No. 20-56233

In the United States Court of Appeals for the Ninth Circuit

JONAH MARTINEZ, et al.,

Plaintiffs–Appellants,

v.

ALEX VILLANUEVA, et al.,

Defendants–Appellees.

On Appeal From The United States District Court
For The Central District of California
Case No. 2:20-cv-02874-AB-SK
The Honorable André Birotte Jr.

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants submit this corporate disclosure and financial interest statement pursuant to Federal Rule of Appellate Procedure 26.1.

Second Amendment Foundation, Inc., has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

California Gun Rights Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

National Rifle Association of America has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Firearms Policy Coalition, Inc., has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Weyland-Yutani LLC, d.b.a. Match Grade Gunsmiths has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

The Target Range has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

A Place to Shoot, Inc., has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Raymond M. DiGuiseppe*
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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Constitutional Provisions

Statutes and Regulations

Other Authorities

INTRODUCTION

This case is another example of the dangers that our Supreme Court has warned against in this era of public health orders broadly infringing on fundamental constitutional rights in the name of combatting the COVID-19 health crisis: "[E]ven in a pandemic, the Constitution cannot be put away and forgotten," *Roman Catholic Diocese of Brooklyn v. Cuomo*, __ U.S. __, 141 S. Ct. 63, 68 (2020), and the courts "may not shelter in place when the Constitution is under attack," for "[t]hings never go well when [courts] do," *id.* at 72.

The Los Angeles County Defendants in this case issued public health orders that effectively shelved the core Second Amendment rights of millions of law-abiding citizens over an extensive period of time, even when substantially less restrictive alternatives existed, and the district court's order granting judgment on the pleadings in their favor effectively shelters the Defendants from any responsibility for their unconstitutional orders that deprived so many of fundamental civil rights at a time when those rights were (and remain) at their zenith.

Plaintiffs invoke their right of appeal, seeking reversal of the district court's erroneous judgment against them on the pleadings and the

opportunity to pursue their righteous claim based on these public health orders that placed their Second Amendment rights under attack.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 in that this action arises under the Constitution and laws of the United States, specifically the Second Amendment to the United States Constitution, and relief is sought under 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983 and 1988. The district court granted the Defendants' Motion for Judgment on the Pleadings on October 20, 2020, dismissing Plaintiffs' First Amended Complaint with prejudice, which was a final appealable order disposing of all the parties' claims. ER-17. The court entered final judgment accordingly on November 9, 2020. ER-15. Plaintiffs timely filed a notice of appeal on November 19, 2020. ER-274; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, in that Plaintiffs are appealing a final judgment of the district court.

PERTINENT AUTHORITIES

The constitutional authority pertinent to this appeal is the Second Amendment to the United States Constitution, which provides:

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

ISSUES PRESENTED

1. Is Plaintiffs' claim under the Second Amendment "moot" even though (a) Los Angeles County Defendants ceased the challenged conduct only after this lawsuit was filed, (b) the Defendants have reserved the discretion to resume the challenged conduct at any time, and (c) Plaintiffs have sought nominal damages for the past constitutional injuries?

2. Can it be said, beyond doubt, that Plaintiffs' First Amended Complaint fails to prove any set of facts that would entitle them to relief on their Second Amendment claim, such that Los Angeles County Defendants were entitled to judgment on the pleadings?

STATEMENT OF THE CASE

I. The Los Angeles County Orders Shuttering Firearms and Ammunition Retailers from March 19, 2020 to May 30, 2020.[1]

On March 19, 2020, in response to the spread of COVID-19, California Governor Gavin Newsom signed Executive Order N-33-20, directing all individuals living in California "to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." ER-192 ("March 19 Order"). The March 19 Order allowed Californians working in critical infrastructure sectors to continue working because of their "importance . . . to Californians' health and well-being." ER-193. And it allowed Californians to "leave their homes or places of residence . . . to obtain or perform" critical infrastructure, or "to otherwise facilitate authorized necessary activities," if they practiced social distancing. *Id.* A violation of the March

[1] Plaintiffs initiated this action against several other governmental agencies and officers concerning similar state and local orders. They ultimately dismissed all defendants except Sheriff Villanueva, Barbara Ferrer, and the County of Los Angeles ("collectively the Los Angeles County Defendants") and focused their claims on the closure orders issued by those defendants. The factual and procedural background presented herein are accordingly focused on those closure orders.

19 Order was a misdemeanor punishable by up to six months' imprisonment and a $1,000 fine. *Id.*; Cal. Gov't Code § 8665.

Also on March 19, 2020, the County of Los Angeles Department of Public Health Officer ("Health Officer") issued a "Safer at Home Order for Control of COVID-19" ("County Order"), applicable to "all cities in Los Angeles County except the cities of Pasadena and Long Beach." ER-186. The County Order mandated "the immediate closure" of all "Non-Essential Retail Businesses." ER-187. "Non-Essential Retail Businesses" included any "retail establishments that provide goods or services to the public that do not come within the definition of Essential Businesses." ER-188.

The County Order established 23 categories of "Essential Businesses," such as supermarkets, hardware stores, building supply stores, nurseries, carpenters, dry cleaners, car dealerships, media outlets, and other establishments that sold "products necessary to maintaining the safety, sanitation, and essential operation of residences." ER-188–90. "Essential Businesses" could "remain open for business," ER-191, if they implemented "infection control precautions," ER-186. These precautions included social distancing, hand sanitizer, a sign instructing

symptomatic people not to enter, and adhering to communicable disease control recommendations established by the Los Angeles County Department of Public Health. *Id.*

Any violation of the County Order was also a "misdemeanor punishable by imprisonment, fine or both . . ." ER-191 (citing Cal. Heath & Saf. Code § 120295).

The Health Officer issued a revised County Order ("Revised County Order") on March 21, 2020. ER-179. The Revised County Order mandated that "[a]ll persons are to remain in their homes or at their place of residence, except to travel to and from Essential Businesses, to work at or provide service to a Healthcare Operation or Essential Infrastructure, to engage in Essential Activities, or to participate in an individual or family outdoor activity, while practicing social distancing." ER-180.

The Revised County Order also expanded the list of Essential Businesses. For example, it now included bicycle repair shops and "construction workers." ER-182–83. Like the first County Order, a violation of the Revised County Order was a "misdemeanor punishable by imprisonment, fine or both . . . ." ER-185.

On March 24, 2020, County of Los Angeles Sheriff Alex Villanueva expressly declared that "[g]un shops" are "non-essential businesses" within the meaning of the County's orders and warned that "[i]f they don't close their doors, they will be cited" and "risk[ed] losing their business licenses." ER-175; *see also* ER-178.

