

On Guns, the Supreme Court’s *Bruen* Decision, and the NYC Subway

By the New York City Bar Association’s Transportation Committee
Robert Brill, Chair

Following the U.S. Supreme Court’s recent decision in *New York State Rifle & Pistol Association, Inc., et al. v. Bruen*¹ in which the Court found the “proper cause” requirement of New York’s long-standing concealed carry licensing regime unconstitutional, Governor Kathy Hochul convened a special session of the New York State Legislature to pass new legislation to conform to the decision and try to keep New Yorkers safe within the changing constitutional landscape.²

The City Bar’s Transportation Committee agrees with, and applauds, the inclusion of the NYC Subway and other mass transit systems, and their instrumentalities, as “sensitive locations” in which possession of a firearm, rifle or shotgun will be a Class E Felony under the New York Penal Law, except if the possessor falls into one of the express exceptions.³ However, given the

¹ *New York State Rifle & Pistol Association, Inc., et al. v. Bruen, Superintendent of New York State Police, et al.*, No. 20-843, 597 U.S. ____, Slip Op., 1-63 (2022).

² See <https://www.nysenate.gov/legislation/bills/2021/S51001>. (“Purpose: The United States Supreme Court’s decision in *New York State Rifle & Pistol Association, Inc., v. Bruen, et al.* struck down a 100-year law requiring applicants for conceal carry gun permits to show ‘proper cause’. It deemed New York State’s existing law unconstitutional because the law afforded too much discretion to the State and its licensing officers in determining ‘proper cause.’ As a result of this decision, the State must amend the State’s laws on concealed carry permits and take other steps to address the consequences of the Supreme Court decision and the resulting increase in licenses and in the number of individuals who will likely purchase and carry weapons in New York State. . . . The proposed legislation changes the concealed carry permitting process and adds specific eligibility requirements, including the taking and passing of firearm training courses for permit applicants. It will enable the State to regulate and standardize training for license applicants. The legislation also identifies sensitive locations where it is prohibited to carry a concealed weapon and establishes that private property owners must expressly allow a person to possess a firearm, rifle, or shotgun on their property. Individuals who carry concealed weapons in sensitive locations or in contravention of the authority of an owner of private property will face criminal penalties. The State will have oversight over background checks for firearms, run regular checks on license holders for criminal convictions, and create a state-wide license and ammunition database. The legislation also strengthens and clarifies the law relating to the sale of body armor and the safe storage of firearms. The bill will take effect on September 1, 2022. An appeals board will be created for those applicants whose license is denied, which will take effect on April 1, 2023.”)

Note: the City Bar took no position on the New York legislation (S.51001/A.41001) prior to its enactment into law and takes no position on the new law, as a whole, here.

³ *See id.*

§ 4. The penal law is amended by adding a new section 265.01-e to read as follows:

§ 265.01-E CRIMINAL POSSESSION OF A FIREARM, RIFLE OR SHOTGUN IN A SENSITIVE LOCATION.

1. A person is guilty of criminal possession of a firearm, rifle or shotgun in a sensitive location when such person possesses a firearm, rifle or shotgun in or upon a sensitive location, and such person knows or reasonably should know such location is a sensitive location.

2. For the purposes of this section, a sensitive location shall mean:
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majority opinion's insensitivity to present-day public safety concerns and its somewhat selective invocation of the "history" of colonial and 19th Century America, as well as that of pre-1776 England,⁴ all of which antedates the enactment of New York's Sullivan Act⁵ in 1911, raises serious concerns as to whether designating the NYC Subway as a "sensitive location" will survive a challenge invoking *Bruen*.⁶

(N) Any place, conveyance, or vehicle used for public transportation or public transit, subway cars, train cars, buses, ferries, railroad, omnibus, marine or aviation transportation; or any facility used for or in connection with service in the transportation of passengers, airports, train stations, subway and rail stations, and bus terminals;

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3. This section shall not apply to:

(A) consistent with federal law, law enforcement who qualify to carry under the federal law enforcement officers safety act, 18 U.S.C. 926c;

(B) persons who are police officers as defined in subdivision thirty- four of section 1.20 of the criminal procedure law;

(C) persons who are designated peace officers by section 2.10 of the criminal procedure law;

(D) persons who were employed as police officers as defined in subdivision thirty-four of section 1.20 of the criminal procedure law but are retired;

(E) security guards as defined by and registered under article seven-a of the general business law, who have been granted a special armed registration card, while at the location of their employment and during their work hours as such a security guard;

(F) active-duty military personnel;

(G) persons licensed under paragraph ©, (d) or (e) of subdivision two of section 400.00 of this chapter while in the course of his or her official duties;

(H) a government employee under the express written consent of such employee's supervising government entity for the purposes of natural resource protection and management;

(I) persons lawfully engaged in hunting activity, including hunter education training; or

(J) persons operating a program in a sensitive location out of their residence, as defined by this section, which is licensed, certified, authorized, or funded by the state or a municipality, so long as such possession is in compliance with any rules or regulations applicable to the operation of such program and use or storage of firearms.

