claim could be brought, but this certainly wasn't it.

00;17;14;27 - 00;17;19;28

Stephen Gutowski

Okay. And whereas Thomas is saying really because she shouldn't be able to do any of these.

00;17;20;01 - 00;17;29;02

Zach Shemtob

It would be very I mean, if you had a finding of, you know, guilt or like an adjudication. Sure. But yeah, again, that's that's going to involve a whole separate process.

00;17;29;09 - 00;18;07;22

Stephen Gutowski

Yeah. Yeah. And there's, there's some more lines in the Mexico case I want to get into, later in this discussion because I think it comes back around, as you mentioned, you said Kagan writes these opinions very specifically, and there is a couple lines in there that may inform, our next discussion here, which goes back to Monday when the court issued its order list and finally made a decision on what to do with two major gun cases, hardware band cases, one being, *Ocean State Tactical v Rhode Island*, which deals with Rhode Island's magazine ban and confiscation law.

00;18;07;24 - 00;18;21;00

Stephen Gutowski

But it was at a preliminary injunction stage which by the way, the court has been extremely reluctant to take up any second in in cases at the anything but the final merits stage, which.

00;18;21;02 - 00;18;38;12

Zach Shemtob

In my view is the way, the way it should be for all cases, that they should really accept in, you know, very serious circumstances. They should wait, for the merits, everything to have been hashed out because they're the final decision makers and so they should have everything before them.

00;18;38;15 - 00;18;40;07

Stephen Gutowski

Okay. But they don't do that for all cases.

00;18;40;07 - 00;18;40;25

Zach Shemtob

No, they do not.

00;18;40;27 - 00;18;43;03

Stephen Gutowski

They have a whole emergency. The Chateau that.

00;18;43;06 - 00;18;49;23

Zach Shemtob

We can that, Yeah. This will be a truly long podcast.

00;18;49;25 - 00;18;50;28

Stephen Gutowski

Really? Yeah. I mean, maybe.

00;18;50;28 - 00;19;01;07

Zach Shemtob

In the future one. I'm happy to discuss the emergency docket or shadow docket or or interim relief docket. Short order docket, everyone. It's a different name for it. But yes, that has become much more prevalent.

00;19;01;11 - 00;19;14;16

Stephen Gutowski

But they say, I guess what they're doing. The second case is not taking them at earlier stages in litigation. That's maybe what the ideal is for these justices, but not what they always do. Right?

00;19;14;24 - 00;19;44;07

Zach Shemtob

Yeah. I mean, a lot of the shadow docket cases are also admin law cases, personnel cases of the administration. Now the Trump administration making these, you know, large moves, whether in restructuring the federal government, or at least, you know, federal agencies. And so the idea is there in order to prevent or to enable Trump to restructure it after that's been stayed by lower courts, they need to get to the Supreme Court immediately or it'll be too late.

00;19;44;09 - 00;19;47;11

Zach Shemtob

I mean, same thing in terms of deportations.

00;19;47;14 - 00;19;59;11

Stephen Gutowski

The people obviously would make that same argument about making this Rhode Island case is a good example. Like this is a law where, not only do they ban the new sales of these magazines, but they ban possession of them after a certain point.

00;19;59;11 - 00;20;23;21

Zach Shemtob

So you got what is it, six months or, what was the time period in which you had to essentially restructure the magazine or sell it off? Yes. Yeah. Right. So yeah. And that's why there was also interestingly, and was brought by Paul Clement, one of the great Supreme Court advocates, an argument that there was a takings problem here violate the Fifth Amendment.

00;20;23;21 - 00;20;31;26

Zach Shemtob

The idea that the government can't take your property without just compensation and that they were also violating the Fifth Amendment by putting this law into effect.

00;20;32;02 - 00;20;40;16

Stephen Gutowski

But I guess they just don't I don't know, for whatever reason, they don't view that as quite the same as some of these administrative law cases that they do.

00;20;40;19 - 00;20;53;04

Zach Shemtob

No, they don't. An administrative law in immigration cases. I think because there's a long history of allowing Second

Amendment cases to percolate and to go through the system, is.

