

April 6, 2020
via e-mail to kathy.kunkel@state.nm.us

Kathyleen M. Kunkel
Cabinet Secretary
New Mexico Department of Health
Harold Runnels Building
1190 S. St. Francis Drive
Santa Fe, NM 87505

Re: Notice to Cease and Desist Deprivation of Constitutional Rights

Dear Secretary Kunkel:

[Gun Owners of America](#) (“GOA”) is a nonprofit organization, exempt from federal income taxes under Section 501(c)(4) of the Internal Revenue Code, which represents the interests of over 2 million members and supporters, many thousands of whom reside in New Mexico. GOA’s mission is to preserve and defend the Second Amendment rights of gun owners. Our members in New Mexico have been extremely concerned about your March 23, 2020 “Public Health Order”¹ (“Order”), which you have interpreted to require gun stores within the state to shut down during the pendency of the state’s declared public health emergency.

Your Public Health Order refers to Governor Michelle Lujan Grisham’s March 11, 2020 declaration of a “Public Health Emergency,”² and purports to rely on your authority under “the Public Health Act ... the Public Health Emergency Response Act ... the Department of Health Act ... and inherent constitutional police powers....” This letter urges you to adopt a better interpretation of your Order, which would permit Second Amendment related businesses in New Mexico to continue to function, for a number of reasons.

First, your Order mandates that all businesses within New Mexico must shut down unless they are listed as “essential business.” Gun stores are not explicitly listed in the 22 categories of “essential businesses” under the Order. However, the Order does explicitly exempt from the shutdown order “[s]ervices necessary to maintain the safety ... of residences or essential businesses including security services...” *Id.* at 3. As such, it is a fair reading to assume that gun stores are essential, as they clearly provide “services necessary to maintain the safety of residences...” Many gun stores also serve the needs of law enforcement, and provide shooting ranges for training, meaning they also could qualify as “facilities used by law enforcement personnel...” Nevertheless, a statement by the Governor’s spokeswoman, Nora Meyers Sackett, that “[i]f a business is not listed as essential in the order, then they’re not essential and they are

¹ <https://cv.nmhealth.org/wp-content/uploads/2020/03/SignedPHO03-24-2019.pdf>

² <https://www.governor.state.nm.us/wp-content/uploads/2020/03/Executive-Order-2020-004.pdf>

ordered closed,”³ means that gun stores must stop serving the general public, and represents a credible threat of prosecution if they continue to do so.

Second, as you may be aware, four days after your Order, the U.S. Department of Homeland Security issued an “Advisory Memorandum on Identification of Essential Critical Infrastructure Workers during COVID-19 Response” from US Department of Homeland Security.” This updated [March 28, 2020](#) version of the CISA Memo replaced the originally issued [March 19, 2020](#) CISA Memo, and designates the following category of workers as “critical infrastructure”:

Workers supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges.

Unlike the shutdown orders in most other states and localities, your March 24, 2020 Order does not reference the CISA list, or designate businesses identified in that list as “essential business.” Thus, we would urge you to expand the “essential business” designations in your Order, to bring it into line with the federal government’s list of the “critical infrastructure” workforce in the DHS March 28, 2020 CISA Memorandum.

Third, applying the Order to gun stores, as you have done, violates both the Second Amendment of the U.S. Constitution and Article II, § 6 of the New Mexico Constitution. In order to engage in the clearly protected activities of “keeping” and “bearing” firearms, weapons first must be acquired. It is beyond serious debate that the Second Amendment thus protects the corresponding right to purchase firearms, just as the First Amendment protects the right to purchase books, paper, and ink. Multiple courts have held as much. The Seventh Circuit has explained that “[t]he right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use; the core right wouldn’t mean much without the training and practice that make it effective.” *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011).² See also *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“Thus ‘the right to possess firearms for protection implies a corresponding right’ to obtain the bullets necessary to use them.”). By ordering that New Mexico gun stores close their doors during the pendency of this public health emergency, you have deprived your citizens of the ability to acquire firearms (including handguns) and ammunition with which to defend themselves, violating their most basic right to keep an operational handgun in the home for self-defense. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

Your actions to close down New Mexico gun stores present a clear and present threat to New Mexicans’ personal and family safety and the protection of others residing in their homes, exposing them to the very real risk of physical harm. Already, countless members of law enforcement nationwide have either tested positive for the COVID-19 virus or have been put into quarantine. What is more, some police and sheriff departments have been announcing that they will not be making arrests for minor crimes in many locations. Under such circumstances, the right — and need — of each individual to protect himself and his family becomes clearly apparent. Other states and cities reportedly have been releasing inmates from various jails, in an effort to stem the tide of the virus. Finally, news stories have reported increasing worries of civil unrest. For all of these reasons, many people who have never owned firearms and, indeed, never

³ https://www.santafenewmexican.com/news/coronavirus/confusion-anger-on-right-as-gun-shops-not-considered-essential/article_4e21e18a-6e01-11ea-9cab-fb2c463cb65f.html

thought they would need them, are now seeking to arm themselves and be able to provide for their own defense. Unfortunately, your Order ensures that they will be entirely unable to do so.

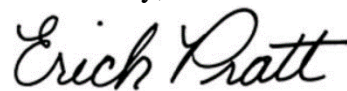
Fourth, we note that New Mexico's action to close down gun stores represents a fringe position nationwide. Indeed, Colorado's Governor, Jared Polis, has seen fit to include "Firearms Stores" as critical retail services which are to remain open.⁴ Many other traditionally anti-gun states have also specifically declared that firearms stores are essential, including New Jersey⁵ and Illinois.⁶ In fact, only a tiny fraction of anti-gun state officials have sadly decided to use this public health crisis as an excuse to pursue their political agendas by declaring that gun stores must close during the COVID-19 pandemic.⁷ In Massachusetts, for example, a person can get an abortion, buy a bottle of vodka, or obtain a breast augmentation, but cannot buy a gun.

It is one thing for a state to order closed a tanning salon or pet grooming service for public health reasons. It is quite another to ban entirely the commercial sale of arms and ammunition, which are expressly and unequivocally protected by state and federal constitutional provisions. The Second Amendment's protections do not stop, nor does the need for self-defense abate, during a pandemic. Indeed, the exact opposite is true. The protection of constitutional rights is most important during times of emergency and unrest, because that is precisely when those rights are needed the most, and is often when the government is most interested in curtailing them.

Thus, we respectfully request that you reconsider your Public Health Order as it applies to gun dealers and other Second Amendment businesses within the state. We urge you to bring New Mexico into line with the vast majority of other states that have allowed gun stores to continue operation, and into line with the DHS CISA Memorandum, and federal and state constitutional requirements.

We would appreciate your response to this letter, informing us as to whether you intend to modify your position on this issue, or whether GOA will need to take the additional appropriate steps to protect gun stores and gun owners in New Mexico. With best regards.

Sincerely,



Erich Pratt
Senior Vice President
Gun Owners of America

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⁴ <https://www.nraila.org/articles/20200326/colorado-governor-polis-allows-gun-stores-to-remain-open-during-state-lockdown>

⁵ <https://www.nj.com/coronavirus/2020/03/gun-shops-are-now-considered-essential-businesses-in-nj-gov-murphy-says.html>

⁶ https://www2.illinois.gov/IISNews/21288-Gov._Pritzker_Stay_at_Home_Order.pdf

⁷ <https://www.thetrace.org/2020/03/coronavirus-gun-store-closures-state-map/>