

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

No. 1:20-cv-00325-KK-JHR

**PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION
FOR TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION**

INTRODUCTION

The “constitution [was] intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs.” *McCulloch v. State*, 17 U.S. 316, 415 (1819). Indeed, “the forefathers . . . knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). “[T]hey made no express provision for exercise of extraordinary authority because of a crisis.” *Id.* (Jackson, J., concurring). The Constitution’s protections remain robust through peace and turmoil. A declaration of emergency does not justify the denial of a natural, constitutionally protected, fundamental right—not even for a limited period of time.

In New Mexico, individuals must generally acquire firearms through a licensed retailer by means of in-person transactions. *See* N.M. Stat. § 30-7-7.1(A). Defendants’ Orders have, thus, made it impossible for Plaintiffs, Plaintiffs’ members and customers, and similarly situated individuals to purchase firearms during this time of extended insecurity by their Orders and actions shuttering firearms retailers, ranges, and repair facilities and preventing individuals from traveling to and from those businesses. Defendants have used the COVID-19 Novel Coronavirus (“COVID-19”) to deprive New Mexicans of their natural and fundamental rights—through executive decree—through their Orders and enforcement actions.

While Defendants may have an interest in reducing the population’s exposure to COVID-19, a total ban on the ability of New Mexicans to buy and train with firearms is overbroad, untailored, and categorically unconstitutional. The “enshrinement of constitutional rights necessarily takes certain policy choices off the table.” *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008). These include policy choices and orders effecting an absolute prohibition on the exercise of a constitutionally protected right. *Id.* Licensed firearm and ammunition retailers, shooting ranges, and repair facilities are essential businesses—they provide law-abiding individuals with critical access to constitutionally protected property and conduct, and must remain open like other essential businesses.

Times of uncertainty and disturbance are precisely when the right to self-defense is most important. When the Second Amendment was ratified, “Americans understood the ‘right of self-preservation’ as permitting a citizen to ‘repel force by force’ when ‘the intervention of society in his behalf, may be too late to prevent an injury.’” *Heller*, 554 U.S. at 595 (2008) (quoting 1 BLACKSTONE’S COMMENTARIES 145–46, n.42 (1803)) (brackets omitted). A global pandemic epitomizes a setting in which waiting for “the intervention of society” on one’s behalf may be too late.

Through their Orders and enforcement actions, Defendants have implemented a number of broad restrictions that affect both individuals and critically essential small businesses. Defendants’ Orders threaten individuals, such as Plaintiffs,

Plaintiffs’ members and customers with civil or criminal penalty should they exercise their constitutionally protected rights (and legal obligations) to travel to and use a firearm retailer, range, or repair facility for the lawful acquisition of constitutionally protected items and services for self-defense. Criminalizing going to, coming from, and operating essential businesses that provide access to the constitutionally protected right to keep and bear arms for self-defense—especially in a manner that is inconsistent with other so-called “essential businesses”—cannot withstand constitutional scrutiny. The injunctive relief that Plaintiffs seek through this action is necessary—and immediately so—to uphold this foundational principle of the United States Constitution.

STATEMENT OF FACTS

I. EXECUTIVE ORDERS 2020-004 AND 2020-022 AND THE PUBLIC HEALTH EMERGENCY ORDER AND ENFORCEMENT

On March 11, 2020, in response to the spread of the COVID-19, Governor Michelle Lujan Grisham, purportedly pursuant to the “All Hazard Emergency Management Act, NMSA 1978, §§ 12-10-1 through 12-10-10” and “NMSA 1978, 12-10A-5”,¹ issued Executive Order 2020-004, declaring a public health

¹ Notably, Section 12-10A-2, specifies that the purpose of the Act is to “provide the state of New Mexico with the ability to manage public health emergencies *in a manner that protects civil rights and the liberties of individual persons.*” N.M. Stat. § 12-10A-2(A) (emphasis added).

emergency.² On April 6, 2020, Governor Grisham “renewed and extended” Executive Order 2020-004 through April 30, 2020. Executive Order 2020-022 (collectively, “Executive Orders”).³ Executive Order 2020-022 further states that “All other powers invoked, directives, and orders contained in Executive Order 2020-004 remain in effect.” On March 23, 2020, Secretary Kunkel issued a Public Health Emergency Order (“Emergency Order”, and collectively, with the Executive Orders, “Orders”) that closed all non-essential businesses and placed restrictions on mass gatherings.⁴ The Emergency Order specifically requires that all non-essential businesses reduce their in-person workforces by 100%. It also “requires the closure of physical . . . retail spaces” of non-essential businesses. There are no exceptions: “All public and private employers are required to comply with th[e] Order.” Emergency Order at 5. The Emergency Order does not list lawful firearm retailers, ranges, or repair facilities as “essential businesses.”⁵

² Executive Order 2020-004 is available at <https://www.governor.state.nm.us/wp-content/uploads/2020/03/Executive-Order-2020-004.pdf> (last visited April 9, 2020).

³ Executive Order 2020-022 is available at https://www.governor.state.nm.us/wp-content/uploads/2020/04/EO_2020_022.pdf (last visited April 9, 2020).

⁴ The Emergency Order is available at <https://www.governor.state.nm.us/wp-content/uploads/2020/03/COVID-19-DOH-Order-fv.pdf> (last visited April 9, 2020).

⁵ The Department of Homeland Security, Cyber-Infrastructure Division (“CISA”), issued updated “Guidance on the Essential Critical Infrastructure Workforce” during the COVID-19 pandemic, which advised that “[w]orkers supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges” fall squarely within the “critical infrastructure workforce.” <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce> (last visited April 15, 2020).

The shuttering of firearm retailers goes much further than just eliminating retail sales. With limited exceptions, New Mexico law prohibits private individuals from transferring firearms between themselves, without having a licensed dealer first conduct a federal instant criminal background check. N.M. Stat. § 30-7-7.1(A). Furthermore, federal law generally requires licensed firearm dealers to conduct background checks in person. 18 U.S.C. § 922(c); 27 C.F.R. § 478.96(b). Accordingly, the Orders categorically bar the ability of individuals to lawfully acquire a firearm in New Mexico.

II. INJURY TO THE PLAINTIFFS

Plaintiff Robert Aragon would like to purchase a firearm and ammunition for self-defense purposes. *Declaration of Robert Aragon* ¶9. Plaintiff Aragon is not prohibited from possessing firearms under state or federal law. (*Id.* ¶4). Due to Defendants' Orders and enforcement actions, however, he is unable to purchase a firearm and ammunition or utilize a range to maintain proficiency with a firearm. (*Id.* ¶¶ 5–12). Plaintiff Aragon cannot purchase a firearm except through a licensed firearms dealer under New Mexico law. (*Id.* ¶6).

Plaintiff David Anthony Segura would like to purchase a firearm and ammunition for self-defense purposes. *Declaration of David Anthony Segura* ¶8. Plaintiff Segura is not prohibited from possessing firearms under state or federal law. (*Id.* ¶4). Plaintiff Segura cannot purchase a firearm except through a licensed

firearms dealer under New Mexico law. (*Id.* ¶6). Furthermore, Plaintiff Segura is a licensed firearms instructor in the State of New Mexico and teaches several courses required to receive a concealed handgun license. (*Id.* ¶13). Due to Defendants' Orders and enforcement actions, however, he is unable to purchase a firearm and ammunition or utilize a range to maintain proficiency with a firearm or to teach courses required to receive a concealed handgun license. (*Id.* ¶¶5–17).

