

S.C.O.P.E. Legal Update

February, 2023

Hochul's budget has some gun control changes

Gov. Hochul proposes some CCIA changes in her budget including excluding the Adirondacks and Catskills from being "sensitive locations", exempting individuals responsible for security at a place of worship from the place of worship sensitive location prohibition, expanding the exemption of hunting and hunting adjacent activity from the sensitive and restricted location prohibitions, and modifies the sensitive location categorization so that establishments that have an active liquor license are sensitive locations, but not locations that were previously issued a liquor license but no longer have an active liquor license.

<http://www.gunpoliticsny.com/?p=26713>

Three New York Congressmembers Want House of Representatives to Label NY Pistol Law Unconstitutional

Three New York Congressmembers are urging the House of Representatives to call out New York's concealed carry pistol law as unconstitutional.

Claudia Tenney (NY-24), Elise Stefanik (NY-2), and Nick Langworthy (NY-23) were joined by Darrell Issa (CA-48) to reintroduce a resolution expressing the sense of the House of Representatives that New York State's Concealed Carry Improvement Act (CCIA) is unconstitutional.

<https://www.fingerlakesdailynews.com/2023/01/17/1706185/>

U.S. Supreme Court lets New York enforce gun law during lawsuit

The Supreme Court is allowing New York to continue to enforce a sweeping new gun law banning guns from "sensitive places" such as schools and playgrounds for now while a court challenge plays out.

The justices on Wednesday turned away a plea by the law's challengers. The gun owners wanted the high court to lift a federal appeals court order that temporarily put on hold a lower court decision blocking portions of the law. The appeals court hasn't finished its review of the case, and justices are often reluctant to weigh in under those circumstances. The justices could still consider the case and the law more generally in the future.

<https://www.pressconnects.com/story/news/ny-news/2023/01/11/u-s-supreme-court-says-new-york-can-enforce-new-gun-law-for-now/69798536007/>

Supreme Court again declines to pause New York gun regs

The Supreme Court on Wednesday rejected a group of firearms dealers' emergency request to block various gun control measures recently passed in New York that they argued were unconstitutional and hurt their businesses.

The brief order, which had no noted dissents, marks the justices' second denial this month of a request to block portions of New York's new gun regulations, which have faced numerous legal challenges under the high court's expansion of Second Amendment protections in June.

An Obama-appointed federal judge early last month denied the firearms dealers' request to immediately pause enforcement of the regulations as the case proceeded, and a panel of three judges on the 2nd Circuit Court of Appeals similarly denied the group's request.

Wednesday's Supreme Court ruling follows the justices' order earlier this month declining a separate request to pause other portions of the new regulations that prohibited concealed carry in certain areas and required permit applicants to demonstrate "good moral character."

No justices publicly dissented from that decision, but Justice Samuel Alito signaled in a statement joined by Justice Clarence Thomas that those challengers should not be deterred.

"I understand the Court's denial today to reflect respect for the Second Circuit's procedures in managing its own docket, rather than expressing any view on the merits of the case," Alito wrote.

https://www.mytwintiers.com/news-cat/top-stories/supreme-court-again-declines-to-pause-new-york-gun-regs/?utm_medium=referral&utm_campaign=socialflow&utm_source=t.co&fbclid=IwAR31qp8DpGt8vmX1Di9pCDy5iVeL0SuZtu9A-_ljuVps9sa_P2o-E9PnrZo

New York Court Deems New York's Red Flag Laws Are Unconstitutional

A New York State Supreme Court Justice ruled last week that New York's Extreme Risk Protection Order laws, often called Red Flag laws are unconstitutional and declined to issue an Extreme Risk Protection Order (ERPO). ...Justice Thomas E. Moran, of the Rochester based Monroe County Supreme Court struck down these laws in a 10 page decision, in a case entitled G.W. v. C.N., 2022 NY Slip Op 22392 (Monroe County Sup. Ct. 2022).

Turning to the Constitutionality of the Article 63-A, which lays out New York's Red Flag laws and procedures, the Court cited the United States Supreme Court decisions in Heller, McDonald and most recently Bruen and applied the Bruen Standard that when the 2nd Amendment's text covers a person's conduct, a law which regulates that conduct is presumptively unconstitutional unless the State can demonstrate that the regulation is consistent with the country's historical tradition of firearms regulations.

