Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

# Supreme Court Cert Grant Creates Uncertainty in Post-*Heller* World: Part I

February 14, 2019

The Supreme Court recently granted certiorari in *New York State Rifle & Pistol Association, Inc. v. City of New York,* in which it will review a portion of New York City's ("NYC" or "the City") firearms licensing scheme that the U.S. Court of Appeals for the Second Circuit ("Second Circuit") upheld as valid. The grant sets the stage for the Supreme Court, potentially, to clarify the scope of the Second Amendment's protection of an individual right to keep and bear arms, as established in the Court's 2008 ruling, *District of Columbia v. Heller*. Since *Heller*, the Supreme Court has substantively opined on the Second Amendment only one other time, in its 2010 opinion, *McDonald v. City of Chicago,* which held that the Second Amendment applies to the states by way of the Fourteenth Amendment. How far the Supreme Court will go in clarifying the scope of the Second Amendment, and how it will impact current federal and state firearms laws and the body of lower court jurisprudence developed in the intervening years, remains to be seen. The case also raises other constitutional questions, including whether the NYC licensing scheme violates the Commerce Clause and the constitutional right to travel. This two-part Sidebar will explore the various constitutional questions raised in the lawsuit. Part I addresses the Second Amendment issues, and Part II addresses the Commerce Clause and right-to-travel issues.

**NYC Licensing Scheme**: New York State sets up the general licensing scheme for firearm possession and carrying within the state but allows local jurisdictions, including NYC, to administer licensing programs at the local level, and, as a result, some local licensing schemes are more stringent than others. At the state level, it's a criminal offense to possess or carry a handgun without a license. There are two general types of state licenses available for most handgun owners: those authorizing the possession of a handgun in a particular place, and those authorizing the concealed carrying of a handgun. For example, a "premises" license—the challenged license type—authorizes the license holder to possess a handgun in the licensee's home. A "carry" license, on the other hand, authorizes the license holder to carry a concealed handgun, but the license will be issued only "when proper cause exists." For both licenses, if an applicant is otherwise qualified and "no good cause exists for the denial of the license," the license will be issued.

The State of New York delegates to local "Licensing Officers" the task of administering handgun licenses for local residents. In NYC, the Police Commissioner issues handgun licenses to NYC residents. The NYC Police Department's licensing division issues a premises license that authorizes the license holder to keep a handgun only at the address specified on the license. The licensee may remove the handgun from that address only for two purposes: (1) to transport the handgun to and from an authorized shooting range

within the City "[t]o maintain proficiency in the use of the handgun," and (2) to transport the handgun to and from areas designated by the New York State Fish and Wildlife Law for authorized hunting, so long as the permit holder has received a hunting amendment to the premises license. In both situations, the transported handgun must be unloaded, in a locked container, and held separately from any ammunition. When the lawsuit was filed, there were seven authorized shooting ranges in NYC, with at least one in each of the City's five boroughs.

**Lower Court Proceedings**: Three NYC residents (and the organizational plaintiff, New York State Rifle & Pistol Association) challenged the constitutionality of NYC's premises licensing scheme. Each plaintiff seeks to take a premises licensed handgun to shooting ranges outside of the City, and one plaintiff wants to take his handgun to a second home elsewhere in New York. As relevant here, the plaintiffs contend that the premises license restriction on transporting firearms outside of one's residence, with its limited exceptions, violates the Second Amendment. In particular, the plaintiffs argue that the City's premises license scheme deprives them of their Second Amendment right to self-defense in a home other than the NYC home attached to the license, and the corollary right to develop competency in the use of the licensed handgun. The District Court for the Southern District of New York found no Second Amendment violation, and the Second Circuit affirmed.

Post *Heller*, the lower federal courts—including the Second Circuit—have generally adopted a two-step framework for evaluating Second Amendment claims, asking (1) does the Second Amendment protect the restricted activity at issue, and, if so, (2) does the challenged law survive under some form of heightened scrutiny? For laws restricting "core" Second Amendment activity, courts typically apply strict scrutiny, which is the most stringent level of review; otherwise, courts generally apply intermediate scrutiny, a more deferential standard.

The Second Circuit assumed that the Second Amendment protects activity restricted by the premises license and determined the provision ought to be evaluated under intermediate scrutiny. In doing so, the court considered "how close the law comes to the core of the Second Amendment right" and "the severity of the law's burden on that right." A statute implicates "core" Second Amendment activity, the court opined, when it interferes with the ability to protect in the home oneself and one's family and property. But the court concluded that the premises license law "imposes no direct restriction at all on the right of the Plaintiffs, or of any other eligible New Yorker, to obtain a handgun and maintain it at their residences for self-protection," given that the law is designed to authorize handgun possession in one's home. Nor, the court added, does "the City's regulatory scheme impose[] any undue burden, expense, or difficulty that impedes their ability to possess a handgun for self-protection" because no evidence was presented showing that the law impacted a NYC resident's ability to acquire a second handgun for a second home, or that associated costs with doing so "would be so high as to be exclusionary or prohibitive." Next, the court "assume[d] that the ability to obtain firearms training and engage in firearm practice is sufficiently close to core Second Amendment concerns that regulations that sharply restrict that ability to obtain such training could impose substantial burdens on core Second Amendment rights." Given the existence of seven authorized firing ranges within City limits, however, the court concluded that the "[p]laintiffs have sufficient opportunities to train with their firearms."