Plaintiff Zachary Fort would like to purchase a firearm and ammunition for self-defense purposes. *Declaration of Zachary Fort* ¶9. Plaintiff Fort is not prohibited from possessing firearms under state or federal law. (*Id.* ¶4). Due to Defendants' Orders and enforcement actions, however, he is unable to purchase a firearm and ammunition or utilize a range to maintain proficiency with a firearm. (*Id.* ¶¶5–10). Plaintiff Fort cannot purchase a firearm except through a licensed firearms dealer under New Mexico law. (*Id.* ¶6). Furthermore, Plaintiff Fort is unable to renew his concealed handgun license, despite being eligible, due to Defendants' Orders and enforcement actions. (*Id.* ¶11–13). Without a concealed carry license, Plaintiff Fort is prohibited from carrying a firearm, in any manner, in any retailer, including grocery stores, gasoline stations, and convenience store, that sells but does not serve liquor for consumption. (*Id.* ¶14–17).

Plaintiff Rose's Guns & More, LLC ("Rose's Guns") would continue to engage in the business of lawfully purchasing, selling, and transferring firearms, but

for Defendants’ Orders and enforcement actions. *Declaration of Elizabeth Rose Jantz* ¶20. In order to purchase a firearm in New Mexico, absent a few minor exceptions, individuals must appear in person at a licensed dealer to conduct the sale or transfer of a firearm. (*Id.* ¶8). Individuals from Rose’s Guns contacted representatives from the Governor’s Office; the New Mexico Attorney General’s Office; the Mayor of Moriarty, New Mexico’s Office; the New Mexico State Police; State Senator James P. White’s Office; and the Moriarty City Police to determine whether Rose’s Guns could operate under Defendants’ Orders and were told that it was a non-essential business and must close. (*Id.* ¶¶9–16).

Plaintiff Southwest Gunsmith Technologies, LLC, (“Southwest Gunsmith”), and its principle Richard Kennedy, would open and engage in the transfer and repair of arms but for Defendants’ Orders and enforcement actions. *Declaration of Richard Kennedy* ¶¶1, 5, 14. In order for Southwest Gunsmith to take possession of client’s firearms for repair, renovation, service, etc., they must appear in person at MAGS Indoor Shooting Range (“MAGS”) to deliver the firearm, where Southwest Gunsmith rents a retail space. (*Id.* ¶6, 8, 13). The New Mexico Department of Public Safety visited MAGS to tell the business it must close or it would be subject to a \$60,000 fine. (*Id.* ¶9). As a result, Southwest Gunsmith was forced to cease operations. (*Id.* ¶10).

Violations of the Orders are misdemeanor offenses punishable by fines up to \$100, six months in prison, or both. N.M. Stat. § 24-1-21. The Emergency Order states “[t]he New Mexico Department of Public Safety, the New Mexico Department of Homeland Security and Emergency Management, the Department of the Environment, and all other State departments and agencies are authorized to take all appropriate steps to ensure compliance with this Order.” Thus, under Defendants’ Orders and enforcement policies, it is a crime for individuals to leave their homes and go to firearms retailers, ranges, and repair facilities. Additionally, it is a crime for retailers, ranges, and repair facilities, including Plaintiffs herein, to operate.

In addition, Plaintiffs New Mexico Shooting Sports Association (“NMSSA”), the National Rifle Association of America (“NRA”), Second Amendment Foundation (“SAF”), and Firearms Policy Coalition, Inc. (“FPC”), are themselves damaged by Defendants’ Orders and enforcement actions. Beyond their own direct damages, these institutional plaintiffs have members and supporters in New Mexico who are injured by Defendants’ Orders and enforcement actions. *See Declarations of Zachary Fort, Alan Gottlieb, Josh Savani, and Brandon Combs*. Accordingly, all Plaintiffs seek this necessary relief.

ARGUMENT

“A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the

absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (collecting authorities); *Dine Citizens Against Ruining Our Env’t v. Jewell*, 839 F.3d 1276, 1281 (10th Cir. 2016) (citation omitted).⁶

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

Plaintiffs will succeed on the merits of their claims. Defendants’ Orders and enforcement actions prohibit all New Mexicans from exercising their natural and fundamental rights guaranteed by the Second Amendment. To establish a likelihood of success on the merits, the plaintiff “must make ‘a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought.’” *Logan v. Pub. Employees Ret. Ass’n*, 163 F. Supp. 3d 1007, 1026 n.6 (D.N.M. 2016) (collecting authorities). Additionally, the Tenth Circuit has held that if a plaintiff can establish that irreparable harm, equities, and the public interest tip strongly in his favor, then the likelihood of success prong is modified, and the plaintiff merely has to show “that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.” *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1255–56 (10th

⁶ “The requirements for a TRO issuance are essentially the same as those for a preliminary injunction order.” *People’s Tr. Fed. Credit Union v. Nat’l Credit Union Admin. Bd.*, 350 F. Supp. 3d 1129, 1138 (D.N.M. 2018) (citations omitted). Accordingly, Plaintiffs brief the TRO and preliminary injunction factors together.

Cir. 2003) (quotations and citations omitted). The loss of a constitutionally protected right—“even for minimal periods of time”—“unquestionably constitutes irreparable injury” and the balance of equities and public interest always favor upholding the Constitution. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (quotations and citations omitted).

In *Heller*, the Supreme Court struck down the District of Columbia’s ban on possessing operable handguns in the home. 554 U.S. at 628–29 (holding that the ban would “fail constitutional muster” under “any of the standards of scrutiny we have applied to enumerated constitutional rights”). Two years later, the Supreme Court held that the Second Amendment applies to the states by virtue of the Fourteenth Amendment because “the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.” *McDonald v. City of Chicago*, 561 U.S. 742, 778, 791 (2010) (plurality opinion).

The Tenth Circuit has since “adopted a ‘two-pronged approach’ to Second Amendment claims.” *Peterson v. Martinez*, 707 F.3d 1197, 1208 (10th Cir. 2013) (quoting *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010)). The court must first “ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment’s guarantee.” *Id.* (quoting *Reese*, 627 F.3d at 800). “If the law does not impose a burden, it is constitutional.” *Id.* “If it does, then the

court ‘must evaluate the law under some form of means-end scrutiny.’” *Id.* (quoting *Reese*, 627 F.3d at 801).⁷ Here, Defendants’ Orders undoubtedly pose such a burden—there can be no right to “keep” or “bear” arms without the ability to acquire them and the ammunition that is essential to their use. Moreover, the right to keep arms includes the corresponding right to maintain proficiency in their use. *Heller*, 554 U.S. at 617–18 (2008) (citation omitted); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). Defendants’ Orders’ completely prohibit the right to acquire arms and ammunition as well as train with them at a shooting range. This categorical ban is unconstitutional.

A. Defendants’ Orders Strike at the Core Protections of the Second Amendment

The Tenth Circuit reaffirmed that “the core purpose of the [Second Amendment] was to allow ‘law-abiding, responsible citizens to use arms in defense of hearth and home.’” *Reese*, 627 F.3d at 800 (quoting *Heller*, 554 U.S. at 635). The Second Amendment takes “off the table” any “absolute prohibition of handguns held and used for self-defense in the home.” *Heller*, 554 U.S. at 616, 636. The right to keep arms necessarily includes the right to “lawfully . . . *acquire* and keep a firearm.”

