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14
15 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF LOS ANGELES**
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18 **TURNER’S OPERATIONS, INC. et al.,**

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Petitioners & Plaintiffs,

v.

ERIC GARCETTI et al.,

Respondents & Defendants.

CASE NO: 20STCP01258

**OPPOSITION TO PLAINTIFFS’ EX
PARTE APPLICATION FOR A STAY OR
TEMPORARY RESTRAINING ORDER
AND ORDER TO SHOW CAUSE**

Hearing Date: April 13, 2020
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**FEE EXEMPT
(GOV. CODE, § 6103)**

TABLE OF CONTENTS

RELEVANT FACTS	3
LEGAL STANDARD	4
ARGUMENT..	4
I. The balance of harms tips overwhelmingly in favor of the City, its officials, and public health.	4
A. The Mayor’s Order is designed to protect as many Angelenos as possible from the risk of contracting COVID-19—and so, critically, furtheres the public policy of preventing the collapse of the local healthcare system.....	5
B. Plaintiffs offer nothing outweighing that consideration: At most they suffered a temporary economic loss common to thousands of other businesses in the City, and then waited nearly a month to seek emergency equitable relief for it.	6
1. Turner’s Operations, Inc.....	6
2. Trader’s Loan & Jewelry, Inc.	7
3. California Rifle & Pistol Association, Inc.	7
II. Plaintiffs are unlikely to succeed on the merits of their preemption claims.....	8
A. The Mayor indisputably had the statutory authority to issue his Order.	8
B. Under ordinary rules of preemption, the Mayor’s Order is presumably <i>not</i> preempted, and plaintiffs bear a heavy burden to show otherwise.	8
C. The Governor’s Order does not preempt the Mayor’s Order.....	9
D. State law governing gun licensing does not preempt an emergency order that has the tangential effect of temporarily closing stores that sell guns.....	11
III. Plaintiffs are unlikely to succeed on the merits of their California Constitutional claim.	13
A. There is no substantive due process violation here.	13
B. There is no procedural due process violation here, either.	15
CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Bi-Metallic Inv. Co. v. State Board of Equalization</i> (1915) 239 U.S. 441	15
<i>Birkenfeld v. Berkeley</i> (1976) 17 Cal.3d 129.....	14
<i>Bottini v. City of San Diego</i> (2018) 27 Cal.App.5th 281.....	13
<i>Brandy v. Villanueva</i> (C.D. Cal. Apr. 6, 2020, No. 2:20-cv-02874-AB-SK)	1, 5
<i>Cal. Rifle & Pistol Assn. v. City of W. Hollywood</i> (1998) 66 Cal.App.4th 1302.....	11
<i>Calguns Foundation, Inc. v. County of San Mateo</i> (2013) 218 Cal.App.4th 661.....	11
<i>Common Cause v. Board of Supervisors</i> (1989) 49 Cal.3d 432.....	10
<i>People ex rel. Feuer v. FXS Management, Inc.</i> (2016) 2 Cal.App.5th 1154.....	4
<i>Fiscal v. City and County of San Francisco</i> (2008) 158 Cal.App.4th 895.....	11
<i>Garcia v. Four Points Sheraton LAX</i> (2010) 18 Cal.App.4th 364.....	12
<i>Gonzalez v. City of Norwalk</i> (2017) 17 Cal.App.5th 1295.....	9
<i>Great Western Shows v. County of Los Angeles</i> (2002) 27 Cal.4th 853.....	10, 11
<i>In re Greg F.</i> (2012) 55 Cal.4th 393.....	11
<i>Hale v. Morgan</i> (1978) 22 Cal.3d 388.....	14
<i>Horn v. County of Ventura</i> (1979) 24 Cal.3d 605.....	14

