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22 **UNITED STATES DISTRICT COURT**
23 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

24 JANICE ALTMAN, an individual, et al.

25 Plaintiffs,

26 vs.

27 COUNTY OF SANTA CLARA,
28 CALIFORNIA, et al.

Defendants.

Case No. 4:20-cv-02180-JST

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PLAINTIFFS’
APPLICATION FOR TEMPORARY
RESTRAINING ORDER, AND/OR, IN THE
ALTERNATIVE, ISSUANCE OF A PRELIMINARY
INJUNCTION**

Date: TBA
Time: TBA
Location: TBA
Judge: Hon. Jon S. Tigar

First Amended Complaint Filed Apr. 10, 2020

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I. INTRODUCTION

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

In California, individuals must generally acquire all modern firearms and ammunition from and/or through duly licensed retailers by means of in-person transactions. (Pen. Code §§ 27545; 28050, et seq.; 30342, et seq.; 30370, et seq.). And, with few exceptions, only individuals holding a valid Firearm Safety Certificate (“FSC”) can acquire and take possession of firearms. (Pen. Code § 26840.) Moreover, because of the State’s waiting period laws and background check systems, individual purchasers and transferees must visit a retailer at least once for ammunition, and at least twice for firearms. Therefore, under these laws, the only way for a Californian to take possession of firearms and ammunition for their self-defense and lawful purposes is through in-person transactions. By their Orders and actions shuttering and criminalizing both operating retailers and shooting ranges, and going to and from retailers and ranges, shuttered firearm and ammunition retailers, Defendants have made it impossible for Plaintiffs, Plaintiffs’ members and customers, and similarly situated individuals to purchase firearms and ammunition during this time of extended insecurity by prohibiting the operation of retailers, and the right of individuals to go to and from them, for an indefinite period of time, and until Defendants say so. Defendants have used the COVID-19 pandemic to deprive Californians of their fundamental rights – through mere executive decree, no less – in Orders and enforcement actions affecting millions of people in thousands of square miles—an entire region.

While Defendants have a legitimate interest in reducing the population’s exposure to

1 COVID-19, the extreme manner in which Defendants are doing so – a total ban – is unlawfully
2 overbroad, irrationally tailored to meet that goal, and categorically unconstitutional. The
3 “enshrinement of constitutional rights necessarily takes certain policy choices off the table.”
4 *Heller*, 554 U.S. at 636. These include policy choices and orders effecting an absolute
5 prohibition on the exercise of Second Amendment rights. *Id.* Licensed firearm and ammunition
6 retailers and shooting ranges are essential businesses, provide law-abiding individuals with
7 critical access to constitutionally protected rights, and must remain open like other *essential*
8 businesses.

9 Times of uncertainty and disturbance are *precisely when the right to self-defense is most*
10 *important*. When the Second Amendment was ratified, “Americans understood the ‘right of self-
11 preservation’ as permitting a citizen to ‘repel force by force’ when ‘the intervention of society in
12 his behalf, may be too late to prevent an injury.’” *District of Columbia v. Heller*, 554 U.S. 570,
13 595 (2008) (quoting 1 Blackstone’s Commentaries 145–46, n.42 (1803)) (brackets omitted). A
14 global pandemic epitomizes a setting in which waiting for “the intervention of society” on one’s
15 behalf may be too late.

16 Through their Orders and enforcement actions, Defendants have implemented a number
17 of shockingly broad restrictions that affect both individuals and critically essential small
18 businesses. But not *all* individuals and businesses are affected alike. Some are favored by
19 Defendants and remain open to the public, while others, like Retailer Plaintiffs herein and others
20 similarly situated to them, are threatened with incarceration, fines, and the loss of their
21 livelihoods. But Defendants also threaten, on pain of criminal penalty, those individuals, like
22 Plaintiffs’, Plaintiffs’ members and customers, and others like them, should they dare exercise
23 their rights (and legal obligation) to go to and use a retailer for the lawful acquisition of
24 constitutionally protected items and services for self-defense. Criminalizing going to, coming
25 from, and operating essential businesses that provide access to the constitutionally protected right
26 to keep and bear arms for self-defense — especially in a manner that is inconsistent with other
27 so-called “essential businesses”— cannot withstand constitutional scrutiny or even rational
28 objectivity. The injunctive relief that Plaintiffs have been forced to seek through this action is

1 necessary – and immediately so – to uphold this bedrock principle of the United States
2 Constitution.

3 II. STATEMENT OF FACTS

4 *State Orders Background*

5 In response to the COVID-19 coronavirus pandemic, on March 17, 2020, Governor
6 Newsom told reporters that his declaring martial law was an option if he feels it necessary.¹
7 Governor Newsom then signed Executive Order N-33-20 on March 19, 2020. (“Executive
8 Order”). See Decl. of George M. Lee (“Lee Decl.”) **Ex. 1**. Governor Newsom’s Executive Order
9 included an order from Dr. Sonia Y. Angell, the State Public Health Officer. On March 22, 2020,
10 Dr. Angell issued a list of “Essential Critical Infrastructure Workers.” Taken together, the State’s
11 Orders directed “all individuals living in the State of California to stay home or at their place of
12 residence.” The only exceptions are for whatever is “needed to maintain continuity of operations
13 of the federal critical infrastructure sectors.” The State Orders granted Dr. Angell the authority to
14 “designate additional sectors as critical in order to protect the health and well-being of all
15 Californians,” but do not identify any additional sectors nor indicate which sectors may qualify
16 as critical. These Orders took effect “immediately” and remain in effect indefinitely. Then, on
17 April 3, 2020, counsel for Gov. Newsom and Public Health Officer Angell represented to the
18 court in another federal action that, “As the Governor has publicly confirmed, the Executive
19 Order does not mandate the closure of firearms and ammunition retailers. To the extent any local
20 official acting on his or her own authority requires the closure of those retailers, such actions do
21 not concern the Executive Order.”²

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24 ¹ “We have the ability to do martial law . . . if we feel the necessity.”
25 [https://www.independent.co.uk/news/world/americas/coronavirus-california-martial-law-shelter-](https://www.independent.co.uk/news/world/americas/coronavirus-california-martial-law-shelter-in-place-lockdown-army-a9410256.html)
26 [in-place-lockdown-army-a9410256.html](https://www.independent.co.uk/news/world/americas/coronavirus-california-martial-law-shelter-in-place-lockdown-army-a9410256.html).

27 ² State Defs.’ Opp. Pls.’ Ex Parte App. Temp. Restraining Ord., *Brandy v. Villanueva*, C.D.Cal
28 No. 2:20-cv-02874-AB-AK, online at [https://www.courtlistener.com/recap/gov.uscourts.cacd.777785/gov.uscourts.cacd.777785.24.0_1](https://www.courtlistener.com/recap/gov.uscourts.cacd.777785/gov.uscourts.cacd.777785.24.0_1.pdf)
[.pdf](https://www.courtlistener.com/recap/gov.uscourts.cacd.777785/gov.uscourts.cacd.777785.24.0_1.pdf). The *Brandy* matter involved similar orders at issue; see *infra* at p. 11.

