

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

ROBERT KASHINSKY; JONTELL PLATTS; :
WITOLD KWIATKOWSKI; GINA DIFAZIO; :
RACING RAILS LLC d/b/a LEGEND : No. 3:20-cv-03127-MAS-ZNQ
FIREARMS; LEGACY INDOOR RANGE AND :
ARMORY LLC; NEW JERSEY SECOND :
AMENDMENT SOCIETY; FIREARMS POLICY :
COALITION, INC.; and SECOND AMENDMENT : **FIRST AMENDED COMPLAINT**
FOUNDATION, INC., :

Plaintiffs,

v.

PHILIP D. MURPHY, in his official capacity as :
Governor of the State of New Jersey; and :
PATRICK J. CALLAHAN, in his official capacity :
as State Director of Emergency Management and as :
Superintendent of the New Jersey State Police, :

Defendants.

COME NOW Plaintiffs ROBERT KASHINSKY, JONTELL PLATTS, WITOLD
KWIATKOWSKI, GINA DIFAZIO, JEREMY MOODY, RACING RAILS LLC d/b/a
LEGEND FIREARMS, LEGACY INDOOR RANGE AND ARMORY LLC, NEW JERSEY
SECOND AMENDMENT SOCIETY, FIREARMS POLICY COALITION, INC. and SECOND
AMENDMENT FOUNDATION, INC., by and through their undersigned attorney, and complain
as follows:

1. This lawsuit challenges the Defendants’ acts of forcibly eliminating all lawful
channels of access to constitutionally protected arms, including, but not limited to, requiring that
people not leave their homes to seek out the purchase of firearms and ammunition (even if they
follow public health guidance for social distancing), mandating the closure of all retail
businesses that sell firearms, and making the required State portal for firearms background

checks on the website of the New Jersey State Police unavailable to users. Individually and collectively, these actions amount to a ban on obtaining firearms in the State of New Jersey.

2. The Plaintiffs bringing this action do not mean to minimize the severity or urgency of the coronavirus pandemic. The exigencies surrounding this viral pandemic both justify and necessitate changes in the manner in which people live their lives and conduct their daily business. However, this emergency—like any other emergency—has its constitutional limits. It would not justify a prior restraint on speech, nor a suspension of the right to vote. Just the same, it does not justify a ban on obtaining guns.

VENUE AND JURISDICTION

3. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343.

4. The Court has personal jurisdiction over the Defendants because each acted, acts and threatens to act under the color of the laws of the State of New Jersey and each did so, does so and threatens to do so within the geographic confines of the State and District of New Jersey.

5. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(1)-(2).

PARTIES

6. Plaintiff ROBERT KASHINSKY is a natural person residing in Somerset (Somerset County), New Jersey.

7. Plaintiff JONTELL PLATTS is a natural person residing in Willingboro (Burlington County), New Jersey.

8. Plaintiff WITOLD KWIATKOWSKI is a natural person residing in Linden (Union County), New Jersey.

9. Plaintiff GINA DIFAZIO is a natural person residing in Union Branch (Monmouth County), New Jersey.

10. Plaintiff JEREMY MOODY is a natural person residing in Avenel (Middlesex County), New Jersey.

11. Plaintiff RACING RAILS LLC d/b/a LEGEND FIREARMS (“Legend Firearms”) is a limited liability company organized under New Jersey law that transacts business in Monroe Township (Middlesex County), New Jersey.

12. Plaintiff LEGACY INDOOR RANGE AND ARMORY LLC (“Legacy”) is a limited liability company organized under New Jersey law that transacts business in Cinnaminson (Burlington County), New Jersey.

13. Plaintiff NEW JERSEY SECOND AMENDMENT SOCIETY (“NJ2AS”) is a not-for-profit corporation organized under New Jersey law with its principle office in Mercer County, New Jersey.

14. Plaintiff FIREARMS POLICY COALITION, INC. (“FPC”) is an exempt (not-for-profit) corporation organized under Delaware law with its principle office in Sacramento County, California.