00;20;53;04 - 00;20;54;25

Stephen Gutowski

Definitely normally at putting it. Yeah. Yeah.

00;20;54;28 - 00;20;59;15

Zach Shemtob

So, so traditionally they have treated these differently than many others. And that's.

00;20;59;17 - 00;21;02;18

Stephen Gutowski

That's Thomas's complaint, right? That they treat it like a second class.

00;21;02;18 - 00;21;08;15

Zach Shemtob

Right. You beat me to it. I mean, I, I not going to take a position either, which.

00;21;08;16 - 00;21;09;08

Stephen Gutowski

Thomas Thomas.

00;21;09;08 - 00;21;30;19

Zach Shemtob

Is certainly the, you know, the advocates, you know, got to have is maybe that's putting too strongly, but but, you know, believes in the Second Amendment and that it protects that individual rights have again and again made clear that this isn't this is being treated as a second class. Right. And for some circuit courts, they they may well have a point.

00;21;30;21 - 00;21;45;12

Stephen Gutowski

Yeah. And so, I mean, it's interesting because the Ocean State case, the magazine case does mirror the, the bump stock case. Cargill case, because that was another one where, there was no way to legally keep those bump stocks under that.

00;21;45;15 - 00;21;45;19

Zach Shemtob

Yep.

00;21;45;21 - 00;22;18;22

Stephen Gutowski

Rule from the ATF, during the first Trump administration. And that came up to the court, in a similar manner of like, please block this before the deadline goes into effect. And they declined to do that. And then later on, they when they did take up the case, they still found they found the the rule to be unconstitutional, not under Second Amendment grounds, but but still it's and it's just kind of, I don't know certainly a quirk of the system maybe put it lightly, to say that they thought the rule was unconstitutional in the end, but they let the confiscation aspect of it happen.

00;22;18;25 - 00;22;32;19

Stephen Gutowski

I don't know either way. It's I guess this is the reason why it's not surprising to see them not take up Ocean State Tactical, because it was at this preliminary injunction stage. Although there were three dissents in that. But three weeks?

00;22;32;19 - 00;22;34;04

Zach Shemtob

Nope. I mean, these cases.

00;22;34;04 - 00;22;34;15

Stephen Gutowski

But yeah, they.

00;22;34;15 - 00;22;48;09

Zach Shemtob

Actually listed 14 times. They were considered 15 separate conferences. And by the way, just for those who aren't, you know, as attuned to it, realist means the court considers it at a conference and then kicks it to the next conference.

00;22;48;16 - 00;23;01;14

Stephen Gutowski

By the way, how does that do? We know what do we know about how that actually works in practice? There's a lot of the court that's behind the scenes here. You don't see it. You know, the conferences look like why do they need 15 times to talk about these cases?

00;23;01;14 - 00;23;24;06

Zach Shemtob

It's impossible to know why something was relisted. The court never lays out its reasons. For that, it could be a number of things. It could be one. You have three justices who are ready to grant cert. And there's a forest who's on the fence and so keeps pushing it forward and saying, okay, next time, next time, let's think about it.

00;23;24;08 - 00;23;33;22

Zach Shemtob

There's also the possibility that the court has already decided to deny cert, and a bunch of dissents are being written. So so that can take up some time.

00;23;33;22 - 00;23;53;11

Stephen Gutowski

So with that in mind, the next case, the one that was at Final Merits, that's another like marquee case for the gun rights movements earlier on in the the fight over Second Amendment rights generally was, Snoopy Brown, which is the Maryland Assault Weapon ban case that Maryland's and Sullivan's band, which targets firearms like the 15th. Yeah.

00;23;53;11 - 00;24;15;07

Stephen Gutowski

And similar, guns for for a ban on sales. It's not confiscated. There's no confiscation aspect to it. Like the the magazine correct case. In Rhode Island. But, you know, this is a this is, the main policy everybody's been fighting over, in America for 30 years, basically. And it's one the court has not ever ruled on.

00;24;15;13 - 00;24;35;08

Stephen Gutowski

And it's here. We finally got to the point. They had one come up from Illinois earlier on the preliminary injunction basis. They denied that one. Now they have. And in Thomas wrote a statement in that one and said something to the effect of I understand that the court, you know, is waiting for final final merits case to take this.