Santa Clara County Orders and Enforcement

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2 On March 16, 2020, the Public Health Department of the County of Santa Clara issued an
3 order directing all residents of the County to shelter in place until April 7, 2020.³ On March 31,
4 2020, the Public Health Department of Santa Clara issued an additional order superseding the
5 March 16, 2020 Order and directing all residents of the County to continue to shelter in place
6 until May 3, 2020.⁴ (Lee Decl., **Ex. 3.**) Under the March 31 Order, firearm and ammunition
7 retailers and ranges are not “Essential Businesses.”

8 Plaintiff Janice Altman, a resident of Santa Clara County, would like to purchase, take
9 possession of, and train with firearms and ammunition for self-defense. Ms. Altman is concerned
10 that as a result of the COVID-19 crisis, Santa Clara County has released prison inmates onto the
11 streets of Santa Clara County who otherwise would have remained incarcerated. (Altman Decl. ¶
12 5; Lee Decl. **Ex. 4.**) Ms. Altman is not prohibited from possessing firearms under state or federal
13 law, and possesses a valid FSC. She could take possession of a purchased firearm and
14 ammunition upon completion of a background check. She resides minutes away from Reed’s
15 Indoor Range, a well-known firearm and ammunition retailer, indoor shooting range, and
16 training facility shuttered by the Santa Clara District Attorney, according to the retailer’s
17 Website. (Lee Decl., **Ex. 5.**) She resides minutes away from other licensed retailers shuttered by
18 the Orders and enforcement actions. Ms. Altman cannot purchase firearms or ammunition except
19 through a licensed firearms dealer and/or licensed ammunition vendor under California law. Due
20 to Defendants’ Orders and enforcement actions, Ms. Altman is prevented from going to a
21 licensed retailer, purchasing firearms and ammunition, passing a background check, and taking
22 possession of the firearms and ammunition, thus infringing upon her right to lawfully purchase
23 and take possession firearms and ammunition for self-defense.

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25 ³ [https://www.sccgov.org/sites/phd/DiseaseInformation/novel-coronavirus/Documents/03-16-20-
26 Health-Officer-Order-to-Shelter-in-Place.pdf](https://www.sccgov.org/sites/phd/DiseaseInformation/novel-coronavirus/Documents/03-16-20-Health-Officer-Order-to-Shelter-in-Place.pdf).

27 ⁴ [https://www.sccgov.org/sites/phd/DiseaseInformation/novel-coronavirus/Pages/order-health-
28 officer-033120.aspx](https://www.sccgov.org/sites/phd/DiseaseInformation/novel-coronavirus/Pages/order-health-officer-033120.aspx).

1 On March 30, 2020, Defendant Mountain View Police Chief Max Bosel sent an email to
2 Plaintiff Greg David, in which Chief Bosel advised Mr. David that his Santa Clara County
3 business, Plaintiff Cuckoo Collectibles LLC d.b.a. Eddy’s Shooting Sports, was required to
4 close. Pursuant to Defendant Santa Clara County’s Order, Plaintiffs and other firearm retailers
5 that Defendants deem to be non-essential are not permitted to operate and sell any firearms,
6 ammunition, or accessories. (David Decl., ¶ 8-9, 10-15.) As reported by San Jose Mercury News,
7 Defendant Sam Liccardo, the Mayor of Defendant San Jose, said, “We are having panic buying
8 right now for food. The one thing we cannot have is panic buying of guns.”⁵ (Lee Decl., Ex. 6.)

9 Enforcement against firearm and ammunition retailers, and individuals who would use
10 them, spans across Santa Clara County. For example, on the website for Reed’s Indoor Range,⁶ a
11 shooting range, retailer, and training facility in Santa Clara County, the Notice provides:

12 Closed by order of the Santa Clara County District Attorney. If you have questions
13 about the Order, contact the DA 408-792-2300. If you are in your 30-day period on
14 a firearm, we cannot deliver it without further guidance from the county. We will
15 open again as quickly as possible, but for now we are not allowed to process firearm
pickups or registrations. Updates will be posted on social media and our website.
Please stay safe and healthy.

16 (Lee Decl., Ex. 5., p. 0047.)

17 ***Alameda County Orders and Enforcement***

18 On March 16, 2020, the Public Health Department of the County of Alameda issued an
19 order directing all residents of the County to shelter in place.⁷ This Order was substantively
20 identical with the Santa Clara County Order issued March 16, 2020 (described above), but
21 applicable to Alameda County. (Lee Decl., Ex. 7.) Likewise, under the Alameda County Order,
22 firearm and ammunition retailers and shooting ranges are not listed as “Essential Businesses.” *Id.*
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25 ⁵ <https://www.mercurynews.com/2020/03/18/coronavirus-san-jose-orders-gun-store-to-close-in-one-of-first-tests-of-essential-under-shelter-order/>.

26 ⁶ <http://www.reedsindoorange.com>.

27 ⁷ <https://www.acgov.org/documents/Final-Order-to-Shelter-In-Place.pdf>.

1 Under Section 11 of the Order, Defendant Sheriff Ahern and all chiefs of police of the County
2 are tasked with enforcement of the provisions set forth in the Order.

3 On March 31, 2020, the Public Health Department of Alameda County issued an
4 additional Order superseding the March 16, 2020 order and directing all residents of the County
5 to continue to shelter in place until May 3, 2020.⁸ (Lee Decl., **Ex. 8**.) Under Section 13(f) of the
6 March 31 order, firearm and ammunition retailers and ranges are not “Essential Businesses.” *Id.*

7 Plaintiff Albert Swann, a resident of Alameda County, wishes to purchase firearms and
8 ammunition for self-defense and defense of his home. Mr. Swann is not prohibited from
9 possessing firearms or ammunition under state or federal law. He would purchase firearms and
10 ammunition in Alameda County, but he is unable to do so as a direct result of the Alameda
11 Order. (Swann Decl., ¶¶ 4–8.)

12 Multiple news outlets have published reports that Alameda County Defendants are
13 actively shuttering access to arms, the ammunition required to use those arms, and the shooting
14 ranges and education facilities that individuals need to learn how to safely and competently use
15 firearms by forcing firearm and ammunition product manufacturers, retailers, importers,
16 distributors, and shooting ranges within Alameda County to close their doors and stop
17 performing sales, transfers, shipments, and deliveries of firearms and ammunition. (Lee Decl.,
18 **Ex. 9 and Ex. 10**.)^{9 10}

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24 ⁸ <http://www.acphd.org/media/563688/health-officer-order-20-04-shelter-in-place-20200331.pdf>

25 ⁹ <https://www.eastbaytimes.com/2020/03/26/coronavirus-1-a-sheriff-goes-back-to-closing-gun-stores-will-others-follow>.

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27 ¹⁰ <https://www.businessinsider.com/california-coronavirus-gun-stores-essential-business-gavin-newsom-2020-3>.