⁷ Notably, the Supreme Court rejected the application of means-end scrutiny in *Heller* to Second Amendment challenges and instead imposed a text, history, and tradition approach. *See Heller*, 554 U.S. at 634–35. In the interest of judicial efficiency, Plaintiffs reserve that argument and proceed with the Tenth Circuit’s analysis framework.

Peterson, 707 F.3d at 1219 (Lucero, J., concurring) (quoting *Heller v. D.C.*, 670 F.3d 1244, 1255 (D.C. Cir. 2011)) (emphasis added). The “right to acquire a firearm” is the “most fundamental prerequisite of legal gun ownership.” *Illinois Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 930, 938 (N.D. Ill. 2014). That has been the law in this country for a century and a half. *Andrews v. State*, 50 Tenn. 165, 178 (1871) (“The right to keep arms, necessarily involves the right to purchase them . . . and to purchase and provide ammunition suitable for such arms.”). “[P]rohibiting the commercial sale of firearms . . . would be untenable under *Heller*.” *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010). It is undeniable that closing lawful firearm retailers falls within the core protections of the Second Amendment, for the right to keep and bear arms is meaningless without a manner in which to access the very instruments needed to exercise the right.

The right to acquire ammunition is also protected at the core of the Second Amendment. “[W]ithout bullets, the right to bear arms would be meaningless.” *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 967 (9th Cir. 2014). “[T]he right to possess firearms for protection implies a corresponding right’ to obtain the bullets necessary to use them.” *Id.* (citation omitted); *see also Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1117 (S.D. Cal. 2017), *aff’d*, 742 Fed. App’x 218 (9th Cir. 2018) (“Without protection for the closely related right to keep and bear ammunition magazines for use with the arms designed to use such magazines, ‘the Second

Amendment would be toothless.” (citation omitted)). Defendants’ shuttering of firearm retailers denies Plaintiffs the ability to acquire firearms and ammunition and thus violates Plaintiffs’ natural and fundamental right to keep and bear arms.

Moreover, there is a corresponding right to develop and maintain proficiency in the use of arms. The Supreme Court noted that “to bear arms implies something more than the mere keeping; it implies the learning to handle and use them[;] . . . it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.” *Heller*, 554 U.S. at 617–18 (quotation and citation omitted); *Ezell*, 651 F.3d at 704 (7th Cir. 2011) (“The 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.”). In *Ezell*, the Seventh Circuit preliminary enjoined the City of Chicago from enforcing an ordinance that banned shooting ranges, while simultaneously requiring those who wished to exercise their Second Amendment protected rights to first undergo training at a range. 651 F.3d at 690. Defendants have done the same here; the forced closure of shooting ranges—while simultaneously requiring citizens to complete live-fire training to acquire a carry permit—categorically infringes upon Plaintiffs’ rights to develop and maintain proficiency in the use of their arms.

COVID-19 does not diminish the scope of the Second Amendment or any other constitutionally protected right. The Second Amendment “is part of ‘a

constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”” *Youngstown Sheet & Tube*, 343 U.S. at 661 (Clark, J., concurring) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)); see *Silveira v. Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing *en banc*) (“The Second Amendment is a doomsday provision.”). Indeed, the Supreme Court stated that “[t]he imperative necessity for safeguarding these rights . . . under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.”” *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (quoting *Kennedy v. Mendoza—Martinez*, 372 U.S. 144, 164–65 (1963)).

Here, regardless of their motivation, Defendants have completely prohibited the exercise of a natural, fundamental right. The right to keep and bear arms was memorialized in the Constitution to ensure that it would be preserved for future generations—especially in uncertain times. Defendants’ forced closure of firearm retailers, ranges, and repair facilities completely infringes upon Individual Plaintiffs’ right to keep and bear arms; it prohibits them from acquiring arms and ammunition, repairing firearms to an operable status, and training with those arms. Additionally, by closing ranges, Defendants have made it impossible for New Mexicans to

lawfully acquire or renew a concealed handgun license because they cannot complete the live shooting requirement—thereby prohibiting New Mexicans from carrying a firearm, in any manner, in any retailer, including grocery stores, gasoline stations, and convenience store, that sells but does not serve liquor for consumption. Defendants’ Orders bar constitutionally protected rights, activities, and business, all of which strike at the core of the Second Amendment’s protections.

B. Defendants’ Orders Are a Complete Prohibition on Certain Second Amendment Protected Rights and Categorically Unconstitutional

In *Heller*, the Supreme Court first looked to the text of the Constitution itself and then to history and tradition to inform the scope and meaning of that text. Indeed, *Heller* held a handgun ban—which is narrower than the effect of Defendants’ expansive Orders and actions—to be categorically unconstitutional: “Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a complete prohibition of their use is invalid.” 554 U.S. at 629. “Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in those cases, which prohibited handgun possession even in the home—are categorically unconstitutional.” *Ezell*, 651 F.3d at 703 (emphasis added).

At issue here is a complete and unilateral suspension on the right of ordinary citizens to acquire firearms and from developing and maintaining proficiency in their use. Defendants’ Orders go further than just banning the commercial sale of firearms

and ammunition—they also ban private transfers. Under New Mexico Law, it is a misdemeanor offense for two people to transfer a firearm between themselves, without having a licensed dealer conduct a federal instant criminal background check. N.M. Stat. §§ 30-7-7.1(A), (G). None of the exemptions to the law apply to the Individual Plaintiffs in this case. N.M. Stat. § 30-7-7.1(B). And with limited exceptions, transfers of firearms through a licensed dealer must be conducted in person. 18 U.S.C. § 922(c); 27 C.F.R. § 478.96(b). Defendants’ Orders’ application to firearm retailers have effectively banned firearms transfers within the state.

Infringements on the “core protection” of the Second Amendment must be held categorically unconstitutional, not “subjected to a freestanding ‘interest-balancing’ approach.” *Heller*, 554 U.S. at 634–35. The Second Amendment “is the very *product* of an interest balancing by the people.” *Id.* at 635 (emphasis in original). And “[t]he very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.” *Id.* at 634 (emphasis in original); *McDonald*, 461 U.S. at 785 (*Heller* “expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.”); *Marzzarella*, 614 F.3d at 92 n.8 (“prohibiting the commercial sale of firearms . . . would be untenable under *Heller*.”).

Plaintiffs are prohibited from exercising their Second Amendment protected rights, at a time when those rights are most important. Worse, anyone who does not already own a firearm in New Mexico is now almost certainly completely prohibited from acquiring constitutionally protected property to defend themselves. As such, Defendants' Orders amount to a categorical ban and should be categorically stricken.

C. Defendants' Orders Fail to Pass Constitutional Muster under any Level of Scrutiny

Defendants' Orders and actions are also unconstitutional under the Tenth Circuit's two-part tiered-scrutiny test. "First, we 'ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee.' If the law does not impose a burden, it is constitutional. If it does, then the court 'must evaluate the law under some form of means-end scrutiny.'" *Peterson*, 707 F.3d at 1208 (internal citations omitted). "[T]he core purpose of the [Second Amendment is] to allow 'law-abiding, responsible citizens to use arms in defense of hearth and home.'" *Reese*, 627 F.3d at 800 (quoting *Heller*, 554 U.S. at 635); *Peterson*, 707 F.3d at 1218 (Lucero, J., concurring).

