

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

## **December, 2021**

### **Hochul approves measure meant to strengthen Red Flag Law**

A measure that requires mental health facilities in New York to obtain extreme risk protection orders for discharged patients or those on conditional release was approved (in November) by Gov. Kathy Hochul.

The new law is meant to strengthen the state's Red Flag Law, which is meant to bar people who show signs of being a threat to themselves or others from obtaining or buying a gun...

In addition to the extreme risk protection component, the new law also requires mental health facilities to provide information about the Red Flag Law.

The new law will take effect immediately.

<https://spectrumlocalnews.com/nys/central-ny/ny-state-of-politics/2021/11/09/hochul-approves-measure-meant-to-strengthen-red-flag-law>

### **Gillibrand pushes for new legislation amid recent violence in Rochester**

In response to Rochester's state of emergency, Senator Kirsten Gillibrand says she's working to address recent violence with new legislation.

That includes banning assault weapons, enforcing a federal anti-gun trafficking law, ensuring reliable background checks and creating a data protection agency that has oversight over social media.

"There's also enormous amounts of anger and division in our communities that is fueling violence," Gillibrand said. "A lot of that is caused by disinformation, lies and by social media platforms that are unregulated."

<https://spectrumlocalnews.com/nys/rochester/politics/2021/11/21/gillibrand-pushes-for-new-legislation-amid-recent-violence-in-rochester>

### **New York cracks down on ghost guns, but will new laws be effective in curbing violence?**

The trio of bills bans the sale and possession of ghost guns and requires gunsmiths to register and serialize firearms along with unfinished frames or receivers.

Tom King, Executive Director of the New York State Rifle and Pistol Association, believes the legislation won't be effective in curbing gun violence.

"Firearms laws are only obeyed by the lawful citizens of the state. Criminals do not pay any attention to any laws that are passed," said King.

"They get a hold of guns all the time. There is a criminal network in the United States. Guns move along in this network," added King.

<https://cbs6albany.com/news/local/new-york-cracks-down-on-ghost-guns-but-will-new-laws-be-effective-in-curbing-violence>

### **NRA loses federal appeal over New York gun store closures**

A federal appeals court Tuesday ruled against the National Rifle Association in its lawsuit challenging New York state's closing of gun stores early in the COVID-19 pandemic.

In a 3-0 vote, the 2nd U.S. Circuit Court of Appeals in Manhattan said the NRA's bid for an injunction was moot because there was "no reasonable prospect" of more closures, after the state legislature curtailed the governor's power to impose COVID-19 restrictions.

The appeals court also refused to award nominal damages, saying the NRA lacked standing to sue on its members' behalf, and that sovereign immunity under the U.S. Constitution's 11th Amendment barred claims against state officials.

<https://www.businessinsurance.com/article/20211116/NEWS06/912345979/NRA-loses-federal-appeal-over-New-York-gun-store-closures>

### **Supreme Court appears skeptical of New York's restrictive gun control law**

The chief justice pointed to the court's landmark decision in 2008 based on the right to self-defense. And he suggested that having a gun for self-defense may be more important to people living in densely populated areas than it is rural areas.

"Well, how many muggings take place in the forest?" he asked Underwood.

Justice Samuel Alito spoke about people who work late at night in Manhattan, people who clean offices, a nurse, an orderly, a dishwasher, and when they have to walk to a subway or bus stop or walk home, "they are scared to death," as he put it, and they apply for a license.

But "they do not get licenses, is that right?" he asked Underwood.

"That is in general right, yes," she replied, if there is no particular personal threat to them.

Alito shot back, "But how is that consistent with the core right to self-defense, which is protected by the Second Amendment?"

At the end of the day, there seemed to be little doubt that a conservative majority will strike down New York's law. Of the six conservative justices, only Justice Amy Coney Barrett did not telegraph her view.

