

James B. Astrachan: A gun case to end gun cases?

By: James B. Astrachan February 5, 2019

On Jan. 22, the United States Supreme Court announced it would hear the appeal of *New York State Rifle & Pistol Ass'n, Inc., et al. City of New York, et al.*, 883 F.3d 45 (2d Cir. 2018). This is the first time since the 2008 *Heller* decision that the Court has heard a gun case. At first blush, the state restriction on handguns involved in this case seems very narrow and without general application to the gun laws of any state besides New York. But there is more to the story.



James B. Astrachan. (File photo)

New York State law requires a license to possess a handgun. A resident of New York City must also obtain a Premise License-Residence to keep a handgun in the home.

The Premise License-Residence only permits the licensee to remove the handgun from the home to practice with it at one of the few New York Police Department-licensed ranges in New York City. A licensee can remove the gun from the residence and transport it to a designated hunting area as long as the licensee obtains a NYPD-issued hunting authorization.

New York City residents with Premise Licenses-Residence challenged the law on several grounds, including its prohibition on transporting a firearm, locked and unloaded, from a residence in New York City to a second residence in New York State.

It's not likely the Supreme Court cares about target practice or transporting a handgun between residences. More likely, the Court wants to visit the level of constitutional scrutiny that courts shall be required to apply to a Second Amendment case. That could be game changing. In this case, the United States District Court applied intermediate scrutiny and cited a plethora of cases from other jurisdictions that did the same when deciding gun cases. Under intermediate scrutiny, the government must only assert an interest that is important and reasonable – public safety, for example. The statutory classification must be substantially related to an important government objective. Under intermediate scrutiny review, almost all gun restrictions will be, and have been, held constitutional.

Strict scrutiny, on the other hand, requires the government's interest to be compelling, and the restriction must be narrowly tailored to accomplish the government's objective. There must not be any less-restrictive means that would accomplish the government's objectives just as well.

The last gun case decided by the Supreme Court was *Heller* and the court held that no level of constitutional scrutiny would satisfy the outright ban of handguns. As a result, the court never reached the question of what constitutional standard of scrutiny must be applied to Second Amendment cases. Since *Heller*, district and appellate courts have applied intermediate scrutiny to enforce gun restrictions, including the outright ban of weapons that would have passed constitutional muster under *Heller*.

It may be that the Supreme Court, with its new conservative members and Justice Clarence Thomas, has granted certiorari in this case to determine exactly what level of scrutiny must be applied in Second Amendment cases. Maybe the justices will stop short of applying strict scrutiny and create a rigorous scrutiny between strict and intermediate scrutiny, as was applied by the Seventh Circuit in *Ezell*. Maybe the justices will stratify the different types of restrictions imposed by law and apply strict to some, such as assault-style rifle bans, and intermediate to others, such as licensing standards. Or maybe the justices will hold that statutes restricting rights under the Second Amendment require review under strict scrutiny.

Many on both sides of the gun issue are waiting and wondering why this case was chosen for review after many gun cases were passed over by the court. A desire to decide the level of constitutional scrutiny to be applied may be the reason. If so, there will be cries of delight or of sorrow. Your glee will depend on where you stand on gun control issues.

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