



An Open Letter From Brady to Public Officials and Lawmakers on Gun Store Closures

Brady is sharing this open letter with public officials and lawmakers to provide legal analysis regarding the constitutionality and permissibility of broad, temporary stay-at-home orders, issued in response to the coronavirus, that include the mandated closure of gun stores. We believe that public officials' broad authority to protect public safety, especially in times of emergency, gives them the constitutional power to require these closures as part of broad orders deemed necessary to stop the spread of the coronavirus.

Governments can use their broad emergency authority to temporarily close gun stores while physical distancing measures are in place. Exercising that emergency authority would not and need not implicate Second Amendment rights. While the Supreme Court has held that the Second Amendment protects the right of law-abiding, responsible citizens to have a gun in the home for self defense,¹ the Constitution does not provide the right to shop for guns at risk of others' health, nor to acquire guns at a moment's notice. Even if government action did touch on the Second Amendment, reasonable justifications support the use of extraordinary powers in an emergency, including the power to restrict retailers' selling privileges. At bottom, temporarily closing gun stores is justified to protect Americans' most fundamental right: the right to live, free of needless threats to health and safety.

GUN LOBBY CHALLENGES TO MANDATED PHYSICAL DISTANCING AND BUSINESS CLOSURES

To protect the public from the spread of the coronavirus, state and local governments have followed the guidance of public health officials by enforcing physical distancing, one key component of which is broad stay-at-home orders, and mandated business closures. While most Americans have accepted this personal and financial sacrifice as necessary to save lives, the gun industry has gone to court to demand that gun stores be allowed to remain open for business. To bolster those legal claims, the gun industry has lobbied the Trump Administration to designate gun businesses as "critical infrastructure," and the Department of Homeland Security (DHS) has acceded to those requests in a non-binding guidance statement.

While some states and localities initially chose to deem gun stores as “essential” — and therefore exempt from broad closure orders — and others designated gun stores “essential” after the DHS guidance, a few states still face gun industry lawsuits. These lawsuits claim that broad closures infringe on the Second Amendment. Some claim that closures “target” the Second Amendment. We believe that argument is incorrect.

EMERGENCY POWERS ARE AVAILABLE TO RESTRICT VIRUS-SPREADING ACTIVITIES

States and localities that choose to include gun stores in broad orders closing non-essential businesses are fully justified to do so by compelling public health and safety concerns. Measures that require the temporary closure of gun stores do not “target” the Second Amendment; rather, they broadly restrict a wide variety of businesses and activities to protect public safety. Shopping for firearms necessarily requires interaction; guns cannot be purchased via automatic kiosks, vending machines, delivery, or curbside pickup.

Physical distancing measures make it impossible for gun dealers to fulfill their critical role in protecting public safety: vetting purchasers to make sure that they are legal, responsible, and able to safely use and store their guns. Most gun dealers take those responsibilities seriously — and willingly — as a necessary counterpart of Second Amendment rights. Physical interaction is also required by inspections of gun dealers by federal and state officials, and these inspections are needed to ensure compliance with the law and to protect public safety. While in ordinary times interaction between gun dealers and government inspectors saves lives, but the ongoing pandemic renders such interaction as dangerous, as it risks the further proliferation of a deadly pathogen which has already killed tens of thousands.

Restricting these physical interactions to prevent the spread of the coronavirus is within governments’ well-established police power authority. Executives — the president, governors, and tribal heads — can access extensive emergency authority to combat a health crisis, provided that authority has both been delegated to them and is an appropriate and reasonable response to the crisis at hand. Appropriate and reasonable is a flexible standard, permitting a wide spectrum of action — so long as temporal and practical safeguards like sunset provisions and geographical boundaries are in place.

Governors have ample emergency powers and wide latitude to address public health crises. For starters, they have plenary police powers to safeguard public health, and most state constitutions contain express or implied executive powers permitting swift action during states of emergency. Governors can also delegate authority to local and municipal officials, such as mayors, sheriffs, and county commissioners, in order to address emergencies in ways that best serve impacted communities.

Leaders across the country can utilize these broad emergency authorities to prohibit non-essential activities likely to spread the coronavirus — activities like gun shopping.

