

Firearm Industry Groups Are Using COVID-19 to Expand Gun Rights

Jennifer L. Pomeranz, JD, MPH

In response to the COVID-19 pandemic, Washington State was the first to declare a state of emergency on February 29, 2020; thereafter, 47 additional states declared states of emergency and the federal government declared a national emergency on March 13, 2020.¹ During the COVID-19 states of emergency, states have ordered nonessential businesses to close.

Each state has a different definition of what is considered essential during state of emergency shutdowns. Essential businesses in New York, for example, include services such as health care operations (eg, hospitals, clinics), utilities, essential retail (eg, grocery stores, pharmacies), and providers of basic necessities to underserved populations.² While New York, New Jersey, and California do not include firearm retailers as essential, other states such as Connecticut have allowed firearm retailers to remain open as essential operations. As a result, the National Rifle Association (NRA) and other firearm advocacy organizations sued New York,³ New Jersey,⁴ and California⁵ for not listing firearm retailers as essential businesses, arguing their failure to do so violates the Second Amendment of the US Constitution.

The firearm industry is engaging in cross-state efforts urging legislatures and courts to interpret gun retail to be an essential service, setting the stage for later arguments that firearm retail is a fundamental right. In addition to the lawsuits in those 3 states, in March 2020, the Supreme Court of Pennsylvania issued an opinion on an unrelated essential services issue. Three judges filed a dissenting opinion arguing that the state must provide “a legal avenue for the purchase and sale of firearms, thus avoiding an impermissible intrusion

upon a fundamental constitutional right.”⁶ Accepting this argument would require an expanded interpretation of the Second Amendment, which specifically protects the right to keep and bear—not sell—arms.

The NRA’s argument is also contrary to governmental authorities during a state of emergency, the use of which necessarily impinges on freedoms and rights strictly guarded during nonemergency times. The clearest examples are isolation and quarantine of individuals who are ill or have been exposed to sick individuals.⁷ There is no question that the federal and state governments have the authority to quarantine and isolate people in certain circumstances during a public health crisis⁷; such confinement intrudes on liberty and privacy interests by restricting a person’s movement from home or quarantine facilities and thereby also prevents their movement across state lines.⁸ Similar confinement and prevention of cross-state movement without a public health or similar emergency justification (or outside of the criminal system) would not be legally justifiable.

Many states have also prohibited public and private gatherings of more than 9 individuals. Yet, the First Amendment of the US Constitution explicitly protects the right to peaceably assemble. Thus, state-of-emergency restrictions necessarily prohibit protected expression such as through parades during this time period. The NRA’s arguments are thus contrary to the fact that during a state of an emergency, government may restrict the free exercise of certain fundamental rights with sufficient justification, including whatever actual right there is to sell or purchase firearms.

The Second Amendment states: “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.” In its 2008 decision, *District of Columbia v Heller*, the US Supreme Court reversed a century of case law to interpret the Second Amendment as protecting gun ownership without any relationship to a well-regulated militia.⁹ Then in 2010, in *McDonald v City of Chicago*, the Supreme Court held that “the right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered

Author Affiliation: School of Global Public Health, New York University, New York, New York.

The author declares no conflicts of interest.

Correspondence: Jennifer L. Pomeranz, JD, MPH, School of Global Public Health, New York University, 715 Broadway, 10th Floor, New York, NY 10003 (jlp284@nyu.edu).

Copyright © 2020 Wolters Kluwer Health, Inc. All rights reserved.

DOI: 10.1097/PHH.0000000000001195

liberty,” so the Second Amendment applies equally to the states.¹⁰ The current lawsuits seek to capitalize on the COVID-19 states of emergency to expand gun rights through state declarations that firearm retail is an essential service and thus fundamental right.