Criminal possession of a firearm, rifle or shotgun in a sensitive location is a class e felony.

⁴ See *Bruen*, slip op., pp. 17-22, 24-62.

⁵ "An Act to amend the penal law, in relation to the sale and carrying of dangerous weapons." Laws of New York. Laws of the State of New York Passed at the Sessions of the Legislature. Vol. 134th sess.: I. 1911. pp. 442-445. hdl:2027/uc1.b4375314. ISSN 0892-287X. Chapter 195, enacted May 25, 1911, effective September 1, 1911. This law established the licensing requirement for handguns in New York.

⁶ See *Bruen*, Slip Op. at 21-22 (Thomas, J.) ("It is true that people sometimes congregate in 'sensitive places,' and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly. Respondents' argument would in effect

In fact, a challenge in the U.S. District Court for the Northern District of New York was mounted shortly after the passage of S.51001/A.41001 into law, and a preliminary injunction motion with a short return date has been filed in the case.⁷ Whether the designation of the NYC Subway as a “sensitive location” will withstand a *Bruen* challenge may rest on the slender reed of the separate concurring opinion of Justice Kavanaugh, joined by Chief Justice Roberts, which maintains that reasonable gun regulation, including related to “sensitive locations,” is still preserved in the *Bruen* majority decision.⁸

exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. . . . Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a ‘sensitive place’ simply because it is crowded and protected generally by the New York City Police Department”). *But see id.* at 33 (Breyer, J., dissenting) (“But what, in 21st-century New York City, may properly be considered a sensitive place? Presumably ‘legislative assemblies, polling places, and courthouses,’ which the Court tells us were among the ‘relatively few’ places ‘where weapons were altogether prohibited’ in the 18th and 19th centuries. *Ante*, at 21. On the other hand, the Court also tells us that ‘expanding the category of ‘sensitive places’ simply to all places of public congregation that are not isolated from law enforcement defines th[at] category . . . far too broadly.’ *Ante*, at 22. So where does that leave the many locations in a modern city with no obvious 18th- or 19th-century analogue? What about subways, nightclubs, movie theaters, and sports stadiums? The Court does not say”).

⁷ See *Antonyuk, et al. v. Bruen*, 1:22-cv-00734 (GTS)(CFH), N.D.N.Y., July 11, 2022.

On July 20, 2022, Plaintiffs made a motion for a preliminary injunction, notwithstanding that New York State’s new gun law will not take effect until Sept. 1, 2022. The NYS Attorney General’s office, representing defendant Bruen, sought leave to extend the time to respond to the motion. U.S.D.J. Suddaby, by order dated July 21, granted defendant until Aug. 15 to file its response. The motion will be heard sometime between Aug. 23 and Aug. 26. Judge Suddaby in his order states, “A Decision and Order on Plaintiffs’ motion will be issued before the statute in question takes effect on September 1, 2022.” *Antonyuk, et al. v. Bruen*, Docket Report, <https://ecf.nynd.uscourts.gov/cgi-bin/DktRpt.pl?133602>, CM/ECF LIVE - U.S. District Court - NYND Docket Report.

⁸ See *Bruen*, slip op., pp. 1-3; see, *ibid.*, at 3 (Kavanaugh, J., concurring) (“Second, as *Heller* and *McDonald* established and the Court today again explains, the Second Amendment ‘is neither a regulatory straightjacket nor a regulatory blankcheck.’ . . . Properly interpreted, the Second Amendment allows a ‘variety’ of gun regulations. *Heller*, 554 U. S., at 636. As Justice Scalia wrote in his opinion for the Court in *Heller*, and Justice Alito reiterated in relevant part in the principal opinion in *McDonald*:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . [N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]

We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those in common use at the time. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons.’ *Heller*, 554 U. S., at 626–627, and n. 26 (citations and quotation marks omitted); see also *McDonald*, 561 U. S., at 786 (plurality opinion).

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With those additional comments, I join the opinion of the Court.”)

While it remains to be seen whether the designation of the NYC Subway as a “sensitive location” passes constitutional muster, the Transportation Committee urges lawmakers and City leadership to continue thinking about ways to keep NYC’s mass transit systems safe. Whether that means continuing to focus on licensing schemes and enforcement mechanisms at the individual level, increasing investments in support and services at the community level, or increasing regulation and accountability of gun manufacturers and sellers at the corporate level – enhancing public safety in the Subway is paramount to restoring the public’s confidence in taking mass transit, which, in turn, is key to restoring, and improving, New York City’s economy and vibrancy.