

Gun Rights Case Could Fizzle on Procedure at High Court (1)

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December 2, 2019

Gun rights advocates finally convinced the justices to take up a Second Amendment case for the first time in nearly a decade, but how the court deals with a procedural hiccup could end up having a bigger impact.

The merits of the case turn on a New York City regulation significantly limiting where lawful gun owners can take their guns, but the justices first have to confront the question of mootness, since the city has since repealed the challenged law.

The mootness issue has the potential to foil the court's first foray back into gun rights since its landmark decisions in *District of Columbia v. Heller* in 2008 and *McDonald v. City of Chicago* in 2010, where a sharply divided court held that the Second Amendment protects the right to keep a firearm in the home for self-defense.

"I suspect the court will probably dump the case shortly after the argument," said constitutional law professor Josh Blackman, of South Texas College of Law Houston.

If the court finds the case moot, it could encourage gamesmanship on the part of governments who can repeal challenged statutes and inhibit the development of the law. Still, the court's non-partisan image could take a hit if it changes Second Amendment law in a case about a repealed statute that is unique in the country, some scholars and gun control advocates said.

Mootness Arguments

Justice Clarence Thomas has referred to the Second Amendment as a second-class right, citing the court's refusal to clarify the scope of the right since *Heller* and *McDonald*.

But New York says this isn't the case for the justices to revisit gun rights because there's nothing left for the Supreme Court to decide after the city repealed the law.

The plaintiffs, gun owners and a local gun right organization, urge the justices to push ahead, noting that the city's attempt to frustrate review by the justices shouldn't be rewarded.

"This Court should not reward, in any way, Gotham's bad faith attempt to keep the law unclear at the expense of the people," the libertarian Cato Institute told the justices in urging them to decide the case on the merits despite the rule change.

The plaintiffs have got Supreme Court heavyweight Paul Clement, of Kirkland & Ellis, on their side, as well as the United States, which will send Jeffrey B. Wall, the number two at the Solicitor General's Office, to argue as an amicus.

The city will be represented by city attorney Richard P. Dearing, who will be making his first Supreme Court appearance.

Gamesmanship

To the extent that New York City is successful at taking the case off the court's calendar "I could see city counsels and state legislatures—and possibly even Congress—getting a lot smarter about mooting out issues," said Brooklyn Law School civil procedure professor Robin Effron.

"The more people look at the supreme court as being very political," such that you are "waiting for the right moment to challenge something," there's certainly the potential for "a little bit of gamesmanship," she said.

This isn't the first time the court has had to deal with litigation strategy potentially yanking an issue from the court's consideration.

The court's "voluntary cessation" doctrine was specifically developed to prevent gamesmanship on the part of parties staring down an adverse court ruling.

That's especially true when the case deals with an underdeveloped area of the law, like the scope of Second Amendment rights, according to Cato.

'Political Project'

But New York University's Adam Samaha, who writes about constitutional rights, said the risks of the court moving forward with the case despite the rule change are acute.

In addition to the city changing its rules, New York state passed a law which makes it nearly impossible for the city to simply reenact the challenged provision, Samaha said.

So the challenged rule no longer exists, the city doesn't have the option of reenacting it, and there is no other jurisdiction that has a similar regulation, Samaha said.

"If you're going to be making significant doctrine based on a rule that doesn't exist anywhere," there are going to be some concerns about the quality of that development, Samaha said.

Mootness limits on the court's power "are designed to be non-partisan and rights-neutral," he said—meaning that the consideration of mootness isn't supposed to change based on how the justices feel about the particular issue in the case.

But that's exactly what's happening, according to a controversial friend-of-the-court brief filed by Senator Sheldon Whitehouse (D-R.I.) and some of his Democratic colleagues.

Referring to the plaintiffs' attempts to secure more robust Second Amendments rights as a "political project," Whitehouse says that if the court goes along it risks further damaging the reputation of the court as an apolitical institution.

Senate Majority Leader Mitch McConnell (R-Ky.) and several of his Republican colleagues responded with their own letter to the justices, urging them not to be “cowed” by Democratic threats.

New York’s supporters include Everytown for Gun Safety, which advocates for universal background checks and other gun control measures. Bloomberg Law is operated by entities controlled by Michael Bloomberg, who serves as a member of Everytown for Gun Safety’s advisory board.