<https://www.npr.org/2021/11/03/1051988277/supreme-court-appears-skeptical-of-new-yorks-restrictive-gun-control-law>

### **Supreme Court Arguments in New York Gun Case Signal Uphill Battle to Defend Overly Restrictive Laws**

It's always risky to predict the outcome of any particular Supreme Court case. However, based on the justices' jurisprudential histories and the questions they asked at oral argument, it seems likely that a majority will find in favor of the petitioners, affirm that there is, indeed, an individual right for ordinary citizens to carry firearms in public for self-defense, and conclude that states must permit residents to exercise this right subject only to reasonable regulations on time, place, and manner.

Such an opinion from the high court likely would act as a death knell not just to New York's public carry framework, but to similarly restrictive frameworks in states such as California, Hawaii, and New Jersey.

Contrary to the fantastical predictions of some gun control advocates and some Second Amendment advocates, it is highly unlikely that the court will spell out a right to permitless carry or question the constitutional validity of less restrictive "shall issue" permit laws.

The practical implication likely will be that states such as New York pivot to fairly onerous "shall issue" frameworks along the lines of the one implemented in the District of Columbia, where applicants "shall" be issued permits, but only if they jump through myriad expensive and time-consuming bureaucratic hoops.

Such a result may not provide a perfect resolution—the more burdensome "shall issue" frameworks certainly raise constitutional concerns of their own.

But as Paul Clement, the petitioners' attorney, told the court, many of the 80 million Americans currently unable to exercise their Second Amendment rights in public eagerly look at D.C.'s public carry laws and say, "We'd like what they're having."

<https://www.heritage.org/courts/commentary/supreme-court-arguments-new-york-gun-case-signal-uphill-battle-defend-overly>

## **Kavanaugh Highlights Texas Abortion Law's Threat to 'Second Amendment Rights, Free Exercise of Religion Rights, Free Speech Rights'**

Texas law S.B. 8 bans pre-viability abortions, which is something that Texas lawmakers are specifically prohibited from doing under existing U.S. Supreme Court precedent. To dodge legal accountability in federal court, those state lawmakers outsourced S.B. 8's enforcement to private actors. According to the law, "any person" may sue "any person who...aids or abets the performance or inducement of abortion" and win at least a \$10,000 bounty plus legal fees if the civil suit is successful. Because no state official is doing the enforcing, Texas maintains, no state official may face a pre-enforcement proceeding in federal court over this obvious denial of a judicially recognized constitutional right.

The U.S. Supreme Court heard oral arguments today in two related cases that question whether Texas' novel legal scheme should be allowed to stand. Justice Brett Kavanaugh cut to the heart of the matter, asking Texas Solicitor General Judd Stone about "the implications of your position for other constitutional rights."

What if a state passed a law that says "everyone who sells an AR-15 is liable for a million dollars to any citizen," Kavanaugh asked the Texas official. "Would that kind of law be exempt from pre-enforcement review in federal court?"

Stone conceded that his theory would shield that gun control law too. "My answers on whether or not federal court review is available does not turn on the nature of the right," he told Kavanaugh.

So "Second Amendment rights, free exercise of religion rights, free speech rights," Kavanaugh emphasized, could all "be targeted by other states" using the Texas abortion law as a model. "And you also said that the amount of the penalty doesn't matter, a million dollars per sale," Kavanaugh added. "A state passes a law [that says] anyone who declines to provide a good or service for use in a same-sex marriage, a million dollars if sued by anyone in the state, that's exempt from pre-enforcement review?"

"Is that a yes?" Kavanaugh pressed the Texas official.

"Yes, your honor," Stone replied.

<https://reason.com/2021/11/01/kavanaugh-highlights-texas-abortion-laws-threat-to-second-amendment-rights-free-exercise-of-religion-rights-free-speech-rights/>

## **The Amendment That Remade America**

The First? The Second? No, the 14th—the basis for every claim against a state government for violating individual rights.