San Diego County Sheriff Bill Gore, by contrast, declared that firearm retailers provide a "valuable public service" during the coronavirus pandemic and allowed them to remain open. ER-173. Sheriff Gore encouraged firearm retailers to require social distancing and sell by mail or appointment when possible. *Id.*

On March 25, 2020, Sheriff Villanueva announced that to prevent the spread of COVID-19 in jails, he had released 10% of the inmate population from county jails. ER-211–12. The same day, Sheriff Villanueva announced that the "LA County Sheriff's Dept. Enforcement efforts to close non-essential businesses have been suspended" because the Governor was expected to "determine what qualifies as a non-essential business." ER-177.

Instead, Governor Newsom granted the county sheriffs discretion to determine whether the gun stores within their county were "essential."

ER-146. In response, on March 26, 2020, Sheriff Villanueva "issued an order that gun and ammunition stores were not considered essential businesses and must close to the general public." *Id.*; *see also* ER-221–22. The order included two exceptions: (1) people who already possessed a California Firearms Safety Certificate ("FSC") and had already initiated a firearm purchase before the shutdowns could complete the transaction by taking possession of the firearm; and (2) ammunition could continue to be sold to "security guard companies." ER-222–23; ER-146–47.

On March 28, 2020, the Director of the United States Department of Homeland Security, Cybersecurity & Infrastructure Agency (CISA), issued an "Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response." ER-149. The Advisory Memorandum listed all those who worked in "supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges" as among "essential critical infrastructure workers." ER-154; *see also* ER-147.

"[B]ased on the additional and latest information from the federal government," on March 30, Sheriff Villanueva "publicly announced that the Los Angeles County Sheriff's Department will not order or

recommend closure of businesses that sell or repair firearms, or sell ammunition." ER-142 ("March 30 Order").[2]

Subsequent COVID-19 orders issued by the County of Los Angeles Department of Public Health on June 18, August 12, and September 4, 2020 were consistent with Sheriff Villanueva's March 30 Order in no longer precluding the operation of firearms and ammunition retailers. *See* ER-83; ER-66; ER-24.

II. The Impact on the Plaintiffs and All Other Similarly Situated Individuals Whom They Represent.

Plaintiff Jonah Martinez is a resident of Los Angeles County. ER-202. Martinez desired to acquire ammunition for the defense of himself and his family, and also to train with his arms during the period that the County Orders were in effect, but the Orders prohibited him from lawfully acquiring such ammunition. *Id.*; ER-165–66.

Plaintiffs Jason Montes, Alan Kushner, and Tom Watt (collectively, along with Martinez, the "Individual Plaintiffs") are individuals who each

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[2] Sheriff Villanueva submitted a declaration, dated April 1, 2020, in support of the Los Angeles County Defendants' opposition to Plaintiffs' ex parte request for a temporary restraining order, in which he attested that he would now "treat those businesses in the firearms industry (which includes Plaintiffs) as essential businesses under the pending public health orders applicable to COVID-19." ER-147.

own or operate a licensed business involved in lawful sales, transfers, training, and/or education related to firearms and ammunition. ER-203–05. As individuals, Montes, Kushner, and Watt were concerned about the safety of themselves, their customers, and the public they serve, and on behalf of themselves and their customers, they desired to conduct firearms training and education, perform the testing for and issue FSCs, and sell and transfer arms during the effective period of the County Orders, but they could not lawfully do so because of the Orders. *Id.*; *see also* ER-170–71. Additionally, Plaintiff Montes brought this action on behalf of himself and all similarly situated residents of the County who, during the operative period of the Orders, were generally barred from obtaining any additional ammunition or any different or additional firearms that they may have reasonably required to exercise their right to keep and bear arms. ER-227.

Plaintiffs Weyland-Yutani LLC, d.b.a. Match Grade Gunsmiths (owned and operated by Plaintiff Montes), The Target Range (owned and operated by Plaintiff Kushner), and A Place To Shoot, Inc. (owned and operated by Plaintiff Watt) (collectively, the "Retailer Plaintiffs"), are licensed businesses located in Los Angeles County that are involved in

lawful sales, transfers, training, and/or education related to firearms and ammunition. ER-206–07. These businesses were concerned about the safety of themselves, their customers, and the public they serve, and on behalf of themselves and their customers, desired to conduct training and education, and to sell and transfer arms and ammunition during the effective period of the County Orders, but the Orders forbade them to do so. *Id.* Additionally, Match Grade Gunsmiths and The Target Range sought to perform the required testing for FSCs and issue such certificates to eligible persons, but the Orders forbade that activity as well. *Id*.

Plaintiffs Second Amendment Foundation, Inc., California Gun Rights Foundation, National Rifle Association of America, and Firearms Policy Coalition, Inc. (collectively, the "Institutional Plaintiffs") are nonprofit organizations that have numerous members and supporters in Los Angeles County similarly situated to the Individual Plaintiffs and Retailer Plaintiffs, and who were thus similarly prohibited under the County Orders from acquiring arms and ammunition, training with

arms, and selling and transferring arms during the period that the Orders were in effect. ER-208–10.[3]

III. Procedural History

On March 27, 2020, Plaintiffs initiated this action against Sheriff Villanueva in his official capacities as Sheriff of Los Angeles County and Director of Emergency Operations, Barbara Ferrer in her official capacity as Director of Los Angeles County Department of Public Health, and the County of Los Angeles, while the County Orders requiring cessation of operations at firearms and ammunition retailers and firing ranges within Los Angeles County were in effect. Dkt. No. 1.[4] Their action challenged the County Orders as violating the Second Amendment to the United States Constitution and sought injunctive and declaratory relief. Dkt. No.

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[3] Two additional individual plaintiffs (Adam Brandy and Daemion Garro) and one additional retailer plaintiff (DG2A Enterprises, Inc., d.b.a. Gun World) brought this action along with the above-named Plaintiffs, but they declined to join the appeal before this Court. ER-202–210; ER-7.

[4] As noted, Plaintiffs brought this action against several other governmental agencies and officers, some of whom were added by way of the First Amended Complaint, but Plaintiffs later dismissed all defendants except the remaining Los Angeles County Defendants in focusing on the County Orders. *See* ER-125–35.

1. The First Amended Complaint (the operative pleading here) was filed two days later, on March 29, 2020. ER-198.[5]

The next day, March 30, 2020, Plaintiffs applied for an ex parte temporary restraining order and order to show cause why a preliminary injunction should not issue. ER-194. The district court denied the application on April 6, 2020. ER-136. The court assumed that the Orders burdened Second Amendment conduct but determined that intermediate scrutiny was warranted because the Orders were "'simply not as sweeping as the complete handgun ban at issue in *District of Columbia v. Heller*, 554 U.S. 570 (2008).'" ER-140 (quoting *Fyock v. Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015)) (brackets omitted). In applying this standard, the court found that "the closure of non-essential businesses, including firearms and ammunition retailers, reasonably fit[] the . . . County's stated objectives of reducing the spread of this disease [COVID-19]." ER-140–41. Thus, the court held, "Plaintiffs fail to demonstrate a

[5] In both the initial Complaint and the First Amended Complaint, Plaintiffs also raised a vagueness claim under the Due Process Clause. ER-268–71; ER-234–41. Ultimately, Plaintiffs elected to focus solely on the Second Amendment claim and relinquished the second cause of action before the matter reached a final judgment. ER-63–64.

likelihood of success on the merits of the Second Amendment claim." ER-141.

