

The Future of the Second Amendment: *New York State Rifle & Pistol Association* at the Supreme Court

May 15, 2020

On April 27, 2020, the Supreme Court issued a two-page *per curiam* (unsigned) opinion in *New York State Rifle & Pistol Association, Inc. v. City of New York*, effectively dismissing a case that had been poised to clarify the Court’s Second Amendment jurisprudence. As described in [previous Legal Sidebars](#), the case involved a portion of New York City’s (NYC’s or the City’s) firearms licensing scheme that the U.S. Court of Appeals for the Second Circuit (Second Circuit) [upheld](#) as valid. The Supreme Court’s *per curiam* opinion did not address whether the firearm licensing provision at issue violated the Second Amendment, however. Instead, the Court [concluded](#) that intervening changes in law gave the plaintiffs in the lawsuit “the precise relief” they had requested, rendering the case moot. It thus appears that for the time being, case law concerning the scope of the Second Amendment right to keep and bear arms could continue to [develop](#) in the lower courts without further High Court guidance. Nevertheless, in separate concurring and dissenting opinions, four Justices signaled “concern” that the Supreme Court’s Second Amendment precedents are not being properly applied and suggested that the Court may need to weigh in to rectify the situation. As such, although *New York State Rifle & Pistol Association* did not result in a substantive constitutional decision, it is possible that the Court will issue such a decision in another case in the near future.

This Legal Sidebar provides an overview of Second Amendment doctrine; summarizes the facts and history of the *New York State Rifle & Pistol Association* case; discusses the Supreme Court’s *per curiam*, concurring, and dissenting opinions in the case; and briefly addresses implications of the decision going forward.

Second Amendment Overview

The Second Amendment [provides](#) in full: “A well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed.” In its 2008 decision in *District of Columbia v. Heller*, a five-Justice majority of the Supreme Court [held](#) that the Amendment protects an individual right to possess firearms for historically lawful purposes and struck down regulations that effectively banned the private possession of operative handguns in the home, [emphasizing](#)

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that the Second Amendment’s “core lawful purpose of self-defense” is “most acute” inside the home. The *Heller* majority also provided some guidance on the scope of the right, [noting](#) that it “is not unlimited” and clarifying that “nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of firearms,” among other “presumptively lawful” regulations. As for the types of weapons that may qualify for Second Amendment protection, the *Heller* Court read a prior decision as limiting [coverage](#) to weapons “in common use at the time” a court reviews a particular firearm, with “dangerous and unusual weapons” being excluded from the ambit of the amendment.

Since *Heller*, the Court has addressed the Second Amendment on two other occasions. In *McDonald v. City of Chicago*, the Court [held](#) that the Amendment applies to state and local governments through the Fourteenth Amendment, and in *Caetano v. Massachusetts*, the Court issued a brief, unsigned order vacating as inconsistent with *Heller* a Massachusetts Supreme Court decision that upheld a law prohibiting the possession of stun guns. The Court’s jurisprudence has thus left key questions unanswered, including (1) the extent to which Second Amendment protections apply outside the home and (2) what methodology courts should use in addressing Second Amendment challenges to firearms regulations more generally. With no further Supreme Court guidance, lower federal courts have generally adopted a two-step [framework](#) for reviewing federal, state, and local gun regulations. At step one, a court asks whether the law at issue burdens conduct protected by the Second Amendment, which typically involves an [inquiry](#) into the historical meaning of the right. If the law does not burden protected conduct, it is [upheld](#). Courts at step one have sometimes [recognized](#) a safe harbor for the kinds of “longstanding” and “presumptively lawful” regulations that the Supreme Court in *Heller* appeared to insulate from doubt. In a variation, some courts have treated such regulations not as *de facto* constitutional but merely as being entitled to a [presumption](#) of constitutionality.