00;24;35;09 - 00;25;03;00

Stephen Gutowski

Yes. But, you know, okay, but now we have a final merits case. They're listed it 15 times, and we got the conclusion on Monday, which is that they are not taking up that case, that there were three votes to take it up. And then, perhaps most instructive at all, we got a statement from Justice Brett Kavanaugh that was not a dissent, but, explanation of the denial.

00;25;03;02 - 00;25;11;13

Stephen Gutowski

And so I guess, it wasn't very long. Neither was the dissent. So it certainly didn't take 15 weeks for either one of those to be written, I would imagine. What do you think happened?

00;25;11;13 - 00;25;38;26

Zach Shemtob

It shows that there was some internal debate, and at least someone wanted to keep kicking it each time, and they just couldn't decide on it. It is rare to see a release 14, release 15 conferences. There. It's not unheard of. Dobbs, I think had 12 requests or something like that. Right. And there are some death penalty cases that have actually had over 20.

00;25;38;28 - 00;25;57;29

Zach Shemtob

So, so it's not entirely unheard of, but it is very rare. And. Yes, but to go back to Kavanaugh, Justice Kavanaugh agreed with Roberts, Barrett and the three liberals to deny cert. And then he wrote a very interesting, respective denial for cert, where he made some of these thinking quite clear.

00;25;58;01 - 00;26;23;00

Stephen Gutowski

Yeah. And Kavanaugh has ruled on this question before. When he was on the DC circuit, he was, in the minority in a panel that decided hell or two, which is, the follow up to the famous landmark case about DC's handgun ban. The same guy Dick Heller filed another lawsuit against DC's assault homes ban or ban on the AR 15 and other, the sale of those firearms.

00;26;23;02 - 00;26;41;29

Stephen Gutowski

And the panel upheld the the law, but Kavanaugh dissented and said, essentially, these are in common use. It's basically the same case as the handgun case. You can't ban, the most popular rifle in America, right? Yeah. And which is something that you've seen Thomas say in these in these dissents.

00;26;42;05 - 00;26;42;15

Zach Shemtob

Again.

00;26;42;15 - 00;27;08;24

Stephen Gutowski

As well, over several times now, over the years. But if that and it's what Kavanaugh repeats here in this, statement on the denial of snap, he basically just says straight up, this, this fourth, the Fourth Circuit was wrong to uphold this law and that these guns are almost certainly protected by the Second Amendment, which is interesting to say.

00;27;08;26 - 00;27;11;08

Stephen Gutowski

When you're denying cert in the case.

00;27;11;10 - 00;27;33;13

Zach Shemtob

Yeah. I mean, you know, just to kind of summarize it, you know, he he made clear that in Heller, the court further, you know, held that the Second Amendment protects those weapons that are in common use by law abiding citizens. Law abiding citizens use, both AR 15 and handguns for a variety of lawful purposes, including self-defense.

00;27;33;13 - 00;28;05;20

Zach Shemtob

In fact, the AR 15 is the most commonly bought rifle in the United States. They of around 16, approximately 16 million Americans own AR 15, or that was the number that they gave. At least I'm not sure how accurate that actually is. Right. But but he said, despite that, he wasn't ready to hear the case. And he gave the reason for that as, and I don't actually read it off opinions from other courts of appeals should assist this court's ultimate decision making on the AR 15 issue.

00;28;05;22 - 00;28;36;14

Zach Shemtob

Additional petitions for CERT will likely be before this court shortly. And in my view, this court should and presumably will address the AR 15 issue soon in the next term or two. Now, there's two very weird aspects of that paragraph. Yeah. The first is what new information, given that Kavanaugh just said, you know, that that he understands it in this way, what new information could be courts of appeals provide to him that would make a difference here?

00:28:36;22 - 00:28:38;17

Stephen Gutowski

And that was Thomas's point in his dissent?

00:28:38;17 - 00:28:39;11

Zach Shemtob

Absolutely.

