



What's At Stake in the Supreme Court on Second Amendment Issues

September 23, 2020

Facing a gun safety movement achieving historic wins from the ballot box to state houses to city councils, the gun lobby has increasingly turned to the courts in its efforts to undo life-saving gun laws. These efforts have overwhelmingly failed: Federal appeals courts have upheld almost every gun law challenged since the Supreme Court's landmark ruling in [District of Columbia v. Heller](#). When the Supreme Court ruled in its first major gun case in almost a decade earlier this year, it denied the NRA a ruling on the merits. Weeks later, the Court announced it would not hear any of the other gun cases in which opponents of gun laws had petitioned for high court review.

With Justice Ruth Bader Ginsburg's seat on the court now open, the NRA and its allies see a chance to stack the court with a pivotal additional vote against gun safety laws. Among the first issues that could come before the Supreme Court in upcoming terms are laws regulating the carrying of guns in public, prohibitions on assault weapons and large-capacity magazines, and laws prohibiting possession by domestic abusers and others with dangerous histories. A new Supreme Court majority could also conceivably change the standard of review in Second Amendment cases, a development that could put nearly every gun law at risk. Below are more details on each of these issues.

The Standard of Review in Second Amendment Cases:

One of the most important questions that the newly-constituted Supreme Court will face is what test courts should apply when determining whether a gun law is consistent with the Second Amendment. Since *Heller*, the federal courts of appeals have uniformly adopted a test which looks both to the Second Amendment's history and to the impact a gun law has on public safety. Under this approach, courts have upheld the vast majority of gun laws against Second Amendment challenges.

Some originalists, like Justice Brett Kavanaugh, argue that, in assessing Second Amendment challenges, courts should consider only the historical scope of gun regulation and should not take into account the benefits of the law for public safety. This extreme approach could call into question newer gun laws like prohibitions on the possession of firearms by domestic abusers. Many gun lobby lawyers also argue that courts should apply strict scrutiny in Second Amendment cases — a standard that would make it significantly easier for opponents to attack wide swaths of popular and effective gun laws, including laws requiring background checks on all gun sales and red flag laws.

Carrying Guns in Public:

Since *Heller*, the federal judiciary has largely allowed states to set their own standards for issuing licenses to carry firearms in public. A number of states have adopted policies requiring applicants to show "good cause" for such a license, *i.e.*, a specific need to carry a gun in public greater than that of the

average citizen. Four federal appellate courts — the United States Courts of Appeals for the [First](#), [Second](#), [Third](#), and [Fourth](#) Circuits — have upheld these good-cause public-carry laws against Second Amendment challenges. But a divided panel of the [D.C. Circuit](#) disagreed and struck down D.C.’s good-cause law as unconstitutional. The Supreme Court has thus far declined to review the decisions upholding carry licensing restrictions. [Three justices](#) (Thomas, Gorsuch, and Kavanaugh) have dissented from those denials, however, and called for the Court to reconsider these cases. The agreement of four justices is all that is needed for the Supreme Court to take up a case for review.

Two cases out of New York should present the first opportunities for the Supreme Court to address the public-carry issue in its upcoming term.

- [New York State Rifle and Pistol Association v. Beach](#), No. 18-280 (2d Cir.): The Second Circuit recently rejected this Second Amendment challenge to New York’s public-carry licensing system in a summary decision relying on its own precedent. A petition for certiorari seeking Supreme Court review is currently due November 24. The lead plaintiff in the case is the NRA’s New York affiliate.
- [Libertarian Party v. Cuomo](#), No. 18-386 (2d Cir.): This is another Second Amendment challenge to New York’s public-carry licensing laws that the Second Circuit recently rejected. The case also involved a challenge to New York’s laws requiring a license to possess a firearm within the home, which the Second Circuit likewise rejected. Plaintiffs filed a petition for rehearing en banc on August 27. If the Second Circuit denies that rehearing petition (which we expect), a cert. petition to the Supreme Court would be due 90 days thereafter.

A bit further down the line is [Young v. Hawaii](#), No. 12-17808 (9th Cir.), a Second Amendment challenge to Hawaii’s public-carry licensing laws that is currently before an en banc panel of the United States Court of Appeals for the Ninth Circuit, with oral argument scheduled for this week. Given the likely timeframe for a Ninth Circuit decision, it is possible that the Supreme Court could decide whether to grant any further review of the case late in its upcoming term.

Prohibitions on Assault Weapons and Large-Capacity Magazines:

The federal judiciary has also nearly unanimously upheld prohibitions and restrictions on assault weapons and large-capacity ammunition magazines. The [First](#), [Second](#), [Third](#), [Fourth](#), [Seventh](#), and [D.C.](#) Circuits have all upheld such laws against Second Amendment challenges. By contrast, a divided panel of the [Ninth Circuit](#) recently struck down California’s large-capacity magazine law on Second Amendment grounds, though (as discussed below) that case still remains subject to further consideration at the court-of-appeals level.