Under the two-step framework, if a challenged law burdens protected conduct, a court next applies [either](#) intermediate or strict “scrutiny” to determine whether the law is nevertheless constitutional. Whether a court applies intermediate or strict scrutiny ordinarily [depends](#) on “the nature of the conduct being regulated and the degree to which the challenged law burdens the right.” A law that severely burdens the “core” protection of the Second Amendment receives strict scrutiny ([meaning](#) that the law must be “narrowly tailored to achieve a compelling governmental interest” to be upheld), [whereas](#) “a regulation that does not encroach on the core of the Second Amendment” receives intermediate scrutiny ([meaning](#) that the law must be “reasonably adapted to a substantial governmental interest”). What precisely constitutes the “core” of the Second Amendment has produced a split among the circuit courts: Several courts have [identified](#) the core right as essentially confined to self-defense in the home, but some other courts have viewed the carrying of a firearm for self-defense *outside* the home, at least in some contexts, as falling [within](#) the Second Amendment’s core.

Using the two-step framework, the federal circuit courts have upheld many, but not all, firearms regulations, often after concluding that the “core” of the Second Amendment is not severely burdened and thus intermediate scrutiny should be applied. However, multiple Supreme Court [Justices](#) have previously signaled that they may not fully agree with the two-step methodology or some of the results that the lower courts have reached. For instance, Justice Kavanaugh [wrote](#) as a judge on the D.C. Circuit that courts should “assess gun bans and regulations based on text, history, and tradition, not by a balancing test such as strict or intermediate scrutiny.”

New York State Pistol & Rifle Association: Background

New York State Rifle & Pistol Association v. City of New York involved a portion of New York City’s handgun licensing regime. In the State of New York, it is a [crime](#) to possess a handgun without a license, and the state delegates to [localities](#) the authority to administer the licensing requirement. In general, a

New York resident who wants to lawfully possess a handgun may obtain two kinds of [licenses](#): a “premises” license, which authorizes possession of a handgun in the home or a place of business, and a “carry” license, which authorizes concealed carry in public. Until [recently](#), premises license holders in NYC could keep a handgun only at the address on the license, and the license holder could remove the handgun from that address without further permission [only](#) (1) to transport it to and from an authorized shooting range within NYC “[t]o maintain proficiency in the use of the handgun” and (2) to transport the handgun to and from areas designated for hunting (subject to license authorization). [Transportation](#) could occur only with the handgun unloaded and in a locked container separate from any ammunition.

In 2013, three NYC residents and the New York State Rifle & Pistol Association, a firearms advocacy organization composed of individuals and clubs throughout the state, filed [suit](#) seeking an injunction against NYC in federal court, alleging that the City’s premises licensing scheme was unconstitutional. The plaintiffs each sought to take their premises licensed handguns to shooting ranges [outside](#) of NYC, and one plaintiff sought to take his handgun to a second home outside the City as well. Among other things, the plaintiffs alleged that because NYC’s premises licensing scheme prohibited them from doing these things, it [deprived](#) them of their right to self-defense in a home other than their licensed NYC home and severely restricted a corollary right to develop competency in the use of the licensed handgun in violation of the Second Amendment. The Second Circuit [upheld](#) the licensing provisions at issue, however, applying the two-step inquiry described above and concluding that the fit between the licensing requirements and the City’s interests in public safety and crime prevention satisfied intermediate scrutiny.

The Supreme Court subsequently agreed to review [whether](#), in the plaintiff-petitioners’ words, “the City’s ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment[.]” The petitioners and the United States (as amicus in support) urged the Supreme Court to take a broad view of the Second Amendment, arguing that the Second Circuit applied a “watered-down” form of scrutiny and that the text, history, and tradition of the constitutional provision make clear that the right at issue extends beyond the home and protects “at a bare minimum” the “right to transport ... arms to other places where they may be lawfully used.” In response, the City asserted that the Second Circuit properly applied the two-part analysis employed by “every circuit to decide the issue” in concluding that the regulations survived intermediate scrutiny.

After the Supreme Court agreed to review the lower court’s rulings, NYC [amended](#) its premises license rules to (1) allow a license holder to transport the licensed handgun directly to and from other residences within or outside the City where he or she could have and possess the handgun and (2) permit transport to and from lawful shooting ranges and competitions within or outside the City as well. Separately, the governor of New York signed [legislation](#) amending the statute that governs premises licenses to make clear that licensed handguns may be transported between locations where possession is lawful, including dwellings and shooting ranges, displacing any inconsistent state or local laws. Based on these changes to the laws at issue in the case, the City [argued](#) that the plaintiffs had received everything they sought in the lawsuit and thus the case had become “moot” (i.e., the parties now [lacked](#) a requisite “personal stake in the outcome”) and should be remanded to the lower courts without addressing the merits of the petitioners’ arguments. In response, the petitioners [asserted](#) that continuing limitations in the new laws had kept the controversy alive and that they could still seek monetary damages for adverse effects from the old rules.

