

Brady music: [00:08](#) ***music plays***

JJ: [00:08](#) Hey everybody. This is the legal disclaimer where we tell you that the views, thoughts, and opinions shared on this podcast belong solely to us, the people talking right now, and not necessarily Brady or Brady's affiliates. Please know that this podcast can contain discussions of violence that some people may find disturbing. It's okay! We do too.

Brady music: [00:43](#) ***music plays***

JJ: [00:43](#) Welcome back everybody to "Red, Blue, and Brady." Today's mini-isode is about something that is exceptionally important and rather complicated, actually. So this week the Supreme Court--sometimes affectionately called SCOTUS--heard the first gun related case in nearly a decade. Spurred on by this possibly historical moment, there were hundreds of gun violence prevention advocates who rallied in front of the Supreme court early on Monday, December 2nd, which meant that people came out braving cold, rain, and DC morning traffic, which is no joke to make sure that their voices were heard. This case has and continues to make national headlines and has led to a lot of conversations about "mootness" whatever that actually is. And the second amendment, which is always a hot button issue, especially in this political climate. Now here to explain why we should all be paying attention to this despite possible wonkiness is John Lowy. Now, even though you've done a fabulous episode before, can you introduce yourself to our, our newer listeners maybe?

Lowy: [01:48](#) Sure. I'm John Lowy, I'm Vice President of legal and chief counsel at Brady.

JJ: [01:53](#) So on Monday the Supreme court heard oral arguments in a case that concerns a former New York gun ordinance. I know for listeners that may not sound super exciting, but it actually is really, really important and there were a lot of people who were really frightened over what could come of this case because of that importance. Lowy, can you give us a brief overview, and, and why is the New York state rifle and pistol association versus the city of New York, which is a super big mouthful, but also super boring name, why is that making front pages right now?

Lowy: [02:26](#) Yeah. The issue before the Supreme court in this case is pretty narrow. It's a very unusual New York ordinance, which regulates the, uh, carrying or driving of guns outside of the city, which there weren't many laws like that around the country. But in fact, this one doesn't even exist anymore because New York city

has repealed it, which means that the Supreme court really shouldn't even be looking at this case. But the more likely effect of this decision, if it's bad one, is that there's language, what we call dicta. That is language that the court says and their opinion but doesn't directly apply to the ruling that other courts around the country can listen to and follow. And it's, you know, those other courts are the ones who are going to be ruling on the constitutionality of most gun laws because the Supreme court just doesn't take that many cases.

JJ: [03:25](#) So how, how did we get here with this particular case? Why, why did this case ended up going all the way to the Supreme court if it seems like it was one that could be very easily tossed out?

Lowy: [03:38](#) Well, I mean it was strange from the beginning because this was a very unusual New York city ordinance. There wasn't an ordinance quite like it anywhere else in the country. So it was odd. Supreme court would take a case that didn't have this broad impact around the country. But, uh, nonetheless the court took it, um, after the New York affiliate of the NRA had brought suit against New York. And then what happened is after the court took it, New York city repealed its ordinance, New York state enacted a law to prevent New York city from ever implementing ordinance like it again. And that's when New York asked for the case to be dismissed because there was no case anymore. And the court refused to dismiss it. And that's how we got here.

JJ: [04:33](#) I just think it's so interesting that of all the cases in the United States that this is the one that's somehow made it.

Lowy: [04:42](#) Yes. It's, it's strange and it's very concerning because it seems to suggest that there are some members of the court who are extremely interested and I could use other words to take a second amendment case and to radically change what the sec amendment has meant throughout American history and do it in a very dangerous way. And, uh, it really seemed like a reach for the court to take this case. And it certainly would be a reach if they reached the merits of it. Given the fact that there is not really a controversy anymore. The real question before the court in this case is who gets to decide what our gun laws are? So and, and right now you know for the most part the American people through their representatives, elected representatives at the state level or federal level pretty much get to decide whether we have laws that prevent domestic abusers from having guns or prevent, you know, dangerous people from carrying guns in public spaces or whether people could have

assault weapons at that's not decided for the most part by the courts. What the gun lobby would like to do in this case is to get a ruling or maybe just language from the Supreme court that says no, the U S constitution protects our right to carry guns anywhere, for example. And if that's, if that happens and if there were such a ruling, then a lot of state laws that regulate public carry might be declared unconstitutional by other courts.

JJ: [06:30](#) Now to go back to sort of long legal names, one of the things that has been coming up in relation to this is another Supreme court case called the district of Columbia V Heller. You know, why was that case important and and what does a case from 2008 have to do with the case now?

Lowy: [06:48](#) Well, in 2008 there was a Supreme Court decision, a district of Columbia vs Heller where the court was deeply divided a five to four vote and the five led by justice Scalia held that the second amendment protects her right, which doesn't have to have anything to do with participating in a state army. It protects the right of individuals to law abiding, responsible individuals to have a gun in the home for self defense. And then two years later the court held that that applies to state laws as well as federal laws. And now the next question is, well it gives people a right to have guns in the home. What else does it do if anything?