As explained in detail above, Defendants' Orders strike at the core of the Second Amendment, and strict scrutiny should apply. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) ("[S]trict judicial scrutiny [is] required" whenever a law "impinges upon a fundamental right explicitly or implicitly protected by the Constitution.").

Emergencies do not lessen the level of judicial scrutiny. The need to protect rights is greatest during a crisis, *Hamdi*, 542 U.S. at 532, which is why other courts have applied strict scrutiny to firearms restrictions during declarations of emergencies. *See Bateman v. Perdue*, 881 F. Supp. 2d 709, 715 (E.D.N.C. 2012) (following Fourth Circuit precedent to apply strict scrutiny to a “core” Second Amendment analysis, but not applying *Heller*’s categorically unconstitutional analysis). The *Bateman* Court ruled that strict scrutiny was the appropriate standard of review because “[m]ost significantly, [the restriction] prohibits law abiding citizens from purchasing and transporting to their homes firearms and ammunition needed for self-defense.” *Id.* The Court should therefore apply strict scrutiny over any lower forms of scrutiny here.

Strict scrutiny “requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Arizona Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (citations and quotations omitted).⁸

Recitation of a compelling interest is not enough to satisfy the first prong of strict scrutiny. Rather, the interest must actually be furthered by the Orders.

⁸ Although the Plaintiff bears the burden of showing that he is likely to succeed on the merits, “burdens at the preliminary injunction stage track the burdens at trial.” *Awad v. Ziriak*, 670 F.3d 1111, 1129 (10th Cir. 2012) (citation omitted). Defendants therefore bear the burden here. *Id.*

Defendants “must demonstrate that the recited harms are real, not merely conjectural, *and that the regulation will in fact alleviate these harms in a direct and material way.*” *Awad*, 670 F.3d at 1129–30 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 644 (1994) (plurality)) (emphasis added).

Defendants cannot demonstrate that closing firearm retailers, ranges, or repair facilities will directly or materially alleviate the harms posed by COVID-19. Any alleviation of the spread of COVID-19 from closing firearm retailers is speculative, at best. Further, all Plaintiffs have affirmatively stated that they would abide by all social distancing and workforce requirements for the operation of essential businesses. Accordingly, Defendants cannot demonstrate that the closure of retail firearms businesses and shooting ranges *further*s a compelling interest.

Moreover, the closure of all firearm retailers, ranges, and repair facilities constitutes a complete ban that is not narrowly tailored, as a matter of law. The Tenth Circuit made it clear: A “complete ban of Sharia law is hardly an exercise of narrow tailoring.” *Awad*, 670 F.3d at 1131; *see also Heller*, 554 U.S. at 635 (comparing the Second Amendment to the First Amendment). The *Bateman* court emphasized the same problem with North Carolina’s emergency-declaration statute that prohibited citizens from lawfully acquiring a firearm during an emergency—the statute was not tailored in any manner whatsoever, let alone narrowly. 881 F. Supp. 2d at 716. The statute did not “target dangerous individuals or dangerous conduct.” *Id.* It did not

“impose reasonable time, place and manner restrictions” like a “curfew to allow the exercise of Second Amendment rights during circumscribed times.” *Id.* The statute “excessively intrude[d] upon plaintiffs’ Second Amendment rights by effectively banning them (and the public at large) from engaging in conduct that is at the very core of the Second Amendment at a time when the need for self-defense may be at its very greatest.” *Id.* (citing *Heller*, 554 U.S. at 795). Defendants’ Orders are indistinguishable from the orders in *Bateman*—they effectively destroy the right to keep and bear arms, and a categorical ban is never narrowly tailored. Defendants’ Orders cannot survive strict scrutiny.

Even if this Court concludes that only intermediate scrutiny applies, Defendants’ Orders still do not pass constitutional muster.⁹ “To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective.” *Reese*, 627 F.3d at 802 (quoting *United States v. Williams*, 616 F.3d 685, 692 (7th Cir. 2010)). Intermediate scrutiny further demands that restrictions of constitutionally protected conduct must be “narrowly tailored” and possess a “close fit between ends and means.” *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). “[T]he essence of narrow tailoring” is . . . ‘focus[ing] on

⁹ The Supreme Court held that the Second Amendment is not subject to “rational basis” review. *Heller*, 554 U.S. at 628 n.27. Therefore, Plaintiffs’ challenge must at least be resolved under intermediate scrutiny.

the source of the evils the [government] seeks to eliminate . . . without at the same time banning or significantly restricting a substantial quantity of speech [or conduct] that does not create the same evils.” *Golan v. Holder*, 609 F.3d 1076, 1083 (10th Cir. 2010) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n.7 (1989)) (some alterations in original). In other words, “when ‘the burden imposed by [a regulation] is congruent to the benefits it affords,’ that regulation is narrowly tailored.” *Id.* (quoting *Turner Broad. Sys., Inc.*, 520 U.S. at 215–16) (alteration in original). To carry this burden, the government must not only present evidence, but “substantial evidence” drawn from “reasonable inferences” that actually support its proffered justification. *Turner Broad. Sys., Inc.*, 520 U.S. at 195 (1997).

Again, and as described in more detail above, Defendants’ Orders are not narrowly tailored. They completely prohibit the exercise of rights protected by the core of the Second Amendment—the right to keep and bear arms for self-defense, to acquire arms and ammunition, to develop and maintain proficiency with arms, and to maintain the functionality of arms—while only having speculative effects on COVID-19. Defendants’ Orders must be stricken under intermediate scrutiny.

II. DEFENDANTS’ BAR ON THE EXERCISE OF PLAINTIFFS’ CONSTITUTIONALLY PROTECTED RIGHTS CONSTITUTES IRREPARABLE INJURY

The violation of a constitutionally protected right, without more, is an irreparable harm. *Elrod v. Burns* 427 U.S. 347, 373 (1976) (“The loss of First

Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”). The Tenth Circuit has upheld this principal for a spectrum of rights. *Hobby Lobby Stores, Inc.*, 723 F.3d at 1145 (religion) (quoting *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (speech)); *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016) (voting) (citation omitted).

The same standard applies to violations of Second Amendment protected rights. The Supreme Court made it clear that the Second Amendment is not a “second-class right, subject to an entirely different body of rules than the other Bill of Rights.” *McDonald*, 561 U.S. at 780. Both the Seventh and D.C. Circuits have held that a plaintiff suffers an irreparable injury when he is denied his Second Amendment protected rights. *Ezell*, 651 F.3d at 699; *Wrenn v. D.C.*, 864 F.3d 650, 667 (D.C. Cir. 2017).

As demonstrated above, Defendants’ Orders completely prohibit Plaintiffs from exercising their Second Amendment protected rights and from engaging in constitutionally protected conduct. Under state and federal law, Plaintiffs cannot exercise their natural and fundamental right to keep and bear arms without lawfully operating firearm retailers to sell and transfer arms, ranges to allow training to become proficient and maintain proficiency, and repair facilities to process and transfer arms that need service. Defendants’ Orders wholly and completely infringe

upon Plaintiffs’ constitutionally protected rights and liberties. Accordingly, Plaintiffs here are irreparably harmed.

