

The Nonparticipation in Enforcement of Federal Firearms Restrictions

A Lawful and Viable Measure for the State of West Virginia to Coming Infringements

West Virginians are deeply concerned about the coming federal overreach and further crippling restrictions on the right to keep and bear arms. You are being asked to “nullify” federal law; to create a “Second Amendment Protection Act” or “sanctuary state” where federal law does not apply; and for your support of all manner of legislation that sounds good but may not be at all viable. The West Virginia Citizens Defense League (WVCDL) has never been about “feel good legislation.” Our members work hard to get legislation passed. Any legislative remedy we seek will be practical, enforceable, and viable.

The Failings of “Nullification” or “Second Amendment Protection Acts”

Public discussion of nullification comes in many forms, usually with thoughts that federal agents will be stopped at the border of the state, refused entry to enforce federal law, or arrested when trying to enforce federal law. Curiously, there is no discussion as to who will be stopping or arresting these agents. Those that expect their local law enforcement to arrest ATF or FBI agents, are either naïve or engaging in feel-good fantasy. Second Amendment Protection Act schemes fail for similar reasons. In 2013, Kansas passed a Second Amendment Protection Act relying on the 10th Amendment of the United States Constitution, claiming that

“A personal firearm, a firearm accessory or ammunition that is owned or manufactured commercially or privately in Kansas and that remains within the borders of Kansas is not subject to any federal law, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory or ammunition that is owned or manufactured in the state of Kansas.”

The result? A Kansas man began manufacturing suppressors, entirely within the borders of Kansas. He later sold a suppressor to another Kansas citizen - a disabled Army veteran. Both men were arrested by federal law enforcement and convicted in federal courts. The men appealed their convictions. The 10th Circuit Court of Appeals upheld the convictions. The United States Supreme Court (SCOTUS) denied certiorari thereby upholding the conviction.

The Tenth Amendment clearly states, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The problem is that SCOTUS, through expansive and abusive interpretation of the interstate commerce clause, has largely eviscerated the Tenth Amendment by claiming that the interstate commerce clause delegates nearly unlimited powers to the federal government. This usurpation reached such levels of absurdity that SCOTUS has held that an Ohio farmer who was growing food on his Ohio farm for his livestock located within Ohio was engaging in ‘interstate commerce’ and thus subject to dictates of federal regulation. (See *Wickard v. Filburn* 317 U.S. 111 (1942).

What Can Be Done?

So what can be done? The dirty secret here is that the federal government relies heavily on state and local law enforcement to enforce its dictates. Most sources note that well over ninety (90) percent of all arrests in America each year are done by state and local law enforcement. Some sources maintain that federal law enforcement arrests may account for less than one (1) percent of annual felony arrests. The vast majority of encounters citizens will have with any form of law enforcement will be with state and local law enforcement.

Additionally, the federal government, contrary to its boasting, does not have unlimited manpower and resources. Let us turn to a familiar example where the federal government has not been able to enforce its laws without the aid of state and local law enforcement – cannabis. Cannabis, also known as marijuana, remains illegal under federal law. Nonetheless, droves of states have not only decriminalized this plant, but allowed for its legalized recreational sale. Aside from a few high-profile raids for the cameras, the DEA and FBI have not been able to stamp out the cannabis trade without state and local help. In fact, DEA agents have publicly admitted that they do not have the financial resources nor the manpower to investigate, raid, and prosecute the cannabis dispensaries in Los Angeles, California – a single American city – let alone in all of America.

The viable answer to curbing federal infringements is to withdraw state and local law enforcement from participating in the enforcement of federal firearms restrictions. This is legally sound (as we will examine in the next section), but what does it look like? Without state and local law enforcement participation, federal law enforcement will be stretched thin, and incapable of enforcing its dictates throughout the State of West Virginia (as well as the other states that cease participation in enforcement). Federal agents cannot lawfully be stopped at the borders and, as with cannabis prohibition, there may be some limited high-profile arrests. Any arrested, must be tried in West Virginia, in front of West Virginia jurors – who may not feel compelled to convict their fellow Mountaineers of crimes created by the federal government that infringe on their rights. The right to keep and bear arms being infringed by outside federal agents will rightfully create animosity from free West Virginians and those in other state jurisdictions who join in the nonparticipation of enforcement of federal law. This will lead to political momentum. It may also result in federal prosecutors deciding not to prosecute such cases if juries are refusing to convict. Naturally, as with cannabis legalization laws, the more state and local jurisdictions that disregard federal dictates, the more federal law enforcement will be stretched thin and ultimately rendered ineffective.

Is This Lawful?

