

February 4, 2019

RQ-0269-KP

FILE # ML-48494-19

I.D. # 48494

Attorney General Ken Paxton
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711

Re: Request for a legal opinion about the legality of municipal governments regulating firearm and ammunition sales as gun-control measures through City zoning or other regulations in light of Texas law

Dear Attorney General Paxton:

It is my understanding that some Texas cities have begun pursuing gun-control measures that regulate firearms and ammunition sales in ways that seem likely to impinge upon the individual freedoms of Texas citizens, and that may contradict longstanding states and federal regulations. These new regulations include prohibitions against everything from sporting goods stores to gun shows within vast portions of some cities, in some cases treating gun stores, gun shows-and by extension, individual Texas citizens who lawfully purchase weapons-similar to how state law currently treats registered sex offenders.

Texas law may prohibit local gun-control regulations

Texas law appears to prohibit cities from regulating firearm or ammunition sales, transfers, or transportation, instead reserving those matters for the Legislature. Tex. Local Gov't Code § 229.001(a)(1) & (3) (prohibiting cities from regulating "the transfer, private ownership, keeping, transportation, licensing, or registration of firearms, air guns, knives, ammunition, or firearm or air gun supplies [.]"). Texas law also prohibits local regulation of "the discharge of a firearm or air gun at a sport shooting range." *Id.* at § 229.001(b). Cities are also not allowed to limit shooting range hours unless they are able to be open at least as much as certain bars. *Id.* at § 229.001(b)(7).

Texas law may allow cities to have *some* zoning laws that *could* apply to gun stores among other businesses, *see* Texas Local Gov't Code § 229.001(b)(3), however, the Legislature also limited that power to instances where the regulations "are not used to circumvent the intent of" the prohibition against regulating gun sales, ammo sales, shooting ranges, and the like. *Id.* at § 229.001(b)(3) (specifically stating that, even as to zoning, cities may not "circumvent the intent of" the prohibition against regulating firearm sales, ammunition sales, and shooting ranges).

Regardless, the City of San Antonio ("the City") recently proposed two regulations of gun sales within the City that would severely restrict where gun sales may take place. When asked whether this law applies, the City of San Antonio's attorney advised City Council members that

the City may freely regulate gun sales simply because it is not regulating licensing, registration, or transportation of firearms *as well*.¹ The City's attorney also said that San Antonio may regulate gun sales, ammunition sales, and gun ranges because there is a precedent: the City of Galveston has done so already. *Id.*

By way of analogy, the City appears to be saying that a school child who is told to use a pencil, rather than use a pen, a crayon, or a marker, may actually *still* use a pen since he is not using a crayon and a marker *as well*. And then the City appears to be saying that the child may use a pen because another kid did it too. I am hopeful that you can bring clarity to the City's legal assertions about this important manner.

Regulations in question

The City of San Antonio recently proposed and is now considering two gun-control regulations restricting both gun and ammunition sales. In the first, the City proposes to ban all firearm and ammunition sales within 1,000 feet of any school or church, which would presumably prohibit sporting-goods stores from locating within the majority of the City.²

In addition to that, the City proposes to limit any business that sells guns or ammunition to locate only in the highest-density commercial areas in the City.³ A copy of this proposed regulation is attached to this letter and is also available at the website cited above.⁴

The City proposes to do these things even though the City's Chief of Police, William McManus, advised the City Council's Committee on Public Safety when asked whether this would impact gun violence: "I can't answer that with any degree of certainty."⁵

Another city, Galveston, prohibits all "gun shops" from locating within 200 feet from schools, public parks, or places of worship. Sec. 2.329 of Development Code, City of Galveston (a copy is attached to this letter). In addition, Galveston has noise limitations that appear to prohibit the development of gun ranges-but *only* gun ranges- to keep the precise decibel level of the previously-existing usage).

¹ Recording of Sept. 26, 2018 Public Safety Committee meeting, available at: <https://sanantonio.legistar.com/MeetingDetail.aspx?ID=639220&GUID=CA409134-DA36-45E0-ABE3-287F5528E91E&Options=info&Search=public+safety>.

² *Compare* Recording of Sept. 26, 2018 Public Safety Committee meeting, available at: <https://sanantonio.legistar.com/MeetingDetail.aspx?ID=639220&GUID=CA409134-DA36-45E0-ABE3-287F5528E91E&Options=info&Search=public+safety> (discussing this proposal), *with* Tex. Gov't Code § 508.187 (establishing child safety zones and requiring that registered sex offenders not "go in, on, or within a distance of" these zones where "children commonly gather" such as a school), *and* Tex. Dep't of Crim. Justice Policy PD/POP-3.65, Aug. 15, 2017 (establishing "500 feet" as the distance registered sex offenders must keep from child safety zones, including schools).