III. THE BALANCE OF EQUITIES WEIGHS IN PLAINTIFFS’ FAVOR

“When a constitutional right hangs in the balance, though, ‘even a temporary loss’ usually trumps any harm to the defendant.” *Free the Nipple-Fort Collins*, 916 F.3d at 806 (citation omitted) (affirming the trial court’s holding that the loss of a constitutional right outweighs the “public’s interest in morality”). Indeed, in *Free the Nipple*, the Tenth Circuit held that “‘being required to wait to bare their breasts in public’ deprives the Plaintiffs of a constitutional right, while the City has no interest in keeping an unconstitutional law on the books.” *Id.*

Just as the harm to women forced to “‘wait to bare their breasts in public,” *id.*, outweighed any interest the government had in enforcing an unconstitutional law, there can be no question that the harm to Plaintiffs here—being deprived of the ability to keep, bear, acquire, sell, transfer, possess, train with, and/or transport a firearm to defend themselves in their homes—must also outweigh Defendants’ interests here. There can be no question Plaintiffs’ inability to exercise their constitutionally protected rights, in a time such as this, outweighs Defendants’ interest in enforcing an unconstitutional Order that fails to consider firearm retailers, ranges, and repair facilities as one of the many “essential businesses.”

IV. GRANTING AN INJUNCTION IS IN THE PUBLIC’S INTEREST

Granting Plaintiffs’ Motion and entering a preliminary injunction here is in the public’s interest. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Hobby Lobby Stores, Inc.*, 723 F.3d at 1147 (quoting *Awad*, 670 F.3d at 1132); *Free the Nipple-Fort Collins*, 916 F.3d at 807 (same). Second Amendment protected rights are no different—the Second Amendment is not a “second-class right, subject to an entirely different body of rules than the other Bill of Rights.” *McDonald, Ill.*, 561 U.S. at 780. Therefore, granting the injunction serves the public’s interest.

The government does not have any interest in enforcing an unconstitutional Order. The Supreme Court has repeatedly warned that “It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.” *Hamdi*, 542 U.S. at 532 (quoting *United States v. Robel*, 389 U.S. 258, 264 (1967) (alteration in original)). If the interest in national defense is not strong enough to justify the suspension of a fundamental constitutional right, then neither is COVID-19. Granting the injunction therefore serves the public’s interest.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs’ Motion for Temporary Restraining Order and/or Preliminary Injunction.

DATED this 15th day of April 2020.

Respectfully Submitted,

/s/Patrick J. Rogers

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Patrick J. Rogers, CERTIFY that, on April 16, 2020, I filed the foregoing using CM/ECF, which causes the parties of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/Patrick J. Rogers

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

Case No. 20-cv-00325

DECLARATION OF ROBERT ARAGON

I, Robert Aragon, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I am over 18 years of age and live in Albuquerque, New Mexico. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify to these facts.

2. I am a member of the Firearms Policy Coalition, LLC.

3. In light of the current circumstances surrounding the spread of and government response to COVID-19, I became concerned about my ability, to protect myself, my family, and my home.

4. I am not prohibited by federal law from purchasing or possessing a firearm, and I am able to pass a federal background check conducted in connection with the purchase and transfer of a firearm.

5. Unlike other constitutionally protected products that can be purchased online and shipped directly to me, under federal and state law, I cannot purchase a firearm online and have it shipped to my home.

6. In order for me to comply with federal and State law, I can only acquire and take possession of firearms in a face to face transaction at a duly licensed firearm retailer.

7. On March 23, 2020, I learned of Defendants' failure to designate firearm retailers and ranges as essential business and their Order to close. On April 6, 2020, I learned of the Governor's extension of the order through April 30, 2020.

8. On April 6, 2020, I also learned of the Governors' Order directing the Secretary of the New Mexico Corrections Department to compile a list of certain inmates, commuting the sentences of those inmates, and their ordered release from state correctional facilities.

9. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would purchase and take possession of a handgun and ammunition for the purpose of defending myself, my family, and our home. I would abide by all social distancing requirements when purchasing a handgun and ammunition.

10. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would make use of the firearm ranges ordinarily available to me to maintain my proficiency with a firearm. I would abide by all social distancing requirements when using the shooting range.

11. I want to exercise my right keep and bear arms—including purchasing a handgun and utilizing a firearms range—for lawful purposes including self-defense, and would do so, but for the reasonable and imminent fear of arrest and criminal prosecution, and/or civil liability under Defendants' laws and enforcement policies, orders, practices, and customs.

12. I have been and continue to be adversely and directly harmed because of Defendants' laws, policies, orders, practices, customs, and enforcement actions.

DATED this 16 day of April 2020.

/s/Robert Aragon

Robert Aragon

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

Case No. 20-cv-00325

DECLARATION OF DAVID ANTHONY SEGURA

I, David Anthony Segura, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I am over 18 years of age and live in Albuquerque, New Mexico, and am a named Plaintiff in the above captioned matter. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify to these facts.

2. I am a member of the National Rifle Association of America.

3. In light of the current circumstances surrounding the spread of and government response to COVID-19, I became concerned about my ability to protect myself, my family, and my home.

4. I am not prohibited by federal law from purchasing or possessing a firearm, and I am able to pass a federal background check conducted in connection with the purchase and transfer of a firearm.

5. Unlike other constitutionally protected products that can be purchased online and shipped directly to me, under federal and state law, I cannot purchase a firearm online and have it shipped to my home.

6. In order for me to comply with federal and State law, I can only acquire and take possession of firearms in a face to face transaction at a duly licensed firearm retailer.

7. I desire to exercise my fundamental right to keep and bear arms for self-defense and purchase a firearm and ammunition for self-defense and other purposes.

I also desire to exercise my fundamental right to practice proficiency shooting with firearms and ammunition.

8. But for Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would acquire firearms and ammunition, as well as teach and practice proficiency and safety with those arms and ammunition at a shooting range, for lawful and constitutionally protected purposes including self-defense.

9. On March 23, 2020, I learned of Defendants' failure to designate firearm retailers and ranges as essential business and their order to close. On April 6, 2020, I learned of the Governor's extension of the order through April 30, 2020.

10. On April 6, 2020, I also learned of the Governors' Order directing the Secretary of the New Mexico Corrections Department to compile a list of certain inmates, commuting the sentences of those inmates, and their ordered release from state correctional facilities.

11. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would purchase and take possession of a handgun and ammunition for the purpose of defending myself, my family, and our home and to train others to do the same. I would abide by all social distancing requirements when purchasing a handgun and ammunition.

12. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would make use of the firearm ranges ordinarily available to me to maintain my proficiency with a firearm. I would abide by all social distancing requirements while at a firearms range.

13. I am a licensed firearms instructor in the State of New Mexico (Instructor Number 556) and a certified NRA pistol instructor and range safety officer. I teach several New Mexico Department of Public Safety certified firearms training courses that are required to receive a concealed handgun license. These courses also promote the safe handling and use of firearms.

14. Due to Defendants' Orders closing firearm ranges, where I conduct both in-person classroom and live shooting instruction, I can no longer offer a complete course that meets New Mexico's requirements to apply for or renew a concealed handgun license.

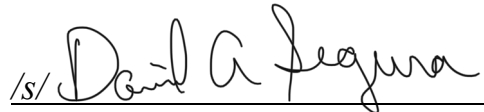
15. I already cancelled a course scheduled for March 29, 2020, due to Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions. I will have to cancel at least one additional course scheduled for April 21–23, 2020, and April 26, 2020, should Defendants' Orders remain in effect.