1 *San Mateo County Orders and Enforcement*

2 On March 16, 2020, the Public Health Department of the County of San Mateo issued an
3 Order directing all residents of the County to shelter in place.¹¹ (Lee Decl., **Ex. 11.**) Again, this
4 Order is substantively identical to other county orders described above, applicable to San Mateo
5 County. Under Section 10(f) of the Order, firearm and ammunition retailers and shooting ranges
6 are not “Essential Businesses.” Under Section 11, the Defendant Sheriff Bolanos and all chiefs of
7 police of the County are tasked with the enforcement of the provisions set forth in the Order. *Id.*

8 On March 31, 2020, the Public Health Department of San Mateo issued an additional
9 Order superseding the March 16, 2020 Order and directing all residents of the County to continue
10 to shelter in place until May 3, 2020.¹² Again, this Order did not list firearm and ammunition
11 retailers and shooting ranges as “Essential Businesses.” (Lee Decl., **Ex. 11.**) Defendant Sheriff
12 Bolanos and all chiefs of police of the County are tasked with enforcement of the provisions set
13 forth in the March 31, 2020 Order. *Id.*

14 On March 23, 2020, Pacifica Police informed Plaintiffs Dmitriy Danilevsky and City
15 Arms LLC that they were required to halt all new sales of firearms and ammunition because
16 firearm and ammunition retailers, like theirs, were non-essential businesses in San Mateo County
17 and therefore required to close. Mr. Danilevsky was informed at that time that the store was
18 provisionally permitted to remain open for the purpose of delivering firearms that had already
19 been purchased, but for no other purpose. (Danilevsky Decl., ¶ 10.) Plaintiffs Danilevsky and
20 City Arms LLC were advised further that the provisional operation allowance was temporary and
21 would expire on April 6, 2020, at which point they were required to close the store entirely and
22 cease all operations. (*Id.*, at ¶ 11.)

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26 ¹¹<https://www.smcgov.org/sites/smcgov.org/files/HO%20Order%20Shelter%20in%20Place%2020200316.pdf>.

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28 ¹²<https://www.smcgov.org/sites/smcgov.org/files/Final%203-31%20Order.pdf>.

Contra Costa County Orders and Enforcement

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2 On March 16, 2020, the Public Health Department of the County of Contra Costa issued
3 an Order directing all residents of the County to shelter in place identical in substance to the
4 orders described above, but applicable to Contra Costa County.¹³ (Lee Decl., **Ex. 12.**) Similarly,
5 under this Order, firearm and ammunition retailers and shooting ranges are not “Essential
6 Businesses.” *Id.* Under Section 11 of the Order, Defendant Sheriff Livingston and all chiefs of
7 police of the County are tasked with enforcement of the provisions set forth in the Order.

8 Again, on March 31, 2020, the Public Health Department of the County of Contra Costa
9 issued an additional order superseding the March 16, 2020 Order and directing all residents of
10 the County to continue to shelter in place until May 3, 2020.¹⁴ (Lee Decl., **Ex. 13.**) Under this
11 Order, all non-essential businesses are ordered to cease all activities at facilities located within
12 the County and under section 13(f), firearm and ammunition retailers and ranges are not
13 “Essential Businesses.” Defendant Sheriff Livingston and all chiefs of police of the County are
14 tasked with the enforcement of the provisions set forth in the March 31st Order. *Id.*

15 Plaintiff Ryan Goodrich, a resident of Contra Costa County, wishes to purchase firearms
16 and ammunition for self-defense, defense of his home, and for work. (Goodrich Decl., ¶¶ 4-9.)
17 Mr. Goodrich is not prohibited from possessing firearms or ammunition under state or federal
18 law. He is employed as an armored truck driver. (*Id.*, at ¶¶ 3, 5.) Under the Contra Costa Order,
19 Mr. Goodrich is considered an essential worker based on his profession, and in order to fulfill his
20 duties, he requires access to firearms and ammunition. Mr. Goodrich would purchase the
21 ammunition he needs for self-defense, the defense of his home, and to execute his work duties.
22 (*Id.*, at ¶ 5.)

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26 ¹³ <https://cchealth.org/coronavirus/pdf/HO-COVID19-SIP-0316-2020.pdf>.

27 ¹⁴ <https://www.contracosta.ca.gov/DocumentCenter/View/64727/2020-0331-Health-Officer-Order-COVID19>.
28

1 On March 25, 2020, the Pleasant Hill Police Department informed plaintiffs Roman
 2 Kaplan, Yan Traytel, and City Arms East LLC that their store in Contra Costa County could no
 3 longer make any new sales or transfers of firearms or ammunition. (Kaplan Decl., ¶¶10-12;
 4 Traytel Decl., ¶¶ 10-13.) On March 31, 2020, in an email to Plaintiff Kaplan, Ronald Priebe of
 5 the Pleasant Hill Police Department confirmed that the City was continuing to enforce a
 6 shutdown against Plaintiffs Kaplan and Traytel’s City Arms East. (*Id.*)

7 On April 1, 2020, in an email to Plaintiff Kaplan, Ronald Priebe of the Pleasant Hill
 8 Police Department stated:

9 I determined a new order was issued by the county health officer, and went into
 10 effect at midnight last night. I’ve attached a copy and highlighted some of what I
 11 believe to be relevant points. Unfortunately, it looks like they did not adopt the fed’s
 12 advisory definitions for essential businesses. There is no mention of gun stores in
 13 the county order. They do make some reference to businesses that *support* essential
 14 businesses (such as a law enforcement organization needing to buy guns/ammo
 15 from you), but that likely wouldn’t apply to individuals (law enforcement or
 16 otherwise). There are other restrictions related to conducting business, such as
 17 social distancing, sending non-essential employees to work from home, etc.
 Although I’ve highlighted some of the pertinent paragraphs related to your
 situation, other portions of the order may be new and need to be adopted, if you’ll
 continue operating in a limited fashion (as we discussed previously, for gun releases
 only). I wish had better news to share and could help more. As always, I appreciate
 your support and cooperation given the situation we’re currently facing.

18 (Kaplan Decl., **Ex. 1.**) Mr. Priebe attached the March 31, 2020 Contra Costa shelter in place
 19 order with “pertinent paragraphs related to [Plaintiff Kaplan’s] situation.” (*Id.*, **Ex. 2.**)

20 ■ ■ ■

21 In California, a violation of a statute is a misdemeanor unless specified to be punishable
 22 otherwise. California Penal Code Prelim. Prov. 19.4 (“When an act or omission is declared by a
 23 statute to be a public offense and no penalty for the offense is prescribed in any statute, the act or
 24 omission is punishable as a misdemeanor.”). County Defendants’ Orders, enforced by Defendant
 25 sheriffs and police chiefs, among others, commonly state: “Pursuant to Government Code
 26 sections 26602 and 41601 and Health and Safety Code section 101029, the Health Officer
 27 requests that the Sheriff and all chiefs of police in the County ensure compliance with and
 28 enforce this Order. The violation of any provision of this Order constitutes an imminent threat

1 and menace to public health, constitutes a public nuisance, and is punishable by fine,
2 imprisonment, or both.” Thus, under Defendants’ Orders and enforcement policies, it is a crime
3 for individuals to leave their homes and go to firearms and ammunition retailers and shooting
4 ranges. Additionally, it is a crime for retailers and ranges, including Plaintiffs herein, to operate.