00:28:39;13 - 00:29:09;13

Stephen Gutowski

He was like, there's we're not going to learn anything new from percolation that's been he says, it's been ten years. We we've we know everything we're going to know. I mean, you could obviously Bruen has kind of changed, the game. And as far as interpreting modern firearms restrictions go. But I would even say, it's a bit of a stretch to say percolation is going to have any effect because the lower courts have really solidified around the logic to upholding some of these, these, bans or striking them down.

00:29:09;13 - 00:29:18;16

Stephen Gutowski

And I don't know that there's going to be any like, innovation in these cases, coming forward. But yeah, but the interesting thing to say.

00:29:18;23 - 00:29:27;06

Zach Shemtob

And then the other interesting thing was this, presumably we'll address it in the next term, or to actually putting it out there that, oh, we're going to make it happen soon.

00:29:27;09 - 00:29:28;00

Stephen Gutowski

It's right.

00:29:28;06 - 00:29:29;22

Zach Shemtob

You know, he's, he's.

00:29:29;24 - 00:29:30;27

Stephen Gutowski

He's very keen.

00:29:30;29 - 00:29:44;11

Zach Shemtob

He's talking to Barrett and Roberts and he's basically saying this is going to happen. This is how I'm going to vote. You know I hope you'll join me. Nudge nudge hint hint. You know, let's see how it goes.

00:29:44;14 - 00:30:10;24

Stephen Gutowski

That's interesting because what I yeah there's that there's a couple ways to look at it. Right. I think there's the one where he's trying to talk to the other two conservatives that are maybe on the fence and nobody knows how they're going to vote. Because. Because if you had if, if everybody knew that Roberts and and Barrett, we're going to vote to uphold,

snow you know, the Maryland to solvents ban then presumably you could get four votes to take the case.

00;30;10;27 - 00;30;36;21

Stephen Gutowski

And if everybody knew they were going to vote to strike it down, you could get four votes to take the case. So the fact that they didn't get four votes one way or the other on this, is maybe a sign that people aren't sure what Baron Roberts are going to do. I guess it's hard, but buried in Roberts to be like they've been on the side of all the the majority of conservative justices and all of these second limit cases.

00;30;36;24 - 00;30;38;24

Stephen Gutowski

Roberts was on Heller. Right.

00;30;38;27 - 00;31;03;03

Zach Shemtob

Absolutely. And Barrett is written on the issue and controversies bar she had a very influential opinion. Dissent. Excuse me. And so, you know, but Roberts is an institutionalist. He cannot he clearly cannot stand, you know, all these hot button issues coming up at once. Yeah. So he he generally tries to avoid too much culture war stuff. He doesn't always that.

00;31;03;03 - 00;31;23;08

Stephen Gutowski

I was wondering. Yeah. That was the other thing I wondered is like well you know is one is Kavanaugh speaking for Roberts and and Barrett or is he speaking to them as is, as you said? And you know, when he's because he's not saying he doesn't say they should do he does say they should take it up, but he says they should and will take it up.

00;31;23;09 - 00;31;41;25

Stephen Gutowski

Yes. Meaning like he knows that they're going to do it in the next. And he gives a timeline, he says the next term or two. Yeah. And so it kind of feels like this court is famously, it's famously doesn't take a lot of cases. Yeah, right. It's much slower paced than previous courts have been.

00;31;41;28 - 00;31;43;08

Zach Shemtob

60 to 80. Yeah.

00;31;43;09 - 00;32;03;18

Stephen Gutowski

Maybe they just didn't. And he talks about how you look there's a lot of opportunities to to do this case. He's clearly got a foregone conclusion about how he's going to rule, but he's like, this is not the last time we're going to have the opportunity to do this. We can wait a year or two. We'll come to the same conclusion.

00;32;03;21 - 00;32;26;10

Stephen Gutowski

Thomas obviously doesn't like that idea. Yeah, he directly says that's, you know, disrespectful to all the people who are, you know, living under a ban that we are going to rule unconstitutional. Right, is sort of the implication or the ban that he says is unconstitutional. But, I don't know, an interesting thing. I definitely got the feeling that Kavanaugh is very confident that they're going to take a.