16. But for Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions prohibiting the operation

of firearms ranges, I would continue to engage in the business of lawfully instructing and training individuals in the State of New Mexico in the safe operation of their firearms. I would abide by all social distancing requirements when offering these courses.

17. I, as well as my customers and individuals who would be customers, have been and continue to be adversely and directly harmed because of Defendants' laws, policies, practices, customs, and enforcement actions.

DATED this 15 day of April 2020.


/s/ David A Segura
David Anthony Segura

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

Case No. 20-cv-00325

DECLARATION OF ZACHARY FORT

I, Zachary Fort, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I am over 18 years of age and live in Albuquerque, New Mexico, and am a named Plaintiff in the above captioned matter. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify to these facts.

2. I am the President of the New Mexico Shooting Sports Association and am authorized to speak on its behalf. I am a member of the National Rifle Association of America; Firearms Policy Coalition, Inc.; and Second Amendment Foundation.

3. In light of the current circumstances surrounding the spread of and government response to COVID-19, I became concerned about my ability, to protect myself, my family, and my home.

4. I am not prohibited by federal law from purchasing or possessing a firearm, and I am able to pass a federal background check conducted in connection with the purchase and transfer of a firearm.

5. Unlike other constitutionally protected products that can be purchased online and shipped directly to me, under federal and state law, I cannot purchase a firearm online and have it shipped to my home.

6. In order for me to comply with federal and State law, I can only acquire and take possession of firearms in a face to face transaction at a duly licensed firearm retailer.

7. On March 23, 2020, I learned of Defendants' failure to designate firearm retailers and ranges as essential business and their Order to close. On April 6, 2020, I learned of the Governor's extension of the order through April 30, 2020.

8. On April 6, 2020, I also learned of the Governors' Order directing the Secretary of the New Mexico Corrections Department to compile a list of certain inmates, commuting the sentences of those inmates, and their ordered release from state correctional facilities.

9. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would purchase and take possession of a handgun and ammunition for the purpose of defending myself, my family, and our home. I would abide by all social distancing requirements when purchasing a handgun and ammunition.

10. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would make use of the firearm ranges ordinarily available to me to maintain my proficiency with a firearm. I would abide by all social distancing requirements when using the shooting range.

11. I previously possessed a valid New Mexico concealed handgun license issued to me by the New Mexico Department of Public Safety. My concealed handgun license expired on April 12, 2020. I am unable to renew my license because

New Mexico law requires me to complete a refresher course with a live shooting component. I am otherwise legally eligible to renew my concealed handgun license.

12. Because of Defendants' closure of firearm ranges, I was and still am unable to complete a refresher course in accordance with New Mexico law. I am otherwise eligible to renew my concealed handgun license.

13. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would make use of the firearm ranges ordinarily available to me to take a state licensed refresher course and renew my concealed handgun license. I would abide by all social distancing requirements when using taking the refresher course and renewing my concealed handgun license.

14. In New Mexico, law-abiding individuals such as myself must have a concealed handgun license to carry a firearm in any place that dispenses liquor but does not sell liquor for consumption such as grocery stores, gasoline stations, and convenience stores.

15. Defendants' Orders and enforcement or potential enforcement prevent me, on pain of civil and/or criminal penalty, from leaving my home and vehicle while carrying a firearm for essential purposes, including but not limited to, purchasing groceries, toiletries, home necessities, and gasoline.

16. I would like to carry a firearm for the purpose of self-defense while outside my home and vehicle for state defined essential purposes. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions, I would carry a firearm with outside my home and vehicle for essential purposes with a valid concealed handgun license for the lawful purpose of self-defense. I would abide by all social distancing requirements while travelling and interacting while carrying a concealed handgun with a valid concealed handgun license for essential purposes such as purchasing groceries, toiletries, home necessities, and gasoline.

17. I want to exercise my right keep and bear arms—including purchasing a handgun, utilizing a firearms range, and renewing my concealed handgun license to carry concealed outside the home—for lawful purposes including self-defense, and would do so, but for the reasonable and imminent fear of arrest and criminal prosecution, and/or civil liability under Defendants' laws and enforcement policies, orders, practices, and customs.

18. I have been and continue to be adversely and directly harmed because of Defendants' laws, policies, practices, customs, and enforcement actions.

DATED this 15 day of April 2020.

/s/ 
Zachary Fort

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

Case No. 20-cv-00325

DECLARATION OF ELIZABETH ROSE JANTZ

I, Elizabeth Rose Jantz, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I am over 18 years of age and live in Moriarty, New Mexico. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify to these facts.

2. In light of the current circumstances surrounding the spread and government response to COVID-19, I became concerned about my ability, the ability of my customers, and the ability of the general public to protect ourselves, our families, and our homes.

3. I am not prohibited by federal law from purchasing or possessing a firearm.

4. I am the manager and organizer of Rose's Guns & More, LLC ("Rose's Guns") and am authorized to speak on its behalf. Rose's Guns is licensed to conduct business as a firearms retailer by the Bureau of Alcohol, Tobacco, Firearms, & Explosives. Rose's Guns is authorized to do business and is in good standing in the State of New Mexico. I have personal knowledge of the business operations of Rose's Guns.

5. Rose's Guns is a member of Firearms Policy Coalition, LLC.

6. In order to transfer a firearm to a purchaser, federal law requires Rose's Guns to meet with the purchaser in person and, among other things, complete a federal background check.

7. Unlike other constitutionally protected products that can be purchased online and shipped directly to the customer, under federal and state law, an individual cannot purchase a firearm online and have it shipped to their home.

8. In order for individuals to comply with New Mexico law, they may only acquire and take possession of firearms in a face to face transaction at a licensed firearm dealer, absent minor exceptions that are generally inapplicable to the majority of individuals. Firearm and ammunition product manufacturers, retailers, importers, distributors, and shooting ranges are “Essential Businesses” to us and our customers.

9. On March 23, 2020, I learned of Defendants’ failure to designate firearm retailers and ranges as essential business and their Order to close. On April 6, 2020, I learned of the Governor’s extension of the Order through April 30, 2020.

10. On Tuesday, March 24, 2020, an agent of Rose’s Guns contacted Governor Michelle Lujan Grisham’s office by phone, and was informed by the party who answered that firearm retailers were not considered essential and must close.

11. On Tuesday, March 24, 2020, an agent of Rose’s Guns contacted New Mexico Attorney General Hector Balderas’ office by phone and was informed by the party who answered that firearm retailers were not considered essential and must close.

12. On Tuesday, March 24, 2020, an agent of Rose's Guns spoke with Moriarty Mayor Ted A. Hart multiple times in person and by phone, who was initially uncertain about the application of the Orders to firearm retailers. Upon further investigation Mayor Hart informed Rose's Guns that firearm retailers were not considered essential and must close.

13. On Tuesday, March 24, 2020, an agent of Rose's Guns contacted the New Mexico State Police by phone and was informed by the party who answered that firearm retailers were not considered essential and must close.

14. On Tuesday, March 24, 2020, an agent of Rose's Guns contacted New Mexico Senator James P. White and spoke with the Senator personally, who said that his information was that the Governor's Orders would not seem to cover firearms that were purchased and paid for prior to Defendants' orders, and only had to be delivered to the lawful purchasers. Senator White suggested calls to the Mayor and State Police to confirm.