On August 21, 2020, the Los Angeles County Defendants filed a motion for judgment on the pleadings. ER-99. Defendants argued that because Plaintiffs' claims for declaratory and injunctive relief were tied to the March 19, 2020 order, which had been superseded by the June 18, 2020 order, there was no live case or controversy, leaving Plaintiffs' without standing and their claims moot as a matter of law. ER-113–17. Defendants further argued that "Plaintiffs' claims fail as a matter of law under intermediate scrutiny," because the challenged action of closing firearms retailers as "non-essential" businesses was not "an unreasonable emergency step to have been taken when the sheer magnitude of the COVID-19 pandemic was both undeniable and potentially uncontainable in March 2020." ER-119.

The district court issued its order on October 20, 2020. ER-17. The court first held that "Plaintiffs' Second Amendment claim against Defendants has likely lost its character as a present, live controversy and should be dismissed as moot," because there was no indication that the Los Angeles County Defendants would again close firearms retailers in

light of the pandemic. ER-21. However, the court "decline[d] to definitively rule on standing and instead . . . address[ed] the merits of this matter." *Id.* The court went on to uphold the restrictions under intermediate scrutiny based on the same essential rationale that led to its denial of a temporary restraining order. That is, the court reasoned, "[a]ssuming that the County Orders burden conduct protected by the Second Amendment by 'affecting the ability of law-abiding citizens to possess [a handgun],'" "intermediate scrutiny is warranted because the County Orders are 'simply not as sweeping as the complete handgun ban at issue in [*District of Columbia v. Heller*, 554 U.S. 570 (2008)].'" ER-22 (quoting *Fyock*, 779 F.3d at 999) (brackets in original). Important to the court's assessment of the burden here was its finding that "the alleged temporary closure of firearms retailers lasted a total of five days from March 25 to March 30, 2020," which the court viewed as "wholly distinguishable from a complete handgun ban or other possible governmental infringement on Second Amendment rights." ER-22. The court ruled that the Orders satisfied intermediate scrutiny because "a five-day closure of non-essential businesses, including firearms and

ammunition retailers, reasonably fit[] the County's stated objectives of reducing the spread of this disease." ER-22–23.

The court granted the motion for judgment on the pleadings and dismissed the matter with prejudice. ER-23. The court entered judgment accordingly on November 9, 2020. ER-15. Plaintiffs filed a timely notice of appeal from the judgment. ER-274.

SUMMARY OF THE ARGUMENT

The district court questioned the justiciability of Plaintiffs' claim, finding it was "likely" moot, but stopping short of so concluding. Even the suggestion of "mootness" is erroneous because multiple well-established exceptions to the mootness doctrine apply and clearly define this case as a live controversy aimed at an actionable and redressable injury. The district court also erred in concluding that Los Angeles County Defendants are entitled to judgment on the pleadings, because Plaintiffs' allegations strongly support the asserted constitutional violations effected by Defendants' orders shuttering the local firearms industry—especially under the lenient standards of review that govern the case.

STANDARD OF REVIEW

"Judgments on the pleadings are reviewed de novo." *George v. Pac.-CSC Work Furlough*, 91 F.3d 1227, 1229 (9th Cir. 1996) (citing *Merchants Home Delivery Serv. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1488 (9th Cir. 1995)). "'Judgment on the pleadings is properly granted when [, accepting all factual allegations in the complaint as true,] there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law.'" *Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012) (citing *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009)) (bracketed text original in *Chavez*). "Judgment may only be granted when the pleadings show that it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir. 1997) (internal quotation omitted).

"Analysis under Rule 12(c) is 'substantially identical' to analysis under Rule 12(b)(6) because, under both rules, 'a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy.'" *Chavez*, 683 F.3d at 1108 (quoting *Brooks v. Dunlop Mfg. Inc.*, 2011 WL 6140912 at *3 (N.D. Cal. Dec. 9, 2011)). This necessarily

involves an analysis of a plaintiff's claims under the *Twombly/Iqbal* "plausibility" standard of the Rule 12(b)(6) rubric. *Chavez*, at 1108–09. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, judgment should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)); *see also U.S v. Hempfling*, 431 F. Supp. 2d 1069, 1075 (E.D. Cal. 2006) ("A Rule 12(b)(6) motion is disfavored and rarely granted.").

Additionally, this Court "review[s] de novo the question whether a case is moot." *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003).

ARGUMENT

I. A Live Controversy Involving Actionable Injury Remains.

The district court found that Plaintiffs' Second Amendment claim "likely lost its character as a present, live controversy," but "decline[d] to definitively rule on standing." ER-21. The court's hesitation to draw any

such conclusion is understandable, because a live controversy involving actionable injury remains ripe for adjudication.

"'As long as the parties have a concrete interest, *however small*, in the outcome of the litigation, the case is not moot.'" *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Chafin v. Chafin*, 568 U.S. 165, 171 (2013)). "A party asserting mootness has 'the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again.'" *Fikre v. Fed. Bureau of Investigation*, 904 F.3d 1033, 1037 (9th Cir. 2018) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)) (brackets and internal quotations omitted).

"It is well-established . . . that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case' unless 'it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur' and 'interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.'" *Fikre*, 904 F.3d at 1037 (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)) (internal quotations omitted). Otherwise, "a dismissal for mootness would permit a resumption of the

challenged conduct as soon as the case is dismissed." *American Diabetes Association v. U.S Dept. of the Army*, 938 F.3d 1147 (9th Cir. 2019).

Another "justiciability-saving exception is for challenges to injuries that are 'capable of repetition, yet evading review.'" *Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs.*, 946 F.3d 1100, 1109 (9th Cir. 2020) (*Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016)). This exception to the mootness doctrine "requires (1) the complaining party to reasonably expect to be subject to the same injury again and (2) the injury to be of a type inherently shorter than the duration of litigation." *Id.* A party has a reasonable expectation of being "subject to the same injury again" when it reasonably believes it "'will again be subjected to the alleged illegality' or will be or 'subject to the threat of prosecution' under the challenged law." *Koller v. Harris*, 312 F. Supp. 3d 814, 823 (N.D. Cal. 2018) (quoting *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007)).

One need look no further than the history and content of Defendants' Orders to see that the risk of an updated order closing firearms retailers and firing ranges has not been "completely and irrevocably eradicated" and that reinstatement remains more than a reasonable possibility. As

in the March 19 Order, Defendants continue in subsequent orders to reserve unto themselves broad, essentially unchecked powers to modify their later orders whenever and in whatever manner they may deem prudent—and in particular to *increase* the current level of restrictions based on any actual or perceived future increased risks with COVID-19.

