

SECOND AMENDMENT LITIGATION UPDATE

**An Overview of Where is NRA in
the Courts Today & Beyond?**

Stephen P. Halbrook

**NRA-ILA Firearms Law &
The Second Amendment Symposium**

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STEPHEN P. HALBROOK, PH.D.
ATTORNEY AT LAW
SUITE 403
3925 CHAIN BRIDGE ROAD
FAIRFAX, VIRGINIA 22030

TELEPHONE (703) 352-7276
FAX (703) 359-0938

Resume

protell@aol.com
www.stephenhalbrook.com

Civil litigation & criminal defense since 1978. Focus on firearms law and constitutional issues involving Federalism and Bill of Rights guarantees. Represent firearm associations, manufacturers, importers, and owners in administrative, civil, & criminal proceedings under federal, state, & local law. ATF classifications and FFL compliance.

Member of Virginia State Bar, D.C. Bar, U.S. Supreme Court, U.S. Courts of Appeals – all circuits. Testified in U.S. Senate & House Judiciary Committees – Gun ban bills, SHARE Act, Fix NICS. Georgetown University Law Center, J.D. (1978); Florida State University, Ph.D. Philosophy (1972). Assistant Professor of Philosophy 1972-81, George Mason, Howard, Tuskegee Universities. Senior Fellow, The Independent Institute.

Supreme Court practice: represented majority of members of Congress as amici curiae in *D.C. v. Heller* (2008). Co-counsel for NRA in *McDonald v. Chicago* (2010). Argued and won: *Castillo v. U.S.* (2000) (right to jury trial issue in Waco Gun Control Act prosecution); *Printz v. U.S.* (1997) (Brady mandates to States); *U.S. v. T/C Arms* (1992) (NFA). Co-counsel in *Small v. U.S.* (2005) (foreign convictions in GCA). Numerous federal & state appeals argued.

Books

Firearms Law Deskbook: Federal and State Criminal Practice (Thomson/West 2020).
Gun Control in Nazi-Occupied France: Tyranny and Resistance (2018).
Gun Control in the Third Reich: Disarming the Jews and “Enemies of the State” (2013).
The Founders’ Second Amendment (2008, 2019). Cited in *McDonald*.
Freedmen, the Fourteenth Amendment, and the Right to Bear Arms (1998). New Edition:
Securing Civil Rights (2010). Cited in *Heller* and *McDonald*.
That Every Man Be Armed (1984, 2013). Cited in *Printz*.
A Right to Bear Arms: State & Federal Bills of Rights (1989).
The Swiss and the Nazis (2006).
Target Switzerland (1998).

Articles (selected). See www.stephenhalbrook.com.

“The Right to Bear Arms,” 43 *Harvard J. L. & Pub. Pol.* 331 (2020).
“Taking *Heller* Seriously,” 13 *Charleston L. Rev.* 175 (Winter 2018).
“Reality Check: The ‘Assault Weapon’ Fantasy,” 14 *G’wtn J. L. & Pub. Pol.* 47 (2016).
“Firearm Sound Moderators,” 46:1 *Cumberland L. Rev.* 33 (2016).

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Introduction

The following analyzes recent and ongoing developments relevant to the right to keep and bear arms. The year 2020 was full of surprises, some pleasant and some not so pleasant, and 2021 is up in the air. NRA-ILA was deeply involved in most of these cases. The following addresses cases in the U.S. Supreme Court, representative ongoing litigation in the lower courts, and the phenomenon of Virginia's Second Amendment Sanctuaries.

First, the U.S. Supreme Court's long-awaited return to a Second Amendment case turned out to be a dud. In *New York State Rifle and Pistol Association v. City of New York*, the City manipulated the Court's jurisdiction to render the case moot, albeit not without a substantial dissent by Justice Alito joined by two other Justices. Then the Court denied certiorari in a dozen Second Amendment cases at the end of the Term, including *Rogers v. Grewal*, involving New Jersey's discretionary gun licensing system. Justice Thomas, joined by Justice Kavanaugh, dissented.

But then the Court's balance shifted with the appointment of Justice Amy Coney Barrett. As a judge on the Seventh Circuit, she dissented in *Kanter v. Barr* with the argument that a ban on firearm possession by persons convicted of non-violent felonies may be unconstitutional as applied. Her opinion in the Fourth Amendment case of *United States v. Watson* went unnoticed, but there she referred to "the constitutional right to carry a gun."

