NATIONAL REVIEW

The Second Amendment Will Soon Be Back at the Supreme Court

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May 1, 2020

The Supreme Court should and will take a Second Amendment case very soon, and Senator Sheldon Whitehouse (D., R.I.) won't be happy. When Whitehouse basically threatened the Supreme Court over a recent Second Amendment case, perhaps he didn't realize that he could get what he wanted and still lose the fight. This week, although the Court dismissed as moot the case that had Whitehouse in a tizzy, the Court is reviewing a slew of Second Amendment petitions that he'll like even less.

The mooted case, *New York State Rifle and Pistol Association v. NYC*, was a challenge to NYC's bizarre travel restrictions for permitted gun owners and the first Second Amendment case the Court had taken in a decade. After the justices agreed to hear the case, New York City and New York state, fearing a decision that would strengthen the Second Amendment, moved quickly to change the law to keep the Court from issuing a decision. This is a form of strategic mooting, because courts generally don't hear controversies that are no longer "live" because there is no relief a court can give if the law has already been changed. And while strategic mooting is fairly common, it's an unsavory form of gamesmanship with the Court's docket.

New York City asked that the case be removed from the docket, and Whitehouse, joined by four other senators, wrote an infamous amicus brief urging the Court to dismiss the case. Whitehouse didn't just confine his arguments to the legal question of mootness. He came within a hair's breadth of outright accusing the Court's Republican-appointed justices as being shills for the NRA and the Federalist Society. His shocking brief closed with what many interpreted as a threat to restructure the Court if the justices didn't go along with his request. "The Supreme Court is not well. And the people know it. Perhaps the Court can heal itself before the public demands it be 'restructured in order to reduce the influence of politics.'"

On Monday, the justices, by a 6-3 vote, dismissed the case as moot. The same day, they added ten held-over Second Amendment petitions to the Court's calendar. These are petitions that were being held pending the Court's decision in the New York case. The justices will discuss these petitions Friday, with decisions likely to be released on Monday.

Five of the petitions challenge various states' "good reason" restrictions on the right to carry a weapon outside the home. Eight states issue carry permits provided that the applicant meets certain objective criteria (e.g. a criminal background check) as well as the vague subjective criterion that the applicant demonstrates a justified need to carry a firearm, often determined by a local sheriff. This has long been thought unconstitutional, and with good reason: No other constitutional right can be conditioned on the subjective determination of a local official. I wouldn't want a Sheriff Sheldon Whitehouse determining whether I can carry a gun.

Another petition challenges California's microstamping requirement, which requires new pistols to stamp the casing with an identifiable mark for better tracking. Problem is, no gun manufacturer has figured out how to do this. It's akin to a law saying people have a right to free speech only if they've turned lead into gold.

There are also a couple of petitions challenging so-called "assault weapons" bans and high-capacity magazine restrictions, and a petition challenging the federal ban on interstate firearm sales, which for some reason irrationally applies to handguns but not rifles.

The Court needs to take a Second Amendment case soon, whether it's one of these cases or another. In the ten years since the Court took a Second Amendment case, the lower courts have floundered to figure out what the decisions in *Heller* and *McDonald* mean. The Ninth Circuit has made a habit out of rubber-stamping almost any restriction on firearms. For example, the court upheld California's ten-day waiting period law as it applied to those who passed the background check in fewer than ten days and were already owners of a firearm or even had a concealed carry permit.

The Seventh Circuit, on the other hand, struck down Chicago's ban on shooting ranges in the city — correctly reasoning that if the purpose of the Second Amendment is to allow guns for self-defense, then that entails the ability to practice with the gun. In response to the Seventh Circuit's decision, the city created an elaborate set of regulations for shooting ranges that left only 2.2 percent of the city even theoretically available for shooting ranges. The Seventh Circuit struck those down too.

There's a wide variance between the circuits where seemingly any gun law is okay and those, like the Seventh, that take the Second Amendment seriously. One of the Court's most important jobs is to rectify that variance. They'll soon take a case to do that, and Senator Whitehouse will again be unhappy.

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