The Court also noted that many safeguards of due process that the State had in other analogous situations did not exist in New York's red flag laws. For example, the Court

noted that Red Flag laws and the New York Mental Hygiene Law use the same definition for “likely to result in serious harm”. However, under the New York Mental Hygiene Law, those determinations are made by a Doctor, a person licensed trained and experienced in making such determinations. However, in the case of New York Red Flag laws, most of the authorized Petitioners are not Doctors and are not licensed, trained or experienced in making that determination. Under the Mental Hygiene Law, two doctors are required to make the determination if a person’s liberty is to be taken away for more than 48 hours. No such safeguard is required, not even one doctor is required, before a person loses their gun rights for one year.

Another example cited by the Court is under Article 10 of the Mental Hygiene Law which permits civil detention of certain dangerous sex offenders after they have served their sentence. However, before a Judge can civilly detain someone under this statute, the convicted sex offender is entitled to a Court appointed, free attorney, a state-funded psychiatrist to assist in the defense, a probable cause hearing within 30 days and ultimately a full jury trial before the convicted sex offender’s liberty can be taken away. The Court pointed out that none of those protections exist in New York’s Extreme Risk Protection order Laws.

The Court pointed out that where mental health issues have formed the basis for a loss of fundamental Constitutional rights in the past in New York, the laws have always provided a number of substantive and procedural due process protections none of which are afforded under New York ERPO laws. The Court reiterated a statement from the Supreme Court that Second Amendment rights are not a second class constitutional right.

https://www.newyorkcriminalattorneyblog.com/new-york-supreme-court-justice-deems-new-yorks-red-flag-laws-are-unconstitutional/?fbclid=IwAR2zWV2oP66-mvtNQ-XrQB686CYa_tMhleN0ZiFBQWRY5CCnWfDdb4AtEXg

Should State Officials Receive Qualified Immunity for Creatively Resisting Bruen?

In substance, these states are defying Bruen by reimposing de facto general bans on publicly carrying handguns. Had these states simply ignored the Supreme Court opinion and continued to enforce their old laws, there would be no question that their officers would be civilly liable under § 1983 and would face potential criminal liability under 18 U.S.C. § 242.

But of course, these states are not directly defying the Supreme Court by continuing to enforce their old laws. Instead, they are engaged in loopholing. “Loopholing” occurs when “a potential offender can readily identify and exploit gaps between what the law should cover and what it actually does.” Here, states are trying to find some loophole—broad definitions of “sensitive places” and bans on carrying firearms on most private property—that will allow them, de facto, to reinstate their general bans on public carry.

This loopholing behavior has none of the usual traits for which the Supreme Court permits qualified immunity. Most qualified immunity cases involve state actors engaged in legitimate policing, who make reasonable or negligent mistakes about the law. These mistakes, moreover, are often made by police in the heat of the moment, in difficult circumstances (e.g., while potentially under the threat of force).....The Supreme Court has never said that qualified immunity protects state actors who intentionally seek to violate a

recognized constitutional right simply because the legal artifice they employ has not been the subject of a prior court decision.

Denying qualified immunity in these cases could mitigate much of the resistance to Bruen. Law enforcement agencies are often regulated by their insurance providers, and insurance providers may deny coverage to jurisdictions engaged in willful court-defiant behavior. Faced with no insurance coverage for deliberately violating constitutional rights, law enforcement agencies will be loathe to enforce patently unconstitutional laws or to engage in stonewalling tactics of their own (e.g., refusing to process gun permit applications). This is the correct incentive structure to stop flagrantly unconstitutional behavior. And if the Court does not do this, it will probably find itself micromanaging implementation of Bruen injunction by injunction, much as it had to overcome resistance to desegregation....

In former may-issue states, gun owners will face substantial legal risks when exercising their rights. But the legal risk may not only be on private citizens. Despite strengthening qualified immunity in recent years, the Supreme Court has not shielded government agents who willfully seek to violate the Constitution. New York, New Jersey, Maryland, and California may find that, in bringing down the heavy hand of the state against individuals who exercise their Second Amendment rights, their own police officers will get hit by the blow.

<https://standinghisground.com/2023/01/17/should-state-officials-receive-qualified-immunity-for-creatively-resisting-bruen/>

Lane v. James - FPC-Backed Challenge to New York's "Assault Weapons" Ban

Summary: Federal lawsuit challenging New York's "assault weapons" ban as unconstitutional under the Second Amendment

Plaintiffs: J. Mark Lane and James Sears

Defendants: New York Attorney General Letitia James, New York State Police Superintendent Stephen Nigrelli, and Westchester County District Attorney Miriam Rocah

Litigation Counsel: Cody Wisniewski, Adam Kraut, and Nicolas Rotsko

Docket: S.D. NY case no. 7:22-cv-10989

<https://www.firearmspolicy.org/lane>

Crime data examined as bail debate heats up

In an exchange with New York Police Department supervisors, Sen. Tom O'Mara, R-Big Flats, asked whether that agency has any data indicating how many authorized gun owners have been charged with using their firearms in the commission of a crime.