Second, the following surveys five ongoing cases on a variety of subjects to watch. In *Young v. Hawaii*, the Ninth Circuit declared a ban on open carry unconstitutional, which is now pending en banc review. *State of Florida v. City of Weston* tests the validity of imposing civil penalties on localities that enact preempted firearm ordinances. Among other cases involving COVID-19 shutdowns, *McCarthy v. Baker* resulted in an injunction against the closure of gun shops in Massachusetts. A similar decision was rendered in Virginia in *Lynchburg Range & Training v. Northam*.

Some big cities impose arbitrary restrictions on gun shops, and one of several pending cases is *The Gun Range v. Decision of Philadelphia Zoning Board of Adjustment*. On another subject, New Jersey's resistance to federal preemption is being tested as applied to the federal Law Enforcement Officers Safety Act (LEOSA), which authorizes retired officers to carry firearms nationwide notwithstanding state laws to the contrary. The case is *Federal Law Enforcement Officers Ass'n v. Grewal*.

Third, the following assesses the phenomenon of Virginia's Second Amendment Sanctuaries. The 2020 General Assembly considered bills like H.B. 961, which would have subjected a person who possesses an "assault firearm" or magazine that holds over 12 rounds to five years imprisonment, the same penalty the law imposes for unlawfully shooting a person with the intent to kill. Some 91 of Virginia's 95 counties declared support for Second Amendment rights.

Attorney General Mark Herring issued a formal opinion that these resolutions have “no legal effect” and that any new “gun safety” laws must be enforced and obeyed. However, local officials and sheriffs take an oath to support and defend the constitutions of Virginia and the United States, those constitutions forbid infringement of the right to keep and bear arms, and these officials can be held liable for violation of clearly established rights. In *Heller*, the U.S. Supreme Court held that the Second Amendment protects firearms that are commonly possessed for lawful purposes.

Law enforcement officials have authority to apply scarce resources to combat violent crime. Commonwealth’s Attorneys may choose not to prosecute defendants for technical gun law violations, just as some have a policy of not prosecuting marijuana possession cases. While H.B. 961 was continued to the 2021 session, states that have enacted such provisions have seen that the majority of gun owners do not comply with bans, despite serious felony penalties.

I. WHAT’S HAPPENING IN THE U.S. SUPREME COURT

A. New York City the Teflon Don: Justice Alito’s Dissent in *NYSRPA*

New York City issues few handgun carry permits, and its premises permit law prohibited taking a handgun off the premises (home or business) except to take it to one of the City’s five gun ranges. A suit was filed where plaintiffs sought to take their handguns to ranges outside the City and to a second home outside the City. The Second Circuit upheld the law as not violating the Second Amendment based on a police declaration that doing so would endanger the public safety. The Supreme Court granted certiorari.¹

While the case was pending in the Supreme Court, the City amended its restrictions on the transport of handguns. In its *per curiam* decision in *New York State Rifle & Pistol Association v. City of New York* (2020), the Supreme Court found that the City’s amendment allowing the petitioners to transport firearms to a second home or shooting range outside the City gave petitioners all the relief they sought, rendering the case moot. The Court vacated the judgment below and remanded the case for the district court to decide whether the new law permits routine stops for coffee, gas, food, or restroom breaks, and also whether plaintiffs may still add a claim for damages regarding the old rule.²

Concurring, Justice Kavanaugh agreed with the analysis of *Heller* and *McDonald* set forth in Justice Alito’s dissent and shared the dissent’s “concern that some federal and state

¹*New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45 (2nd Cir. 2018), *cert. granted*, 139 S. Ct. 939 (2019).