As with public carry, the Supreme Court has, to this point, declined to review an assault weapon or large-capacity magazine case. Recent decisions out of the Third and Ninth Circuits, however, could potentially soon change that:

- [Association of New Jersey Rifle and Pistol Clubs v. Attorney General New Jersey](#), No. 19-3142 (3d Cir.): The Third Circuit recently rejected this Second Amendment challenge to New Jersey’s prohibition on large-capacity magazines, over the strenuous dissent of a Trump-appointed judge. Last week, plaintiffs filed a petition for rehearing en banc before the full Third Circuit. If that petition is denied, we expect that plaintiffs will promptly seek review in the Supreme Court, which would likely consider whether to take the case sometime in the early part of next year.
- [Duncan v. Becerra](#), No. 19-55376 (9th Cir.): This is a challenge to California’s prohibition on the possession, sale, manufacture, and transport of large-capacity magazines. A divided panel of the Ninth Circuit struck down the law last month in an opinion authored by another Trump appointee, Judge Kenneth Lee. The panel majority’s decision broke with the precedent set by every other federal court of appeals to address the issue. California has requested that the Ninth

Circuit review the case en banc. If that request is denied, California could potentially decide to seek Supreme Court review early next year.

If either the Third Circuit in *Association of New Jersey Rifle and Pistol Clubs* or the Ninth Circuit in *Duncan* grants en banc review, any Supreme Court review of those cases would be unlikely before the Court's 2021-22 term.

Another case to monitor for the future is *Rupp v. Becerra*, No. 19-56004 (9th Cir.), a Second Amendment challenge to California's prohibition on assault weapons. The Ninth Circuit has scheduled oral argument in the case for next month, and eventual Supreme Court review is a possibility in the 2021-22 term.

Laws Prohibiting Gun Possession for Those Showing Risks of Dangerousness or Lack of Responsibility:

Justice Ginsburg's replacement could also potentially upend laws prohibiting the possession of firearms by those with dangerous histories or who are likely to act irresponsibly with guns. Federal law prohibits firearms possession by, among others, felons, domestic abusers, and those who have been involuntarily committed to a mental-health facility. In *Heller*, the Supreme Court made clear that such laws are presumptively constitutional, but it also left open the possibility of individuals with prohibiting records challenging the law as applied to them. Since *Heller*, courts have largely rejected these challenges, albeit with some important exceptions. The [Sixth Circuit](#), for example, has allowed for an as-applied Second Amendment challenge to the federal mental-health prohibitor for those who could prove they are no longer mentally ill. And the [Third Circuit](#) has allowed as-applied challenges to the federal prohibition on gun possession by those with certain otherwise disqualifying state misdemeanors.

At any time, there are several of these as-applied cases making their way through the federal courts. The one currently of most particular note is *Mai v. United States*, No. 18-36071 (9th Cir.), an as-applied challenge to the lifetime prohibition on firearms possession by those who have been involuntarily committed to a mental-health facility. A panel of the Ninth Circuit rejected this challenge, and the full court recently denied a petition for en banc review over vigorous [dissents](#) authored or joined by seven Trump-appointed judges, including two members of his Supreme Court shortlist. The Supreme Court will likely consider the case for review later this coming term. As-applied challenges by those prohibited from firearm possession because of a [domestic violence protective order](#) or a [DUI conviction](#) are among the others that could soon find their way before the Supreme Court as well.

Aside from as-applied challenges, there is also a pending challenge in the Fourth Circuit to the federal law prohibiting firearms dealers from selling handguns to those under the age of twenty-one. The Fourth Circuit could decide this case, *Hirschfeld v. ATF*, No. 19-2250 (4th Cir.), at any time, making Supreme Court review possible late this coming term or early in the 2021-22 term.

Other Notable Cases:

- [Zoie H. v. Nebraska](#), No. 19-1418 (S. Ct.), is a Second and Sixth Amendment challenge to a Nebraska law that prohibits firearms possession until the age of twenty-five by those convicted in juvenile court of crimes that are the equivalent to adult felonies. Former U.S. Solicitor General Paul Clement, a member of President Trump's Supreme Court shortlist, filed the cert. petition. The Supreme Court is scheduled to consider the case for review at its initial conference of the term next week.
- [Rhode v. Becerra](#), No. 20-55437 (9th Cir.), is a challenge to a California law requiring that those purchasing ammunition first complete a background check. A federal district court granted a preliminary injunction against the law earlier this year, finding that it likely violated the Second Amendment and the dormant Commerce Clause. California appealed, and oral argument in the

Ninth Circuit is scheduled for November 9. Paul Clement again represents plaintiffs. Supreme Court review does not seem likely before the 2021-22 term.