00;32;26;12 - 00;32;26;21

Zach Shemtob

Step.

00;32;26;27 - 00;32;31;13

Stephen Gutowski

Which makes you think he's confident that his his view is going to win out.

00;32;31;19 - 00;32;56;12

Zach Shemtob

He's making it very clear. And I think especially to Roberts and Barrett, you know Roberts being the institutions and Barrett's a procedural list. One thing we've learned she is a procedural. So she believes very much in proper procedures being adhered to in a particular way. So that may partly explain why she didn't join here. But but I do think that, yes, these cases, as Kavanaugh puts out there, will be taken up soon.

00;32;56;12 - 00;33;06;26

Zach Shemtob

Finally. And at that point, you know, I, I do think at least Barrett or Roberts will join the other conservatives.

00;33;06;29 - 00;33;10;28

Stephen Gutowski

Yeah. Yeah. I mean, they only need one, right. That seems pretty obvious.

00;33;10;28 - 00;33;22;19

Zach Shemtob

Pretty straightforward. They're not they're not even though there was some interesting language in the Mexican case, you're not going to get Kagan. You're not going to get Sotomayor and you're not going to get Jackson.

00;33;22;19 - 00;33;47;19

Stephen Gutowski

Well, let's talk about that real quick, because that that is the other interesting thing from this, this week's rulings is that, as you mentioned, Kagan is very particular in what she puts in her opinions. And this Mexico case was a unanimous decision. Nobody was dissenting from any part of it. And no one, you know, other than what we already discussed with Jackson and Thomas and some of their views on, in their concurrence, nobody no one takes issue with any of the with what is a very particular phrase.

00;33;47;19 - 00;34;14;12

Stephen Gutowski

I'll just read it directly because it's, it's it is interesting. You know, as noted above, Mexico here focuses on the manufacturers production of, quote, military style assault weapons, among which it includes Ar15 rifles, AK 47 rifles and 50 caliber sniper rifles. But those products are both widely legal and bought by many ordinary consumers. Parentheses. The AR 15 is the most popular rifle in the country.

00;34;14;15 - 00;34;37;28

Stephen Gutowski

The manufacturers cannot be charged with assisting in criminal acts. Just because Mexican cartel, members like those guns do. So I don't the majority saying written by Kagan saying, the AR 15, the most popular rifle in the country, just straight up claiming that as facts. I mean, they cite an NPR story, and I think it's it's not really in dispute that that's the case.

00;34;38;00 - 00;34;49;02

Stephen Gutowski

But, you know, interesting thing, I mean, is not those products are both widely legal and bought by many ordinary consumers. Isn't that common use?

00;34;49;05 - 00;35;04;06

Zach Shemtob

Right. Yeah, it's it's surprising. I mean, you know, when the, the ultimately the, the test here that seems to have been developed through Heller is, you know, the government can ban dangerous and unusual weapons.

00:35:04;12 - 00:35:05;08

Stephen Gutowski

Right.

00:35:05;10 - 00:35:25;28

Zach Shemtob

And that's been the famous. Well, yeah. The and there is ki it reminds me kind of, of, cruel and unusual punishment under the Eighth Amendment. So it's an area of mine is the Eighth Amendment. And courts have kind of read out the end and made it more of an order. And so we'll see if they do that here.

00:35:25;28 - 00:35:26;23

Zach Shemtob

And then I think some of.

00:35:26;23 - 00:35:27;27

Stephen Gutowski

Some of our courts,

00:35:27;29 - 00:35:47;13

Zach Shemtob

Exactly some of the lower courts have, but you, you have this. Yeah. Whether they're a dangerous and unusual weapon. And the idea is, if they're in common use, you know, they're not an unusual weapon. But then you have this other line in Heller, which is weapons that are most useful in military service. M-16 rifles and the like may be banned.

00:35:47;16 - 00:36:02;14

Zach Shemtob

And so a lot of the lower courts have used just that language to carve out, AR fifteens from being, you know, recognized as guaranteed by the Second Amendment. Right.