That amendment, among its other provisions, bars states from abridging “the privileges or immunities” of citizens or depriving any person of life, liberty or property “without due process of law.” It’s best known for guaranteeing to all persons “the equal protection of the laws.”

The historical evidence is overwhelming that Second Amendment rights belong to individuals. “But if there’s any doubt about that, raised by the existence of the Militia Clause of the Second Amendment, there’s no doubt whatsoever that the 14th Amendment’s Privileges or Immunities Clause was aimed at the protection of the individual right—in this case the individual rights of the freed blacks to keep and carry their own weapons.

[https://www.wsj.com/articles/fourteenth-amendment-states-civil-rights-federalism-originalism-abortion-dobbs-jackson-11635535364?reflink=share\\_mobilewebshare](https://www.wsj.com/articles/fourteenth-amendment-states-civil-rights-federalism-originalism-abortion-dobbs-jackson-11635535364?reflink=share_mobilewebshare)

## **Court Rejects Negligence Lawsuit Against Armslist Over Murder Using Gun Bought in Armslist-Facilitated Transaction**

The court takes a narrow view of 47 U.S.C. § 230(c)(1), but rejects liability as a matter of state law: “public policy [with regard to how gun sales can be arranged] is more properly determined by the peoples’ elected representatives rather than by the courts.”

<https://reason.com/volokh/2021/11/12/court-rejects-negligence-lawsuit-against-armslist-over-murder-using-gun-bought-in-armslist-facilitated-transaction/>

## **Firearms manufacturers flee Northeast for states that love guns and hate taxes**

The announced departure this past week of Remington, the country’s oldest gun manufacturer, from a blue state to a red state is just one of several instances of firearm companies relocating to friendlier jurisdictions in recent years.

Remington, founded more than 200 years ago, will soon be headquartered in LaGrange, Georgia, hundreds of miles away from its current base of operations in New York, where the business was founded. The move is evidence of a shift in the gun industry in which companies are moving to new states — typically Republican-led states with lower taxes and more politically accommodating environments for gunmakers.

Last year, gunmaker Kimber Manufacturing also announced that it will move its corporate headquarters from New York to Alabama, Olin relocated its Winchester

Centerfire Operations from Illinois to Mississippi, and Stag Arms moved from Connecticut to Wyoming, among several other company moves.

In addition to gun laws, other regulations have played a role in companies relocating. Several businesses, not just in the gunmaking space, have moved from states like New York and California since the pandemic began because of burdensome restrictions.

<https://www.washingtonexaminer.com/policy/firearms-manufacturers-flee-northeast-for-states-that-love-guns-and-hate-taxes>

### **Without False Claims About The Risk of Concealed Handgun Permit Holders, The Left Has Nothing**

Since 1976, 18 states eliminated “proper cause” requirements, and gun control advocates have consistently predicted disaster. But in state after state, concealed handgun permit holders have proved to be extremely law-abiding, and Right-to-Carry states have never even held a legislative hearing to consider moving back to “proper cause.”

In Florida and Texas, permit holders are convicted of firearms-related violations at one-twelfth of the rate at which police officers. In the 19 states with comprehensive permit revocation data, the average revocation rate is one-tenth of one percent. Usually, permit revocations occur because someone moved or died or forgot to bring their permit while carrying.

Academics have published fifty-two peer-reviewed, empirical studies on concealed carry. Of these, 25 found that allowing people to carry reduces violent crime, and 15 found no significant effect. A minority (12) observed increases in violent crime. These 12, however, suffer from a systematic error to varying degrees: they tend to focus on the last 20 years and compare states that recently passed concealed carry laws with more lenient states that had sustained growth in permits over the past two decades. The finding that crime rose relatively in such states is consistent with permit holders reducing crime.

<https://townhall.com/columnists/johnrlottjr/2021/11/11/without-false-claims-about-the-risk-of-concealed-handgun-permit-holders-the-left-n2598915>