15. Plaintiff SECOND AMENDMENT FOUNDATION, INC. (“SAF”) is a not-for-profit corporation organized under Washington law with its principle office in King County, Washington.

16. Defendant PHILIP D. MURPHY is the Governor of the State of New Jersey, and he is named as a defendant in his official capacity as such.

17. Defendant PATRICK J. CALLAHAN is the State Director of Emergency Management in New Jersey and is also the Superintendent of the New Jersey State Police, and he is named as a defendant in his official capacity as such.

PERTINENT CONSTITUTIONAL PROVISIONS

18. The Second Amendment to the United States Constitution provides:

A well-regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

19. The Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008).

20. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21. The Second Amendment “is fully applicable to the States.” *McDonald v. City of Chicago*, 561 U.S. 742, 750 (2010); *see also id.* at 805 (Thomas, J., concurring).

22. The “core lawful purpose” of the right to keep and bear arms is “self-defense.” *Heller*, 554 U.S. at 571, 630; *accord McDonald*, 561 U.S. at 767-68.

23. The Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.” *Heller*, 554 U.S. at 635.

24. “Commercial regulations on the sale of firearms do not fall outside the scope of the Second Amendment[.]” *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010). Rather, “prohibiting the commercial sale of firearms . . . would be untenable under *Heller*.” *Id.*

PERTINENT STATUTES AND REGULATIONS

25. It is illegal to purchase a rifle or shotgun in New Jersey unless an individual holds a Firearms Purchaser Identification card (“FPID”), and it is illegal to purchase a handgun unless one holds a Permit to Purchase (“PTP”). *See* N.J.S.A. § 2C:58-3(a)-(b). To obtain either a FPID or PTP, a person must submit fingerprints and pass a background check investigation conducted

by local police authorities. *See* N.J.S.A. § 2C:58-3(e)-(f). Police cannot issue a FPID or PTP to any person who (*inter alia*) has been convicted of a crime, confined to a mental institution, subjected to a restraining order, or who is under the age of 18. *See id.* § 2C:58-3(c). A PTP authorizes a person to purchase a single handgun and expires after 90 days, although it can be renewed once for an additional 90 days. *See id.* § 2C:58-3(f).

26. It is also illegal to purchase a firearm in New Jersey unless the transaction is conducted “through a licensed retail dealer” in firearms. N.J.S.A. § 2C:58-3(a)(2), (b)(2). A licensed retail dealer is obliged to complete a background check before consummating a firearm transaction. *Id.* § 2C:58-3(a)(3), (b)(3); *see also id.* 18 U.S.C. § 922(t); N.J.A.C. §§ 13:54-3.12, -3.13(a)(6).

27. In New Jersey, the Division of State Police conducts background checks in connection with firearm sales. N.J.A.C. §§ 13:54-1.2, -3.12, -3.13(a)(6), -3.19. However, the National Instant Check System maintained by the federal government is also available to complete background checks.

28. Subject to certain exceptions that are not applicable in New Jersey, federal law requires licensed firearms dealers to deliver firearms to purchasers at their licensed business transactions. *See* 27 C.F.R. § 478.96(b).

EXECUTIVE ORDER 107 AND THE CLOSURE OF THE BACKGROUND CHECK PORTAL

29. As the Court is aware, a novel coronavirus has caused a pandemic illness that is spreading throughout the world, including the United States and the State of New Jersey. It is unclear how long it will take for this pandemic illness to run its course, and estimates have ranged from one month to 18 or more months.

30. On March 21, 2020, Defendant Governor Murphy issued Executive Order 107, which ordered that “[t]he brick-and-mortar premises of all non-essential retail businesses must close to the public as long as this Order remains in effect.” Executive Order 107 did not include licensed firearms dealers in its list of “essential” businesses, meaning that they must be “close[d] to the public” for the duration of the order.