1	<i>IT Corp. v. County of Imperial</i>	
2	(1983) 35 Cal.3d 63.....	4
3	<i>Kasler v. Lockyer</i>	
4	(2000) 23 Cal.4th 472.....	13
5	<i>Korean Am. Legal Advocacy Found. v. City of Los Angeles</i>	
6	(1994) 23 Cal.App.4th 376.....	12
7	<i>McDougall v. County of Ventura</i>	
8	(C.D. Cal. Apr. 1, 2020, No. 2:20-cv-02927-CBM-AS).....	5
9	<i>O’Connell v. Superior Court</i>	
10	(2006) 141 Cal.App.4th 1452.....	4, 6
11	<i>Optivision, Inc. v. Syracuse Shopping Center Associates</i>	
12	(N.D.N.Y. 1979) 472 F.Supp. 665	6
13	<i>Perkey v. Dep’t of Motor Vehicles</i>	
14	(1986) 42 Cal.3d 185.....	13
15	<i>San Diego Building Contractors Assn. v. City Council of San Diego</i>	
16	(1974) 13 Cal.3d 205	15
17	<i>Santa Monica Pines, Ltd. v. Rent Control Board</i>	
18	(1984) 35 Cal.3d 858.....	12
19	<i>Sherwin-Williams Co. v. City of Los Angeles</i>	
20	(1993) 4 Cal.4th 893.....	8
21	<i>Suter v. City of Lafayette</i>	
22	(1997) 57 Cal.App.4th 1109.....	13, 14
23	<i>T-Mobile West LLC v. City and County of San Francisco</i>	
24	(2019) 6 Cal. 5th 1107.....	8, 12
25	<i>Tahoe Keys Prop. Owners’ Assn. v. State Water Res. Control Bd.</i>	
26	(1994) 23 Cal.App.4th 1459.....	4
27	<i>White v. Davis</i>	
28	(2003) 30 Cal.4th 528.....	4, 7
	<i>Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control</i>	
	(1966) 65 Cal.2d 349.....	14
	Statutes	
	Bus. & Prof. Code, § 7301	13
	Gov. Code, § 8550.....	8
	Gov. Code, § 8630.....	8

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4
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Gov. Code, § 8634.....8

Gov. Code, § 53071.....10

Pen. Code, § 2560510

1 **OPPOSITION TO PLAINTIFFS’ EX PARTE APPLICATION FOR A STAY OR**
2 **TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE**

3 Plaintiffs don’t dispute that the COVID-19 pandemic is a public health emergency of historical
4 proportions. Nor do they suggest that the City of Los Angeles should ignore public health officials’
5 recommendations to take every possible measure to separate people in order to limit the spread of
6 SARS-CoV-2, the virus that causes COVID-19. Plaintiffs don’t even really dispute that Mayor
7 Garcetti’s Safer At Home Order serves that goal by imposing drastic limitations on in-person
8 commercial transactions, which has resulted in the temporary closure of thousands of businesses,
9 trading in all sorts of goods, in order to save lives.

10 Accounting for exactly those sorts of considerations, the United States District Court for the
11 Central District of California last week denied an application, in *Brandy v. Villanueva* (C.D. Cal.
12 Apr. 6, 2020, No. 2:20-cv-02874-AB-SK), to temporarily restrain enforcement of the Mayor’s Order.
13 A copy of that decision is filed with this opposition.

14 It is hard to imagine what harms the plaintiffs in this case could assert that the plaintiffs in the
15 *Brandy* case—themselves a group of gun stores and gun rights organizations—could not. The law,
16 however, requires plaintiffs to make a *significant* showing of irreparable injury before public officials
17 can be enjoined in the enforcement of their duties. Now consider the gravity of the harms these
18 plaintiffs might suffer without ex parte relief—relief they didn’t bother seeking until nearly a month
19 after the Mayor’s Order first issued:

20 The first plaintiff, Turner’s Operations, Inc., is the parent company of a 28-outlet regional
21 sporting goods store. A total of one Turner’s location, in Reseda, is closed pursuant to the Mayor’s
22 Order. There are multiple other Turner’s locations that remain open within an hour’s drive of the
23 closed store. (In Los Angeles County alone, open Turner’s locations include Pasadena, Santa Clarita,
24 Norwalk, Torrance, Signal Hill, and West Covina.)