²*New York State Rifle & Pistol Association, Inc. v. City of New York*, 140 S. Ct. 1525, 1526-27 (2020).

courts may not be properly applying” those precedents, a problem that the Court should address “soon.”³

Justice Alito, joined by Justice Gorsuch and Justice Thomas, dissented. “By incorrectly dismissing this case as moot, the Court permits our docket to be manipulated in a way that should not be countenanced.” The City energetically defended its law until certiorari was granted, which “apparently led to an epiphany of sorts, and the City quickly changed its ordinance.” And yet that did not render the case moot.⁴

First, Justice Alito wrote, the new law did not give the licensees “*unrestricted access*” to ranges, competitions, and second homes outside of the City. Its requirements that travel must be direct, continuous, and uninterrupted left vague whether a person could stop for groceries, to pick up a friend to go to the range, or to visit a relative who lives near the range.⁵ Second, where constitutional rights have been violated, plaintiffs may be awarded nominal or compensatory damages.⁶

On the merits, Justice Alito would have held that the old law violated the Second Amendment. As *Heller* stated, “to bear arms implies something more than the mere keeping [of arms]; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use.”⁷ While sometimes a gun may be rented at a range, “the same model gun that the person owns may not be available at a range, and in any event each individual gun may have its own characteristics.”⁸

Moreover, the City “points to no evidence of laws in force around the time of the adoption of the Second Amendment that prevented gun owners from practicing outside city limits.” The City cited historical laws against the discharge of firearms within cities, but there was no showing that “municipalities during the founding era prevented gun owners from taking their guns outside city limits for practice.”⁹

Finally, Justice Alito wrote: “If history is not sufficient to show that the New York City

³*Id.* at 1527 (Kavanaugh, J., concurring).

⁴*Id.* (Alito, J., dissenting).

⁵*Id.* at 1534.

⁶*Id.* at 1536.

⁷*Id.* at 1541 (citation omitted).

⁸*Id.*

⁹*Id.*

ordinance is unconstitutional, any doubt is dispelled by the weakness of the City’s showing that its travel restriction significantly promoted public safety. Although the courts below claimed to apply heightened scrutiny, there was nothing heightened about what they did.”¹⁰ (This is part Part IV-B of the dissent, in which Justice Thomas did not join.) Inspector Lunetta had given three reasons in support of the public-safety argument.

First, “the travel restrictions discouraged licensees from taking their guns outside the home,” but this repudiated “that a reasonable opportunity to practice is part of the very right recognized in *Heller*” Second, the restrictions prevented a person going to a range “from using it in a fit of rage after an auto accident,” but that “does not explain why a person headed for a range outside the City is any more likely to engage in such conduct than a person whose destination is a range in the City.” Third, police needed to check with ranges to ensure that a person was actually going to or from the range, but they could do that with ranges both in and outside the City. “[A] court engaged in any serious form of scrutiny would have questioned the absence of evidence, but no substantiation was provided or demanded below.”¹¹

Justice Alito concluded that “the City’s travel restriction burdened the very right recognized in *Heller*. History provides no support for a restriction of this type. The City’s public safety arguments were weak on their face, were not substantiated in any way, and were accepted below with no serious probing. And once we granted review in this case, the City’s public safety concerns evaporated.”¹²

B. Justice Thomas’ Dissent from Denial of Certiorari: The New Jersey Carry Case

At the end of the 2019 Term, the Supreme Court denied all pending Second Amendment cases. In *Rogers v. Grewal* (2020), Justice Thomas, joined by Justice Kavanaugh, dissented from the denial of certiorari in a Third Circuit decision upholding New Jersey’s “may issue” carry license law. Some states require a “justifiable need” or “good reason” for exercising the right to bear arms.¹³ Instead of deciding whether a law violates the right based on text, history, and tradition, some circuits have minimized *Heller*’s framework and “then ‘filled’ the self-created ‘analytical vacuum’ with a ‘two-step inquiry’ that incorporates tiers of scrutiny on a sliding scale.”¹⁴ That “test appears to be entirely made up,” as “the Second Amendment provides no

¹⁰*Id.* at 1541-42.

¹¹*Id.* at 1543.

¹²*Id.* at 1544.

¹³*Rogers v. Grewal*, 140 S. Ct. 1865 (2020) (Thomas, J., dissenting from denial of cert.).