5 In total, “health officers in seven Bay Area jurisdictions are extending a previous stay-at-
6 home order at least through May 3, 2020 in order to preserve critical hospital capacity across the
7 region.” (Lee Decl., **Ex. 14.**) Currently, six Northern California counties have completely banned
8 the operation of firearm and ammunition retailers (Alameda, Contra Costa, Marin, Santa Clara,
9 San Francisco, and San Mateo Counties). Collectively, and not including the counties of Marin
10 and San Francisco, Defendant counties alone have banned and shut down firearms and
11 ammunition retailers for over 3,600 square miles, closing off and damaging the fundamental
12 rights of over 5 million people in California who reside in these counties. (Lee Decl., **Ex. 15.**)

13 Notably, the Department of Homeland Security, Cyber-Infrastructure Division (“CISA”),
14 issued updated (Version 2.0) “Guidance on the Essential Critical Infrastructure Workforce”
15 during the COVID-19 pandemic. (Lee Decl., **Ex. 15.**)¹⁵ While the CISA’s guidance is advisory in
16 nature, its findings and conclusions were “developed, in collaboration with other federal
17 agencies, State and local governments, and the private sector” for the specific purpose of
18 “help[ing] State, local, tribal and territorial officials as they work to protect their communities,
19 while ensuring continuity of functions critical to public health and safety, as well as economic
20 and national security.” To that end, CISA determined that “[w]orkers supporting the operation of
21 firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting
22 ranges” fall squarely within the “critical infrastructure workforce.”

23 In addition to the individual and retailer Plaintiffs, Plaintiffs Second Amendment
24 Foundation, Inc. (“SAF”), California Gun Rights Foundation (“CGF”), California Association of
25 Federal Firearms Licensees, Inc. (“CAL-FFL”), National Rifle Association of America (“NRA”),
26

27 ¹⁵ Guidance on the Essential Critical Infrastructure Workforce,
28 <https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>

1 and Firearms Policy Coalition, Inc. (“FPC”) are themselves damaged by the Orders and
 2 enforcement actions. Beyond their own direct damages, these institutional plaintiffs have
 3 California members and supporters who are affected by Defendants’ Orders and enforcement
 4 actions. (See Declarations of Brandon Combs, Alan Gottlieb, Gene Hoffman, Mike Baryla, and
 5 Josh Savani.) All Plaintiffs accordingly seek this necessary relief.

6 ***Brandy v. Villanueva***

7 In *Brandy v. Villanueva et al.*, C.D. Case No. 2:20-cv-02874-AB-AK, the district court
 8 considered and on April 6, 2020, denied the plaintiffs’ application for a temporary restraining
 9 order against similar orders [ECF No. 29].

10
 11 **III. ARGUMENT**

12 **A. STANDARD FOR ISSUING A TEMPORARY RESTRAINING ORDER AND PRELIMINARY**
 13 **INJUNCTION.**

14 This court is well familiar with the four-factor test on an application for a temporary
 15 restraining order and motion for a preliminary injunction. A plaintiff “must establish that he is
 16 likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of
 17 preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the
 18 public interest.” *Am. Trucking Ass’ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.
 19 2009) (quoting *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)). To grant preliminary
 20 injunctive relief, a court must find that “a certain threshold showing [has been] made on each
 21 factor.” *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Assuming that this threshold
 22 has been met, “serious questions going to the merits’ and a balance of hardships that tips sharply
 23 towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also
 24 shows that there is a likelihood of irreparable injury and that the injunction is in the public
 25 interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

26 **B. PLAINTIFFS WILL SUCCEED ON THE MERITS OF THEIR CLAIMS.**

27 Plaintiffs will succeed on the merits of their claims, as the Defendants’ sweeping Orders
 28 and enforcement actions at issue prohibit millions of Californians in an entire region from

1 exercising fundamental rights guaranteed by the Second Amendment, and violate principles of
2 Due Process under the Fifth and Fourteenth Amendments.

3 **1. Defendants’ Orders and Enforcement Actions Deny Access To, Exercise Of, and**
4 **Infringe Fundamental, Individual Second Amendment Rights.**

5 The Second Amendment to the United States Constitution provides: “A well regulated
6 Militia, being necessary to the security of a free State, the right of the people to keep and bear
7 Arms, shall not be infringed.” U.S. Const. amend. II. The Second Amendment “guarantee[s] the
8 individual right to possess and carry weapons in case of confrontation.” *Heller*, 554 U.S. at 592.
9 And because “the Framers and ratifiers of the Fourteenth Amendment counted the right to keep
10 and bear arms among those fundamental rights necessary to our system of ordered liberty,” it
11 applies to the States through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S.
12 742, 778, 791 (2010) (plurality opinion).

13 The Supreme Court has held that the Second Amendment guarantees the right to
14 “possess” weapons. *Heller*, 554 U.S. at 592. And “the Court has acknowledged that certain
15 unarticulated rights are implicit in enumerated guarantees. . . . [F]undamental rights, even though
16 not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment
17 of rights explicitly defined.” *Richmond Newspapers v. Virginia*, 448 U.S. 555, 579–80 (1980).
18 Accordingly, “the right to possess firearms for protection implies a corresponding right to obtain
19 the bullets necessary to use them.” *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967
20 (9th Cir. 2014) (citing *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)). And “[t]he
21 right to keep arms, necessarily involves the right to purchase them.” *Andrews v. State*, 50 Tenn.
22 165, 178 (1871). See *Illinois Ass’n of Firearms Retailers v. City of Chicago*, 961 F.Supp.2d 928,
23 930 (N.D. Ill. 2014) (“the right to keep and bear arms for self-defense under the Second
24 Amendment . . . must also include the right to *acquire* a firearm”) (emphasis in original); *cf.*
25 *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1052 (Colo. 2002) (“When a person buys a
26 book at a bookstore, he engages in activity protected by the First Amendment because he is
27 exercising his right to read and receive ideas and information.”). Thus, the right to possess
28 weapons necessarily also includes the right to acquire and transfer them. “Without protection for

1 these closely related rights, the Second Amendment would be toothless.” *Luis v. United States*,
 2 136 S.Ct. 1083, 1098 (2016) (Thomas, J., concurring).