³ Recording of Sept. 26, 2018 Public Safety Committee meeting, available at: <https://sanantonio.legistar.com/MeetingDetail.aspx?ID=639220&GUID=CA409134-DA36-45E0-ABE3-287F5528E91E&Options=info&Search=public+safety>.

⁴ The City proposed grandfathering in current uses, but in order to be grandfathered in, a number of conditions must be met, such as continuous usage (even for gun shows, which must obtain a new permit every 12 months). Moreover, the City's proposed regulations do not appear to allow for any future modifications to those uses to, for instance, cover a slightly larger area, so it appears that over time, the "grandfathered" users may become unlawful as well, especially in the case of gun shows.

⁵ Recording of Sept. 26, 2018 Public Safety Committee meeting, available at: <https://sanantonio.legistar.com/MeetingDetail.aspx?ID=639220&GUID=CA409134-DA36-45E0-ABE3-287F5528E91E&Options=info&Search=public+safety>.

Federal law may also prohibit these regulations

In addition to the state law described above, my understanding is that the United States Supreme Court and the federal courts of appeals now view any regulation that burdens Second Amendment rights with a higher level of scrutiny since that regulation may impinge upon individuals' rights under the Second Amendment of the United States Constitution. *See, e.g., McDonald v. City of Chicago*, 561 U.S. 742 (2010) (striking down a city regulation that regulated handgun ownership and transportation); *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) (striking down local zoning regulations that prohibited gun ranges in ways similar to the measures discussed above); *Mance v. Sessions*, 880 F.3d 183 (5th Cir. 2018) (applying what your office recently described as a "form of strict scrutiny" to a gun regulation under a Second Amendment analysis).

It is my understanding that the Fifth Circuit Court of Appeals analyzes laws challenged under the Second Amendment and requires the government to meet "strict scrutiny," which means that the City must have a compelling governmental interest to regulate the matter (in light of state law) and that their regulation must be the most narrowly tailored means to achieve regulation. Or, at the very least, city regulations of gun ownership and transfer must pass "heightened scrutiny," as in the original *Ezell* case, where the Seventh Circuit Court of Appeals clarified that "a severe burden on the core Second Amendment right of armed self-defense will require an extremely strong public-interest justification and a close fit between the government's means and its end." *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011); *see also District of Columbia v. Heller*, 554 U.S. 570, 628 n.27 (2008) ("if all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibition on irrational laws, and would have no effect.")

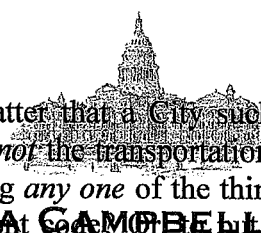
In addition, the Texas Constitution, like the United States Constitution, contains a provision guaranteeing citizens the right to bear arms. Tex. Const., art. I § 23. My understanding is that the Texas Supreme Court would likely interpret the Texas Constitution as protecting the right to bear arms at least as much as the federal constitution, similar to how that Court treats First Amendment case.

Thus, the City of San Antonio's proposed regulations may be barred by three separate laws: state law, state constitutional law, and federal constitutional law.

Request

In light of the above, I have three questions and hereby request your legal opinion as to the City of San Antonio's proposed regulations and the regulations enacted in Galveston:

1. Does Chapter 229 of the Texas Local Government Code or other state statute preempt cities such as San Antonio or Galveston from enacting the regulations described above: specific limits on where gun stores or gun shows may locate, prohibitions on how close gun stores or gun shows may locate to schools or churches (whether 200 feet or 1,000 feet), and regulations that severely limit where new gun stores or gun shows could be placed, especially when they treat awful gun purchases more harshly than the state treats registered sex offenders?

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2. In relation to that, does it matter that a City such as San Antonio says that it is only regulating firearms *sales*, but *not* the transportation and registration of firearms? Or, is a City prohibited from regulating *any one* of the things described in Section 229.001(a)(1) of the Texas Local Government Code? In other words: when the Legislature passes a law that prohibits local governments from interfering with transfer, ownership, or registration of an item, does the Legislature mean that local governments are prohibited from interfering with *each* of those things, *including* transfer?
3. Assuming that the regulations described above violate either the Texas Local Government Code, the Texas Constitution, or the United States Constitution, what consequences might cities face for nonetheless proceeding with such regulations, especially if the regulations violate the federal constitution? Might council members be individually sued if they pass such a regulation, for instance?

Thank you for consideration of this request. Please feel free to contact my office should you need any additional information or details regarding this request.

Sincerely,



Senator Donna Campbell, M.D.
Chair, Veterans Affairs and Border Security
Texas Senate District 25