Yes. Unlike other “nullification” efforts, nonparticipation has clear legal precedent from the United States Supreme Court. In the case of *Printz v. United States*, 521 U.S. 898 (1997), the Court examined the Brady Handgun Violence Protection Act, which – at the time – mandated that state and local law enforcement perform federally mandated background checks on prospective firearm purchasers. In striking down this mandate the Court held:

“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political

subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.” (See page 935)

Thus, states cannot prevent federal agents from enforcing federal law, but the federal government cannot mandate nor command state law enforcement to enforce federal law or regulation. This anti-commandeering prohibition in *Printz* applies to federal funding as well. Funding cannot be withheld from the State of West Virginia due to our refusal to participate in enforcing federal law. This is why Colorado still gets federal money even when flouting cannabis prohibition and California still gets federal funds even when explicitly rejecting federal immigration regulations.

The West Virginia Legislature should take the legally viable step of preventing its state and local law enforcement agencies from being exploited to enforce unpopular infringements upon the right to keep and bear arms. None other than the father of the United States Constitution, James Madison, advised in Federalist #46 that “refusal to cooperate with officers of the Union” was a viable response to both unconstitutional federal measures or even constitutional but unpopular federal measures foisted upon the states. We have seen state and local law enforcement directed not to participate in federal enforcement of both cannabis prohibition as well as federal immigration law. Do West Virginians not deserve the same protection from their Legislature in the face of impending evisceration of their right to keep and bear arms? The answer to that important question is a resounding yes and it is why your constituents are clamoring for you to do something. Attached is our proposed legislation. If you have any questions, feel free to contact the WVCDL.

Ian T. Masters, Esq.
President, WVCDL
304-794-6702

Amber Perry, LGSW, LPN
Vice President, WVCDL
Registered Lobbyist
406-672-0157

Kevin Patrick, Jr.
Secretary, WVCDL
Registered Lobbyist
304-376-5288

WVCDL 2021 Priority Legislation

Key: **Green** = existing Code. **Red** = new code to be enacted

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

ENGROSSED

Committee Substitute

for

House Bill 2694

BY DELEGATES STEELE, FOSTER, SUMMERS, J. PACK, PHILLIPS, D. JEFFRIES, CLARK, SYPOLT,
MAYNARD, GRAVES AND HOWELL

[Introduced February 23, 2021; referred to the Committee on the Judiciary]

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated [§61-7B-1](#), [§61-7B-2](#), [§61-7B-3](#), [§61-7B-4](#), and [§61-7B-5](#), all relating to creating the “Second Amendment Preservation Act”; stating legislative findings; providing prohibitions for agencies of the state, political subdivision of the state, or employees, while acting in their official capacity, of an agency or political subdivision of the state; requiring the Attorney General to publish model policies; and providing for severability.

Be it enacted by the Legislature of West Virginia:

ARTICLE 7B. THE SECOND AMENDMENT PRESERVATION ACT.

§61-7B-1. Short title.

This article shall be known and may be cited as the “Second Amendment Preservation Act”.

§61-7B-2. Legislative findings.

The Legislature of the State of West Virginia finds:

(a) That the right to keep and bear arms is a fundamental individual right that may not be infringed, and;

(b) Firearm owners are valuable and essential members of the West Virginia community. With over 60% of all West Virginia citizens owning firearms, any firearm restriction adversely affects all of West Virginia, and;

(c) A relationship of trust between West Virginia’s firearm owners and state and local agencies is central to the public safety of the people of West Virginia, and;

(d) This trust is threatened when state and local agencies are entangled with federal law enforcement, with the result that firearm owners and community members fear approaching police when they are victims of and/or witnesses to crimes, seeking basic health services, or attending school, to the detriment of public safety and the well-being of all West Virginians, and;

(e) Entangling state and local agencies with federal law enforcement programs diverts already limited resources and blurs the lines of accountability between local, state, and federal governments, and;

(f) State and local participation in federal law enforcement programs also raises constitutional concerns, including the prospect that West Virginia residents could be detained in violation of the Fourth Amendment and Second Amendment to the United States Constitution, or targeted on the basis of political affiliation, religion, or other protected classes. Additionally, entanglement between state and federal forces raises issues of conflicts of the West Virginia State Constitution and;

(g) This bill seeks to ensure effective policing, to protect the safety, well-being, and constitutional rights of the people of West Virginia, and to direct the state’s limited resources to matters of greatest concern to state and local governments and;

(h) This act shall not be construed as providing, expanding, or ratifying any legal authority for any state or local law enforcement agency to participate in federal firearm law enforcement. Instead, it is the legislature’s goal to protect West Virginia employees, including law-enforcement officers, from being directed, through federal executive orders, agency orders, statutes, laws, rules,

or regulations in effect on or after the effective date of this article, to violate their oath of office and individual rights affirmed under the Second Amendment to the Constitution of the United States and Article 3, Section 22 of the Constitution of the State of West Virginia and:

(i) That pursuant to and in furtherance of the principles of federalism enshrined in the Constitution of the United States, and recognized by the United States Supreme Court, the federal government may not commandeer this state's officers, agents, or employees to participate in the enforcement or facilitation of any federal act or regulatory program, and;

(j) That this right to be free from the commandeering hand of the federal government has been most notably recognized by the United States Supreme Court in *Printz v. United States* when the Court held: The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

§61-7B-3. Prohibitions.