3 For all these same reasons, firearm retailers are protected by the Second Amendment. If
 4 “[a] total prohibition against sale of contraceptives ... would intrude upon individual decisions in
 5 matters of procreation and contraception as harshly as a direct ban on their use,” *Carey v.*
 6 *Population Servs., Int'l*, 431 U.S. 678, 687–88 (1977), the same rationale applies to firearms.
 7 Thus, “[c]ommercial regulations on the sale of firearms do not fall outside the scope of the
 8 Second Amendment.” *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010). “If there
 9 were somehow a categorical exception for these restrictions [on gun sales], it would follow that
 10 there would be no constitutional defect in prohibiting the commercial sale of firearms. Such a
 11 result would be untenable under *Heller*.” *Id.* See also *Mance v. Sessions*, 896 F.3d 699 (5th Cir.
 12 2018) (implicitly recognizing a right to sell firearms by analyzing a burden on that right).

13 **(a) Defendants’ Orders and Enforcement Actions Are a Prohibition on**
 14 **Second Amendment Rights and Categorically Unconstitutional.**

15 The Supreme Court held in *Heller* that the appropriate test to be applied is a categorical
 16 one, first looking to the text of the Constitution itself, and then looking to history and tradition to
 17 inform the scope and meaning of that text. Indeed, *Heller* held a handgun ban – which is the
 18 effect of Defendants’ expansive Orders and actions, among other restrictions – categorically
 19 unconstitutional: “Whatever the reason, handguns are the most popular weapon chosen by
 20 Americans for self-defense in the home, and a complete prohibition of their use is invalid.” 554
 21 U.S. at 629. “Both *Heller* and *McDonald* suggest that broadly prohibitory laws restricting the
 22 core Second Amendment right—like the handgun bans at issue in those cases, which prohibited
 23 handgun possession even in the home—are categorically unconstitutional.” *Ezell*, 651 F.3d at
 24 703 (emphasis added).

25 At issue here is a complete and unilateral suspension on the right of ordinary citizens to
 26 acquire firearms and ammunition, a right protected by the Second Amendment. Due to the ever-
 27 expanding nature of the laws regulating firearm transfers, in-person visits to gun stores and
 28 retailers are the *only* legal means for ordinary, law-abiding citizens to acquire and purchase

1 firearms—and now, ammunition—within the State of California. See, e.g., Cal. Pen. Code §
2 27545 (requiring all firearm transfers be processed through a licensed dealer); Pen. Code § 30312
3 (requiring all ammunition transactions to be made through a licensed ammunition vendor, in a
4 face-to-face transfer). In addition, firearm and ammunition retailers are required to initiate
5 background checks at the point of transfer to fulfill the State’s mandates, administer the vast
6 majority of FSC tests to ensure that a recipient is aware of firearm safety rules, and administer
7 the safe handling demonstration. Pen. Code §§ 28175 (“The dealer or salesperson making a sale
8 shall ensure that all required information has been obtained from the purchaser. The dealer and
9 all salespersons shall be informed that incomplete information will delay sales.”); 28200 et seq.
10 (establishing procedure for collecting information and fees associated with required background
11 checks). These are additional services that gun store dealers now *must* provide in furtherance of
12 the State’s statutes and regulations.

13 The State has mandated these burdensome in-person requirements, requiring, for
14 example, at least two visits to licensed retailers for each firearm transaction, and at least one for
15 ammunition transactions. Defendants simply cannot be permitted to take actions that effectively
16 ban access to, on pain of criminal liability, and shut down all firearm and ammunition transfers in
17 their jurisdictions. Such transactions cannot be done remotely as many other, non-firearm online
18 retailers are able to do. *See* Pen. Code § 27540 (requirements for dealer delivery of firearms).
19 The effect of Defendants’ Orders and enforcement actions is a destruction of a fundamental,
20 individual right. It is well established that the deprivation of constitutionally protected individual
21 liberty, even temporarily, constitutes irreparable injury. *Associated Press v. Otter*, 682 F.3d 821,
22 826 (9th Cir. 2012) (“the loss of First Amendment freedoms, for even minimal periods of time,
23 unquestionably constitutes irreparable injury.”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373
24 (1976)).

25 The effect of Defendants’ Orders, and Defendants’ enforcement of them, is a ban on
26 individuals’ going to and from, and on the operation of, all firearm and ammunition retailers and
27 shooting ranges in the massive jurisdictions within which their various Orders apply. As the
28 Orders are now being interpreted and enforced, millions of Californians are being prevented from

1 acquiring or practicing with firearms or ammunition, and during a time of national *crisis*.

2 Defendants' is a policy outcome that is completely taken off the table under *Heller*. The
3 "central" holding in *Heller* was "that the Second Amendment protects a personal right to keep
4 and bear arms for lawful purposes, most notably for self-defense within the home." *McDonald*,
5 561 U.S. at 780. "The very enumeration of the right takes out of the hands of government—even
6 the Third Branch of Government—the power to decide on a case-by-case basis whether the right
7 is really worth insisting upon." *Heller*, 554 U.S. at 634.

8 Plaintiffs must here preserve and maintain their position that any interest-balancing test,
9 including tiered scrutiny, is inappropriate under *Heller*, particularly for categorical bans like and
10 including those at issue here. *Heller*, 554 U.S. at 634, 635 ("We know of no other enumerated
11 constitutional right whose core protection has been subjected to a freestanding 'interest-
12 balancing' approach"; "The Second Amendment . . . is the very product of an interest balancing
13 by the people"); *Ezell*, 651 F.3d at 703 ("Both *Heller* and *McDonald* suggest that broadly
14 prohibitory laws restricting the core Second Amendment right—like the handgun bans at issue in
15 those cases, which prohibited handgun possession even in the home—are categorically
16 unconstitutional.").

17 Anyone who does not already own a firearm in Defendant Counties is now entirely
18 prohibited from exercising their Second Amendment rights in thousands of square miles
19 throughout Defendants' jurisdictions, at a time when those rights are most important. As such,
20 Defendants' actions amount to a categorical ban and should be categorically invalidated.

21 **(b) The Orders Cannot Survive Any Level of Scrutiny.**

22 The Defendants' orders and actions also fail the Ninth Circuit's two-part test applying
23 tiered scrutiny. Assuming *arguendo* that an interest-balancing test is appropriate, the challenged
24 provisions fail any level of scrutiny. Generally, the Ninth Circuit applies a two-part test for
25 Second Amendment challenges. *United States v. Chovan*, 735 F.3d 1127 (9th Cir. 2013). "The
26 two-step Second Amendment inquiry we adopt (1) asks whether the challenged law burdens
27 conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate
28 level of scrutiny." *Id.* at 1136–37. But consistent with Supreme Court precedent, "[a] law that

1 imposes such a severe restriction on the fundamental right of self defense of the home that it
2 amounts to a destruction of the Second Amendment right is unconstitutional under any level of
3 scrutiny.” *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016). *Accord Bauer v. Becerra*, 858
4 F.3d 1216, 1222 (9th Cir. 2017) (“A law that . . . amounts to a destruction of the Second
5 Amendment right is unconstitutional under any level of scrutiny”). “That is what was involved
6 in *Heller*.” *Silvester*, 843 F.3d at 821 (citing *Heller*, 554 U.S. at 628–29).