RESTRICTIONS ON GUN SHOPPING NEED NOT IMPLICATE THE SECOND AMENDMENT

The Second Amendment does not create a free-standing right to sell guns. As courts have made clear, imposing conditions and qualifications on gun sales is presumptively lawful, as is limiting gun sales based on important public safety concerns.² Indeed, “no historical authority suggests that the Second Amendment protects an individual’s right to sell a firearm unconnected to the rights of citizens to ‘keep and bear’ arms.”³

While the Second Amendment may imply a right to acquire guns in some circumstances, there is no right to buy guns immediately. Federal law allows time for Brady Background Checks to ensure that purchasers are legally permitted to buy guns, and some state laws require significantly longer periods for more thorough checks. Numerous state and local governments impose post-sale waiting, or “cooling off,” periods which must elapse before a purchaser can take possession of the firearm.

These waiting periods are constitutional even under normal circumstances,⁴ to say nothing of the present world’s diminished economic activity and slow transaction speed. Stay-at-home and shelter-in-place orders — all of which are set to expire in the short term, health and safety permitting — serve essentially the same function: they delay gun purchases, not prevent them.

For those who already possess firearms and simply want to buy more, the Second Amendment holds even less sway. While the Supreme Court has recognized the right of responsible, law-abiding citizens to keep a gun in the home for self-defense, there is no right to acquire multiple guns.

Beyond the Second Amendment, some states have laws that preempt firearms regulation in some ways, but such legislation should not deter prudent and well-bounded state executive action being taken against the coronavirus pandemic. A handful of states have enacted statutes expressly forbidding gun regulation in an emergency, but those statutes have thus far been largely untested in courts.

TEMPORARILY CLOSING GUN STORES AND OTHER NON-ESSENTIAL BUSINESSES DOES NOT INFRINGE ON DUE PROCESS

In some cases,⁵ federally licensed firearms dealers (FFLs) claim that temporary gun store closures deprive them of their property interest without due process. This argument is incorrect.

The Fifth and Fourteenth Amendments to the Constitution prevent state and federal governments from depriving anyone of “life, liberty, or property without due process of law.”⁶ The Supreme Court settled this issue almost a century ago in *Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health*, 186 U.S. 380 (1902). In *Compagnie*, the plaintiff, a shipping corporation, claimed that a Louisiana law, under which the State Board of Health quarantined the plaintiff’s ship to prevent the spread of infectious disease, deprived the plaintiff of property without due process.

In rejecting the corporation’s claim, the Court affirmed that “from an early day the power of the States to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, [and] is beyond question.”⁷ According to the Court, due process anticipates that a state’s authority to impose a quarantine law necessarily includes the authority to enforce it. The Court therefore rejected as unsound⁸

*the proposition that the effect of the Fourteenth Amendment was to strip the government, whether state or national, of all power to enact regulations protecting the health and safety of the people, or, what is equivalent thereto, necessarily amounts to saying that such laws when lawfully enacted cannot be enforced against person or property without violating the Constitution.*⁹

The Supreme Court’s decision confirms that states may exercise their constitutionally-authorized police powers to protect health and safety, like those intended to prevent the spread of the coronavirus, without infringing on due process rights. Indeed, it is well-established that state and local governments may, in the course of an emergency, impose reasonable, good faith, temporary limitations on otherwise constitutional activities.¹⁰

Due process attacks on store closures also should fail because the government may impose emergency rules of general application¹¹ without notice and comment when those orders are legislative, rather than adjudicative, in nature.¹² Generally, legislative rules are prospective, “policy-type rules or standards,” whereas adjudicative rules are designed to determine “facts in particular cases on the other.”¹³ Government orders which close non-essential businesses, including gun stores, are legislative, generally applicable rules, rather than specific, adjudicative rules, and therefore do not require notice or comment. For this reason, a California state court has already rejected one challenge to a gun store closure because the order in question had “the character of a legislative decision.”¹⁴

THE RIGHT TO SHOP FOR GUNS MAY NOT INFRINGE ON THE RIGHT TO LIVE

Public health officials, from Dr. Anthony Fauci on down, have made clear that physical distancing saves lives. Put another way, close physical interaction, such as waiting in lines or shopping, can kill. Essentially, the constitutional question underlying gun lobby lawsuits seeking to exempt gun stores from broad closures is this: does a supposed right to shop for guns override the public’s right to live? The answer to that question should be an unqualified no.