"I will tell you this really is an extremely low number — like probably single digits over the past three years that I've been doing my position," said Michael LiPetri, chief of crime control strategies for the police agency.

Following a U.S. Supreme Court ruling last year that found New York's sections of New York's pistol permit law were unconstitutional, Hochul convened a special session of the Legislature to rush through a new law that added more restrictions on individuals who have pistol permits. She and her political ally, Attorney General Letitia James, argue the changes were needed to protect public safety.

Gun rights [proponents] have argued the state should instead impose tougher laws on criminals who use firearms to victimize others.

https://www.thedailystar.com/crime-data-examined-as-bail-debate-heats-up/article_fa43a32e-a10a-11ed-be42-2324943c53dd.html

Pistol license reopened in Onondaga County, but backlog remains

The Onondaga County Sheriff Department's pistol license unit office in Syracuse will be reopening for the first time since the start of the pandemic, but it still might be a while before getting a permit.

COVID-19 closed the office, forcing the department to conduct permitting operations entirely by mail. But now, residents will again have the option to apply for a gun permit in person.

Onondaga County Undersheriff Jeff Passino said they're hiring new special patrol officers, or SPOs, to staff up for those looking for a face-to-face appointment.

"We're not taking away the mail-in for the citizens that like that," Passino said. "But the citizens that want to speak to somebody directly at the window, these three SPOs will be there along with the other staff that's currently working in the pistol issue unit to take care of those amendments for them."

Despite the new hires, wait times might not be speeding up. Newly elected Onondaga County Sheriff Toby Shelley said it could take more than a year to get the sheriff's department's approval to own a gun. And that's a best-case scenario.

"It's 60 weeks just to get an appointment," Shelley said. "That's if you have all your paperwork done, your fingerprints done, background check done."

<https://www.waer.org/2023-01-11/pistol-license-reopened-in-onondaga-county-but-backlog-remains>

New Gun Restrictions Are Coming in States Where Democrats Reign

Across the country, gun safety legislation remains a top issue in statehouses, some five years after the Parkland, Florida, mass school shooting inspired a new movement against the firearms lobby.

Democratic lawmakers, some bolstered by new so-called trifectas — or control of the governor's office and both legislative chambers — are eager to pass new bans on semi-automatic rifles, while also enacting red flag laws and background checks to keep firearms out of the hands of potentially violent people.

<https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2023/01/19/new-gun-restrictions-are-coming-in-states-where-democrats-reign>

ATF Drops New Pistol Brace Rule: It's Not Good

The rule was announced in a somewhat cryptic statement from the Justice Department on Jan. 13, 2023. It says that if an individual, manufacturer, or retailer puts a brace on a firearm that was not designed as a pistol and has a barrel under 16 inches long, it is now considered a short-barreled rifle (SBR) under the National Firearms Act of 1934 (NFA). That means to legally remain in that configuration, it would require a tax stamp and registration with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

In the announcement, Attorney General Merrick Garland explained that the concern addressed by the rule was that braces were being used to circumvent the NFA. There's no way of knowing how many braces are in circulation, but it's in the millions — even the ATF estimates 7 million braces exist, but according to the Congressional Research Service, that number could be anywhere between 10 and 40 million.

According to the announcement, the rule goes into effect on the date of publication in the Federal Register and allows a 120-day period for manufacturers, dealers, and individuals to register any existing NFA short-barreled rifles covered by the rule. The normal SBR tax will be waived.

If anyone doesn't want to register, the ATF says they can remove the brace "to return the firearm to a pistol," or they can surrender the gun to the ATF.

The ATF's statement would appear to mean that *all* pistols with braces are now SBRs, because who has a pistol with a barrel longer than 16 inches? But at the end of the announcement, the feds say, "Nothing in this rule bans stabilizing braces or the use of stabilizing braces on pistols," yet it remains unclear on what pistols a brace would be legal.

Along with the announcement, the ATF posted a webpage explaining the rule and issued instructions on how to comply. The webpage also includes two lists of braced firearms that the ATF now considers to be SBRs, with models like the Ruger AR-556 with a short barrel and an SBA3 brace attached and the Q Honey Badger with an HBPDW brace mentioned specifically, among others.