Other than compliance with an order of a court of this state, notwithstanding any law, regulation, rule, or order to the contrary, no agency of this state, political subdivision of this state, or employee of an agency or political subdivision of this state acting in his or her official capacity may:

(a) Use agency or department moneys or personnel to investigate, interrogate, detain, detect, or aid a federal agency in whole or in part or arrest persons for federal law enforcement purposes, including any of the following:

(1) Inquiring into an individual's ownership regarding a firearm, firearm accessory, or ammunition, if the act, law, order, rule, or regulation for which the individual is suspected to be in violation does not exist under the laws of this state nor is substantially similar to a law of this state;

(2) Detaining an individual on the basis of a hold request related solely to an alleged federal firearm violation;

(3) Providing personal information about an individual, including, but not limited to, the individual's home address or work address if that information is required for the purpose of furthering a federal firearm investigation into a violation of federal firearm law that is not otherwise unlawful in West Virginia, unless that information is available to the public;

(4) Making or intentionally participating in arrests based strictly on a federal firearm law that differs from or is not substantially similar to a West Virginia law;

(5) Performing the functions of an agent or officer of the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, whether pursuant to any other law, regulation, or policy, whether formal or informal, if such function is to knowingly and willingly participate in any way in the enforcement of any federal act, law, order, rule, or regulation regarding a firearm accessory or ammunition if the act, law, order, rule or regulation does not exist in the laws of the State of West Virginia or is not substantially similar to a law of West Virginia;

(6) Placing law enforcement officers under the supervision of federal agencies or employ law enforcement officers deputized as special federal officers or special federal deputies for purposes of federal firearm law enforcement unless the act, law, order, rule, or regulation for which such enforcement is sought is the same as or substantially similar to a law of West Virginia. All law enforcement officers remain subject to West Virginia law governing conduct of law enforcement officers and the policies of the employing agency;

(7) Providing office space exclusively dedicated for federal authorities for use within a municipal or county law enforcement facility for the purpose of federal firearms regulation enforcement; or

(8) Utilizing any assets, state funds, or funds allocated by the state to local entities on or after the effective date of this article, in whole or in part, to engage in any activity that aids a federal agency, federal agent, or corporation providing services to the federal government in the enforcement or any investigation pursuant to the enforcement of any federal act, law, order, rule, or regulation regarding a firearm, firearm accessory, or ammunition if the act, law, order, rule, or regulation does not exist under the laws of this state or is not substantially similar to a law of this state.

(b) Notwithstanding the limitations in subsection (a), this section does not prevent any West Virginia law enforcement agency from doing any of the following that does not violate any policy of the law enforcement agency or any local law or policy of the jurisdiction in which the agency is operating:

(1) Investigating, enforcing, or detaining upon reasonable suspicion of, or arresting for a violation of state law that is detected during an unrelated law enforcement activity.

(2) Responding to a request from federal law enforcement authorities for information about a specific person's criminal history, including previous criminal arrests, convictions, or similar criminal history information, or where otherwise permitted by state law.

(3) Conducting enforcement or investigative duties associated with a joint law enforcement task force, including the sharing of confidential information with other law enforcement agencies for purposes of task force investigations, so long as the following conditions are met:

(A) The primary purpose of the joint law enforcement task force is not federal firearm law enforcement; and

(B) The enforcement or investigative duties are primarily related to a violation of state or federal law unrelated to federal firearm law enforcement.

§61-7B-4. Attorney General to publish model policies.

The Attorney General, by January 1, 2022, and as often thereafter as the Attorney General deems necessary, shall publish model policies for agencies of this state, political subdivisions of this state, and employees of agencies or political subdivisions of this state to provide guidance on limiting assistance with federal law enforcement under this article, to the fullest extent possible consistent with federal and state law.

§61-7B-5. Severability.

If any provision of this article or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this article, and to this end the provisions of this article are declared to be severable.

NOTE: The purpose of this bill is to prevent any agency of this state, political subdivision of this state, or employee of an agency or political subdivision of this state acting in his or her official capacity from assisting federal law enforcement officers in the investigation or enforcement of alleged violations of federal firearm laws which are not also violations of the laws of this state. Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.