7 As discussed above, Defendants’ acts strike at the very core of the Second Amendment,
8 thereby satisfying the first step of the two-part test. At the second step of the inquiry, a court is to
9 measure “how severe the statute burdens the Second Amendment right. ‘Because *Heller* did not
10 specify a particular level of scrutiny for all Second Amendment challenges, courts determine the
11 appropriate level by considering ‘(1) how close the challenged law comes to the core of the
12 Second Amendment right, and (2) the severity of the law’s burden on that right.’” *Duncan v.*
13 *Becerra*, 265 F.Supp.3d 1106, 1119 (S.D. Cal. 2017) (granting preliminary injunction), *aff’d*, 742
14 F.App’x 218 (9th Cir. 2018) (quoting *Bauer*, 858 F.3d at 1222). “Guided by this understanding,
15 [the] test for the appropriate level of scrutiny amounts to ‘a sliding scale.’ [...] ‘A law that
16 imposes such a severe restriction on the fundamental right of self defense of the home that it
17 amounts to a destruction of the Second Amendment right is unconstitutional under any level of
18 scrutiny.’ [...] Further down the scale, a ‘law that implicates the core of the Second Amendment
19 right and severely burdens that right warrants strict scrutiny. Otherwise, intermediate scrutiny is
20 appropriate.” *Bauer*, 858 F.3d at 1222 (citing *Silvester*, 843 F.3d at 821, and *Chovan*, 735 F.3d
21 at 1138; *see also*, *Bateman v. Purdue*, 881 F.Supp.2d 709, 715 (E.D. N.C. 2012) (applying strict
22 scrutiny to North Carolina’s emergency declaration statutes that effectively prevented access to
23 firearms).

24 If heightened scrutiny applies, Defendants’ policies should be evaluated under strict
25 scrutiny, meaning Defendants must show that their policies are narrowly tailored to achieve a
26 compelling state interest, and that no less restrictive alternative exists to achieve the same ends.
27 *United States v. Alvarez*, 617 F.3d 1198, 1216 (9th Cir. 2010) (citing *Citizens United v. Fed.*
28 *Election Comm’n*, 558 U.S. 310, 340 (2010)). With the wide breadth of the Order and its effect of

1 completing destroying the right to keep and bear arms during this pandemic, by no stretch of
2 imagination would it survive strict scrutiny – which highlights the reality that it is the very sort of
3 categorical ban that can never be tolerated under *Heller*. This calculus does not change in an
4 emergency, declared or otherwise. In *Bateman v. Purdue*, the district court evaluated North
5 Carolina’s statutes which authorized government officials to impose various restrictions on the
6 possession, transportation, sale, and purchase of “dangerous weapons” during declared states of
7 emergency. 881 F.Supp.2d at 710–11. The district court evaluated the statutes under the two-part
8 test, and found first that “[i]t cannot be seriously questioned that the emergency declaration laws
9 at issue here burden conduct protected by the Second Amendment.” *Id.* at 713–14. “Additionally,
10 although the statutes do not directly regulate the possession of firearms within the home, they
11 effectively prohibit law abiding citizens from purchasing and transporting to their homes
12 firearms and ammunition needed for self-defense. As such, these laws burden conduct protected
13 by the Second Amendment.” Accordingly, under strict scrutiny, the emergency declaration
14 statutes were voided and declared to be unconstitutional since the statutes were not narrowly
15 tailored, e.g., with reasonable time, place and manner restrictions. *Id.* at 716.

16 Accordingly, if heightened scrutiny is appropriate here, strict scrutiny should likewise
17 apply. But even under intermediate scrutiny, the Order, and the Defendants’ enforcement of it,
18 are unconstitutional. Under intermediate scrutiny review, the government bears the burden of
19 demonstrating a reasonable fit between the challenged regulation or law and a substantial
20 governmental objective that the law ostensibly advances. *Board of Trustees of State Univ. of New*
21 *York v. Fox*, 492 U.S. 469, 480–81 (1989). To carry this burden, the government must not only
22 present evidence, but “substantial evidence” drawn from “reasonable inferences” that actually
23 support its proffered justification. *Turner Broad. Sys., Inc.*, 520 U.S. 180, 195 (1997). And in the
24 related First Amendment context, the government is typically put to the evidentiary test to show
25 that the harms it recites are not only real, but “that [the speech] restriction will in fact alleviate
26 them to a material degree.” *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1177 (9th Cir. 2018)
27 (citing *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999))
28 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). This same evidentiary burden should

1 apply with equal force to Second Amendment cases, where equally fundamental rights are
2 similarly at stake. See, *Ezell*, 651 F.3d at 706–07 (“Both *Heller* and *McDonald* suggest that First
3 Amendment analogues are more appropriate, and on the strength of that suggestion, we and other
4 circuits have already begun to adapt First Amendment doctrine to the Second Amendment
5 context”) (citing *Heller*, 554 U.S. at 582, 595, 635; *McDonald*, 130 S.Ct. at 3045; *see also*
6 *Marzzarella*, 614 F.3d at 89 n.4 (“[W]e look to other constitutional areas for guidance in
7 evaluating Second Amendment challenges. We think the First Amendment is the natural
8 choice.”)).

9 Under intermediate scrutiny, a court must ensure that “the means chosen are not
10 substantially broader than necessary to achieve the government’s interest.” *Ward v. Rock Against*
11 *Racism*, 491 U.S. 781, 800 (1989). Thus, in the First Amendment context, “the government must
12 demonstrate that alternative measures that burden substantially less speech would fail to achieve
13 the government’s interests, not simply that the chosen route is easier.” *McCullen v. Coakley*, 134
14 S.Ct. 2518, 2540 (2014). For example, restrictions on commercial speech must “tailored in a
15 reasonable manner to serve a substantial state interest.” *Edenfield v. Fane*, 507 U.S. 761, 770
16 (1993). The Supreme Court has made abundantly clear that such “reasonable tailoring” requires
17 a considerably closer fit than mere rational basis scrutiny, and requires evidence that the
18 restriction directly and materially advances a *bona fide* state interest. In the Second Amendment
19 context, even Justice Breyer’s balancing test proposed in his *Heller* dissent (and expressly
20 rejected by the majority) considered “reasonable, but less restrictive, alternatives.” 554 U.S. at
21 710 (Breyer, J., dissenting). Many circuit courts recognize the obligation in the Second
22 Amendment context. *Heller v. District of Columbia*, 801 F.3d 264, 277–78 (D.C. Cir. 2015)
23 (“*Heller III*”); *Ass’n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910
24 F.3d 106, 124 n.28 (3d Cir. 2018); *Ezell*, 651 F.3d at 709; *Moore v. Madigan*, 702 F.3d 933, 940
25 (7th Cir. 2012); *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010); *Bonidy v. U.S. Postal*
26 *Serv.*, 790 F.3d 1121, 1128 (10th Cir. 2015).