Lastly, the Second Circuit concluded that the premises license scheme survived intermediate scrutiny. The City argued that "limiting the geographic range in which firearms can be carried allows the City to promote public safety by better regulating and minimizing the instances of unlicensed transport of firearms on city streets." The court concluded that there was a substantial fit between the licensing regime and the City's important interests in public safety and crime prevention, and observed that plaintiffs presented a "dearth of evidence" to support their contention that the licensing regime imposed a substantial burden on their protected rights.

**Supreme Court Proceedings**: The case is set to be heard by the Supreme Court sometime during the October 2019 term, meaning a decision can be expected by summer 2020. At this stage in the

proceedings, the plaintiffs reiterate that the City's premises license law imposes a severe burden on their Second Amendment right to keep a handgun in the home for self-defense and to enhance the safe and effective use of their handguns. Plaintiffs characterize as "nonsensical" the City's asserted public safety interest because, in their view, the City is proliferating "both the number and the transportation of handguns within [C]ity limits" in two ways: (1) by requiring handguns to be carried within the City (to shooting ranges) when they could be transported outside of the City, and (2) by requiring handguns to sit unattended in vacant homes when a City resident is at a second home. NYC objects, contending first that evidence "explained the need to be able to effectively monitor and enforce the limits on the transport of handguns by individuals who have only a premises license, and not a carry license," which the City could not effectively do in the past when premises license holders *could* transport handguns to shooting ranges outside of NYC. The City also argues that forcing NYC residents to leave handguns in vacant homes would create a public safety risk only if premises license holders are not safely storing their handguns.

**Questions for the Court:** In its ruling, the Supreme Court may opine on what constitutes "core" Second Amendment activity. There is disagreement among the federal appellate courts, however, about what activity falls under this description. Some courts have drawn a distinction between the Second Amendment's application to firearm use within the home versus outside the home, opining that the Second Amendment is at its zenith in the home and becomes more limited outside the home. Rationales for this distinction include public safety concerns for when firearms leave the home, as well as *Heller*'s declaration that the home is "where the need for defense of self, family, and property is most acute." Still, other courts have opined that certain firearm activities outside of the home constitute core Second Amendment activity. For instance, the D.C. Circuit held that the right of law-abiding citizens to carry a *concealed* firearm in public is a core component of the Second Amendment's protections. And a panel of the Ninth Circuit has held that the right to *openly* carry firearms in public for self-defense is a core Second Amendment activity, even though the full Ninth Circuit previously had ruled that the Second Amendment does not protect a right to carry a concealed firearm in public. (However, the open carry case will also be reheard by the full Ninth Circuit.)

Additionally, to rule on whether NYC's premises license law comports with the Second Amendment, the Supreme Court will likely have to answer a question that it has eluded since *Heller*: How should Second Amendment claims be evaluated? Although the lower courts have generally coalesced around the two-step inquiry described above, dissenting judges in various cases have urged other methods of analysis. Some circuit judges, including now-Justice Kavanaugh, have advocated for an approach that would analyze the Second Amendment's text, history, and tradition, rather than apply any kind of balancing test like strict or intermediate scrutiny. These dissenting opinions potentially could be invoked in further briefing in this case, including from amici curiae, in an effort to persuade at least four more Justices to adopt Justice Kavanaugh's approach.

**Takeaways for Congress:** The Supreme Court's ruling potentially could reverberate into the current landscape of federal firearms regulation, as well as impact policy proposals brewing in the 116th Congress. Although no court has struck down under the Second Amendment a single federal firearms law, if the Supreme Court announces a new standard of review to analyze Second Amendment claims, those laws may be subject to renewed challenge under the newly adopted test. Additionally, the Court's ruling could have ramifications for proposed legislation in the 116th Congress that seeks to further regulate firearms. For example, bills have been introduced proposing to implement a federal licensing scheme for handguns; to ban the sale, manufacture, and possession of semiautomatic "assault weapons"; and to expand the categories of persons who cannot possess a firearm. But if the Supreme Court rules in the plaintiffs' favor by concluding that NYC's premise licensing scheme violates the Second Amendment, the holding potentially could limit the way in which the federal government (and states, for that

matter) may regulate firearm possession and carrying in a number of ways, including limitations on any necessary qualifications for obtaining a license or for possessing a firearm, as well as restrictions on where firearms may be carried.

## Author Information

Sarah Herman Peck
Legislative Attorney

## Disclaimer