15. On Tuesday, March 24, 2020, an agent of Rose's Guns contacted the Moriarty City Police by phone and spoke with the Moriarty Chief of Police who stated that firearm retailers were not considered essential and must close. Rose's Guns informed the Chief of Police of Senator White's interpretation of the remaining firearm transfers it had pending. The Chief of Police did not take a position, but

asked Rose's Guns that it inform the City Police each time it conducted such a transfer.

16. Based on the official statements from the Governor's Office, the Attorney General's office, Mayor Hart, Senator White, and the State Police, Rose's Guns ceased all retail business operations the evening of Tuesday, March 24, 2020. Rose's Guns has not engaged in a business transaction since it ceased operation. It has not engaged in the transfer of a firearm, except for transfers that were pending prior to Defendants' Orders—and for each of those, six total, Rose's Guns contacted and informed the State Police.

17. It is also my understanding that Defendants' Orders do not designate Rose's Guns as an essential business and require Rose's Guns to be closed to the public. Such closures damage Rose's Guns, other firearm and ammunition retailers, our customers, and law-abiding members of the public who wish to exercise their rights.


18. Rose's Guns would abide by all social distancing and workforce reduction requirements applicable to other "essential businesses" while operating, including but not limited to, limiting the number of people in the store, routinely disinfecting hard surfaces, and imposing social distancing requirements.

19. Very little of Rose's Guns' operation requires direct public interaction, however, that portion is integral, as it is impossible for Rose's Guns to lawfully transfer a firearm to an individual unless they can appear in person at the store.

20. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions prohibiting the operation of firearms retailers, Rose's Guns would continue to engage in the business of lawfully purchasing, selling, and transferring firearms and ammunition. Rose's Guns' agents fear arrest, criminal prosecution, and/or civil liability for engaging in its business activity—activity that is constitutionally protected.

21. Rose's Guns, as well as our customers and individuals who would be customers, have been and continue to be adversely and directly harmed because of Defendants' laws, policies, orders, practices, customs, and enforcement actions.

DATED this 15 day of April 2020.


Elizabeth Rose Jantz
Manager and Organizer
ROSE'S GUNS & MORE, LLC

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

Case No. 20-cv-00325

DECLARATION OF RICHARD KENNEDY

I, Richard Kennedy, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I am over 18 years of age and live in Edgewood, New Mexico, and am a named Plaintiff in the above captioned matter. I have personal knowledge of the facts stated herein, and if called as a witness, I could competently testify to these facts.

2. I am a member of both Firearms Policy Coalition, Inc. and Second Amendment Foundation.

3. In light of the current circumstances surrounding the spread of and government response to COVID-19, I became concerned about my ability, the ability of my customers, and the ability of the general public to protect ourselves, our families, and our homes.

4. I am not prohibited by federal law from purchasing or possessing a firearm.

5. I am a member of Southwest Gunsmith Technologies, LLC ("Southwest Gunsmith") and am authorized to speak on its behalf. Southwest Gunsmith is licensed to conduct business as a federal firearms licensee by the Bureau of Alcohol, Tobacco, Firearms, & Explosives. Southwest Gunsmith is authorized to do business and is in good standing in the State of New Mexico. I have personal knowledge of the business operations of Southwest Gunsmith.

6. Southwest Gunsmith operates as a gunsmithing service. Gunsmithing allows us to design, build, modify, renovate, and repair firearms, magazines, and

appurtenances for our customers. In order to provide our services, we must meet with the customer in person and legally take possession of their firearm. Firearm and ammunition product manufacturers, retailers, repair facilities, importers, distributors, and shooting ranges are “Essential Businesses” to us and our customers.

7. On March 23, 2020, I learned of Defendants’ failure to designate firearm retailers, ranges, and repair facilities as essential business and their Order to close. On April 6, 2020, I learned of the Governor’s extension of the Order through April 30, 2020.

8. Southwest Gunsmith’s rents space in MAGS Indoor Range Shooting Range (“MAGS”) in Moriarty, New Mexico. This space is integral to Southwest Gunsmith’s operation, as it is its only retail space open to the public, where as a matter of practice it conducts client and firearm intake, which include federally mandated transfers, that are necessary to its business operations.

9. On March 29, 2020, MAGs informed me that they were visited by the New Mexico Department of Public Safety who informed them that they must cease all operations or that they would be subject to a \$60,000 fine. As a result of that visit, MAGS closed its doors at that point and informed me of the closure.

10. Southwest Gunsmith ceased all retail business operations on Sunday, March 29, 2020. Southwest Gunsmith has not engaged in a business transaction nor a firearm transfer since it ceased operation.

11. It is my understanding that Defendants' Orders do not designate Southwest Gunsmith as an essential business and require Southwest Gunsmith to be closed to the public. Such closures damage Southwest Gunsmith, other firearm and ammunition retailers and repair facilities, our customers, and law-abiding members of the public who wish to exercise their rights.

12. Southwest Gunsmith would abide by all social distancing and workforce reduction requirements applicable to other "essential businesses" while operating, including but not limited to, limiting the number of people in the store, routinely disinfecting hard surfaces, and imposing social distancing requirements.

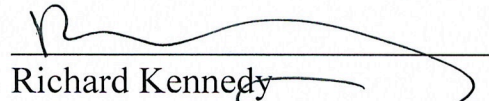
13. Very little of Southwest Gunsmith's operation is public facing, however, that portion is integral, as Southwest Gunsmith is unable receive and return a firearm unless the customer is able to appear in person at the store.

14. But for the Defendants' Orders and actions and reasonable fear of prosecution under those Orders and enforcement actions prohibiting the operation of firearms retailers, Southwest Gunsmith would continue to engage in its business of gunsmithing, including lawfully transferring firearms. Southwest Gunsmith's agents fear arrest, criminal prosecution, and/or civil liability for engaging in its business activity—activity that is constitutionally protected.

15. Southwest Guns and I, as well as our customers and individuals who would be customers, have been and continue to be adversely and directly harmed

because of Defendants' laws, policies, orders, practices, customs, and enforcement actions.

DATED this 5th day of April 2020.


Richard Kennedy
Member and Authorized Agent
SOUTHWEST GUNSMITH
TECHNOLOGIES, LLC

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

Case No. 20-cv-00325

DECLARATION OF ALAN GOTTLIEB

I, Alan Gottlieb, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I am the Executive Vice President of Second Amendment Foundation, (“SAF”), a Plaintiff in this action, and am over 18 years of age. I am authorized to speak and testify on behalf of SAF as to the matters set forth in this Declaration.

2. SAF is a non-profit corporation organized under the laws of the State of Washington with its principal place of business in Bellevue, Washington.

3. SAF has over 650,000 members and supporters nationwide, including in the State of New Mexico.

4. The purposes of SAF include promoting the exercise of the right to keep and bear arms and legal action focusing on the constitutional right to privately own and possess firearms.

5. 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.

6. Both members and supporters of SAF have contacted our organization because they have been unable to purchase firearms or ammunition or use firearms ranges because of the challenged COVID-19 orders that are currently in place and enforcement thereof.

7. SAF is participating in this case on behalf of its members and supporters, including the named Plaintiffs, and similarly situated individuals.

8. SAF has and continues to expend and divert resources, and has been and continues to be adversely and directly harmed, because of Defendants' laws and orders, and their enforcement policies, orders, practices, customs, and actions challenged herein.