27 “[The Court] must determine whether the regulation *directly* advances the governmental
28 interest asserted, *and whether it is not more extensive than is necessary to serve that interest.*”

1 *Greater New Orleans Broad. Ass'n, Inc.*, 527 U.S. at 183 (internal citations omitted) (emphasis
2 added). The government bears the burden of justifying its restriction on constitutional rights, and
3 that “burden is not satisfied by mere speculation or conjecture; rather, a governmental body
4 seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites
5 are real and that its restrictions will in fact alleviate them to a material degree.” *Edenfield*, 507
6 U.S. at 770-71. “The Government is not required to employ the least restrictive means
7 conceivable . . . but one whose scope is in proportion to the interest served.” *Greater New*
8 *Orleans Broad. Ass'n, Inc.*, 527 U.S. at 188.

9 More, a governmental interest that is as inconsistently pursued as Defendants’ here is not
10 and cannot be a substantial one for constitutional purposes. To be sure, the question is not
11 whether an interest is important at the highest level of generality; rather, the fundamental concern
12 is whether a government is genuinely applying rules about its interest in a consistent manner
13 such that it demonstrates the importance of the interest. Like the regulatory regime that failed
14 constitutional muster in *Greater New Orleans Broad. Ass’n, Inc.*, Defendants’ Orders and
15 enforcement actions here are “so pierced by exemptions and inconsistencies that [they] cannot
16 hope to exonerate [them].” *Id.* at 190.

17 More, the substantiality of the interest in Defendants’ Orders and enforcement actions,
18 relative to the incontrovertible importance of and right to the constitutionally enumerated,
19 fundamental right to keep and bear arms – particularly for self-defense in times of crisis – is
20 informed by the federal government’s declaration that the firearm industry, its workers, and its
21 products, are all critical infrastructure. So too must those who would go to and use them to
22 acquire constitutionally protected items and services be protected in doing so.

23 Here, there can be no “reasonable fit” nor a “proportional fit” between blanket Orders and
24 enforcement actions that prohibit all legal firearm and ammunition transfers and training at
25 shooting ranges, and the Defendants’ presumptive desire to abate the spread of a viral pandemic.
26 Nor can it be said that the mandatory closing of all firearms retailers in their entirety “is not more
27 extensive than is necessary” to limit community spread. Like all other businesses, retailers, and
28 service providers that are exempt from Defendants’ Orders and enforcement actions, firearm and

1 ammunition retailers and ranges, and the people, like Plaintiffs, who would go to them, could
2 abide by maximum occupancy limitations, social distancing requirements, and sanitation
3 regimens just as with the many other essential businesses allowed to continue operating. And
4 likewise, to the extent that certain activities (such as the pickup/transfer of firearms, ammunition,
5 and the safe handling demonstration) are statutorily mandated to be conducted using in-person
6 transactions, these activities can be conducted while adhering to the same best practices and
7 necessary precautions required of other businesses that are permitted to continue operating
8 during this time.

9 Adherence to the Defendants' Orders is simply a take-it-or-leave it proposition, with no
10 room for less restrictive alternatives that would otherwise allow transactions to proceed. As
11 Defendant San Jose Mayor Liccardo recently said, unsurprisingly and as a window into
12 Defendants' motivations, "We are having panic buying right now for food. The one thing we
13 cannot have is panic buying of guns." (Lee Decl., **Ex. 6**, p. 0051.) Defendants' motivations are
14 manifested within this statement, evidence of a simple unwillingness even to consider less
15 restrictive alternatives that would allow firearm transfers to proceed while preserving a purported
16 interest in public health. This zero-tolerance approach, whether motivated by ideological
17 concerns or otherwise, runs afoul of the government's burden that the restrictions at issue be
18 "proportional in scope," "not more extensive than necessary," or reasonably tailored to achieve
19 the government's interest. However laudable an interest may be, well-settled United States
20 Supreme Court jurisprudence has clearly spoken on what constitutes intermediate scrutiny.
21 Defendants' Orders and enforcement actions do not pass constitutional muster under categorical,
22 heightened, or even intermediate constitutional scrutiny.

23 **2. Defendants' Orders and Enforcement Actions Violate Due Process.**

24 Plaintiffs will further prevail on their second claim, set forth in their First Amended
25 Complaint, that the Orders, and Defendants' enforcement practices specifically targeting firearm
26 and ammunition retailers, effect a deprivation of due process under the Fifth and Fourteenth
27 Amendments. The Fifth Amendment to the United States Constitution provides, in pertinent part:
28 "No person shall be. . .deprived of life, liberty or property, without due process of law. . . ."

1 Likewise, the Fourteenth Amendment provides “nor shall any state deprive any person of life,
2 liberty, or property, without due process of law[.]”

3 In this case, arbitrariness exists within all of the Defendants’ Orders and enforcement
4 actions, as the Orders classify as “essential” a variety of businesses which have no clear
5 connection to *essential* goods and services (let alone expressly constitutionally protected goods
6 and services), particularly in a time of crisis. For example, “convenience stores, and other
7 establishments engaged in the retail sale of unprepared food, canned food, dry goods, non-
8 alcoholic beverages, fresh fruits and vegetables, pet supply, fresh meats, fish, and poultry, as well
9 as hygienic products and household consumer products necessary for personal hygiene or the
10 habitability, sanitation, or operation of residences” are deemed to expressly fall within this
11 protected category of “Essential” businesses. So too are “auto-supply” stores, businesses “that
12 provide food, shelter, and social services, and other necessities of life for economically
13 disadvantaged or otherwise needy individuals,” landscapers, gardeners, “[b]icycle repair and
14 supply shops,” and hardware stores. But not firearm and ammunition retailers? Particularly
15 during or in anticipation of a further time of crisis?

16 The answer may be found, again, in the words of Defendant Mayor Liccardo: “We are
17 having panic buying right now for food. The one thing we cannot have is panic buying of guns.”
18 (Lee Decl., **Ex. 6**.) So there we have it: even if firearms and ammunition are essential,
19 Defendants simply *cannot* allow people to have them now, no matter how essential they may be.

20 Defendants’ Orders, and their enforcement of them, lead to the conclusion that
21 Defendants’ Orders, policies, practices, customs, and enforcement actions are arbitrary and
22 capricious, overbroad, unconstitutionally vague, and violate Plaintiffs’ Due Process rights.
23 Putting aside Defendants’ expressed dislike of firearms and those who sell and buy them, the
24 Retailer Plaintiffs fall within any reasonable definition of “Essential Businesses,” because they
25 are establishments engaged in the retail sale of household consumer products necessary for
26 maintaining the safety of individuals, like individual Plaintiffs and others similarly situated who
27 are prevented from attending Retailer Plaintiffs’ establishments to purchase or transfer firearms,
28 ammunition, accessories, and components necessary—and constitutionally protected—for the

1 defense of their homes, selves, and others.

2 Moreover, Retailer Plaintiffs are essential service providers who provide statutorily
3 mandated services, such as the processing of background checks, administration of waiting
4 period laws, administration of FSC tests, and “safe handling” demonstrations, all of which must
5 be conducted *in person* pursuant to State laws and regulations.