00:36:02;14 - 00:36:14;15

Stephen Gutowski

And that even happened in snuff. That was one of the lynchpins for the Fourth Circuit. Was this idea that F-15s are military style weapons and and dicta in in Heller has line.

00:36:14;20 - 00:36:35;17

Zach Shemtob

By the way, for for what it's worth, the fourth, circuit's opinion was written by J. Harvey Wilkinson, who's actually a judicial conservative appointed by Reagan. And yeah, he pivots a little on guns, but it was interesting to see that unlike the First Circuit, which is a very liberal circuit here, you had an opinion written by traditionally a more conservative jurist.

00:36:35;20 - 00:36:54;03

Stephen Gutowski

Yeah. But so I guess the what what it seems like you don't think we should make too much of this line showing up in that Mexico opinion, even though it was written by Kagan. And I think, you know, I think most people would assume that the three liberal justices are not going to vote to strike down, an assault weapons ban.

00:36:54;05 - 00:37:12;08

Stephen Gutowski

But I don't know. There's been some arguments, as we mentioned earlier, this idea that maybe the liberals are trying to get, on some of the border line stuff. Maybe they're trying to show that unified front so they can perhaps strategically get conservatives to come to their side on things.

00;37;12;13 - 00;37;12;25

Zach Shemtob

Yeah.

00;37;12;25 - 00;37;15;27

Stephen Gutowski

Mine or I don't know, or. So what do.

00;37;15;27 - 00;37;37;24

Zach Shemtob

You mean in cases like those here. So so I think that the these cases, these three cases were all interesting. They were all to a certain extent hot button issues. But but I think it's to eventually say, well, we voted that way. And on the AR 15 issue, you know, come on, will you join it to the to the more conservatives, will you join us since we were reasonable on these other cases?

00;37;37;24 - 00;37;38;18

Zach Shemtob

But I think.

00;37;38;21 - 00;37;38;29

Stephen Gutowski

This.

00;37;38;29 - 00;37;58;14

Zach Shemtob

Is the hot button issue that it's one that the for better or worse. And I'm again not taking a side here, but but I do think that reading tea leaves, I find it highly unlikely that Kagan, Jats and Sotomayor will end up, voting with, conservatives on this one.

00;37;58;19 - 00;38;21;29

Stephen Gutowski

But we have seen them do this in the past. When you got this exact quote, there was 2016 Saturno, dealt with. Now, that was not it was not as controversial of an issue because, it was stun guns, right. Which are non-lethal or less lethal, weapons. But, but you had a curiam ruling that said, yeah, they're protected.

00;38;22;01 - 00;38;41;04

Stephen Gutowski

I mean, just reinforce the idea that modern firearms, modern weapons are protected. It's not just the weapons that existed at the founding era. You know, which the court I think Alito had a concurrence that called it, you know, a nearly frivolous argument from the Massachusetts Supreme Court at the time. But, you know, I don't know.

00;38;41;09 - 00;39;07;26

Stephen Gutowski

I'm just saying. Yeah, I would be very surprised. Like you said, I'd be very surprised if you got any of the liberals on board with striking down a ban on our fifteens, but I'm surprised to see, a unanimous opinion written by Kagan where she includes the line that arrow fifteens are popular, and then essentially owned by ordinary citizens, by many ordinary citizens.

00;39;07;29 - 00;39;35;22

Zach Shemtob

You know, I said earlier, everything Kagan writes, she's an extraordinary writer. And, really deliberate jurist. Everything she writes is intentional. So, you know, she you can't you can't just write it off. Even though, again, I think it's unlikely that. Right. Jackson, Sotomayor or Kagan would would join, you know, the others in terms of saying our fifteens are protected by the, possession protected by the Second Amendment.

00:39:35;25 - 00:39:57;18

Stephen Gutowski

Yeah. So it probably comes down more to what a Roberts and Barrett think. And. Yeah, you know, as well, Roberts and Barrett again have been on the majority side, or at least them with the majority of conservatives and all of the Second Amendment cases. Neither of them have explicitly written on assault weapons bans in the past.

00:39:57;20 - 00:40:04;08

Stephen Gutowski

The Cantor case that you mentioned for, for Barrett was about nonviolent felons, which did take a pretty expansive, you know.