31. Although Executive Order 107 did not expressly address the firearms background checks that the Division of State Police conducts, shortly after Defendant Governor Murphy issued the order, the Division of State Police posted a notice on the background check portal of its website stating, *inter alia*:

The New Jersey State Police NICS Unit is directing the vendor of the NICS Online Application (NICUSA) to turn off the NICS Online Services for submitting NICS transactions by eliminating the “Request Form” button, effective 9:00pm EST, Saturday, March 21, 2020. You will still have the ability to view the message board and the status of previously submitted transactions. This “Request Form” feature will remain off until further order by Governor Murphy.

A copy of this message is attached hereto as Exhibit 1.

32. Since the end of March 21, 2020, it has been impossible to submit a background check to the Division of State Police for approval.

33. Furthermore, at the time the Division of State Police posted its notice and closed the background check portal, background checks that had been submitted from Thursday, March 19, 2020 onward were still pending. The Division of State Police announced that it would complete the background checks from Thursday, March 19, 2020, but that it would not complete the background checks submitted on Friday and Saturday, March 20-21, 2020.

**DEFENDANTS' ACTUAL AND THREATENED ENFORCEMENT OF
THE CHALLENGED LAWS, POLICIES AND PRACTICES
AND ITS INJURY TO THE PLAINTIFFS**

34. Plaintiff Robert Kashinsky holds a FPID and currently owns a couple firearms, which are primarily intended for hunting and other sporting purposes. When the novel coronavirus began to spread in the United States, he became concerned about his ability to protect himself and his wife in the event that the situation developed such that emergency services were unavailable or were not reliably available. He decided that it had become an appropriate time to purchase a firearm that would be more suitable for personal protection.

35. On Saturday, March 21, 2020, Plaintiff Kashinsky visited the premises of a licensed firearms dealer in New Jersey and decided that he would purchase one of two particular long guns (a rifle and a shotgun) they had in the store. Plaintiff planned to return to the store on Tuesday, March 24, 2020 to purchase the one he ultimately decided upon.

36. On Sunday, March 22, 2020, Plaintiff Kashinsky learned of Executive Order 107 and the closure of the background check portal on the State Police website. Accordingly, he is no longer able to purchase the firearm he intended to purchase.

37. Plaintiff Jontell Platts does not currently possess a firearm, but she does hold a FPID and a valid PTP. The PTP will expire on April 22, 2020. When the novel coronavirus began to spread in the United States, she became concerned about her ability to protect herself and her family in the event that the situation developed such that emergency services were unavailable or were not reliably available. She decided that it had become an appropriate time to purchase a firearm.

38. Plaintiff Jones visited the premises of a licensed firearms dealer on Saturday, March 21, 2020. She selected a handgun for purchase and paid the purchase price. She left the

store that evening with the State Police background check still pending. It remains pending at the present time. Accordingly, she is unable to take possession of the gun she has purchased.

39. Plaintiff Witold Kwiatkowski does not currently possess a firearm, but he does hold a FPID. When the novel coronavirus began to spread in the United States, he became concerned about his ability to protect himself and his family in the event that the situation developed such that emergency services were unavailable or were not reliably available. He decided that it had become an appropriate time to purchase a firearm, and he planned to do so on Monday, March 23, 2020 or shortly thereafter.

40. On Sunday, March 22, 2020, Plaintiff Kwiatkowski learned of Executive Order 107 and the closure of the background check portal on the State Police website. Accordingly, he is no longer able to purchase the firearm he intended to purchase.

41. Plaintiff Gina Difazio holds a FPID and currently owns a rifle and a handgun. When the novel coronavirus began to spread in the United States, she became concerned about her ability to protect herself and her family in the event that the situation developed such that emergency services were unavailable or were not reliably available. While she already owns a rifle and a handgun, she felt that a shotgun would be a better choice for protection in a densely populated environment because (*inter alia*) the projectile of a shotgun will not travel nearly as far and will stop more readily when it impacts a wall. Plaintiff Difazio planned to purchase a shotgun on Monday, March 23, 2020 or shortly thereafter.