9. SAF is also participating in this case on its own behalf to rectify the losses, damages, and other injuries caused to it by the COVID-19 emergency orders mandating the closure of firearm and ammunition retailers, ranges, and repair facilities. As a result of these orders, and the Defendants' implementation of these orders, SAF has spent and continues to spend a significant amount of time responding to requests from the public, and it also spends both time and money making pertinent information available. All of these expenditures of time and money caused by Defendants' orders and enforcement thereof come at the expense of other priorities that SAF would otherwise pursue.

10. If the Defendants' laws, orders, and enforcement policies, practices, and customs challenged in this case are not enjoined, additional harm will result in the form of ongoing damages to SAF and its members, and similarly situated members of the public.

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DATED this 15th day of April 2020.

/s/ Alan M. Gottlieb

Alan Gottlieb
Executive Vice President
SECOND AMENDMENT FOUNDATION

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

Case No. 20-cv-00325

DECLARATION OF JOSH SAVANI

I, Josh Savani, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I am the Director of Research and Information of the National Rifle Associa-

tion of America, Inc. (“NRA”), a Plaintiff in this action, and am over 18 years of age. I am authorized to speak and testify on behalf of NRA as to the matters set forth in this Declaration.

2. NRA is a 501(c)(4) nonprofit corporation organized under the laws of the State of New York with its principal place of business in Fairfax, Virginia.
3. NRA has over 5 million members and supporters nationwide, including in the State of New Mexico. These members include Plaintiffs David Anthony Segura and Zachary Fort.
4. In Accordance with Article II of the NRA’s bylaws, the NRA’s purposes and objectives include “To protect and defend the Constitution of the United States, especially with reference to the God-given inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess ... transfer ownership of, and enjoy the right to use, keep and bear arms, in order that the people may exercise their individual rights of ... defense of family, person, and property.”
5. As detailed in the Plaintiffs’ Complaint, Plaintiffs, Plaintiffs’ members and customers, and other similarly situated individuals would exercise the fundamental human right to acquire, keep, bear, and practice proficiency training and shooting with arms – including firearms, ammunition, magazines, and appurtenances – for lawful purposes including self-defense, and would do so, but for fear of liability and prosecution under Defendants’ laws, orders, poli-

cies, practices, customs, and enforcement actions.

6. Members of NRA have contacted our organization because they have been unable to purchase firearms or ammunition or use firearms ranges because of the challenged COVID-19 orders that are currently in place and enforcement thereof.
7. NRA is participating in this case on behalf of its members and supporters, including the named Plaintiffs, and similarly situated individuals.
8. NRA has and continues to expend and divert resources, and has been and continues to be adversely and directly harmed, because of Defendants' laws and orders, and their enforcement policies, orders, practices, customs, and actions challenged herein.
9. NRA is also participating in this case on its own behalf to rectify the losses, damages, and other injuries caused to it by the COVID-19 emergency orders mandating the closure of firearm and ammunition retailers, ranges, and repair facilities. As a result of these orders, and the Defendants' implementation of these orders, NRA has spent and continues to spend a significant amount of time responding to requests from the public, and it also spends both time and money making pertinent information available. All of these expenditures of time and money caused by Defendants' orders and enforcement thereof come at the expense of other priorities that NRA would otherwise pursue
10. If the Defendants' laws, orders, and enforcement policies, practices, and cus-

toms challenged in this case are not enjoined, additional harm will result in the form of ongoing damages to NRA and its members, and similarly situated members of the public.

DATED this 15th day of April 2020.

/s/ 
Josh Savani

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

ROBERT ARAGON; DAVID ANTHONY SEGURA; ZACHARY FORT; RICHARD KENNEDY; ROSE'S GUNS & MORE, LLC, a limited liability company; SOUTHWEST GUNSMITH TECHNOLOGIES, LLC, a limited liability company; NEW MEXICO SHOOTING SPORTS ASSOCIATION, a nonprofit corporation; NATIONAL RIFLE ASSOCIATION OF AMERICA, a nonprofit corporation; SECOND AMENDMENT FOUNDATION, a nonprofit corporation; and FIREARMS POLICY COALITION, INC., a nonprofit corporation,

Plaintiffs,

v.

MICHELLE LUJAN GRISHAM, Governor of New Mexico, in her official capacity; NEW MEXICO DEPARTMENT OF HEALTH; and KATHYLEEN KUNKEL, Secretary for the New Mexico Department of Health, in her official capacity; J. Does 1–10,

Defendants.

Case No. 20-cv-00325

DECLARATION OF BRANDON COMBS

I, Brandon Combs, declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following statements are true and correct to the best of my knowledge:

1. I am the President of Firearms Policy Coalition, Inc., (“FPC”), a Plaintiff in this action, and am over 18 years of age. I am authorized to speak and testify on behalf of FPC as to the matters set forth in this Declaration.

2. FPC is a not-for-profit corporation organized under Delaware law.

3. FPC’s mission is to defend and promote the People’s rights—especially the natural, fundamental, individual Second Amendment protected right to keep and bear arms—advance individual liberty, and restore freedom.

4. FPC’s purposes are: (A) To protect and defend the Constitution of the United States and the People’s rights, privileges and immunities deeply rooted in this Nation’s history and tradition, especially the inalienable, fundamental, and individual right to keep and bear arms; (B) To protect, defend, and advance the means and methods by which the People of the United States may exercise those rights, including, but not limited to, the acquisition, collection, transportation, exhibition, carry, care, use, and disposition of arms for all lawful purposes, including, but not limited to, self-defense, hunting, and service in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens; (C) To foster and promote the shooting sports and all lawful uses of arms; and, (D) To foster and promote awareness of, and public engagement in, all of the above.

5. FPC serves its members and the public through legislative and regulatory advocacy, grassroots advocacy, litigation and legal efforts, research, education, outreach, and other programs.

6. FPC has members and supporters, who have all the indicia of membership, in the State of New Mexico.

7. Both members and supporters of FPC have contacted our organization because they have been unable to purchase firearms or ammunition or use firearms ranges because of the challenged COVID-19 orders that are currently in place and enforcement thereof.

8. FPC is participating in this case on behalf of its members and supporters, including the named Plaintiffs, and similarly situated individuals.

9. FPC has and continues to expend and divert resources, and has been and continues to be adversely and directly harmed, because of Defendants' laws and orders, and their enforcement policies, orders, practices, customs, and actions challenged herein.

10. FPC is also participating in this case on its own behalf to rectify the losses, damages, and other injuries caused to it by the COVID-19 emergency orders mandating the closure of firearm and ammunition retailers, ranges, and repair facilities. As a result of these orders, and the Defendants' implementation of these orders, FPC has spent and continues to spend a significant amount of time

responding to requests from the public, and it also spends both time and money making pertinent information available. All of these expenditures of time and money caused by Defendants' orders and enforcement thereof come at the expense of other priorities that FPC would otherwise pursue.

11. If the Defendants' laws, orders, and enforcement policies, practices, and customs challenged in this case are not enjoined, additional harm will result in the form of ongoing damages to FPC and its members, and similarly situated members of the public.

DATED this 15th day of April 2020.

A handwritten signature in black ink, appearing to read 'Brandon Combs', is written over a horizontal line.

Brandon Combs
President
FIREARMS POLICY COALITION, INC.