¹⁴*Id.* at 1866.

hierarchy of “core” and peripheral rights.”¹⁵

In part II of the dissent (in which Justice Kavanaugh did not join), Justice Thomas wrote that “the right to carry arms for self-defense inherently includes the right to carry in public.”¹⁶ On the historical side, “cases and treatises from England, the founding era, and the antebellum period confirm that the right to bear arms includes the right to carry in public.”¹⁷ “Finally, numerous Congressmen expressed dismay at the denial of blacks’ rights to bear arms when discussing the Civil Rights Act of 1866, the Freedmen’s Bureau Act of 1866, and the Fourteenth Amendment.”¹⁸

Part III of the dissent states that a handful of states ban the ability of most citizens to exercise the right to bear arms, while the majority allow the carrying of arms to varying degrees. Granting certiorari would have allowed the Court “to provide lower courts with much-needed guidance, ensure adherence to our precedents, and resolve a Circuit split.”¹⁹ It remains to be seen whether the Court will do so in a future case.

Since the Supreme Court denied petitions for certiorari in all Second Amendment cases at the end of its 2019 Term, litigants are forced to file new cases. A redo of the *Rogers* case has been filed in the District of New Jersey, styled *Mazahreh v. Grewal*.²⁰

C. Enter Justice Amy Coney Barrett

New York City found that it is no longer the Teflon Don when Amy Coney Barrett arrived on the Court. As it did in *NYSRPA*, the City tried to moot its alleged violation of free exercise of religion regarding its COVID-19 shutdown order to churches and synagogues in *Roman Catholic Diocese of Brooklyn v. Cuomo*.²¹ Justice Barrett cast the decisive vote in the 5-4

¹⁵*Id.* at 1867.

¹⁶*Id.* at 1868.

¹⁷*Id.* at 1869.

¹⁸*Id.* at 1874, citing Halbrook, “The Jurisprudence of the Second and Fourteenth Amendments,” 4 *Geo. Mason L. Rev.* 1, 21–25 (1981).

¹⁹*Id.* at 1875.

²⁰Complaint, *Mazahreh v. Grewal*, Case 1:20-cv-17598 (D. N.J., Dec. 1, 2020). https://cdn.ymaws.com/www.anjrpc.org/resource/resmgr/legal_motions___briefs/filed_complaint_3__p0166893x.pdf.

²¹*Roman Catholic Diocese of Brooklyn v. Cuomo*, 2020 WL 6958354 (US 2020) (per curiam).

decision that large churches and synagogues should be treated as fairly as large stores.

As a judge on the Seventh Circuit, now Justice Barrett rendered two decisions of interest from a Second Amendment perspective. In *Kanter v. Barr*, that court rejected the argument that the federal ban on possession of a firearm by a felon violates the Second Amendment as applied to a person convicted of mail fraud.²² Dissenting, Judge Barrett would have held that Founding-era practices provide no support for a ban on gun possession by all felons, and that banning all non-violent felons from such possession is not substantially related to the governments' interest in preventing future gun violence.²³ In a Third Circuit dissent, Judge Bibas would have followed the same reasoning regarding a person convicted of making a false statement on a tax return.²⁴

Judge Barrett wrote the opinion in *United States v. Watson*, upholding suppression of evidence under the Fourth Amendment where police searched a vehicle based on a report that the driver was seen carrying a gun, which was lawful in Indiana.²⁵ She wrote that “citizens should be able to exercise the constitutional right to carry a gun without having the police stop them when they do so.”²⁶

II. CASES TO WATCH

A number of constitutional and statutory issues involving firearm laws are pending throughout the country. The following are some of the more significant cases in which the NRA has filed amicus curiae briefs.

A. Hawaii's Carry Ban

Bob Dylan sang “the times they are a-changing.” Today, based on the Trump judicial appointees, the Ninth Circuit is a-changing. In *Young v. Hawaii*, Judge O’Scannlain wrote for the majority that Hawaii’s total ban on the right to carry handguns in public other than for security guards violates the Second Amendment. “Just as the Second Amendment does not protect a right to bear arms only in connection with a militia, it surely does not protect a right to

²²*Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019).

²³*Id.* at 467, 468 (Barrett, J., dissenting).

²⁴*Folajtar v. Attorney General of the United States*, 2020 WL 6879007, *11-12 (3rd Cir. 2020) (Bibas, J., dissenting).

²⁵*United States v. Watson*, 900 F.3d 892, 893, 895 (7th Cir. 2018).