42. On March 23, 2020, Plaintiff Difazio learned of Executive Order 107 and the closure of the background check portal on the State Police website when she contacted a licensed firearms dealer and inquired about available shotguns. Accordingly, she is no longer able to purchase the firearm she intended to purchase.

43. Plaintiff Jeremy Moody does not currently possess a firearm, but he does hold a FPID. When the novel coronavirus began to spread in the United States, he became concerned about his ability to protect himself and his family in the event that the situation developed such that emergency services were unavailable or were not reliably available. He decided that it had become an appropriate time to purchase a firearm.

44. Plaintiff Moody visited the premises of a licensed firearms dealer on Friday, March 20, 2020. He selected a shotgun for purchase and paid part of the purchase price. He left the store with the intention of returning during the week of March 22, 2020 and paying the balance of the purchase price. Accordingly, he is unable to complete his purchase of the shotgun.

45. Plaintiff Legend Firearms is a retail dealer in firearms that is licensed under both federal law and New Jersey law to engage in business as such.

46. Plaintiff Legacy Indoor Range and Armory LLC (“Legacy”) is a retail dealer in firearms that is licensed under both federal law and New Jersey law to engage in business as such.

47. As the coronavirus pandemic unfolded, both Legend Firearms and Legacy implemented safety measures following guidelines from the Center for Disease Control and New Jersey officials, such as the routine cleansing of doorknobs and countertops, social distancing, and a limitation on the number of people in the store at once.

48. Now that Executive Order 107 has taken effect, both Legend Firearms and Legacy are no longer open to the public.

49. Since Executive Order 107 took effect, and since the Division of State Police made the background check portal unavailable, individuals have contacted both Legend Firearms and Legacy and expressed their desire to purchase firearms for the purpose of personal

protection. Both Legend Firearms and Legend have advised these people that it is no longer possible to conduct business or sell, purchase, or transfer firearms in New Jersey.

50. Furthermore, because the Division of State Police refuses to complete the background checks submitted to it on March 20-21, 2020, a significant number of otherwise complete purchases remain pending indefinitely. Legend Firearms cannot deliver at least 30 guns that it sold to customers on those dates, and Legend Firearms cannot deliver at least 8 guns that it sold to customers on those dates.

51. Legend Firearms and Legacy both wish to continue to do business using the guidance set forth in Executive Order 107 for businesses that are deemed “essential” and would continue to do business under those conditions but for Executive Order 107’s failure to designate it as “essential” and the closure of the State Police background check portal. If Legend Firearms and Legacy were permitted to remain open, even in a limited capacity, they would be able to sell firearms to qualified individuals who desired them, such as the individual plaintiffs in this case, and it would be able to deliver the guns it sold on March 20-21 to their owners.

52. Plaintiff New Jersey Second Amendment Society (“NJ2AS”) is a civil rights advocacy group dedicated to protection of the Second Amendment. NJ2AS has members across New Jersey that desire protect themselves and their constitutional rights. NJ2AS brings these claims on its own behalf and on behalf of its members.

53. Plaintiff Firearms Policy Coalition, Inc. (“FPC”) is a non-profit organization with purposes that include defending and promoting the People’s rights and freedom. FPC serves its members and the public through legislative advocacy, grassroots advocacy, litigation and legal efforts, research, education, outreach, and other programs. FPC’s members and supporters reside both within and outside the State of New Jersey. FPC represents its members and supporters,

who include individuals aggrieved by Executive 107 and the other actions complained of herein, and brings this action on behalf of itself, its members, supporters who possess all the indicia of membership, and similarly situated members of the public. FPC has expended and diverted resources, and adversely and directly harmed, because of Defendants' laws, policies, practices, and customs challenged herein. FPC brings these claims on its own behalf and behalf of its members.