Both the County's July 18 and August 12 Orders provide that the County may issue orders "more restrictive" than the State's orders. ER-83, 97; ER-67, 81. Both advise business owners to check the Public Health website "*daily* to identify any modifications to the Order" because they are "required to comply with any updates until the Order is terminated." ER-96; ER-80 (emphasis added). And both Orders remain effective "until [] revised, rescinded, superseded, or amended in writing by the Health Officer." ER-97; ER-81. Further, the Orders emphasize the continuing dangers of the coronavirus as conditions that will remain and potentially increase in severity. ER-89; ER-73 (COVID-19 "continues to present a substantial and significant risk of harm to residents' health").

Defendants' August 12 Order stresses the "serious recent regression of COVID-19 indicators" in the County "which show troubling and substantial increases in new daily reported COVID-19 cases,

hospitalizations, and the testing positivity rate." ER-67. The Order highlights "evidence of continued community transmission of COVID-19 within the County," and laments that "[u]nfortunately, the daily number of new cases has significantly increased," placing "a significant portion of the County population at risk for serious health complications, including hospitalizations and death from COVID-19." ER-73, 74. The Order "required the immediate temporary closure of specific activities and business sectors." ER-67. While this did not name firearms or ammunition retailers, given the focus on limiting direct and indirect interactions among people as a primary means to prevent the spread of the virus, it is certainly conceivable—indeed quite likely—such retailers remain at risk of further closure. Even with the recent advent of vaccines, the number of new COVID-19 infections and deaths from the disease continue to rise in Los Angeles County. *See* Los County Angeles Public Health, News Release, 2/28/21, http://publichealth.lacounty.gov/phcommon/public/media/mediapubhpdetail.cfm?prid=2991; *see also* LA County COVID-19 Surveillance Dashboard, County of Los Angeles Public Health, 3/3/21,

http://dashboard.publichealth.lacounty.gov/covid19_surveillance_dashboard/.

Compelling evidence that the County may reverse its position by again mandating the closure of firearms retailers and ranges is what the County has *already done* through its previous orders, categorizing them as among the "nonessential" businesses prohibited from operating. Coupled with the dire picture painted in the August 12 Order based on the same essential risks that spurred the initial round of shutdowns, and which risks continue to persist to this day, undeniably, a legitimate rationale exists for inferring this is bound to happen again.

Additionally, Plaintiffs have properly pled relief in the form of nominal damages, in seeking redress of the constitutional injuries already inflicted. This is something the Los Angeles County Defendants cannot avoid by claiming "mootness," *Outdoor Media Grp. v. City of Beaumont*, 506 F.3d 895, 902 (9th Cir. 2007), especially when they have not "*completely and irrevocably eradicated* the effects of the alleged violation," *Fikre*, 904 F.3d at 1037. "As a general rule, amending or repealing an ordinance will not moot a damages claim because such relief is sought for 'a past violation of [the plaintiff's] rights,'" *Epona LLC v.*

Cty. of Ventura, 2019 WL 7940582, at *5 (C.D. Cal. Dec. 12, 2019) (quoting *Outdoor Media Grp.*, at 902), and such damages "are particularly important in vindicating constitutional interests," *New York State Rifle & Pistol Association, Inc. v. City of New York, New York*, __ U.S. __, 140 S. Ct. 1525, 1536 (2020) (Alito, J., dissenting).

Thus, "[a] live claim for nominal damages will prevent dismissal for mootness." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002); *New York State Rifle & Pistol Association*, 140 S. Ct at 1536 (Alito, J., dissenting) ("it is widely recognized that a claim for nominal damages precludes mootness"). It would defeat the important purposes of 42 U.S.C. § 1983 claims, which an organized society must "scrupulously observe[]," if Defendants could claim "mootness" to avoid any responsibility for this deprivation of fundamental civil rights. *Bernhardt*, 279 F.3d at 872. Their attempt to do so must be rejected, and the district court erred to the extent it even found that Plaintiffs' Second Amendment claim is "likely" moot, ER-21, particularly since the FAC strongly supports the claim under the lenient standards of review for advancing to the merits stage.

II. The Prior Orders Utterly Destroyed Core Second Amendment Rights.

A. The Nature of the Second Amendment Right.

The Second Amendment declares in no uncertain terms: "the right of the people to keep and bear Arms, *shall not* be infringed." U.S. Const. amend. II (italics added). Incorporated against the states through the Fourteenth Amendment, *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010), the Second Amendment confers "an individual right to keep and bear arms," *Heller*, 554 U.S. at 595. It is a fundamental constitutional right guaranteed to the people, which is key to "our scheme of ordered liberty." *McDonald*, at 767–68. The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller*, at 592. And it "elevates above all" governmental interests in restricting the right, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id* at 635. "The 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 original).

B. The prior Orders completely denied access to the acquisition of firearms and ammunition and the use of firing ranges throughout the County.

For 11 consecutive days, Los Angeles County Defendants deprived millions of Los Angeles County residents of their Second Amendment rights. No one could acquire a firearm or ammunition from any retailer anywhere within the County while the prior Orders were in effect—subject only to a limited exception for *firearms* (not any ammunition) for those who *already* had an FSC and *already* initiated a purchase of a firearm before the shutdowns went into effect. ER-146–47. Otherwise, all firearm retailers were mandated to close to the public; private transfers were unavailable because California requires all private transfers to be processed through a licensed dealer; and travel outside the home was prohibited except to engage in the narrowly defined forms of "essential" activities, to provide services to "essential" infrastructure, or to access "essential" businesses, which excluded firearms and ammunition retailers and firing ranges. Anyone who did not possess both a firearm and ammunition on March 18, 2020, was denied the ability to exercise the fundamental rights protected by the Second Amendment until March 30, 2020—with the limited exception carved out for those who happened

to have already initiated a firearm purchase, but who were still barred from obtaining any *ammunition* for that firearm (unless they were "security guards").

Further, all those who did happen to already have a firearm and ammunition before the shutdowns took effect were denied the corollary right to pursue training and proficiency with those arms at firing ranges. For these 11 days between March 19 and March 30, 2020, Los Angeles County Defendants effectively erased core fundamental constitutional rights guaranteed under the Second Amendment. The Individual Plaintiffs, Retailer Plaintiffs, Institutional Plaintiffs' members and supporters, and all other similarly situated residents of the County were among those whose rights were so denied.