JJ: [07:31](#) And so that's then what? Then this big upcoming decision is, right? That's what this current second amendment case is?

Lowy: [07:41](#) Exactly. I mean the, the Heller decision left open a lot of really, really big questions. And one of them is so you have a right to gun in the home. Well do you have a right to a gun outside of the home in public spaces and parks? Can you carry a loaded firearm converging? Anyone carry a loaded firearm and parks, roads, schools, workplaces, and can States and local governments maybe Congress do something about it? Or is this a constitutional right that cannot be subject to legislation or regulation? So that's one big question. Another is what sort of weapons are protected by the second amendment? Justice Kavanaugh, before he went on the Supreme court was one of the few judges in America who held that there's a constitutional right to military style assault weapons. So that's a question that the Supreme court has not decided as well.

JJ: [08:32](#) In your opinion, what would a bad ruling be versus what would a good ruling be in this case?

Lowy: [08:38](#) Well, let me first start with a good ruling. I mean, and I mean this I think is not just a good ruling, but a, I think a correct ruling, which is for the district court. What they should say is this isn't a case anymore because the New York, uh, ordinance that is being challenged has since been repealed in New York state has passed a law that prevents it from being re-enacted. So this case should be dismissed as moot. That is, there is no case or controversy, so we're just not even going to talk about the second amendment. That would be the proper thing for the court to do. And then if it didn't do that, it could say, well, this, uh, it could rule on this particular case. The first question would be whether it, uh, is governed by federal law, um, and you don't even get to the constitutional issue.

Lowy: [09:30](#) So it'd be, it would be a narrow, the court should do is a narrow decision that does not create this, you know, case law on what the second amendment means in other cases that aren't for it. They now the badge potential ruling, which is what the gun lobby is pushing for. And by the way, that the plaintiffs in this case are affiliates of the NRA. They're pushing for a declaration that, uh, that the second amendment protects a right of people to armed confrontation in public places, uh, that they have a right to carry loaded lethal firearms in public faces. And, uh, essentially if they deem it necessary to engage in armed confrontation, that is to pull out their gun and shoot people because they think it's necessary to, uh, protect themselves that the constitution allows that. I mean, some of them might not go quite that far, but as a practical matter they do because they're saying that the constitution protects their right to carry lethal firearms in public in order to use them when they see fit to use them. So that's, that's pretty scary because that's, you know, a fundamental, you know, longstanding, right, of Americans is to protect their communities and to enact public safety laws. And certainly, you know, keeping loaded firearms, uh, off their streets and prevent people from firing them and people from carrying them who shouldn't have them, uh, is really fundamental and something that's been accepted throughout American history.

JJ: [11:19](#) So the arguments were yesterday morning, I know that you were there, there was also, there was also a rally going on. How, how do you think the arguments went? Can you sort of give us a postmortem? What happened?

Lowy: [11:31](#) Sure. Well, I mean it's always dangerous to predict what a court's going to do because for the most part judges are asking questions. They're not saying what they are going to decide. However, a lot of times those questions really indicate what

they probably are going to decide. And it was certainly a argument and some of the questions were what I'd call the usual suspects. Justice, Gorsuch and Alito asking very tough questions in New York city justices Sotomayor, Ginsburg, God bless her and Briar asking tough questions of the NRA, a affiliate lawyer, but perhaps most interesting was chief justice Roberts who most people would say is probably going to be the deciding vote in a case like this. And from the questions he asked, he seemed to be indicating that he thought there really wasn't a case here anymore since the ordinance that was being challenged no longer exists. And he asked the city for assurances that there would be no negative consequences to someone who had violated the sense repealed ordinance and the city assured short and that there wouldn't be. And I think most people in the courtroom got the sense that he would likely rule along with the four more progressive justices that this case should be dismissed because there is no case.

JJ: [13:04](#) How do you feel about the possibility of those?

Lowy: [13:07](#) Well, I think the best outcome would be if the court held that there is no case or controversy and dismiss the case and didn't reach the merits. Uh, the second amendment issue. Um, and I hate to do this to, to bet or to predict, but my prediction would be that that is where the court goes. And so I certainly felt good about that. And in a justice Roberts, chief justice Roberts is known as a institutionalist is someone who, who cares properly about the institution of the Supreme court. And, and part of that institution is making sure that it doesn't overreach and that it doesn't decide issues that it shouldn't be deciding. And this seems to be a case like that.

JJ: [14:01](#) And when we're talking about, you had mentioned earlier like dictums so almost is that the judgment that is written by the Supreme court judges or sort of the language surrounding their ruling that that ends up being super important?

Lowy: [14:16](#) Yeah, I mean dicta is basically a, I didn't take Latin, uh, at any point in school, but so, but it's essentially stuff the court says that it doesn't really need to say for its opinion. So I mean, the, the issue here is, is this repealed New York city ordinance constitutional or not? But then the court will almost certainly say a bunch of other stuff in the context of the second amendment. And it did. So, and Heller, by the way, it, there is a, a substantial part of that opinion, which has very little to do with the DC law. That was an issue. But it talks about actually some very helpful language that, uh, about that the second amendment right is not unlimited and that longstanding laws

remain presumptively constitutional. You know, it could do the same thing here with a more conservative court where the court in which instead of justice Kennedy who was widely viewed as sort of a moderating swing vote previously, that he is now replaced by a justice Kavanaugh who is widely viewed as likely one of the more extreme, uh, gun rights people. So, you know, they could have that language, uh, that dicta which is very dangerous. And even though that's not precedent because it's not a ruling that other courts are required to follow, a lot of lower courts take the view and there's a lot to this that they should take very seriously. Everything the Supreme court says, even if it is dicta.