25 The second plaintiff, pawn shop Trader’s Loan & Jewelry, Inc., is entitled to continue
26 operating because it acts a financial institution in its community. If Trader’s is open for that purpose,
27 then the Mayor’s Order doesn’t prohibit it from engaging in other forms of commerce, including gun
28 sales. Consequently, it stands to gain nothing whatsoever from emergency equitable relief.

1 The chief executive officer of the third plaintiff, California Rifle & Pistol Association, Inc., is
2 plaintiffs' counsel. The only interest the Association seeks to vindicate in this litigation belongs to its
3 unnamed members, who live in the City but are presently unable to buy or collect firearms from stores
4 that are temporarily closed, on an emergency basis, to help blunt the spread of a deadly pandemic.

5 And that points to the public's interest here. The public's interest, along with that of the City
6 and the City officials that plaintiffs have sued, is in safeguarding the health and safety of millions of
7 Angelenos against the COVID-19 epidemic.

8 The Court must account for those competing interests. It is difficult to see how that accounting
9 could result in anything except the denial of the plaintiffs' application, before the Court even reaches
10 the question of whether plaintiffs' legal claims have merit. They don't.

11 Plaintiffs insist that they are entitled to ex parte relief from the Mayor's Order, because—
12 unlike other businesses in the City—gun stores are privileged against closure by: (1) a *permissively*
13 worded order issued by the Governor, which does not mandate that the City afford gun stores any
14 privilege whatsoever, and which incorporates an expressly *non-binding* bulletin from the Department
15 of Homeland Security; and (2) statutory sections that express the Legislature's intent to occupy the
16 field of "the registration or licensing" of firearms, but which are silent on the Legislature's feelings
17 about mitigating the effects of a pandemic. Neither of those two things compels the conclusion that
18 plaintiffs are exempt from the City's broad police power, which allows it to do precisely what it has
19 done—with the cooperation of businesses generally—in the face of an unprecedented threat to public
20 health.

21 Invoking the California Constitution as a fallback doesn't help plaintiffs, either. It confers no
22 fundamental right to sell guns, and so requires the City to show only a rational basis for the Mayor's
23 Order temporarily closing gun stores along with so many other businesses. And there is *no* serious
24 argument that the Mayor's Order lacks a rational basis, i.e., mitigating the spread of a deadly disease.

25 The bottom line is that plaintiffs have failed to meet the burden of demonstrating their
26 entitlement to a temporary restraining order. The Court should deny their ex parte application.

RELEVANT FACTS

Faced with “a global emergency that is unprecedented in modern history,” Mayor Garcetti sought to slow the spread of the novel coronavirus in the City of Los Angeles. (P.’s RJN Ex. G at 39.) He therefore ordered Angelenos “to isolate themselves in their residences.” (*Ibid.*) The Mayor’s Safer At Home Order, originally issued on March 19, 2020, identifies limited exceptions to this stay-at-home rule for “certain essential activities,” such as obtaining healthcare and food, and, correspondingly, for operating businesses that provide healthcare and sell food. (*Id.* at 40-44.) The Mayor’s Order has since been revised twice and extended once. (Eisenman Decl. ¶ 1 & Ex. 1.) It is currently due to expire on May 15, 2020. (Eisenman Decl. Ex. 1.)

As is relevant here, the Mayor’s Order does not deem the purchase or sale of firearms or ammunition an “essential activity,” and as such, no business is entitled to remain open by virtue of the fact that it purchases or sells firearms or ammunition.