The Second Amendment prohibition here is as burdensome as—if not more burdensome than—the COVID-19 restrictions that the Supreme Court has recently deemed unconstitutional. In *Roman Catholic Diocese of Brooklyn v. Cuomo*, the high court struck down the Governor of New York's order restricting attendance at religious services to 10 people in "red" zones and 25 people in "orange" zones. __ U.S. __, 141 S. Ct. 63, 66 (2020). The Court held this "drastic measure" was "far more severe than

has been shown to be required to prevent the spread of the [corona]virus. . . ." *Id.* at 67, 68. Even in red zones—where New York's threat level was the highest—a 10-person limit was "far more severe" than necessary. *Id.* at 67. By comparison, here, virtually the entire Los Angeles County population was barred from even entering a gun store or a firing range for 11 days straight. Moreover, religion can be practiced to *some* extent—inadequate as it may be—outside houses of worship, but the prohibition here forbade *all* access to firearms and ammunition retailers and firing ranges for County residents (save the narrow carve-out created for firearm purchase transactions already initiated before the shutdowns). Thus, if the restrictions "effectively barring many from attending religious services" in *Roman Catholic Diocese* "strike at the very heart of the First Amendment's guarantee of religious liberty," *id.* at 68, then the restrictions here barring virtually all Los Angeles County residents from the necessary means to acquire firearms and ammunition, in the lawful exercise of the fundamental rights of self-defense strike at the very heart of the Second Amendment's guarantees.

C. The 11-day prohibition effected a severe deprivation of constitutional rights.

"'The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). The loss of Second Amendment freedoms, for even minimum periods of time, can be fatal. Every second counts when the need for self-defense arises. The Founders "understood the [Second Amendment] right to enable individuals to defend themselves." *Heller*, 554 U.S. at 594. Indeed, one cannot assume local law enforcement can or will come to the rescue in time. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005) (A woman whose children were murdered by her estranged husband after police failed to respond to her calls, "did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband.").

The Second Amendment guarantees a "'right of self-preservation'" "permitting a citizen to 'repe[l] 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 (quoting 1 BLACKSTONE'S COMMENTARIES 145–46 n.42 (1803)); *see also Caetano v. Massachusetts*, __ U.S. __, 136 S. Ct. 1027, 1033 (2016)

(Alito, J., concurring) ("The Commonwealth of Massachusetts was either unable or unwilling to do what was necessary to protect Jaime Caetano, so she was forced to protect herself" with a stun gun against her abusive ex-boyfriend "waiting for [her] outside" one night after work).

Range training is also an important Second Amendment right. "Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise. . . . The right to keep and bear arms, for example, implies a corresponding right to obtain the bullets necessary to use them, and to acquire and maintain proficiency in their use." *Luis v. United States*, __ U.S. __, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring in the judgment) (quotations and citations omitted). The Seventh Circuit explained why firing ranges and training are essential to the Second Amendment in *Ezell v. City of Chicago* ("*Ezell I*"), 651 F.3d 684, 703 (7th Cir. 2011). Declaring unconstitutional a ban on target ranges within city limits, the court wrote: "[T]he core right wouldn't mean much without the training and practice that make it effective." *Id.* at 704. Because maintaining proficiency with firearms is "an important corollary to the meaningful exercise of the core right to possess firearms for self-

defense," the court struck down the range restriction, even under "not quite 'strict scrutiny.'" *Id.* at 708.

A firearms prohibition that blocks access to all firearms and ammunition retailers and firing ranges throughout the county of a person's residence for 11 days is a severe burden that jeopardizes the core Second Amendment right of self-defense. It effectively eliminates the right to keep and bear arms for self-defense of everyone who does not already possess a firearm and ammunition at the time the prohibition is enacted. And the ability to readily employ *firearms* in particular for self-defense purposes—and do so proficiently—is crucial to the guarantees of the Second Amendment. As *Heller* itself emphasized in this context, "the American people have considered *the handgun* to be the quintessential self-defense weapon," and thus "*handguns* are the most popular weapon chosen by Americans for self-defense in the home." 554 U.S. at 629 (italics added).

The severity of the County's 11-day ban was exacerbated by California's 10-day waiting period for all lawful gun purchases upheld in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016). Rather than an 11-day prohibition on Second Amendment rights, Plaintiffs and all similarly

situated county residents effectively endured a 21-day prohibition. Anyone in the county who sought to acquire a firearm on March 30, 2020—the first day since March 18, 2020 that they could under the County's Orders (save for a brief window opened on March 26 to complete transactions initiated before the closures)—had to wait an *additional* 10 days to possess it because of the waiting period upheld in *Silvester*.

The same is true concerning the ammunition purchases that County residents were prevented from making during this time: such transactions are now subject to a pre-purchase background check, which alone already exacts a substantial burden on law-abiding citizens attempting to acquire the ammunition they need for their firearms. *See Rhode v. Becerra*, 445 F. Supp. 3d 902, 931 (S.D. Cal. 2020) (in granting a preliminary injunction against this background check requirement, Judge Benitez found "the background check system is not working well," as "[t]housands of law-abiding citizen residents have been completely and unjustifiably rebuffed" and "[o]thers are delayed days and weeks while trying to overcome bureaucratic obstacles"). So, the law-abiding citizens of Los Angeles County who were precluded from initiating ammunition purchases during the County's shutdown of the firearms industry were

denied the ability to even begin the process of overcoming these "bureaucratic obstacles" and were that much further delayed in ultimately obtaining the means necessary to arm themselves. *See id.* ("When one needs to defend herself, family, or property right now, but is defenseless for lack of ammunition, it is the heaviest kind of irreparable harm.").[6] The 11-day ban imposed by the County's Orders is substantially more burdensome than what the district court considered in upholding the Orders—to say nothing of the 21 total days virtually anyone desiring a firearm on March 19 had to wait. The district court, in determining what level of scrutiny to apply, stated that "the alleged temporary closure of firearms retailers lasted a total of five days from March 25 to March 30, 2020." ER-22. The actual ban—11 days—lasted over twice as long. Los Angeles County Defendants essentially conceded as much in never *disputing* the length of the delay on which Plaintiffs have based their claim, and instead simply *defending* it on the ground that it was "reasonable" in light of the pandemic and relatively short-lived because

[6] Although Judge Benitez issued a preliminary injunction against the background check requirement for ammunition, at the request of the California Attorney General, the injunction was stayed pending further order of this Court. *Rhode v. Becerra*, Ninth Circuit Case No. 20-55437, 2020 WL 2049091, April 24, 2020.

the County's orders no longer expressly precluded operation of firearms and ammunition retailers as of *June 18*. *See* ER-113 (arguing the March 19 Order on which Plaintiffs based their claim was "old news" because it was superseded by the June 18 Order under which "[f]irearms retailers were not included" among the businesses subject to closure) (emphasis added).

That is, the arguments of Los Angeles County Defendants themselves indicate their Orders did not clearly permit firearms and ammunition retailers to operate during the pandemic until June 18. And perhaps so. But, at a minimum, it is clear the shutdown orders remained in effect as a bar to the operation of all such establishments for the 11-day period between March 19 and March 30, 2020, when Sheriff Villanueva announced he would cease treating them as "non-essential." There also has been no dispute, and can be no legitimate dispute, that Sheriff Villanueva's own orders that expressly declared firearms and ammunition retailers as "non-essential" *were based* on the March 19 Order requiring all "non-essential businesses" to shutter.