All rights, including the right to bear arms, are constrained by Americans’ most fundamental right: the right to live. The Declaration of Independence affirms that our nation was founded to protect life, liberty, and the pursuit of happiness, and courts have recognized that the fundamental interest an individual has in his own life supports broad governmental authority to protect public safety.

The Supreme Court and other, lesser courts have repeatedly held that all rights are constrained

when lives and public safety are at stake. The Fifth Amendment right not to self-incriminate does not require a police officer to provide Miranda warnings before asking a suspect about a gun's whereabouts;¹⁵ the First Amendment does not protect speech which may provoke a fight or incite violence;¹⁶ freedom of religion does not protect practices that endanger lives, such as snake handling;¹⁷ and common law property rights do not bar entry onto the land of another if it appears necessary to prevent serious harm.¹⁸ The right to keep and bear arms, whatever its scope and breadth, should not be read to infringe on Americans' right to live.¹⁹

The need to protect public safety in the wake of the coronavirus pandemic necessitates similar constraints on liberties which are far more established. While we respond to this public health emergency, the right to peaceably assemble does not entitle protests down Main Street; Easter and Passover were celebrated via Zoom. Any guarantees under the Second Amendment must likewise make room for America's first freedom.

CONCLUSION: EXECUTIVE ORDERS CLOSING GUN STORES ARE JUSTIFIED TO COMBAT THE CORONAVIRUS PANDEMIC

Americans, for the most part, are strong and good people, willing to make sacrifices in order to help and protect each other. To fight the novel coronavirus, however, government action is needed to prevent the pathogen's spread. One person can set off a chain reaction that spreads the virus broadly to others. Different communities and leaders may have different solutions as to which businesses and activities to curtail, and for how long. Public officials should be able to exercise their authority to mandate physical distancing through broad, temporary closures. Orders mandating those closures should respect the realm of emergency authority, and their necessity — and temporal limits — should be reassessed soberly and often; but we believe these orders are both appropriate and constitutional measures, given the circumstances, and that using them to close gun stores will help keep people safe from the coronavirus.

1. District of Columbia v. Heller, 554 U.S. 570 (2008)

2. District of Columbia v. Heller, 554 U.S. 570, 663-679 (2008)

3. Teixeira v. Cty. of Alameda, 873 F.3d 670, 681–88 (9th Cir. 2017)

4. See, e.g., Silvester v. Harris, 843 F.3d 816, 827–29 (9th Cir. 2016)

5. E.g., Cedrone v. Baker, (1:20-cv-40041) Compl. ¶¶ 68-72, 95-103

6. U.S. Const. amend. V; U.S. Const. amend. XIV, § 1

7. Id. at 387

8. Id. at 393

9. Id.

10. See e.g., Smith v. Avino, 91 F.3d 105 (11th Cir. 1996) (“In an emergency situation, fundamental rights such as the right of travel and free speech may be temporarily limited or suspended.”), abrogated on other grounds by Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998); United States v. Chalk, 441 F.2d 1277, 1278 (4th Cir. 1971) (upholding a curfew during a state of emergency and noting that a mayor’s “invocation of emergency powers necessarily restricts activities that would normally be constitutionally protected”)

11. E.g. Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441, 445, (1915)

12. Garcia-Rubiera v. Fortuno, 665 F.3d 261, 272 (1st Cir. 2011); Agency Inc. v. Sammis, 14 F.3d 133, 142 (2d Cir. 1994)

13. United States v. Florida E. C. R. Co., 410 U.S. 224, 245 (1973)

14. Turner’s Operations, Inc. v. Garcetti, No. 20STCP01258 (Cal. Super. Ct. Apr. 15, 2020)

15. New York v. Quarles, 467 U.S. 649, 651-53 (1984)

16. Chaplinsky v. N.H., 315 U.S. 568 (1942)

17. State v. Massey, 51 S.E.2d 179, 180 (N.C. 1949) (internal citation omitted)

18. Camfield v. United States, 167 U.S. 518, 522-23 (1897)

19. Lowy, Jonathan & Kelly Sampson, The Right Not To Be Shot: Public Safety, Private Guns, and The Constellation of Constitutional Liberties, 14 Geo. L.J. & Pub. Pol’y 187 (2016)