However, in *District of Columbia v Heller*, the majority of the Court defined the rights secured by the Second Amendment as the right to “keep arms,” which it found was “simply a common way of referring to possessing arms.”⁹ The second right is the right to “bear arms,” which the Court explained means “to ‘carry.’”⁹ The possession and carrying of firearms do not include the sale or purchase thereof. Moreover, in *District of Columbia v Heller*, and *McDonald v City of Chicago*, the Court expressly stated that its holdings did not interfere with state “laws imposing conditions and qualifications on the commercial sale of arms.”^{9,10} Such conditions include determinations that the commercial sale of firearms is nonessential during state and national public health emergencies and the subsequent closure of firearm retail establishments.

Reducing the sale and use of firearms during a pandemic is equally necessary from a community resources perspective.¹¹ During the COVID-19 pandemic, there is a shortage of health care resources, equipment, services, and professionals. Yet, firearm violence requires care across emergency medicine, radiology, anesthesiology, surgery, physical medicine, rehabilitation, psychiatry, paramedics, nursing, pharmacists, and hospital administrators and staff,¹² all of whom are needed to attend to the pandemic at hand.

To support community health and reduce firearm violence in the short term, states should continue to recognize firearm retailers as nonessential businesses. To reduce firearm violence in the long term, Congress and state legislatures should fundamentally shift the

focus of the law to protect transparent politics and public health. Otherwise, the firearm industry will continue to seize upon any opportunity it can find—even an international public health emergency—to prioritize gun retailers and owners over the nation’s safety.

References

1. Lockdowns, closures: how is each US state handling coronavirus? *Aljazeera*. April 10, 2020. <https://www.aljazeera.com/news/2020/03/emergencies-closures-states-handling-coronavirus-200317213356419.html>. Accessed April 12, 2020.
2. What businesses are considered essential under Tri-State Workforce Reductions Order. *NBC New York*. Updated April 3, 2020. <https://www.nbcnewyork.com/news/business/what-businesses-are-considered-essential-under-ny-workforce-reduction-order/2336886>. Accessed April 12, 2020.
3. Hakim D. Ailing N.R.A. finds new rallying cry: keep gun shops open. *The New York Times*. April 2, 2020. <https://www.nytimes.com/2020/04/02/us/nra-guns-coronavirus.html>. Accessed April 12, 2020.
4. Rummell N. New Jersey sued for closing gun shops in pandemic. *Courthouse News Service*. March 23, 2020. <https://www.courtnewshouse.com/new-jersey-sued-for-closing-gun-shops-in-pandemic>. Accessed April 12, 2020.
5. Passantino J. NRA sues California Gov. Gavin Newsom and other state officials over gun store closures. *CNN*. March 28, 2020. <https://www.cnn.com/2020/03/28/us/nra-sues-california-over-gun-store-closures/index.html>. Accessed April 12, 2020.
6. Civil Rights Def. Firm, P.C. v Wolf, 2020 Pa. LEXIS 1585 (March 22, 2020) (concurring and dissenting opinion of Judge Wecht).
7. Hershey TB, Pryde JA, Mwaungulu GS Jr, Phiifer VI, Roszak AR. Putting the law into practice: a comparison of isolation and quarantine as tools to control tuberculosis and Ebola. *J Public Health Manag Pract*. 2017;23(2):e25-e31.
8. Katz R, Vaught A, Formentos A, Capizola J. Raising the yellow flag: state variation in quarantine laws. *J Public Health Manag Pract*. 2018;24(4):380-384.
9. *District of Columbia v Heller*, 554 US 570 (2008).
10. *McDonald v City of Chicago*, 561 US 742 (2010).
11. Jiang Y, Ranney ML, Sullivan B, Hilliard D, Viner-Brown S, Alexander-Scott N. Can statewide emergency department, hospital discharge, and violent death reporting system data be used to monitor burden of firearm-related injury and death in Rhode Island? *J Public Health Manag Pract*. 2019;25(2):137-146.
12. Ranney ML, Betz ME, Dark C. #ThisIsOurLane—firearm safety as health care’s highway. *N Engl J Med*. 2019;380:405-407.