<https://freerangeamerican.us/atf-pistol-brace-rule-2/>

New 4473 Released By BATFE

A new Form 4473 released by the Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE) in early December includes a variety of changes on the portion completed by the FFL. It has been expanded to seven pages, rather than the previous version's six. There are only three modifications to the fields completed by the transferee, however.

Perhaps the most noteworthy change appears on the FFL's side of the new 4473, at the top of the form. They must now use the letters "PMF" when recording the transfer or acceptance of privately made firearms. The BATFE announcement explains, Any firearm, received by a FFL, that was privately made (not manufactured by another licensee) must now be recorded on the ATF Form 4473. 'Privately Made Firearm (PMF)' has been added to item 1, Section A. It now reads: 'Manufacturer and Importer, if any or Privately made firearm (PMF) (If the manufacturer and importer are both different, include both).'

<https://www.americanrifleman.org/content/new-4473-released-by-batfe/>

No Matter the 'Details on (The California) Shootings,' Biden Says, Congress Should Respond by Banning 'Assault Weapons'

"Senator Feinstein—alongside Senators Murphy, Blumenthal and others— reintroduced a federal Assault Weapons Ban and legislation that would raise the minimum purchase age for assault weapons to 21," Biden said on (January 24). "Even as we await further details on these shootings, we know the scourge of gun violence across America requires stronger action."

Regardless of what "further details" might reveal, in other words, Biden thinks banning "assault weapons," or at least restricting their sale to people 21 or older, is a rational response to these crimes. As he sees it, "stronger action" is obviously necessary, even if that action is not logically related to the incidents that prompted his statement.

In the context of the two California shootings, the age restriction Biden mentioned is clearly a non sequitur. The Monterey Park murderer, who killed himself before he could be arrested, was 72. The Half Moon Bay suspect is 66.

<https://reason.com/2023/01/25/no-matter-the-details-on-these-shootings-biden-says-congress-should-respond-by-banning-assault-weapons/>

Congressman Morelle (Rochester NY) supports bills to ban assault weapons, require background checks

The two measures are known as the Assault Weapons Ban and the Bipartisan Background Checks Act.

The Assault Weapons Ban looks to ban the sale, import, and manufacturing of semiautomatic weapons and large-capacity ammunition-feeding devices. However, those who use rifles for hunting and sport, as well as members of the military and police who use assault weapons, would be protected.

The other bill, known as the Bipartisan Background Checks Act, would require all locations that sell guns to do a background check on customers buying a gun.

<https://www.rochesterfirst.com/news/political-news/congressman-morelle-supports-bills-to-ban-assault-weapons-require-background-checks/>

Law Banning Handgun Sales to Law-Abiding Adults Under 21 Struck Down

The Fourth Circuit Court of Appeals ruled last week that the federal ban on handgun sales to those aged 18 to 20 is unconstitutional.

The Second Amendment Foundation immediately called it a “monumental victory for Second Amendment rights.”

Writing for the majority, Judge Julius N. Richardson noted that a historical reading of the text and structure of the Constitution clearly shows that 18- to 20-year olds are protected by the Bill of Rights.

“Virtually every other constitutional right applies whatever the age. And the Second Amendment is no different.”

The 1968 federal law banning the sale of handguns to young adults under the age of 21 was therefore struck down by the Richmond-based appeals court.

The SAF has similar cases pending in Illinois, Louisiana, Pennsylvania, Washington, California, Minnesota, and other states.

(Note: The United States Court of Appeals for the Fourth Circuit is a federal court located in Richmond, Virginia)

<https://tinyurl.com/5472vh7b>

Fifth Circuit Holds People Can't Be Disarmed Just Based on Civil Restraining Order

A federal appeals court ruled Thursday that the government can't stop people who have domestic violence restraining orders against them from owning guns — the latest domino to fall after the U.S. Supreme Court's conservative majority set new standards for reviewing the nation's gun laws.

Police in Texas found a rifle and a pistol at the home of a man who was the subject of a civil protective order that banned him from harassing, stalking or threatening his ex-girlfriend and their child. The order also banned him from having guns.

Chuck Michel, president of the California Rifle and Pistol Association, said the problem with laws like the one the federal appeals court struck down is that they are too broad and don't take into account the details of each case. He offered as an example a client of his whose neighbor filed a restraining order against them because they had pointed a security camera on their property.