²⁶*Id.* at 897.

bear arms only as a security guard.”²⁷

The Ninth Circuit granted a petition for rehearing en banc, which was held on September 24, 2020. Without making any predictions on the outcome, at oral argument the judges seemed somewhat evenly split.²⁸

B. Florida’s Preemption Law

The State of Florida occupies the field of firearm regulation and preempts localities from enacting firearm restrictions except as explicitly authorized. A county may require a background check and a three-to-five day waiting period for handgun purchases, but may not require gun registration. Despite that, localities regulate gun shows, impose reporting requirements on gun sales, and otherwise push the envelope.

Civil penalties are imposed on localities and legislative members who pass preempted laws. A number of localities claim that law violates the separation of powers and is beyond the legislative power, and the circuit court of Leon County agreed. Several suits are consolidated under *State of Florida v. City of Weston*. The State appealed, and the case is pending before the First District Court of Appeal.²⁹ The NRA filed an amicus brief in support of the State. Oral argument took place on July 14, 2020.³⁰ A decision is pending.

C. Massachusetts Coronavirus Ban on Gun Shops

In Massachusetts, Governor Charlie Baker initially declared gun shops to be “essential” businesses, then withdrew the designation. Liquor stores remained essential. When gun shops sought injunctive relief in *McCarthy v. Baker*, Judge Douglas Woodlock (a Reagan appointee) declared from the bench, “We don’t surrender our constitutional rights. These plaintiffs have constitutional rights that deserve respect and vindication, and it becomes necessary for a court to do that rather than the executive when the executive declines.” He added: “I don’t have anything like a substantial fit between the goals of the emergency declared by the commonwealth and the burdening of the constitutional rights.”³¹

²⁷*Young v. Hawaii*, 896 F.3d 1044, 1071 (9th Cir. 2018).

²⁸http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000017952.

²⁹*State of Florida v. City of Weston*, Case 1D19-2819 (Fla. 1st DCA).

³⁰<https://www.1dca.org/Oral-Arguments/Live-Video-Oral-Arguments>.

³¹Mass. Gun Stores To Reopen After Judge Nixes COVID-19 Ban, <https://www.law360.com/articles/1271300/mass-gun-stores-to-reopen-after-judge-nixes-covid-19-ban>.

In his Amended Preliminary Injunction Order, Judge Woodlock ruled that the dealers may sell firearms by appointment only, that no more than four customers could enter per hour, that hours may not exceed 9:00 a.m. to 9:00 p.m., that masks must be worn, that social distancing must be in place, and other safety rules must be followed.³² As of December 1, 2020, cross-motions for summary judgment are pending.

It is worth noting that Virginia Governor Northam's closure of shooting ranges met a similar fate. In *Lynchburg Range & Training v. Northam*, Circuit Judge F. Patrick Yeatts enjoined the closure order based on the arms guarantee in the Virginia Constitution and on a statute prohibiting the governor from using his emergency powers to limit the possession or sale of firearms.³³ The court colorfully wrote: "The Governor appears to argue that, when he declares a state of emergency, he can ignore any law that limits his power, even laws designed to limit his power during a state of emergency."³⁴

D. Philadelphia's Zoning Restrictions on Gun Shops

Some localities are notorious for using zoning restrictions essentially to ban gun shops. Chicago, Illinois, Alamada County, California, and Arlington, Virginia, are prime examples. The right to keep and bear arms obviously depends on the right to buy and sell firearms, about which no restrictions existed at the Founding.

Philadelphia's restrictions are currently being litigated in *In re Appeal of The Gun Range v. Decision of Philadelphia Zoning Board of Adjustment*.³⁵ Like adult services and drug paraphernalia stores, gun shops are banned in all commercial districts. They are prohibited within 500 feet of any residential district, and are only allowed in industrial zones, which encompass only 7% of the city.

The case is currently pending in the Court of Common Pleas, after the Commonwealth Court remanded it "to address the constitutional issues raised by Appellant under the Second Amendment of the United States Constitution, as well as under article 1, section 21 of the

³²*McCarthy v. Baker*, Case 1:20-cv-10701 (D. Mass., May 7, 2020).

³³Va. Code § 44-146.15(3).

³⁴*Lynchburg Range & Training, LLC v. Northam*, No. CL20000333, 2020 WL 2073703, *2 (Lynchburg, Va., Cir. Ct. Apr. 27, 2020).

