THE DAILY RECORD
Western New York's Source for Legal and Real Estate News

D.C. gun ruling again raises an issue the Supreme Court has been reluctant to review

Robert Barnes

July 31, 2017

When a panel of the U.S. Court of Appeals for the District of Columbia Circuit decided an important gun rights case last week, some advocates were already thinking ahead.

Clark Neily of the Cato Institute told my colleague Ann E. Marimow that the 2-to-1 ruling against the District's requirement of a "good reason" to obtain a permit to carry a gun in public was "thoroughly researched and carefully reasoned."

It would "make an ideal vehicle for the Supreme Court to finally decide whether the Second Amendment applies outside the home," Neily said.

As if.

The fact is the justices have shown a remarkable lack of interest in deciding that issue, or in expanding upon their landmark 2008 decision in *District of Columbia v. Heller*. They have had multiple chances to define with specificity what the Second Amendment protects beyond *Heller*'s guarantee of individual gun ownership in one's home, and they have declined each opportunity.

Just last month, the court decided to stay out of a similar case from California, where the U.S. Court of Appeals for the 9th Circuit decided that the Second Amendment does not protect the right to carry a concealed weapon in public.

Declining to even review the ruling brought an impatient rebuke from Justice Clarence Thomas.

It "reflects a distressing trend: the treatment of the Second Amendment as a disfavored right," wrote Thomas, who was joined by Justice Neil M. Gorsuch.

Thomas said he found the 9th Circuit's ruling "indefensible."

But "even if other members of the court do not agree that the Second Amendment likely protects a right to public carry, the time has come for the court to answer this important question definitively. Twenty-six states have asked us to resolve the question presented," he wrote.

Circuit Judge Thomas B. Griffith acknowledged the absence of clear direction at the beginning of his opinion last week on the D.C. permit procedure.

“Constitutional challenges to gun laws create peculiar puzzles for courts,” he wrote, because they require balancing the highest goal of government — protecting innocent lives — against individual rights bestowed by the Constitution.

“The Supreme Court,” he observed, “has offered little guidance.”

The court’s first in-depth examination of the Second Amendment is “younger than the first iPhone,” Griffith wrote. “And by its own admission, that first treatment manages to be mute on how to review gun laws in a range of other cases.”

By “listening closely” to what the court had to say in *Heller*, Griffith and Judge Stephen F. Williams blocked the District’s law as a violation of a core Second Amendment protection.

The law requires those seeking a permit to carry a concealed firearm to show that they have “good reason to fear injury” or a “proper reason,” such as transporting valuables. Living in a high-crime area “shall not by itself” qualify as a good reason.

As of July 15, D.C. police had approved 126 concealed-carry licenses and denied 417 applicants.

Judge Karen LeCraft Henderson came up with a very different interpretation from her colleagues. *Heller* blessed the District’s regulation, she wrote, because of the city’s unique security challenges as the nation’s capital and because the permit process does not affect the right to keep a firearm at home.

“The sole Second Amendment ‘core’ right is the right to possess arms for self-defense in the home,” Henderson wrote.

She added that by “characterizing the Second Amendment right as *most* notable and *most* acute in the home, the Supreme Court necessarily implied that that right is *less* notable and *less* acute outside the home.”

She noted that her colleagues had put on “blinders” to the historical analyses of the D.C. Circuit’s sister circuits: All who have considered the issue concluded that restrictive state regulations on carry permits are constitutional.

There aren’t many states with such stringent requirements — Maryland, New Jersey and New York are among them. They are outliers, said attorney Alan Gura, a go-to Second Amendment lawyer who successfully argued *Heller* at the Supreme Court and the D.C. case, *Wrenn v. District of Columbia*, as 44 states “allow citizens to claim their rights.”

As is its custom, the Supreme Court has not given reasons when it declined to review the lower court decisions upholding the state restrictions. That unanimity, though, could be one reason the Supreme Court has not gotten involved.

The court most often steps in when there is a conflict in the lower courts. The D.C. Circuit’s panel decision creates that — for now.

The city has not decided on its next legal move, but it seems likely to ask the full D.C. Circuit to review the panel’s decision. As David Kopel, a University of Denver law professor and gun rights activist notes, when *Heller* was decided in that court a decade ago, the full circuit declined to review and overturn the panel’s groundbreaking endorsement of an individual right to gun ownership.

But the court has changed dramatically since then. It is more liberal now, with a majority of judges appointed by Democratic presidents.

If the full D.C. Circuit joined its sister circuits in upholding the "good reason" requirement, gun rights activists would be back to the Supreme Court, again asking for review.

As Thomas's dissent indicates, there is some division on the court on the matter, and reasons for why the justices have not stepped in are a matter of speculation.

Perhaps a solid majority agrees the lower courts have read *Heller* correctly and that it leaves space for jurisdictions to impose stringent requirements for carrying a gun outside the home.

Or perhaps the court remains closely divided — *Heller* was decided on a 5-to-4 vote — and the justices simply have little appetite for tackling the controversial matter of guns in the absence of a lower court disagreement that would force their hands.