00:40:04;11 - 00:40:05;28

Zach Shemtob

Male face, I think.

00:40:06;00 - 00:40:38;24

Stephen Gutowski

Yeah. You know, it was mail from, guy convicted of mail fraud and she, she said that, that's where she gets into, like, the dangerousness, the idea, the standard that they were they talk about in Rahami that they've yet to revisit. But, you know, she, she was in a dissent on that, you know, the more pro, gang gun position of the, ones available in that case, she took so and again, she's been on the same side as a majority of conservatives in all the gun cases, including obviously, brewing.

00:40:38;24 - 00:40:57;13

Stephen Gutowski

Yeah, being most important one. But, and I guess, just real quick to, to, to put a cap on this, we're talking about the different justices and where they're, where they're at. And I think it's hard to know exactly where Roberts and Barrett stand, other than that, they didn't vote to take up this case, while the other four seemed like they would have.

00:40:57;16 - 00:41:23;04

Stephen Gutowski

But again, their history doesn't indicate any real big split between them and the other conservatives on Second Amendment stuff, except for, Thomas, who seems to be split, with he's certainly, more aggressive on the issue than the other conservatives. It appears, based on just a couple of things. And this is where I want to get your input of what what do you think's going on here and whether he's isolated on the issue or not?

00:41:23;07 - 00:41:27;28

Stephen Gutowski

You know, obviously we had he wrote Bruen, which is the Second Amendment test that now.

00:41:27;28 - 00:41:30;24

Zach Shemtob

Was joined by Roberts, by the way. Yeah.

00:41:30;27 - 00:42:01;16

Stephen Gutowski

So all the conservatives joined. Yeah. But then the very first, the very next case, second, in case they took with the first time they applied that test, it's 81 with Thomas in the, the, the, the, the only dissent in that case, and then now you've seen him do a couple of dissents to these, cert denials, the, the Illinois case, this case, so, you know, in Maryland, where no one's joined him in those statements either.

00:42:01;19 - 00:42:13;19

Stephen Gutowski

Now, not that they don't have a similar point of view, but I don't know. I'm just wondering if you think he's he's becoming isolated on this or what do we make of it? Well, my reading typed into it.

00:42;13;22 - 00:42;34;29

Zach Shemtob

I think Thomas is doing what Thomas has always done. He's staking out his claim. He's making clear this is my position. And he thinks down the line he may have more sympathetic justices join him. I mean, this has been his way. Now for many years. He wrote many dissents, which at the time were scoffed at, sometimes joined by Scalia.

00:42;35;01 - 00:42;53;23

Zach Shemtob

And just seen as you know, this is way too radical. And as time has gone by, and things have changed, he's been, you know, for better or worse, he's been vindicated. So I think this is part of Thomas's M.O.. He's, as I said, he's staking his claim and he's saying, no one joins me. So be it.

00:42;54;00 - 00:43;21;05

Zach Shemtob

But people will join me down the line interested? And, you know, the interesting one to see is if Alito or Gorsuch joins him and, you know, Gorsuch on some things is super aggressive, like, like, you know, can be really, you know, all in, on others less. So this is one where he seems to, you know, Vander stock's such an interesting case because it's a conflict, I think, between.

00:43;21;05 - 00:43;22;00

Stephen Gutowski

Those kind case.

00:43;22;00 - 00:43;30;12

Zach Shemtob

Gorsuch's textualism and his libertarian leanings. And the textualism, I think, in his view, one out there.

00:43;30;15 - 00:43;39;05

Stephen Gutowski

For Gorsuch, for Gorsuch. I will say like that Vander Stack is another one where Thomas was in a small minority, and that time he was joined by Alito.

00:43;39;06 - 00:43;40;06

Zach Shemtob

Yes.

00:43;40;09 - 00:44;11;01

Stephen Gutowski

And actually, I was kind of wondering if you if you read his denial, his, dissent to denial in Snoke, the last paragraph of it talks about Vander Stack. And it wasn't, you know, his complaint is that he thinks the way the court upheld the ATF's so-called ghost gun rule, or the frames and or series rule, implicates this big problem where ATF, if it wanted to, could just ban all air or fifteens as sort of precursors to machine guns.