³⁵*In re Appeal of The Gun Range v. Decision of Philadelphia Zoning Board of Adjustment*, Court of Common Pleas, Philadelphia County, Case 151003454.

Pennsylvania Constitution.”³⁶ The latter provides: “The right of the citizens to bear arms in defence of themselves and the State shall not be questioned.”³⁷

E. New Jersey Seeks to Preempt Federal Preemption: LEOSA

The federal Law Enforcement Officers Safety Act (“LEOSA”) provides in part: “Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b).”³⁸ Subsection (b) lists four requirements based on length of service and meeting qualification standards.

New Jersey has other ideas, and seeks to impose its own requirements in addition to the above. A state court held that LEOSA is not an “alternate path” for retired officers to carry a firearm and that they must comply with New Jersey’s additional requirements.³⁹ This is being challenged in the U.S. district court in *Federal Law Enforcement Officers Ass’n v. Grewal*.⁴⁰ The case is in its early stages and no decisions have been rendered.

III. VIRGINIA’S SECOND AMENDMENT SANCTUARIES

Note: the following is a summary of the author’s “Virginia’s Second Amendment Sanctuaries: Do They Have Legal Effect?” The full text is available at <https://ssrn.com/abstract=335216>.

In the November 2019 elections in Virginia, both houses of the General Assembly changed hands from Republican to Democrat, giving the governor the votes he needed to enact new crimes, with severe penalties, regarding the possession and transfer of firearms. Numerous bills to do so were introduced for the 2020 session of the General Assembly. Most prominent was H.B. 961, which would have made it a Class 6 felony to possess an “assault firearm” or

³⁶*Gun Range, LLC v. City of Philadelphia*, 2018 WL 2090303, *7 (Pa. Com’wel Ct. 2018).

³⁷Pa. Const., Art. I, § 21.

³⁸18 U.S.C. § 926C(a).

³⁹*In re Casaleggio*, 420 N.J. Super. 121, 128 (App. Div. 2011)

⁴⁰*Federal Law Enforcement Officers Ass’n v. Grewal*, Case 3:20-cv-05762-MAS-TJB (D. N.J.).

magazine that holds over 12 rounds.⁴¹ Its penalty of five years in prison was the same if a person would unlawfully “shoot . . . any person . . . with the intent to . . . kill”⁴²

In reaction, 91 of Virginia’s 95 counties and 56 cities and towns declared themselves “Second Amendment sanctuaries” or otherwise passed resolutions opposing infringement on the right to keep and bear arms.⁴³ Attorney General Mark Herring issued an opinion that these resolutions have “no legal effect” and that any new “gun safety” laws must be enforced and obeyed without question unless declared unconstitutional by the judiciary.⁴⁴

To what extent may local governments and local constitutional officers decline to enforce firearm bans applicable to law-abiding citizens that are deemed violative of the text of the arms guarantees of the Virginia and U.S. constitutions and which have not been upheld by the judiciary? The Opinion quotes a Virginia judicial decision that “[p]olice are charged to enforce laws until and unless they are declared unconstitutional,” but neglects the sentence that follows, noting “the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.”⁴⁵

Law enforcement officials are not “shielded from liability for civil damages” if they “violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁴⁶ Where a requirement is “set forth in the text of the Constitution, no reasonable officer could believe” that it is not clearly established.⁴⁷ The relevant text here provides that “the right of the people to keep and bear arms shall not be infringed.”⁴⁸ While the Attorney General Opinion is silent on that right, the public officials who adopted the Second Amendment Sanctuary resolutions and those who enforce the law took an oath to support and defend the

⁴¹<http://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB961>.

⁴²Va. Code § 18.2-51.

⁴³Second Amendment Sanctuaries as of March 20, 2020. <https://www.vcdl.org/>. See also <https://va2nd.com/>.

⁴⁴Attorney General Opinion 19-059, at 1 (Dec. 20, 2019). <https://www.oag.state.va.us/files/Opinions/2019/19-059-Jones-issued.pdf>.

⁴⁵*Freeman v. Commonwealth*, 65 Va. App. 407, 421-22 (2015), quoting *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979). Cited in Opinion 4 n.23.