At virtually the same time as the Mayor’s Order issued, Governor Newsom issued Executive Order N-33-20. The Governor’s Order (which incorporated an order from the State Public Health Director) likewise directed “all individuals living in the State of California to stay home,” except “as needed to maintain continuity of operations of the federal critical infrastructure sectors” outlined in a document prepared by the Department of Homeland Security. (P.’s RJN Ex. B at 11.) It went on to “order that Californians working in these 16 critical infrastructure sectors may continue their work because of the importance of these sectors to Californians’ health and well-being.” (*Id.* at 12.) The Governor’s Order further recognized that “[t]he supply chain must continue, and Californians must have access to such necessities as food, prescriptions, and health care.” (*Ibid.*) So it added that “[w]hen people need to leave their homes,” whether “to obtain or perform the functions above, or to otherwise facilitate authorized necessary activities, they should at all times practice social distancing.” (*Ibid.*)

The Governor’s Order did not specify what constitutes “authorized necessary activities.” It did not speak to whether the purchase or sale of firearms and ammunition constituted such an activity. When asked about that specifically, the Governor said he would leave the matter in the hands of individual jurisdictions. (Pet. ¶ 36 and Pet. Ex. J at 83.)

1 The Department of Homeland Security subsequently revised its “federal critical infrastructure
2 guidelines,” which are themselves expressly advisory, to include as essential “[w]orkers supporting the
3 operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and
4 shooting ranges.” (P.’s Mem. at 8:19-8:24; P.’s RJN Ex. D at 21.)

5 Plaintiffs—a gun store, a pawn shop, and a gun-rights advocacy group—sued Mayor Garcetti,
6 City Attorney Feuer, LAPD Chief Michel Moore, and the City of Los Angeles six days after the
7 Department of Homeland Security revised its guidance, or 15 days after the Mayor’s Order issued.
8 The relief they demand is, in essence, that the City and the named officials be enjoined from enforcing
9 the Mayor’s Order in its entirety. (Pet. at p. 27.) Eight days later, or 23 days after the Mayor’s Order
10 issued, plaintiffs filed an ex parte application for a stay or temporary restraining order, seeking to
11 enjoin the enforcement of the Mayor’s Order to the extent that it “require[s] gun stores to close
12 indefinitely.” (App. at 2:8-2:9.)

13 LEGAL STANDARD

14 A party seeking emergency injunctive relief bears the burden of demonstrating *both* that it is
15 likely to succeed on the merits in the underlying litigation, *and* that in the absence of that relief, it will
16 suffer greater harm than the party whose conduct it seeks to enjoin. (*White v. Davis* (2003) 30 Cal.4th
17 528, 554; *People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1158.) It is the
18 moving party’s burden to establish “all elements necessary to support issuance of a preliminary
19 injunction” (or a temporary restraining order). (*O’Connell v. Superior Court* (2006) 141 Cal.App.4th
20 1452, 1481 (*O’Connell*)). “The ultimate goal of any test to be used” in deciding whether to issue
21 emergency injunctive relief “is to minimize the harm which an erroneous interim decision may cause.”
22 (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 73.)

23 ARGUMENT

24 **I. The balance of harms tips overwhelmingly in favor of the City, its officials, and public** 25 **health.**

26 “There is a general rule against enjoining public officers or agencies from performing their
27 duties,” and before a court can do so, public policy considerations must be weighed heavily. (*Tahoe*
28 *Keys Prop. Owners’ Assn. v. State Water Res. Control Bd.* (1994) 23 Cal.App.4th 1459, 1471.) To

1 overcome those considerations, plaintiffs “must make a *significant* showing of irreparable injury.”
2 (*Ibid.*, italics added.)