“They lost their gun rights,” he said. “When they do a blanket prohibition without considering individualized circumstances, they shoot the dogs with the wolves.”

<https://tinyurl.com/5k6s9hrh>

Florida: Court Rejects Parkland Family's Lawsuit Against Gun Maker, Store

A state appeals court on Wednesday rejected a request by the parents of a Parkland school shooting victim to pursue a lawsuit against gun maker Smith & Wesson, according to a report.

A three-judge panel of the 4th District Court of Appeal upheld a circuit court judge's decision to dismiss an attempt by Fred and Jennifer Guttenberg to obtain an "advisory opinion," which would have allowed them to pursue a lawsuit against Smith & Wesson and Sunrise Tactical Supply. The Guttenbergs' 14-year-old daughter, Jaime, was among those killed in the shooting.

In its ruling, the court said it could not assure the Guttenbergs that they could sue Smith & Wesson without risking significant fees should they lose. The Guttenbergs sought the advisory opinion to determine whether gun makers and sellers were legally protected from lawsuits under Florida state law.

https://patch.com/florida/miami/court-rejects-parkland-familys-lawsuit-pursuit-against-gun-maker?utm_source=twitter&utm_medium=web&utm_campaign=share

Court Rejects Challenge to California's Disclosure of Certain Gun Owner Records to Researchers

Five California registered gun owners ... filed suit to prevent Rob Bonta, Attorney General of the State of California, from enforcing a California law that permits the State to disclose their personal identifying information to bona fide research institutions for the ostensible purposes of preventing gun violence, shooting accidents, and suicide....

The gun owners, all of whom are law abiding citizens who passed background checks, raise four claims. First, they argue that AB 173 violates—or at minimum, chills—their Second Amendment right to keep and bear arms. Second, they maintain that disclosing their personal identifying information to non-government researchers violates privacy protections guaranteed to them by the Fourteenth Amendment. Next, they assert that AB 173 violates their right to due process under the Fourteenth Amendment by retroactively expanding access to their restricted personal information. Their final claim, applicable only to applicants for concealed weapon permits ("CCW") and holders of such permits, is that federal law preempts AB 173 insofar as AB 173 authorizes disclosure of their social security numbers to third parties in derogation of the federal Privacy Act of 1974....

The court rejected the Second Amendment challenge

<https://reason.com/volokh/2023/01/12/court-rejects-challenge-to-californias-disclosure-of-certain-gun-owner-records-to-researchers/>

Maine Crime Fell Following 2015 Repeal of Gun Control Law

When Maine began allowing eligible residents to carry concealed firearms without a government license in 2015, gun control advocates warned that Wild West-style gun violence would erupt across the state.

Instead, the opposite has happened.

In fact, property crime and violent crime have fallen in Maine since the 2015 reform, according to crime data tracked by the FBI.

The reform, introduced by State Sen. Eric Brakey (R-Auburn) and signed into law by Republican Gov. Paul LePage, ended a state-run gun control program that required individuals to obtain a permit before carrying a concealed firearm — effectively adopting a policy known informally as Constitutional Carry.

While rates of violent crime increased nationally from 2015 to 2020, the rate of violent crime in Maine fell steadily beginning in 2015, after a slight increase from 2014 to 2015, according to data collected by the FBI's Uniform Crime Reporting Program.

<https://www.themainewire.com/2022/12/maine-crime-fell-following-2015-repeal-of-gun-control-law/>

A 'Red Flag' Study Raises the Question of How Often People Who Talk About Mass Shootings Actually Commit Them

"Red flag" laws, which authorize "extreme risk protection orders" (ERPOs) prohibiting gun possession by people who are deemed a threat to themselves or others, aim to prevent homicides and suicides. That hope has persuaded legislators in 19 states and the District of Columbia to enact red flag laws, and the Bipartisan Safer Communities Act, which Congress passed last year, included grants that encourage other jurisdictions to follow suit.

It nevertheless remains unclear whether these laws work as advertised, especially when it comes to stopping mass shootings, the main impetus driving such legislation. A recent RAND Corporation analysis found "inconclusive evidence" that red flag laws decrease suicides or violent crime and "no qualifying studies" showing an impact on mass shootings.

ERPOs usually are presented as a way to prevent mass shootings. But data from Connecticut and Indiana, the first two states to enact red flag laws, indicate that ERPOs typically are deployed against respondents who are viewed as suicidal.

<https://reason.com/2023/01/20/a-red-flag-study-raises-the-question-of-how-often-people-who-talk-about-mass-shootings-actually-commit-them/>