⁴⁶*Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

⁴⁷*Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

⁴⁸ U.S. Const., Amend. II; Va. Const., Art. I, § 13.

constitutions of Virginia and the United States.⁴⁹

When General Herring was first elected, the prior Attorney General was defending the constitutionality of Virginia’s Marriage Amendment. Herring filed a notice in the litigation that, based on “his independent constitutional judgment,” he “will not defend the constitutionality of those laws,” but “will argue for their being declared unconstitutional” under the federal Fourteenth Amendment.⁵⁰ There was no binding judicial decision on point at that time.

Currently, there are no Virginia decisions upholding any of the “gun safety” measures because they are all unprecedented in the Commonwealth. Regarding the proposed ban on “assault firearms,” in *District of Columbia v. Heller*, the U.S. Supreme Court held that the Second Amendment protects arms that are “typically possessed” or “in common use” by law-abiding citizens “for lawful purposes like self-defense.”⁵¹

Even aside from the constitutional issues, local officials have authority to apply scarce resources to combat violent crime and other crimes that have actual victims. They may exercise discretion not to direct resources to ferreting out gun owners who have a banned feature on a rifle or the sale of a shotgun to a friend without a background check.

“Moreover, the institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion.”⁵² A prosecutor must “ensure that criminal prosecutions are pursued only to seek justice. Consequently, the Commonwealth’s attorney should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute.”⁵³ Some Commonwealth’s Attorneys may choose not to prosecute defendants for technical gun law violations, just as some have a policy of not prosecuting marijuana possession cases.

As an example of prosecutorial discretion not to enforce a specific law, Fairfax County Commonwealth’s Attorney Steve Descano issued Policy Directive 20-01 on January 2, 2020, which “directs the Office’s prosecutors to move to dismiss simple possession of marijuana

⁴⁹See Joyce Lee Malcolm, “The Case for Second Amendment Sanctuaries: The Duty to Defend the Constitution.” https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677320.

⁵⁰Notice of Change in Legal Position by Defendant Janet M. Rainey, *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va. Jan. 23, 2014).

⁵¹*District of Columbia v. Heller*, 554 U.S. 570, 624-25, 627 (2008).

⁵²*Bradshaw v. Commonwealth*, 228 Va. 484, 492 (1984).

⁵³No. 01-078, Op. Atty. Gen. Va. (2001), <https://oag.state.va.us/files/Opinions/2001/01-078.pdf>.

charges levied against adults.”⁵⁴ It notes: “Removing adult simple possession-of-marijuana cases from prosecutors’ dockets allows prosecutors more time to focus on serious crimes that often involve victims.”⁵⁵

Finally, the proposed and enacted gun prohibitions will make criminals out of law-abiding citizens without any effect on real crime. Experience has proven that gun confiscation schemes have never worked because gun owners neither surrender nor register their firearms. Under New York’s 2013 ban, only 23,847 citizens registered their “assault weapons,” while nearly one million failed to comply,⁵⁶ despite the threat of incarceration for a *minimum* of three-and-one-half years and up to seven years.⁵⁷

While H.B. 961, the “assault firearm” and magazine ban bill, failed to pass in the 2020 session, it was continued to the 2021 session by vote of the Senate Judiciary Committee.⁵⁸ More such proposals may be expected. The Second Amendment Sanctuaries will be re-energized, and bill supporters will say that they have no legal effect. The debate will be *déjà vu* all over again.

⁵⁴<https://www.marijuanamoment.net/virginia-prosecutor-announces-his-office-will-not-pursue-marijuana-possession-cases/>.

⁵⁵Steve Descano, Commonwealth’s Attorney, County of Fairfax, *Policy Directive 20-01*, at 3 (Jan. 2, 2020).

⁵⁶“Nearly One Million New Yorkers Didn’t Register Their “Assault Weapons,”” <https://www.forbes.com/sites/frankminiter/2015/06/24/nearly-one-million-new-yorkers-didnt-register-their-assault-weapons/#5a1c73b5702f>.

⁵⁷N.Y. Penal Law §§ 265.02(7), 70.02(3)(c).

⁵⁸<https://lis.virginia.gov/cgi-bin/legp604.exe?211+vot+S03C0361+HB0961>.