



September 26, 2019

Dave Hardy, an attorney in private practice in Arizona, thinks this is the term when the Supreme Court finally decides whether a constitutional right to carry a firearm extends beyond the front door.

Gun rights advocates like Hardy, who's been writing about the Second Amendment since the 1970s, have waited for years for the Supreme Court to hear a new challenge to a gun control law.

"You don't do much work in the field, in terms of earning money, but it's been something that interests me," Hardy said.

The wait has gone on since the 2008 District of Columbia v. Heller decision, which established that the Second Amendment wasn't about arming militias. Instead, according to the court, it guarantees an individual's right to keep and bear arms. The only guarantee spelled out in that decision, authored by the late Antonin Scalia, was the right to keep a gun in the home for self-defense.

The decision explicitly left room for further regulation: "Like most rights, the Second Amendment right is not unlimited," wrote Scalia. "It is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

What The Court Has Protected, And What It's Prohibited

Existing prohibitions, such as those preventing felons from owning firearms or against carrying in certain places, were cleared by the court in the Heller decision. Two years later, the Supreme Court protected the individual right to keep and bear arms from state regulation in 2010 decision McDonald v. Chicago.

In the past decade, the court has refused to hear any challenges to appeals courts or state court rulings. These include a case that upheld a ban on assault weapons in a Chicago suburb, and California's licensing and background check restrictions, among many others.

"Sometimes you'll see the Supreme Court rule and the circuit courts become very enthusiastic about the ruling. And then they'll expand it as far as they humanly can," said Hardy. That's not how it has worked with the right to keep and bear arms. "This is one where they're decidedly reluctant. I don't know if I would say hostile, but decidedly reluctant to go one inch further than the Supreme Court is prepared to take them."

This has left gun rights advocates increasingly frustrated.

The New York Case

The justices *have* accepted New York State Rifle and Pistol Association's appeal in its case against New York City's law —repealed in June— prohibiting gun owners from carrying their firearms outside the home, except to designated gun ranges inside city limits.

There's agreement among observers on both sides of the gun control debate that New York's law was unusually restrictive and the Supreme Court is likely to strike it down.

Arguments are scheduled for Dec. 2, but the court could still decide that, because city legislators repealed the law, the case is moot and dismiss it. The state also passed a law preventing similar regulations in the future.

There are signs that the court will let it go ahead. They could have dismissed it at any point since New York changed the law. Instead, the court required the city to file a brief in support of the law. And the case has found a spot on the calendar.

David Kopel, a legal scholar at the Cato Institute and a gun rights advocate, says the court should still address the law.

“It was upheld by the Second Circuit, which said that banning people from taking their guns outside the city for target practice isn't even a Second Amendment issue.” Kopel said. “So there's still that precedent that's out there.”

Kopel is one of the advocates who's been pressing the court for years to expand on *Heller* and *McDonald* and expand the right to carry a gun outside the home. In their view, lower courts have been too eager to uphold restrictions on gun ownership.

Politics vs. The Second Amendment

The New York case arrives at the Supreme Court at a time when the debate over gun control is near the top of the political agenda in many states and in Congress. On the federal level, the Democratic-controlled House of Representatives has passed bills expanding background checks, banning high-capacity magazines and supporting red flag laws.

A new ban on military-style rifles is widely supported by the leading Democratic presidential candidates. None of these has been passed by the Senate or signed into law. But Senate Majority Leader Mitch McConnell, a Republican, has said he would introduce gun control measures for a vote in the Senate if they have the president's support.

With all that in mind, attorneys for March For Our Lives, a youth-led movement founded in the aftermath of the mass shooting at a high school in Parkland, Florida, filed a brief arguing the court should keep this movement in mind and not make too broad of a ruling on gun rights.

“They're asking the court to leave enough flexibility in the review of regulations to let public opinion and political developments have a say,” said Ira Feinberg, the lead counsel for March For Our Lives.