New York State Pistol & Rifle Association: Supreme Court Decision and the Future

On April 27, 2020, the Supreme Court issued a brief opinion [declining](#) to weigh in on the Second Amendment issues raised in the *New York State Rifle & Pistol Association* case. Instead, the Court determined that the intervening changes of law had rendered the petitioners’ challenge to the old restrictions moot. As such, the Court took the view that the case should be remanded so that the lower courts could address whether the petitioners could add a claim for damages with respect to the old rules

and raise additional claims with respect to the new rules. The Court accordingly vacated the Second Circuit's judgment and remanded the case without addressing the Second Amendment.

Four Justices wrote or joined separate opinions that grappled with the constitutional issues more directly. Justice Kavanaugh [concurred](#) that the case should be remanded for the lower courts to consider any ostensible new claims in the first instance, but he wrote separately to express "concern that some federal and state courts may not be properly applying" the Second Amendment. He urged the Court to "address that issue soon" and cited his own prior dissenting opinion as a D.C. Circuit judge in which he asserted that Second Amendment claims should be analyzed based on text, history, and tradition. Justice Kavanaugh also agreed with the analysis of the Court's Second Amendment jurisprudence set out in Justice Alito's [dissent](#). In that dissent, Justice Alito, joined by Justice Gorsuch and (in large part) Justice Thomas, [argued](#) that the case was not moot given ongoing disputes over limitations in the new laws and the potential availability of monetary damages. Justice Alito therefore would have reached the merits of the case and concluded that NYC's premises license restrictions [violated](#) the Second Amendment. According to Justice Alito, the restrictions "burdened the very right recognized in *Heller*," i.e., "the right to keep a handgun in the home for self-defense," which carries a concomitant [right](#) to transport the handgun "to a range in order to gain and maintain the skill necessary to use it responsibly." And in Justice Alito's view, given that the case implicated "a concomitant of the same right recognized in *Heller*," the City failed to identify any historical basis for restrictions on that right involving transporting firearms outside city limits for practice. Justice Alito further [argued](#) that even if history were not sufficient to establish the unconstitutionality of the licensing scheme at issue, the scheme should not survive heightened scrutiny given the perceived weakness of the City's public safety rationale. In summation, Justice Alito indicated that if "the mode of review" employed by the Second Circuit in the case was "representative of the way *Heller* has been treated in the lower courts ... there is cause for concern."

In light of the Supreme Court's disposition in *New York State Pistol & Rifle Association*, the Second Amendment status quo in the lower courts, for the moment, remains. However, the law may still be poised to change in the near future. Though the Court did not address the Second Amendment in its *per curiam* opinion, four Justices signaled concern that lower courts may be reviewing firearm laws in an overly lax manner that is inconsistent with the Court's jurisprudence. And the Court does not have to wait long to take up the right to keep and bear arms if it so chooses: Petitions for certiorari are pending in at least 10 additional Second Amendment cases (including cases involving challenges to requirements that are also the subject of legislation introduced in the 116th Congress, such as [assault weapons](#)). Justice Kavanaugh also [suggested](#) in his concurrence in *New York State Pistol & Rifle Association* that the Court should "perhaps" address the perceived deficiency in lower courts' application of Second Amendment doctrine in one of those cases. Four votes [must](#) exist to grant certiorari in a case, and the concurring and dissenting opinions in *New York State Pistol & Rifle Association* suggest that Justices Alito, Gorsuch, Kavanaugh, and Thomas may be interested in having the Court further elaborate on the scope of the Second Amendment soon. Whether those four Justices would join with a fifth to alter the doctrine being applied in the lower courts remains to be seen, however. Were the Court to do so, the decision could have significant implications for existing firearms laws and the ability of lawmakers to legislate in this area in the future.

Author Information

Michael A. Foster
Legislative Attorney

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