D. Pandemic or Not, Courts Cannot "Shelter in Place" While the Constitution is Under Attack.

The Supreme Court has repeatedly made clear, and has pointedly reminded us again during this pandemic, that the Constitution itself cannot be placed on lockdown. As Chief Justice Marshall explained long ago, the Constitution was "intended to endure for ages to come" and designed to be enforced *through* the "various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). Indeed, the Court's message on these matters has always been clear, even during the infancy of its jurisprudence: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866). "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." *Id.* at 121.

The Founders "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). Rightly, "they made no

express provision for exercise of extraordinary authority because of a crisis," *id.*, because enumerated and fundamental rights, including the right to keep and bear arms, remain in full force even and especially in times of crisis.

In fact, Second Amendment rights often reach the pinnacle of their importance during emergencies, specifically because the right is designed to ensure Americans can defend themselves when the government cannot—i.e., to preserve and foster the "'right of self-preservation'" in "permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Heller*, 554 U.S. at 594–95 (quoting 1 BLACKSTONE'S COMMENTARIES at 145–46 n.42); *see also McDonald*, 561 U.S. at 777 n.27.

Moreover, "[t]he right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1135 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018) (quoting *Grace v. D.C.*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016)). That peace of mind is particularly important during times of crises and public unrest—just like that which

has been spurred by the COVID-19 pandemic. The County's Orders robbed Los Angeles County residents of this psychological comfort and peace of mind by directly and severely restraining their ability to acquire firearms and ammunition in the lawful exercise of their Second Amendment rights.

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese*, 141 S. Ct. at 68. Just as "[g]overnment is not free to disregard the First Amendment in times of crisis," *id.* at 69, government is not free to disregard the Second Amendment. The emergencies that this country has endured are great and varied—including pandemics, natural disasters, financial depressions, world wars, and even a civil war—and surely COVID-19 is not the last great obstacle. To allow the Constitution to be violated except during times of peace and prosperity would transform rights into privileges. The founders recognized that "[s]uch a doctrine leads directly to anarchy or despotism," *Ex parte Milligan*, 71 U.S. at 121, and the high Court has always wisely avoided it.

III. The County's Orders Destroyed Core Second Amendment Rights and Are Therefore Categorically Unconstitutional.

As this Court has recognized, some firearm restrictions are so severe that heightened scrutiny is not even warranted: "A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Silvester*, 843 F.3d at 821 (citing *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)).

"A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Id.* "Otherwise, intermediate scrutiny is appropriate. *Id.*; *see also Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017) ("A law that . . . amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny . . . Further down the scale [is] . . . strict scrutiny. Otherwise, intermediate scrutiny is appropriate.").

In other words, "what was involved in *Heller*" is categorically invalid, *Silvester*, 843 F.3d at 821, "[f]urther down the scale" is strict scrutiny, *Bauer*, 858 F.3d at 1222, and "intermediate scrutiny is appropriate" for all other laws, *id.*

The County Orders at issue here are analogous to "what was involved in *Heller*." *Heller* held a ban on inoperable firearms categorically unconstitutional. The ban, the Court explained, "ma[de] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and [was] hence unconstitutional." 554 U.S. at 630. Similarly, the Orders "ma[de] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and [are] hence unconstitutional." *Id.*

The *Heller* Court applied no tiered scrutiny analysis, considered no social science evidence, included no data or studies about the costs or benefits of the ban, and expressly rejected the intermediate scrutiny–like balancing test proposed by Justice Breyer's *Heller* dissent. After all, the Court explained, "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 634.

In *McDonald*, the Court reaffirmed its rejection of an interest-balancing approach for bans on core Second Amendment rights. 561 U.S. at 785 ("In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.").

The Seventh Circuit has also recognized that both *Heller* and *McDonald* held bans on the exercise of core Second Amendment rights "categorically unconstitutional." *Ezell I*, 651 F.3d at 703. The Seventh Circuit has also held a prohibition on carrying arms in public categorically invalid, because it destroyed the right to self-defense outside the home. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). The court appropriately dismissed the idea of even applying a heightened scrutiny analysis for such a severe ban. *Id.* at 941 ("Our analysis is not based on degrees of scrutiny").

Justice Alito's concurring opinion in *Caetano* is in accord with this framework. He explained that Massachusetts' categorical ban on stun guns was flatly unconstitutional based on the simple, yet fundamental fact that "stun guns are widely owned and accepted as a legitimate means of self-defense across the country," and are thus neither dangerous nor unusual so as to fall outside the protection of the Second Amendment. *Caetano*, 136 S. Ct. at 1033 (Alito, J., concurring).[7]

[7] Similar bright-line rules of categorical unconstitutionality are common in the jurisprudence concerning other fundamental rights. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 303–04 (2017) (providing

Heller explained that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." 554 U.S. at 629. But the prohibitions here did just that in denying access to all firearms and ammunition retailers and firing ranges crucial to the exercise of core Second Amendment rights. Under the simple, yet fundamental *Heller* test, the Orders effectively destroyed core rights, rendering them categorically unconstitutional without resort to further scrutiny. *Heller*, at 629 (quoting *State v. Reid*, 1 Ala. 612, 616–17 (1840)) ("A statute which, under the pretence of regulating, amounts to a destruction of the right . . . would be clearly unconstitutional"); *see also Rhode*, 445 F. Supp. 3d at 931 ("Under the simple *Heller* test, judicial review could end right here.").

Again, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. Among them is an 11-day prohibition against accessing firearms and ammunition retailers as well as firing ranges essential to the lawful exercise of Second Amendment rights—regardless of the nature of the justification that the

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such examples for the First, Fifth, Sixth, Eighth, Tenth, and Fourteenth Amendments).

government claims. If the handgun ban in *Heller* "would fail constitutional muster" under "any of the standards of scrutiny," then the complete prohibition here must fail under any standard as well. *Id.* at 628–29.

IV. The Prohibition Fails Any Level of Heightened Scrutiny.

A. If heightened scrutiny is applied, strict scrutiny is required.

"A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Silvester*, 843 F.3d at 821 (citing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)).

Heller held that the "core lawful purpose of" the Second Amendment is "self-defense." 554 U.S. at 630; *see also id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment right.").

The County's Orders infringed upon the right to keep and bear arms for self-defense within the home, "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628; *see also McDonald*, 561 U.S. at 780 ("our central holding in *Heller*" was "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.").

The County's Orders not only "implicate[d] the core of the Second Amendment right and severely burden[ed] that right," they erected an 11-day roadblock against the means essential to lawfully exercising the Second Amendment guarantees in prohibiting access to firearms and ammunition retailers (save for the sliver of firearms transactions initiated before the shutdowns) and prohibiting *all* access to firing ranges, and during a time when the need to preserve and protect those rights was at its pinnacle. And it was effectively a *21-day* roadblock for firearm purchases when coupled with the mandatory 10-day waiting period. Strict scrutiny is the only appropriate standard, assuming any scrutiny is warranted. *See Bateman v. Perdue*, 881 F. Supp. 2d 709, 715 (E.D.N.C. 2012) (applying strict scrutiny to North Carolina's emergency declaration statutes that "prohibit[ed] law abiding citizens from purchasing and transporting to their homes firearms and ammunition needed for self-defense.").