54. Plaintiff Second Amendment Foundation, Inc. ("SAF") has over 650,000 members and supporters nationwide, including in the State of New Jersey. The purposes of SAF include promoting both the exercise of the right to keep and bear arms and education, research, publishing, and legal action focusing on the constitutional right to privately own and possess firearms. SAF also promotes research and education on the consequences of abridging the right to keep and bear arms and on the historical grounding and importance of the right to keep and bear arms as one of the core civil rights of United States citizens. SAF brings these claims on its own behalf and on behalf of its members.

55. Defendant Governor Murphy is the Governor of New Jersey, who executed Executive Order 107, and who has authority to repeal or revise its terms to alleviate the injuries to the Plaintiffs. Defendant Governor Murphy is ready, willing and able to enforce the provisions of New Jersey law complained of herein against the Plaintiffs.

56. Defendant Colonel Callahan is the Superintendent of the State Police and the Director of Emergency Management, who has the authority (under Executive Order 107) "to make additions, amendments, clarifications, exceptions, and exclusions to th[e] list" of "essential" retail businesses. Defendant Colonel Callahan is ready, willing and able to enforce the provisions of New Jersey law complained of herein against the Plaintiffs. Moreover, as

Superintendent of the State Police, Defendant Colonel Callahan is responsible for the decision by the State Police to make the background check portal unavailable.

CAUSE OF ACTION FOR DEPRIVATION OF CIVIL RIGHTS
42 U.S.C. § 1983

57. Defendants' acts of prohibiting the operation of retail firearms businesses without regard to their manner of operation and of foreclosing any ability to access the background check portal prohibit law-abiding individuals from purchasing firearms for the purpose of protecting themselves and their families (or for any other purpose). Independently and collectively, these acts stand as a perpetual bar on firearms ownership.

58. State and local governments do not have the power to prohibit the keeping and bearing of arms, nor to close the channels of distribution by which people obtain firearms.

59. Defendant Murphy's directive (in Executive Order 107) that all dealers in firearms must close to the public, without exception, stands as a ban on purchasing firearms.

60. Defendants' policy or practice of making the State Police background check portal unavailable, and of refusing to process background checks submitted on March 20-21, 2020, independently stands as a perpetual ban on purchasing firearms.

61. The Plaintiffs and the Plaintiffs' members reasonably fear that Defendants will enforce Executive Order 107 and their related policies, customs, and practices against them.

62. Defendants' ongoing threat to enforce Executive Order 107 against the Plaintiffs and/or the Plaintiffs' members, as well as their ongoing policy or practice of making the State Police background check portal unavailable and refusing to process submitted background checks, prevents the Plaintiffs, Plaintiffs' members, and those similarly situated from purchasing or selling firearms, thus causing injury and damage that is actionable under 42 U.S.C. § 1983.

PRAYER

WHEREFORE, Plaintiffs pray for the following relief:

- i. A declaratory judgment that Executive Order 107 and Defendants' policies, practices, and customs individually and/or collectively prohibit the purchase, sale, and transfer of firearms and thus violate the Second and Fourteenth Amendments;
- ii. a declaratory judgment that Defendants' policy or practice of making the State Police background check portal unavailable and of refusing to process submitted background checks violates the Second and Fourteenth Amendments;
- iii. a preliminary and/or permanent injunction restraining Defendants and their officers, agents, servants, employees, and all persons in concert or participation with them who receive notice of the injunction, from enforcing Executive Order 107 and Defendants' policies, practices, and customs that individually and/or collectively prohibit the purchase and sale of firearms;
- iv. an injunction directing Defendants and their officers, agents, servants, employees, and all persons in concert or participation with them who receive notice of the injunction, to make the State Police background check portal available and to process submitted background checks, or, in the alternative, an injunction preventing Defendants from enforcing their policies, practices, and customs that prevent the State Police from making the State Police background check portal service available and processing submitted background checks;
- v. such other and further relief, including injunctive relief, against all Defendants, as may be necessary to effectuate the Court's judgment, or as the Court otherwise deems just and equitable; and
- vi. attorney's fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable law.

Dated: March 25, 2020

s/ David D. Jensen
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