JJ: [16:03](#) So to get a little meta for a minute, pull back the curtain a little bit. What is Brady's role within this particular case?

Lowy: [16:12](#) Well, I mean, Brady has been at the forefront of second amendment law for 30 years or more. Um, we have been writing articles about the second amendment means and should mean, uh, including articles of the second amendment, uh, must be interpreted to recognize a, a right to live, uh, what we call it a right not to be shot. Um, we've filed briefs which has been very impactful in virtually every significant second amendment case over the past 30 years. And we did in this case as well. And, uh, you know, historically we will also assist governments that are defending their laws against second amendment challenges in some cases actually representing them. I mean, I actually argued a case on behalf of, uh, the state of Colorado where we were Abacus and, and we were, I was, uh, seated Brady was seated time to, uh, defend Colorado law against the second amendment challenge. So, so we've certainly been in the trenches in many cases. In this case, um, we filed a brief arguing for a reasonable interpretation, the second amendment that protects the right to live and you know, as we're doing right here today, getting the word out about what this decision could mean.

JJ: [17:37](#) And where, where did we go from here then? Where do we go from here?

Lowy: [17:42](#) Well, I mean, first we wait for the court's decision. Um, which could be very quick. Court could decide very quickly. This was improvident Lee. Granted that is, we shouldn't have, uh, heard the argument to begin with because there's no case anymore. That could happen fairly quickly or the court could, uh, take a longer time, a few months, um, into the spring or summer and issue a decision. And that could be good or bad and feeling optimistic and feeling that there's a good chance that we'll be

good. But what we will almost certainly do shortly after is do it all over again with a different case because there are many a second amendment challenges that the gun lobby and its friends are bringing. Uh, Supreme court is sort of sitting on a number of those waiting to decide whether to take them or not. And there is a very good chance that even if the court does not reach the second amendment issue in this case, it will do so soon, probably on a case with even more far reaching implications. So stay tuned. My guesses, we will be back in the Supreme court before you know it.

JJ: [18:58](#) Yeah. Brady's always here just watching and waiting and trying to get next to justice Ginsburg. So on a personal note, Lowy, I'm wondering what was it like for you leaving the court?

Lowy: [19:10](#) You know, I was in the courtroom as I missed most of the rally that took place outside, but I was, uh, but I heard some event and I just paid in some of it towards the end. And I'll tell you as someone who, uh, has been litigating these cases for over 20 years now, I was at the Heller argument, I was at the McDonald's argument. I've been at a number of other Supreme court arguments, uh, over the years and back in those days. Uh, and that's just 10 years ago or so, the gun lobby dominated those sorts of events. And if there was a rally going on in front of the Supreme court, it was all gun lobby folks, NRA folks. We were not present much, if at all. And times sure have changed because you know, there was a, I think there was one guy with a bullhorn, you know, with, with these strong second amendment views.

Lowy: [20:10](#) Besides that it was Brady, Gifford's, Everytown, March For Our Lives. Probably a number of other organizations, you know, and we dominated it. And one message I did hear, uh, from speakers was we have a right not to be shot. We have a right to live and the court has to recognize it. And you know, that's what this case and many of these cases is really all about. And I think making that point as did in front of the Supreme court and you know, echoing across America, that's really, really important. It's, it's really important even for what the justice is, uh, ultimately rule on because most of them don't want to take away a right that people believe they have. And you know, if people make the point that they believe that they have a right to live and they have a right to safety and they have a right not to be shot and just express that loud and clear as we're doing, uh, that's a message that I do think most justices on the Supreme court will respect. And so it helps us pass laws that we want, but it also helps, uh, wind cases I think appropriately so.

JJ: [21:41](#) Well, again, thank you so much Lowy, for, for calling in and for all of your amazing work and for representing Brady and also the gun violence prevention movement. So, well, I think this, as we've dubbed it, the SCOTUS case will continue to be one to watch.

Lowy: [21:57](#) There will be a sequel. I can guarantee it.

JJ: [22:00](#) I have a feeling there's going to be, this is going to be sort of like the Halloween movies. I have a feeling we're gonna hit 15 or 16***laughs***

Lowy: [22:05](#) Exactly. A franchise. Yes. ***laughs***

Brady music: [22:09](#) ***music plays***

JJ: [22:12](#) Thanks for listening. As always, Brady's lifesaving work and Congress, the courts and communities across the country is made possible. Thanks to you. For more information on Brady or how to get involved in the fight against gun violence, please like and subscribe to the podcast. Find us online@bradyunited.org or give us a follow on social at Brady buzz. Be safe and remember, take action, not sides.

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