By parity of reasoning, this Court has applied strict scrutiny to restrictions on indoor religious worship services in *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020) and *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1140 (9th Cir.

2021); *cf. S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717–18 (2021) (Gorsuch, J., concurring) ("As the Ninth Circuit recognized, regulations like these violate the First Amendment unless the State can show they are the least restrictive means of achieving a compelling government interest.") (citing *S. Bay*, 985 F.3d at 1142).

The same rationale applies here, where every gun shop and firing range in the county was mandated to close but "'hundreds of people' could shop at" many other businesses totally unnecessary or unrelated to the exercise of constitutional rights, "on any given day," like bicycle repair shops, car dealerships, and dry cleaners. *S. Bay*, 985 F.3d at 1141 (quoting *Roman Catholic Diocese*, 141 S. Ct. at 66–67). "Such dichotomous and 'troubling results'" are "subject to strict scrutiny." *Id.* (quoting *Roman Catholic Diocese*, 141 S. Ct. at 66–67).

B. The County's Orders fail intermediate scrutiny, and consequently, also strict scrutiny.

Even if intermediate scrutiny applies, the County Orders fail because they were poorly tailored—indeed, not tailored at all—and substantially less burdensome alternatives existed.

Intermediate scrutiny requires "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit

between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139. To satisfy intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (internal quotations omitted). In this context, "the [government] bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647 (1985)).[8] Here, Defendants cannot to do so. While the objective of preventing the spread of COVID-19 is an important interest, *see Roman Catholic Diocese*, 141 S. Ct. at 67, the claimed fit here is unreasonable and overbroad. Indeed, clearly undermining the claimed interest behind the shutdowns is the undisputed fact that numerous other businesses clearly *not* "essential" to the exercise of any constitutional rights were permitted to operate while all gun stores and firing ranges were mandated to close.

[8] While the foregoing cases involved restrictions on free speech under the First Amendment, as this Court has recognized, we are "guided by First Amendment principles" in resolving challenges to Second Amendment restrictions. *Jackson*, 746 F,3d at 961.

C. The County Orders were not narrowly tailored to serve the claimed interests.

As the Supreme Court has explained, a total ban on the exercise of fundamental constitutional rights satisfies the "narrowly tailored" requirement "only if each activity within the proscription's scope is an appropriately targeted evil." *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989) (quoting *Frisby v. Schultz,* 487 U.S. 474, 485 (1988)). The scope of the County Orders encompassed the full panoply of Second Amendment rights in completely blocking access to the industry essential for the acquisition, use, and training in the exercise of the right to keep and bear arms—the antithesis of an "appropriately targeted evil." *Id.*

The County Orders generally prohibited the operation of all gun stores and firing ranges, of all sizes, in all locations within the county. "And the restrictions appl[ied] no matter the precautions taken, including social distancing, wearing masks, leaving doors and windows open, . . . and disinfecting spaces between" customers, *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring), even though there has been no showing (and no reason exists to believe) these establishments could not have implemented the same disease prevention protocols that the other businesses followed in being permitted to continue their enterprises.

Moreover, unlike people who were simply seeking to pursue leisurely activities, like riding bicycles, the County Orders were aimed at law-abiding citizens seeking to exercise fundamental constitutional rights. Los Angeles County Defendants have put forth no reason why people could supposedly safely visit places like bicycle repair shops but could not safely patronize gun stores or firing ranges while observing identical precautions—presumably because no reason exists. *Cf. Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) ("once a State creates a favored class of businesses . . . the State must justify why houses of worship are excluded from that favored class"). "The only explanation for treating" gun stores "differently seems to be a judgment that what happens there just isn't as 'essential' as what happens" in places unrelated to the exercise of Second Amendment rights. *Id.* at 69 (Gorsuch, J., concurring); *see id.* at 73 (Kavanaugh, J., concurring) ("New York's restrictions on houses of worship not only are severe, but also are discriminatory," because "a grocery store, pet store, or big-box store down the street does not face the same restriction."). That is, it was a *policy* judgment. But, again, "[t]he very enumeration of the right [to keep and bear arms] takes out of the hands of government . . . the power to decide

on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

D. Los Angeles County Defendants must provide *substantial* evidence of proper tailoring, but they have provided no evidence at all in support of their Orders.

Under intermediate scrutiny, "the [government] bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). "This burden is not satisfied by mere speculation or conjecture." *Edenfield*, at 770. The government cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). Rather, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them." *Edenfield*, at 771. The demonstration must be based on "substantial evidence." *Turner Broad. Sys. v. F.C.C.* ("*Turner I*"), 512 U.S. 622, 666 (1994); *Turner Broad. Sys. v. F.C.C.* ("*Turner II*"), 520 U.S. 180, 195 (1997).

For example, in *City of Renton v. Playtime Theatres, Inc.*, the Supreme Court upheld a zoning ordinance where the record

contained "substantial evidence" that led to "detailed findings," based on "a long period of study and discussion," as well as "extensive testimony" that supported the claimed interests. 475 U.S. 41, 51 (1986) (citation omitted). Also, *Turner II* was heard after the Court had remanded *Turner I* for 18 months of additional factfinding. The *Turner II* Court determined that the record supported Congress's predictive judgments where it included "[e]xtensive testimony," "volumes of documentary evidence and studies," and "extensive anecdotal evidence." *Id.* at 198, 199, 202.

By comparison, in *44 Liquormart, Inc.*, the government failed to justify a ban on price advertising for alcoholic beverages "without any findings of fact," 517 U.S. at 505, and in *Edenfield*, the Court struck down a ban on in-person solicitation by certified public accountants because the government "present[ed] no studies" or "any anecdotal evidence," 507 U.S. at 771.

Here, Defendants have failed to provide any evidence that COVID-19 was more likely to spread at gun stores or ranges than at the litany of other "essential" businesses they allowed to operate. Nor have they linked the spread of COVID-19 to any firearm retailers or firing ranges. *See Roman Catholic Diocese*, 141 S. Ct. at 68 ("the State has not claimed

that attendance at the applicants' services has resulted in the spread of the disease."); *S. Bay*, 141 S. Ct. at 717 (Roberts, C. J., concurring) ("the State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake").