00:44;11;03 - 00:44;28;13

Stephen Gutowski

Under the logic the court use, that's that's what Thomas argues in the very last pair, that most of the most of his dissent is just about, you know, the idea that AR 15 are in common use and protected by the Second Amendment, and there's no need to wait for more percolation. It's been ten years where, you know, we're dragging our feet.

00:44;28;13 - 00:44;40;16

Stephen Gutowski

We wouldn't do this with other, constitutional rights, he claims. Right. Typical stuff that you'll hear from from Thomas on this issue. And then in the last paragraph, he's like, by the way, Vander Stack was terrible.

00:44:40:19 - 00:44:41:29

Zach Shemtob

Yeah. That that made I.

00:44:41:29 - 00:44:44:00

Stephen Gutowski

Wonder if that's why people didn't want to so much.

00:44:44:01 - 00:45:00:19

Zach Shemtob

That may have alienated Gorsuch. But, again, Thomas is not afraid of alienating for sure, because he thinks in the, you know, at the end of the day, he will be vindicated and proven right. And there is, again, for better or worse, there is some history of that.

00:45:00:21 - 00:45:19:21

Stephen Gutowski

Yeah. Absolutely. All right. Well, I appreciate you taking the time to join us here and give us your insight into what the court may be thinking on these things. I don't think there's a better publication for, that if, than the SCOTUSblog. So I'm glad that you joined us, to, today. And hopefully we'll have you back on in the future.

00:45:19:21 - 00:45:31:10

Stephen Gutowski

Once, once they load up on some more gun cases, I guess we're done talking about them. I mean, there's some there's some that, you know, are seeking cert, but yeah, nothing. They've played they're clearly played.

00:45:31:17 - 00:45:39:05

Zach Shemtob

For this term. I think we're finished. But yeah, it was a it was an absolute pleasure to be here. And I look forward to future conversations.

00:45:39:08 - 00:45:54:10

Stephen Gutowski

Absolutely. And so, you know, and and if people want to follow the show's blog and they want to see the coverage that you guys are going to do on, the Supreme Court and especially as it relates to, Second Amendment and gun issues, where can they do that?

00:45:54:12 - 00:46:13:16

Zach Shemtob

You can. I mean, just go to SCOTUSblog.com and we have all sorts you can go to the case term and see all the cases that are pending. You can check out our statistics and see those. For instance, if you click on the case page for Snopes or the case page, I think for Heller back in the day, it'll bring you to all our writings on that.

00:46:13:21 - 00:46:20:00

Zach Shemtob

You know, you get the Supreme Court docket, it gives you all the information you need on these on these cases.

00:46:20:04 - 00:46:37:27

Stephen Gutowski

Is a great resource. Truly is. So I encourage people to head over to this blog, and check it out today if they haven't already. And yeah, I appreciate you coming on. We'll have to have you on. In the future as well, don't you? I'm sure a lot more cases to discuss. So I'm looking forward to it.

00:46:37;29 - 00:46:41;28

Zach Shemtob

Kavanaugh's, you know, putting it out there. So, yeah, 1 or 2 terms. We'll be back again.

00:46:41;28 - 00:47:01;27

Stephen Gutowski

Devin has already given us a, deadline. You know, a couple years, which called, I think, you know, like I said, I think it gives to me the insight is they're probably going to strike down this law at some point in the future. That's cold comfort to some degree for gun rights advocates. I think you basically.

00:47:01;27 - 00:47:09;16

Stephen Gutowski

Tom. Don't worry, a couple of years from now, you'll get what you want. And it's been, you know, Heller was 2008. McDonald was 2010.

00:47:09;16 - 00:47:10;02

Zach Shemtob

Yep.

00:47:10;04 - 00:47:25;03

Stephen Gutowski

That's that was Thomas's point in his dissent. So, but, you know, I think it's still anything you can get that where the Supreme Court's giving you insight into what they're thinking is, is valuable. So. All right, that's all we've got for this week. We will see you guys again real soon.