3 **A. The Mayor’s Order is designed to protect as many Angelenos as possible from the**
4 **risk of contracting COVID-19—and so, critically, furthers the public policy of**
5 **preventing the collapse of the local healthcare system.**

6 The Mayor’s Order recognizes the advice of public health experts: “Because SARS-CoV-2”—
7 the virus that causes COVID-19—“spreads among people in close proximity to one another, any
8 measure that discourages interpersonal contact helps to slow its spread.” (Simon Decl. ¶¶ 2, 9.) In the
9 absence of measures to keep people apart (and other interventions), “each person sick with COVID-19
10 will on average infect between five and six other people.” (*Id.* ¶ 2.) And data suggest “that people
11 who exhibit no symptoms of COVID-19 can nevertheless spread SARS-CoV-2.” (*Ibid.*)

12 The resources required to treat COVID-19 patients are allocated County-wide, and they are
13 finite. (*Id.* ¶ 7.) Meanwhile, among identified cases in the County, 24.5 percent required
14 hospitalization, with nearly 20 percent of those requiring intensive care and ventilator support. (*Id.*
15 ¶ 6.) It follows that actions to slow the spread of the virus (like the Mayor’s Order) “increase[] the
16 amount of time before the County’s hospital capacity is overwhelmed.” (*Id.* ¶ 9.) Or, as the Chief
17 Science Officer at the Los Angeles County Department of Public Health put it: “[A]ction to enforce
18 social distancing is imperative and will save lives.” (*Ibid.*)

19 Plaintiffs concede this, calling orders like the Mayor’s “significant measures that are genuinely
20 designed to promote public safety in this time of crisis.” (Pet. ¶ 1.)

21 And in the last two weeks, two separate federal district judges have recognized the strength of
22 that imperative when balanced against demands to open gun stores for business. Both of them refused
23 to accede to those demands. One wrote, of Ventura County’s similar emergency public health order,
24 that the balance of the equities favors “limiting the spread of virulent disease” over opening gun stores.
25 (*McDougall v. County of Ventura* (C.D. Cal. Apr. 1, 2020, No. 2:20-cv-02927-CBM-AS) slip op. at
26 p. 2.) The other, in the context of the same Order at issue here, likewise recognized the “important
27 government objective” of “reducing the spread of COVID-19, a highly dangerous and infectious
28

disease.” (*Brandy v. Villanueva* (C.D. Cal. Apr. 6, 2020, No. 2:20-cv-02874-AB-SK) slip op. at pp. 5-6.)¹

In the face of this, the only thing plaintiffs have to say is that this Court should not afford the heavy weight ordinarily due the public interest when considering “a unilateral executive mandate” like the Mayor’s Order. (P.’s Mem. at 19:10-19:13.) Plaintiffs offer no authority to support that proposition, and whatever they want to call it, the Mayor’s Order was enacted pursuant to law. (See § II.A., *post*.) Moreover, the harm that the Court is weighing is not, as plaintiffs would have it, some sense of frustration that the named City officials would suffer if they were unable to enforce the Mayor’s Order. (P.’s Mem at 19:22-20:3.) The harm is the risk of increasing the number of COVID-19 infections, and so dangerously eroding the hospital capacity necessary to treat them—never mind the capacity to accommodate other illnesses and injuries requiring hospitalization. (See Simon Decl. ¶ 8 [extra hospital capacity added to accommodate non-COVID-19 patients].)

B. Plaintiffs offer nothing outweighing that consideration: At most they suffered a temporary economic loss common to thousands of other businesses in the City, and then waited nearly a month to seek emergency equitable relief for it.

Against the public interest in decreasing the spread of a deadly disease, plaintiffs claim little in the way of harm—and, having waited weeks to seek emergency relief, *nothing* in the way of urgent harm. (See *O’Connell*, *supra*, 141 Cal.App.4th at p. 1481 [a trial court should consider a plaintiff’s delay in seeking relief when determining how much weight to afford its claim of imminent and irreparable injury].)

1. Turner’s Operations, Inc.

Turner’s contends the irreparable harm it suffers is in being prevented from “operating their firearm business,” and that “being shut down indefinitely could result in their business[] permanently ending.” (P.’s Mem. at 18:6-18:8.) But, as Turner’s admits, its Reseda location is the only one of its 28 stores that “has been ordered to cease all operations as a result of a current public health order.” (Ortiz Decl. ¶ 11.) What about the other 27 stores? Turner’s says nothing about how much of its overall business it’s lost as a result of only one store closing, and nothing about how much of that

¹ The federal court decisions are attached as Exhibits 2 and 3 to the Eisenman Declaration.