Similar to the insufficient showings in *44 Liquormart* and *Edenfield*, Los Angeles County Defendants have offered no findings of fact, studies, or even anecdotal evidence purporting to demonstrate that a complete closure of firearms retailers and firing ranges was in any way *narrowly tailored* to achieve the goal of minimizing the spread of COVID-19—especially when there is no reason to believe, and certainly no evidence to suggest, that the risks of the virus could not have been adequately addressed or abated by following the same safety protocols as the "essential" businesses. *See Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1259 (D.C. Cir. 2011) ("the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments"); *Ezell v. City of Chicago* ("*Ezell II*"), 846 F.3d 888, 895 (7th Cir. 2017) (the government cannot "invoke [its] interests as a general

matter and call it a day"). *S. Bay*, 141 S. Ct. at 718–19 ("Nor, again, does California explain why the narrower options it thinks adequate in many secular settings—such as social distancing requirements, masks, cleaning, plexiglass barriers, and the like—cannot suffice here.").

The government "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." *Turner I*, 512 U.S. at 664 (quotations omitted). It must prove that "the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 782–83.

Because Los Angeles County Defendants have offered no evidence to demonstrate "the required fit," they necessarily have not and cannot show their claimed interest would have been "achieved *less* effectively" had they permitted firearms retailers and firing ranges to operate with the standard safety protocols in place. Without any such evidence or effort to carry their burden here, Defendants' claimed interests in the need for these complete shutdowns devolve into "mere speculation" and "conjecture." *Edenfield*, 507 U.S. at 770–71. *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) ("The government has offered numerous

plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between [18 U.S.C.] § 922(g)(9) and an important governmental goal") (italics original).

E. Given the dearth of evidence to support a reasonable fit, substantially less burdensome alternatives indisputably existed.

Strict scrutiny requires that the County's Orders be "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000)). While intermediate scrutiny does not demand the least restrictive means available, it does require that "the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800.

In the First Amendment context, "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 573 U.S. at 495. In the Second Amendment context, Justice Breyer's intermediate scrutiny-like balancing test

proposed in his *Heller* dissent considered "reasonable, but less restrictive, alternatives." *Heller*, 554 U.S. at 710 (Breyer, J., dissenting).

Several sister circuits have considered the existence of less burdensome alternatives as pertinent to a proper analysis of restraints imposed on Second Amendment rights. *See e.g., Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 122, 124 n.28 (3d Cir. 2018); *Heller v. District of Columbia* ("*Heller III*"), 801 F.3d 264, 277–78 (D.C. Cir. 2015); *Ezell I*, 651 F.3d at 709; *Moore*, 702 F.3d at 940; *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1128 (10th Cir. 2015).

The Fourth Circuit recently explained its less-burdensome-requirement rule while applying intermediate scrutiny to a content-neutral speech restriction: The government must present evidence that, before enacting the restriction, "it seriously undertook to address the problem with less intrusive tools readily available to it." *Billups v. City of Charleston, S.C.*, 961 F.3d 673, 688 (4th Cir. 2020) (citing *McCullen*, 573 U.S. at 494). "In other words, the government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the

government's interest." *Id.* "The government's burden in this regard is satisfied only when it presents "actual evidence supporting its assertion[s]." *Id.*

Here, in simply citing a general interest in reducing the spread of COVID-19 as the basis for the County Orders, Defendants have provided no "actual evidence" that they "actually tried or considered" less restrictive alternatives. And substantially less restrictive alternatives unquestionably existed. Defendants applied those alternatives to many other providers of goods and services—goods and services unrelated to the exercise of the fundamental right to keep and bear arms—like bicycle repair shops, car dealerships, and dry cleaners.

That businesses and industries unrelated and unnecessary to the exercise of enumerated rights were not subject to the same restrictions was enough for the Supreme Court to rule in favor of the plaintiffs in *Roman Catholic Diocese*. *See* 141 S. Ct. at 66 ("In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish."); *id.* at 72 (Gorsuch, J., concurring) ("while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates . . .

executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."). So too in the *Calvary Chapel* case, where this Court noted the local directive could have been tailored in the same manner for religious services as it was for other industries: "instead of a fifty-person cap, the Directive could have, for example, imposed a limitation of 50% of fire-code capacity on houses of worship, like the limitation it imposed on retail stores and restaurants, and like the limitation the Nevada Gaming Control Board imposed on casinos." *Calvary Chapel*, 982 F.3d at 1234. Therefore, as in this case, "though slowing the spread of COVID-19 is a compelling interest, the Directive [was] not narrowly tailored to serve that interest." *Id.*; *see also S. Bay*, 141 S. Ct. at 717 (Barrett, J., concurring) (noting that a ban on singing would be judged more harshly depending on "whether the singing ban applies across the board (and thus constitutes a neutral and generally applicable law) or else favors certain sectors (and thus triggers more searching review)"); *id.* at 719 (Gorsuch, J., concurring) ("the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests").

In fact, on March 28, 2020, in the midst of the shutdown orders, the Director of the United States Department of Homeland Security, Cyber and Infrastructure Agency (CISA) issued a guidance recommending that "[w]orkers supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges" be allowed to continue working during the COVID-19 pandemic. Christopher C. Krebs, *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, at 6, U.S. DEPARTMENT OF HOMELAND SECURITY. ER-149. This guidance from CISA was produced "in consultation with federal agency partners, industry experts, and State and local officials," who determined that keeping the firearms industry operating would "help State, local, tribal and territorial officials as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security." *Id.* Sheriff Villanueva claimed to have been persuaded by this advice and inspired to reverse his own shutdown orders on March 30, 2020, ER-147—also proving that the substantially less restrictive alternative had existed all along and it was simply a matter of declaring the firearms industry "essential" so it could

operate under the same safety protocols as all the other businesses treated as "essential" from the get-go.

As in the *Roman Catholic Diocese* case, "the [government] has not shown that public health would be imperiled if less restrictive measures were imposed." 141 S. Ct. at 68. Indeed, the U.S. Department of Homeland Security believed it was "critical to public health and safety" to keep firearm businesses open. Los Angeles County Defendants have not met the demands of intermediate scrutiny, nor therefore, strict scrutiny. The County Orders were unconstitutional under measure.

CONCLUSION

The district court's order granting the motion for judgment on the pleadings was erroneous on both its fronts: Plaintiffs' Second Amendment claim surely presents a live controversy concerning an actionable and redressable injury, and the strong allegations in the First Amended Complaint are surely more than sufficient to state a "plausible" case for such relief under the lenient standards of review. Plaintiffs therefore respectfully request that this Court reverse the judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Currently pending before this Court is the matter of *McDougall, et al v. County of Ventura, et al*, Case No. 20-56233, which concerns an appeal from the dismissal of a similar challenge under the Second Amendment to similar public health orders of Los Angeles County.

Additionally, the matter of *Altman, et al v. County of Santa Clara, et al*, N.D. Ca. Case No. 4:20-cv-02180-JST, concerns a similar challenge under the Second Amendment to similar public health orders of multiple counties in the Bay area, the final disposition of which remains pending before the district court.

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 11,131 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature *Raymond M. DiGuiseppe* **Date:** March 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Ninth Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 5th day of March 2021.

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