Locked and Loaded: Supreme Court is ready for a showdown on the Second Amendment

Jonathan Turley

October 16th, 2021

In the movie "True Grit," federal marshal Rooster Cogburn is asked if the gun that he brandished at a crime scene was loaded. Cogburn, played by John Wayne, dryly responds, *"*A gun that's unloaded and cocked ain't good for nothing." Something similar might be said of a Supreme Court docket, particularly when there is a Second Amendment case that could prove one of the most impactful decisions of the term.

The court will soon take up New York State Rifle & Pistol Association Inc. v. Bruen, more than a decade after its last major gun rights decision. The case promises to be a showdown between the Supreme Court and lower courts, which have been chipping away at the high court's prior Second Amendment rulings.

In 2008, the Supreme Court handed down a landmark ruling in District of Columbia v. Heller, recognizing the Second Amendment as encompassing an individual right to bear arms. Two years after Heller, in McDonald v. City of Chicago, the court ruled that this right applied against the states.

The new case concerns concealed-carry restrictions under N.Y. Penal Law § 400.00(2)(f) that require a showing of "proper cause." Lower courts have upheld the New York law, but there are ample constitutional concerns over its vague standard, such as showing that you are "of good moral character." The case presents a single short, direct question — whether New York's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

The high court has been carefully waiting for just the right case to address states and cities that have sought to limit gun rights. Indeed, just this week, the court turned down a challenge of a Wisconsin law imposing a lifetime ban on gun ownership for former felons, including cases

involving nonviolent crimes. That and other cases seemed tailor-made for Justice Amy Coney Barrett, who wrote a strong defense of the Second Amendment in a similar case as an appellate judge.

It often is difficult to determine which side of the court supplied the votes to grant review in a case. That is not the situation here. The New York case was clearly accepted by conservative justices with a mind toward reversal of the U.S. Court of Appeals for the 2nd Circuit.

The selection of a New York case is particularly poignant. Some of the justices were none too pleased with the Big Apple last year when city officials suddenly sought to withdraw a case on the court's docket. New York politicians had passed a law that many of us viewed as unconstitutional, with its imposition of burdensome limits on the transportation of lawful guns from homes. Those politicians publicly thumped their chests about going to the Supreme Court with the law and limiting the Second Amendment precedent; professing absolute confidence, they litigated the law, and, again, the 2nd Circuit supported the dubious statute. The Supreme Court accepted the case for review and was expected to overturn the law — until New York suddenly changed the law and then quietly sought to withdraw its case before any ruling.

The court ultimately dismissed the case but did so over the objections of three dissenting justices. It was a rare instance in which the court resisted such a mootness ruling after a party sought to withdraw — but, then, few litigants have had the temerity to do what New York did.
Justices Samuel Alito, Neil Gorsuch and Clarence Thomas specifically called out New York for "manipulating" the docket by withdrawing an unconstitutional law just before a final opinion. Justice Brett Kavanaugh joined in the condemnation and added menacingly that "some federal and state courts may not be properly applying Heller and McDonald. The Court should address that issue soon, perhaps in one of the several Second Amendment cases with petitions for certiorari now pending before the Court."

The court then did precisely that, by accepting a case with the very same plaintiffs: New York State Rifle & Pistol Association. On this occasion, however, the court is unlikely to tolerate another bait-and-switch by state officials trying to withdraw the case at the last minute.

If those four justices are still intent on pushing back on lower courts, they need only Chief Justice John Roberts or Barrett to hand down a major ruling in favor of gun rights.

The briefs filed in the case include groups such the Cato Institute, which directly confronted the court about it being legally absent without leave on gun rights for more than a decade. Cato has argued that judicial "inaction has contributed to the Second Amendment's demise. It's no secret that many federal courts have engaged in systematic resistance to Heller and McDonald."

Many point to the court's statement in Heller, which acknowledged that "like most rights, the right secured by the Second Amendment is not unlimited." It then listed possible "sensitive places" for denying permits to former felons. Lower courts limiting gun rights have repeated those lines like a mantra, and the high court appears poised to bring clarity to that ambiguity.

Bruen has many of the same elements as Heller, including a rich historical discussion of what gun ownership has meant through history. Notably, English subjects in the American colonies were the first to receive written guarantees of the right to bear arms for self-defense; settlers of the Virginia colony in 1607 and the New England colony in 1620 were subjects under royal charters recognizing that right. In England, the right to bear arms was formally declared in the 1689 Declaration of Rights that stated that the right to arms was among the subjects' "true, ancient and indubitable rights."

That history will weigh heavily in the court defining the right of people to carry weapons in self-defense outside of the home. In many ways, Bruen is the shot not taken last year in New York State Rifle & Pistol Association Inc. v. City of New York. Now the same plaintiffs are back, and New York has supplied another perfect case for the expansion of gun rights. So if you are wondering if Bruen is loaded, at least four justices are likely to agree that a Second Amendment case "that's unloaded and cocked ain't good for nothing."