

AWAITING NY CARRY CASE: JUSTICE KAVANAUGH

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In our last issue, and in anticipation of the high Court hearing *New York State Rifle & Pistol Association, Inc. v. Bruen* on November 3, we commenced a series of articles expositing the wisdom of various current Supreme Court Justices regarding the Second Amendment. For our second installment, we examine the postulations of Justice Brett M. Kavanaugh, as found in *New York State Rifle & Pistol Association, Inc. v. City of New York*, 130 S. Ct. 1525 (April 27, 2020).

Kindly note that Justice Kavanaugh wrote but a brief opinion, joining in the Court's decision, but echoing the concerns raised by his senior, Justice Samuel A. Alito, Jr., in the latter's robust dissent. Accordingly, we need address the Alito dissent before reverting to the Kavanaugh concurrence.

Procedurally, *NYSRPA v. NYC* was a *per curiam* opinion (no one Justice claimed authorship), the case was declared moot, the lower court ruling vacated (nullified), and the controversy remanded (returned) to the courts below. As such, nothing truly precedential emerged from the high bench.

Yet that did not deter Justice Alito. In the first paragraph of his erudite dissent, he argued that, by dismissing the case as moot, "the Court permits our docket to be manipulated in a way that should not be countenanced." Indeed, in the many pages to follow, Justice Alito took the City and State of New York to task for inconsistent arguments, and constantly shifting positions in order to evade the supreme tribunal's scrutiny.

Even more importantly, in that same powerful opening,

Justice Alito robustly reminds that 12 years prior in *Heller*, the Court held that "the Second Amendment protects the right of ordinary Americans to keep and bear arms," and *McDonald* two years later made *Heller's* liberty guarantee fully applicable to the States. The learned dissent expressed obvious dismay with the fact that, since these two landmarks became the law of the land, the Supreme Court has consistently failed to address the accuracy of lower court decisions rejecting various challenges to constitutionally suspect firearms regulations.

As for Justice Kavanaugh, he concurred that the Court was right to dismiss *NYSRPA v. NYC* as moot, but made it plain that he "agree[d] with Justice Alito's general analysis of *Heller* and *McDonald*." Far more portentous, Justice Kavanaugh declared, "I share Justice Alito's concern that some federal and state courts may not be properly applying *Heller* and *McDonald*," and the Supreme Court "should address that issue soon." How prescient by Justice Kavanaugh, since the *Bruen* petition for review was filed eight months later.

Assessing Justice Kavanaugh's words in *NYSRPA v. NYC*, the fact he concurred with the Court pales in significance to the fact that he joined without hesitation in Justice Alito's analysis of *Heller* and *McDonald*, and added his own belief that the lower courts are not properly applying those vital precepts, required the Supreme Court to take action. It awaits to be seen how Justice Kavanaugh's words impact the Supreme Court's disposition of *Bruen*. ■