1 business could be handled by its other nearby locations, including—in Los Angeles County alone—
2 locations in Pasadena, Santa Clarita, Norwalk, Torrance, Signal Hill, and West Covina. (See
3 Eisenman Decl. ¶ 6; see, e.g., *Optivision, Inc. v. Syracuse Shopping Center Associates* (N.D.N.Y.
4 1979) 472 F.Supp. 665, 686 [no irreparable harm when plaintiff “has a number of other retail outlets”
5 and its “continued operation . . . as a corporate entity does not appear to be threatened”].)

6 **2. Trader’s Loan & Jewelry, Inc.**

7 Trader’s is a financial institution, and so may remain open as an essential service under the
8 Mayor’s Order. It suffers no harm.

9 **3. California Rifle & Pistol Association, Inc.**

10 The California Rifle & Pistol Association, the CEO of which happens to be plaintiffs’ counsel
11 (see Eisenman Decl. Ex. 4), claims that its “members and supporter[s]” cannot “acquir[e] a firearm,”
12 and that some unidentified “members and supporters who have already purchased a firearm” cannot
13 pick them up from closed stores. (P.’s Mem. at 18:14-18:18.) The first point is hyperbole, since at
14 least one store in the City that sells guns—Trader’s—is open. (To say nothing of, e.g., the open
15 Turner’s locations that are closer to some points in the City than is the closed Turner’s location in
16 Reseda.)

17 As for the second, a person’s inability to collect a previously purchased gun from a temporarily
18 closed store is, admittedly, *some* kind of harm. (Though there is no argument that it is any particularly
19 significant kind of harm, e.g., one of constitutional scope.) But that, along with whatever harm
20 Turner’s may have shown, must be weighed against the public interest in averting the collapse of the
21 healthcare system under the strain of an historical pandemic. (See § I.A, *ante*.)

22 Ultimately, the Court’s decision whether to enter a temporary restraining order must account
23 for, and “minimize the harm” caused by, the risk that the Court gets it wrong. (*White, supra*, 30
24 Cal.4th at p. 554.) The risk to the City and the millions of Angelenos in it is the diminution of the
25 efficacy of measures meant to slow the spread of SARS-CoV-2 and prevent the collapse of the
26 County’s healthcare system under the weight of COVID-19 patients. The risk to plaintiffs of error is
27 the continued temporary closure of 1/28th of Turner’s stores, and the inconvenience to the “members
28

1 and supporters” of the California Rifle & Pistol Association of having their purchases tied up
2 temporarily.

3 The balance weighs so heavily against plaintiffs that it is enough of a reason by itself to deny
4 their ex parte application.

5 **II. Plaintiffs are unlikely to succeed on the merits of their preemption claims.**

6 **A. The Mayor indisputably had the statutory authority to issue his Order.**

7 The California Emergency Services Act (Gov. Code, § 8550 et seq.) gives the Mayor the
8 emergency powers necessary “to protect the health and safety and preserve the lives and property of
9 the people” in the City. (*Id.* §§ 8550, subd. (a) and 8557, subd. (b).) Having declared a local
10 emergency (P.’s RJN Ex. E.), the Mayor is empowered to “promulgate orders and regulations
11 necessary to provide for the protection of life and property.” (Gov. Code, §§ 8630, 8634.) The Mayor
12 did so, issuing the Order about which plaintiffs now complain.

13 **B. Under ordinary rules of preemption, the Mayor’s Order is presumably *not***
14 **preempted, and plaintiffs bear a heavy burden to show otherwise.**

15 The California Constitution vests the City with authority to “make and enforce all local, police,
16 sanitary, and other ordinances and regulations” as long as they do not “conflict with general laws.”
17 (Cal. Const., art. XI, § 7.) In issuing his Order under the Emergency Services Act, that is exactly the
18 sort of regulatory authority the Mayor exercised.