Feinberg added that, while the New York law is unusually restrictive, the issues at stake are much larger. The court, in an opinion striking down that law, could apply what's known as “strict scrutiny” to any regulation of gun rights. Strict scrutiny would require the government to make the case for why any regulation is necessary and would effectively guarantee public safety. That would likely lead to the overturning of the New York law.

To drive the point home, the March For Our Lives brief led with a series of anecdotes of people affected by gun violence.

“The plea that we make in the brief is that the court should not adopt a standard like strict scrutiny, which would make it impossible to justify any regulations here,” Feinberg said. “There’s an urgent need for regulation.”

Kopel argues that’s exactly why the Constitution guarantees certain rights.

“There have been times where there were at least seemingly public majorities that have been in favor of all kinds of censorship or abuse of religious or ethnic or racial minorities,” said Kopel. “And, yes, the Constitution closes off the discussion about that.”

What The Justices’ Records Mean

Since the Heller case was decided, Justices Anthony Kennedy and Antonin Scalia have left the court. Scalia’s replacement, Justice Neil Gorsuch, did not write any opinions on gun control regulations before coming to the Supreme Court. Gorsuch did sign onto a dissent by Thomas in 2017 denying review of a California law restricting public carry.

Thomas wrote: “The Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it.”

And Kennedy’s replacement, Justice Brett Kavanaugh, is viewed as more hostile to gun regulations than his predecessor. In a 2011 dissent while on the D.C. Court of Appeals, Kavanaugh argued the government could not ban guns like the AR-15 because they were in common use and not historically banned.

“He doesn’t care about what effect any of these laws will have on public safety,” said Allen Rostron, a law professor at the University of Missouri Kansas City and formerly a lawyer for Brady, a gun control advocacy organization.

“[Kavanaugh] says that the right to keep and bear arms should be interpreted and applied based strictly on the text of the Second Amendment, the history of it and tradition,” Rostron said.

According to Rostron, the court could choose to apply a level of review to government regulation that would make any gun control law impossible to defend.

“If they said, ‘We want proof, really compelling proof about what exactly this gun law would do and how it would improve safety,’” Rostron said, “it’s very hard to prove it definitively one way or the other.”

Coming Up With Standards For Gun Regulations

Rostron argues there are two areas the court still has to sort out: Just where does the Second Amendment right to keep and bear arms apply? Precedent has established the right inside the home. How much of a right do citizens have to carry firearms outside the home?

The other core question: just how strong is the right to keep and bear arms? Who can be denied it and on what grounds? How many hoops can people be made to jump through before getting a firearm?

He says many existing restrictions, like on felons or people with domestic violence convictions owning firearms, are likely to be left in place. But licensing requirements might start getting a harder look.

“Certainly the places in the country that have more restrictive requirements, more discretion with law enforcement and that sort of thing for gun licensing, would potentially be struck down, I think,” Rostron said.

There are cases challenging New Jersey’s licensing rules: Rogers v. Grewal, Cheeseman v. Polillo and Ciolek v. New Jersey that have all been appealed to the U.S. Supreme Court.

A Massachusetts case, Gould v. Morgan, challenging the licensing system in that state has also been appealed to the Supreme Court.

Gun Rights And A History Of Discrimination

Nezida Davis, an Atlanta-based attorney for the National African American Gun Association, filed a brief asking the Supreme Court to rule against New York City’s law.

The brief points out a long history of prohibiting gun ownership among African Americans, going back to the days of slavery and continuing through the Jim Crow era. It argues that licensing systems, in which sheriffs decide who has the right to a license to carry, violate the Fourteenth Amendment right to equal protection.

“These types of restrictions, where government agencies decide whether you have the right to get a firearm, we’ve found that leads to discrimination,” Davis said.

While there’s widespread agreement that New York’s law won’t get the Supreme Court’s approval, the big question everyone interested in the gun debate is waiting to learn is: How far are they going to go in striking it down?