6 And Retailer Plaintiffs’ businesses provide goods to residences and essential businesses.
7 They are, in every meaningful sense, “essential,” as CISA has recognized. But here, Defendants’
8 arbitrary and capricious classification scheme is made even more constitutionally suspect
9 because it bypassed the constitutionally authorized method for enacting laws. Legislatures are
10 supposed to enact laws; executive agencies are supposed to enforce them. Even had a legislative
11 body made these irrational and constitutionally repugnant rules, after due deliberation and
12 debate, they would be invalid. And while the constitutional harms are not made more (or less)
13 illegal because of the violation of separation of powers, that harm arises from both the substance
14 of unconstitutional polices, and also from the process that gave rise to them. Defendants here,
15 acting unilaterally, deserve no deference or legislative benefit of the doubt.

16 Moreover, Defendants’ Orders and enforcement actions are unconstitutionally vague,
17 because they do not define critical terms, encompass protected activity, omit definitions of key
18 terms, operate as complete bans, do not require specific intent to commit an unlawful act, and
19 permit and encourage arbitrary and erratic arrests and convictions with too much discretion
20 committed to law enforcement. “As generally stated, the void-for-vagueness doctrine requires
21 that a penal statute define the criminal offense with sufficient definiteness that ordinary people
22 can understand what conduct is prohibited and in a manner that does not encourage arbitrary and
23 discriminatory enforcement.” *Gonzales v. Carhart*, 550 U.S. 124, 148–49 (2007) (quoting
24 *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). The breadth and built-in vagueness here run
25 afoul of the due process clause because the subject Orders fail to give adequate guidance to those
26 who would be law-abiding, to advise them of the nature of the offense with which they may be
27 charged, or to guide courts in trying those who are accused of violating such orders.

28 “Vague laws offend several important values. First, because we assume that man is free

1 to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary
 2 intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.
 3 Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and
 4 discriminatory enforcement is to be prevented, laws must provide explicit standards for those
 5 who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges,
 6 and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary
 7 and discriminatory applications.” *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*,
 8 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972));
 9 accord *United States v. Williams*, 553 U.S. 285, 304 (2008) (“[a] conviction fails to comport with
 10 due process if the statute under which it is obtained fails to provide a person of ordinary
 11 intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages
 12 seriously discriminatory enforcement.”).

13 And thus, Plaintiffs will prevail in challenging not only the underlying orders and
 14 enforcement policies for their blatant violations of enumerated constitutional rights, but also in
 15 the manner in which the policies were enacted. It is a bedrock principle of our constitutional
 16 order that legislatures may not enact vague and ambiguous laws that give unfettered discretion to
 17 executive agencies to ‘figure out’ the details later, while also ‘passing the buck’ to those
 18 executive agencies to make and enforce the policies that impact the people’s lives, liberty, and
 19 property. Defendants’ enforcement of vague and arbitrary County Orders violates fundamental
 20 precepts of due process, cannot stand, and must be enjoined.

21 **C. THE DESTRUCTION OF CONSTITUTIONAL RIGHTS CONSTITUTES IRREPARABLE INJURY.**

22 “It is well established that the deprivation of constitutional rights ‘unquestionably
 23 constitutes irreparable injury.’ *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting
 24 *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); 11A Charles Alan Wright et al., *Federal Practice and*
 25 *Procedure* § 2948.1 (2d ed. 1995) (“When an alleged deprivation of a constitutional right is
 26 involved, most courts hold that no further showing of irreparable injury is necessary”);
 27 *Norsworthy v. Beard*, 87 F.Supp.3d 1164, 1193 (N.D.Cal. 2015) (“Irreparable harm is presumed
 28 if plaintiffs are likely to succeed on the merits because a deprivation of constitutional rights

1 always constitutes irreparable harm.”); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th
2 Cir. 1997) (an alleged constitutional infringement will often alone constitute irreparable harm);
3 *Duncan*, 265 F.Supp.3d at 1135 (“The same is true for Second Amendment rights. Their loss
4 constitutes irreparable injury.... The right to keep and bear arms protects tangible and intangible
5 interests which cannot be compensated by damages.... ‘The right to bear arms enables one to
6 possess not only the means to defend oneself but also the self-confidence—and psychic
7 comfort—that comes with knowing one could protect oneself if necessary.’”) (citing *Grace v.*
8 *District of Columbia*, 187 F.Supp.3d 124, 150 (D.D.C. 2016)). See also, *Ezell*, 651 F.3d at 699–
9 700 (a deprivation of the right to arms is “irreparable,” with “no adequate remedy at law”).

10 Plaintiffs have established a strong likelihood of success based on clear violations of their
11 right to keep and bear arms under the Second and Fourteenth Amendments to the United States
12 Constitution, and their right under the Fifth and Fourteenth Amendments. “As with irreparable
13 injury, when a plaintiff establishes ‘a likelihood that Defendants’ policy violates the U.S.
14 Constitution, Plaintiffs have also established that both the public interest and the balance of the
15 equities favor a preliminary injunction.” *Ms. L. v. U.S. Immigration and Customs Enforcement*,
16 310 F.Supp.3d 1133, 1147 (S.D. Cal. 2018) (quoting *Arizona Dream Act Coalition v. Brewer*,
17 757 F.3d 1053, 1069 (9th Cir. 2014); see also *Rodriguez v. Robbins*, 715 F.3d 1127, 1146 (9th
18 Cir. 2013) (“Generally, public interest concerns are implicated when a constitutional right has
19 been violated, because all citizens have a stake in upholding the Constitution.”) Because
20 Plaintiffs have made such a showing, both the public interest and the balance of the equities
21 weigh in favor of and compel the relief they seek of a temporary restraining order and
22 preliminary injunction.

23 Finally, Plaintiffs respectfully disagree with the Court’s decision in *Brandy v. Villanueva*,
24 C.D. Case No. 2:20-cv-02874-AB-AK, denying a temporary restraining order against similar
25 orders [ECF No. 29]. In that matter, the Court failed to apply categorical or strict scrutiny, and
26 improperly applied intermediate scrutiny, and was incorrect for the reasons set forth herein.

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IV. CONCLUSION

There is no dispute that the coronavirus pandemic is serious in nature. Plaintiffs certainly do not intend to say or imply otherwise. But despite the abrupt way that the coronavirus has imposed itself upon our society, fundamental human rights cannot be closed off. This is especially true of the right to keep and bear arms for self-defense. And it is the true test of our national character as a People that we adhere to constitutional principles, without fear, and directly in the face of such dangers. We must pass this test, and every other test that challenges our resolve to honor our founding principles. For these reasons, and as set forth above, Plaintiffs respectfully request that this Court grant their Application for a Temporary Restraining Order or, in the Alternative, Motion for Preliminary Injunction and protect the fundamental, individual rights at stake in this important case.

Dated: April 10, 2020

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