19 If the Mayor’s Order conflicted with state law—if it duplicated or contradicted state law, or if
20 it entered an area the Legislature fully occupied either expressly or by implication—then there might
21 be an argument that state law preempted it. (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4
22 Cal.4th 893, 897-898.) But “[w]hen,” as here, “local government regulates in an area over which it
23 traditionally has exercised control,” then “California courts will presume the regulation is *not*
24 preempted unless there is a *clear indication* of preemptive intent.” (*T-Mobile West LLC v. City and*
25 *County of San Francisco* (2019) 6 Cal. 5th 1107, 1116 (*T-Mobile*), cleaned up, italics added.) A party
26 arguing for preemption has the burden of proving that. (*Ibid.*)

27 Plaintiffs cannot meet their burden of showing that the Mayor’s Order is preempted. It does
28 not duplicate or contradict the Governor’s Order, and—as it is a measure directed to pandemic

1 response—it does not enter a field the Legislature occupied when it regulated the licensing and
2 registration of firearms.

3 **C. The Governor’s Order does not preempt the Mayor’s Order.**

4 Plaintiffs first argument is that the Governor’s Order (P.’s RJN Ex. B), which incorporates
5 advisory guidelines issued by the Department of Homeland Security, conflicts with the Mayor’s Order
6 (P.’s RJN Ex. G). This entire argument turns on the premise that because the federal advisory
7 guidelines put gun sales in a “federal critical infrastructure sector,” when the Governor’s Order
8 referenced those guidelines, it had the effect of incorporating their advice that gun sales be allowed to
9 continue unabated throughout the state. If that is true, plaintiffs posit, then the Governor’s Order is in
10 conflict with the Mayor’s Order, which temporarily stops gun sales—along with innumerable other
11 things that are not “essential activities.”

12 But plaintiffs’ premise isn’t true: The Governor’s Order does *not* incorporate the set of federal
13 advisory guidelines that deem gun sales part of a “federal critical infrastructure sector.”

14 The Governor’s Order directs “all individuals living in the State of California to stay home or
15 at their place of residence except as needed to maintain continuity of operations of the federal critical
16 infrastructure sectors” outlined in the Department of Homeland Security advisory guidelines. (P.’s
17 RJN Ex. B at 11.) And those advisory guidelines do *currently* list workers supporting gun sales as part
18 of a “federal critical infrastructure sector.” (P.’s RJN Ex. D at 21.) But it is undisputed that the
19 advisory guidelines did not include gun sales when the Governor’s Order was issued. (P.’s Mem. at
20 8:19-8:24 [conceding that when the Governor’s Order was issued “federal guidelines did not expressly
21 reference firearm vendors”].) As a matter of law, the Governor’s Order cannot now be read as if they
22 did—it doesn’t auto-update: “It is a well established principle of statutory law that, where a statute
23 adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions
24 are incorporated in the form in which they exist *at the time of the reference and not as subsequently*
25 *modified.*” (*Gonzalez v. City of Norwalk* (2017) 17 Cal.App.5th 1295, 1311, cleaned up.) If the
26 Governor’s Order doesn’t incorporate the current federal guidelines, then the Governor’s Order has
27 nothing to say about gun sales at all. It cannot conflict with the Mayor’s Order, dooming the
28 plaintiffs’ preemption argument.

