



Supreme Court may expand Second Amendment rights despite repeal of disputed gun restrictions

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WASHINGTON – The Supreme Court may be on the verge of expanding gun rights for the first time in nearly a decade. What's surprising is how it got there.

The court on Monday will hear a challenge to an obscure New York City rule that set such rigid restrictions on transporting legally owned guns that it was repealed in July.

But it turns out that wasn't what they really wanted. Backed by the National Rifle Association and the Trump administration, the challengers to New York's abandoned restrictions are hoping the high court refuses to declare the case moot. That would give them a chance to win the biggest Second Amendment victory since landmark rulings a decade ago affirmed the right to keep guns at home for self-defense.

Faced with a defunct ban on transporting guns outside city limits, the increasingly conservative court majority could render a decision making clear what some justices believe: that the Second Amendment extends beyond the home, and that lower courts should view state and local limits on carrying guns in public with skepticism.

"This would be a strange case in which to go big," says Joseph Blocher, a professor at Duke University School of Law and co-director of the Duke Center for Firearms Law. "Yet the stakes going forward are potentially huge."

Gun rights groups were surprised in January when the high court agreed to hear the case. Gun control groups were surprised in October when the justices refused to jettison it, even after the city and state erased restrictions that were likely unconstitutional.

Both actions went against the court's recent modus operandi when it comes to guns: avoidance. Since its 2008 and 2010 rulings striking down gun restrictions in the District of Columbia and Chicago, the court has refused to hear dozens of cases challenging lesser limits on who can own what types of guns, where they can be taken, what requirements must be met and more.

During that time, lower courts have resolved more than 1,000 Second Amendment cases, ruling more than 90% of the time in favor of gun control measures, according to a study by Blocher and Southern Methodist University assistant law professor Eric Ruben. Since Connecticut's Sandy Hook Elementary School shooting in 2012 that killed 20 students and six staff members, more than 300 gun safety laws have been passed.

The trend has frustrated gun rights groups as well as conservative justices who say federal and state court judges are not applying a stringent test to most gun restrictions.

When the Supreme Court refused in 2017 to second-guess an appeals court ruling that upheld California's limits on carrying guns in public, Associate Justice Clarence Thomas summed up the frustration.

“I find it extremely improbable,” Thomas wrote, “that the Framers understood the Second Amendment to protect little more than carrying a gun from the bedroom to the kitchen.”

'Text, history and tradition'

The court has changed since then. Gone is retired Justice Anthony Kennedy, who signed on to the late Associate Justice Antonin Scalia's 2008 decision in *District of Columbia v. Heller* after ensuring it would leave the door open to state and local restrictions.

In his place: Associate Justice Brett Kavanaugh, who dissented as a federal appeals court judge from a ruling upholding the district's subsequent ban on semi-automatic rifles and its firearms registration requirements. Kavanaugh said courts should analyze gun bans and regulations based on the Second Amendment's "text, history and tradition."

Enter an extreme rule such as New York City's, which barred licensed handgun owners from taking their guns beyond its five boroughs, even to second homes or shooting ranges. Federal district and appeals courts upheld the 18-year-old rule, but it looked like a goner at the Supreme Court.

Gun control groups such as Brady, Everytown for Gun Safety and the Giffords Law Center to Prevent Gun Violence feared something else: a decision that would expand public carry rights elsewhere, including in nine states that give law enforcement officials discretion to deny licenses. Those are California, New York, New Jersey, Massachusetts, Maryland, Connecticut, Rhode Island, Delaware and Hawaii.

Rather than fight it out in court, the city repealed the rule, and the state replaced it with a statute that permits the previously banned transportation of firearms. The two liberal-dominated governments felt that would end the case.

Not so fast, the justices said. They called for oral argument on whether the case is now moot, as well as on the rule itself. The New York State Rifle & Pistol Association, which challenged the restrictions, claimed in court papers that gun owners' rights still were limited and warned that the rule could be reimposed. The U.S. Solicitor General's Office said gun owners still might seek damages for prior constraints.

With Thomas, Kavanaugh and Associate Justices Samuel Alito and Neil Gorsuch all in favor of a more robust Second Amendment, all eyes now are on Chief Justice John Roberts, the new swing vote in many areas of the law.

“The NRA has been looking for a way to get the Supreme Court to endorse its dangerously extreme view of the Second Amendment,” says Eric Tirschwell, managing director of litigation

at Everytown for Gun Safety. "It hasn't succeeded, but in this case a newly constituted Supreme Court seems to be opening the door, at least a little. The stakes could not be higher."

Guns in public

Despite the losses in lower courts, the gun lobby doesn't have it so bad. In most states, law-abiding adults not only can own a gun but also can carry it with them. Restrictions generally deal with permits, registration, background checks, types of weapons and restrictions on young people, felons and those with mental illnesses.

What's protected is "the core of the Second Amendment – can I carry a gun around with me pretty much wherever I want?" says Clark Neily, vice president for criminal justice at the libertarian Cato Institute. "For the average person, there's no interest in owning a fully automatic machine gun."

The biggest issue left unresolved by the Heller decision was the right to carry firearms, either concealed or openly. When that case was decided, about 40 states already permitted it, but some big ones – notably California and New York – had major limitations. They still do.

"For too long, lower courts have stubbornly controverted the Supreme Court's ruling in *D.C. v. Heller*," says Jason Ouimet, executive director of the NRA's Institute for Legislative Action. "The nation's highest court should defend all Americans – and its own precedents – in a manner that vindicates the fundamental nature of the rights enshrined within the Second Amendment."

If conservatives have their way, the court could extend Second Amendment rights beyond the home, or simply require that lower court judges demand more specific justifications for state and local restrictions.

Hannah Shearer, litigation director at the Giffords Law Center, notes the dispute before the court involves "a law that only existed in New York City and currently exists nowhere – it looks like a small issue, but they're making very sweeping legal claims."

If such a broad decision does not come this time, there are more cases in the pipeline, including challenges to permitting requirements for carrying firearms in public in New Jersey and parts of Massachusetts. A federal appeals court struck down Washington, D.C., restrictions in 2017, creating a split among lower courts that eventually may get the Supreme Court's attention.

"There's a backlog of gun rights cases that this could impact," says Alan Gottlieb, executive vice president of the Second Amendment Foundation.

It's far less likely that the high court will enter the debate over bans on assault weapons, such as those used in some mass shootings. Lower courts from Massachusetts to California have upheld such bans. The justices recently refused to shield Remington Arms Co. from potential liability in the Sandy Hook shooting.

The high court's only firearms ruling in recent years reversed a Massachusetts court that had upheld a ban on stun guns.

Public opinion polls continue to show strong support for tougher laws on gun sales. A recent Gallup Poll showed 64% want stricter laws, while only 7% want them loosened. But only 29% would go so far as to ban handgun possession for most people.

Buoyed by recent victories, gun control groups and their allies worry that what the justices write when deciding the New York case could influence lower courts to strike down other restrictions.

“The court doesn’t have to look like it’s making a big change,” says Adam Winkler, a UCLA School of Law professor and Second Amendment expert. “It can make a big change by setting the foundations for future cases.”