1 Even if plaintiffs' premise was true, though, their argument would fail because the Governor's
2 Order doesn't *mandate* anything with respect to anyone working in a "federal critical infrastructure
3 sector"—regardless of whether that sector includes people selling guns. Instead, if the Governor's
4 Order is mandatory as to anyone, it is only as to people who *don't* work in a critical-infrastructure
5 sector: The Governor's Order requires everyone to stay home *except* for critical-infrastructure
6 workers, which is not the same as requiring critical-infrastructure workers to go to work. As to
7 critical-infrastructure workers, the Governor's Order is permissive. That is why it goes on to say: "I
8 order that Californians working in . . . critical infrastructure sectors *may* continue their work because
9 of the importance of these sectors to Californians' health and well-being." (P.'s RJN Ex. B at 12,
10 *italics added.*) That is not the same as commanding that workers in those sectors "must" or "shall" go
11 to work in the face of contrary orders from other authorities (for example), because "[i]t is a well-
12 settled principle of statutory construction that the word 'may' is ordinarily construed as permissive,
13 whereas 'shall' is ordinarily construed as mandatory." (*Common Cause v. Board of Supervisors*
14 (1989) 49 Cal.3d 432, 443.)

15 Consequently, even if gun salespeople were included in the set of critical-infrastructure
16 workers, the Governor's Order would only *allow* them to go to work; it wouldn't mandate that they go
17 to work. If any clarification were needed on that point, the Governor himself provided it when he
18 subsequently said that he would leave it to individual jurisdictions to determine whether gun stores
19 ought to be deemed essential businesses and allowed to open. (P.'s Mem. at 8:27-8:28.) Suffice it to
20 say, in excluding gun sales from its list of essential activities, the Mayor's Order thus "does not
21 mandate what state law expressly forbids" or "forbid what state law expressly mandates." (*Great*
22 *Western Shows v. County of Los Angeles* (2002) 27 Cal.4th 853, 866 (*Great Western*).) And without
23 that conflict, the Mayor's Order isn't preempted.²

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25
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27 ² Worse for plaintiffs, the Governor's Order disclaims the "creat[ion] [of] any rights or
28 benefits, substantive or procedural, enforceable at law or in equity" against anyone. (P.'s RJN Ex.
B at 12.) Yet plaintiffs would read into the Governor's Order a right to operate gun stores during
a public health emergency, and then demand to enforce that right in equity against City officials.

D. State law governing gun licensing does not preempt an emergency order that has the tangential effect of temporarily closing stores that sell guns.

Plaintiffs’ second argument is that because the Legislature has expressly occupied the entire field of “registration or licensing of commercially manufactured firearms” (Gov. Code, § 53071) and has decreed that no permit can be required of a handgun purchaser (Pen. Code, § 25605), it has therefore expressly or impliedly preempted an order that closes—on a temporary, emergency basis and among thousands of other businesses—gun stores. (P.’s Mem. at 13:1-13:7.) It is strange to think that by expressly occupying the arena of “registration or licensing of commercially manufactured firearms,” the Legislature had in mind anything like preventing cities from enacting temporary emergency public health measures in support of a quasi-quarantine. (See *In re Greg F.* (2012) 55 Cal.4th 393, 406 [statutes are construed with the presumption that the Legislature did not intend them to produce absurd consequences].)

After all, the California Supreme Court’s “review of case law and the corresponding development of gun control statutes in response to that law demonstrates that the Legislature has chosen *not* to broadly preempt local control of firearms but has targeted certain specific areas for preemption.” (*Great Western, supra*, 27 Cal.4th at p. 864, italics added; see *Cal. Rifle & Pistol Assn. v. City of W. Hollywood* (1998) 66 Cal.App.4th 1302, 1313 [recognizing only three fully-preempted firearm-related fields: (1) licensing and registration; (2) carrying of handguns in residences, places of business, or private property; and (3) sales of imitation firearms].)

Nevertheless, plaintiffs claim that *Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895 (*Fiscal*) “unequivocally held that state law preempts,” on various grounds, “local bans on selling firearms”—a category within which plaintiffs place the Mayor’s Order. (P.’s Mem. at 13:3-13:6.) But plaintiffs read an important qualifier out of *Fiscal*, which *actually* held that a local government cannot enact “an *absolute and total ban* of firearm and ammunition sales on all property, public and private, within its geographic boundaries.” (*Fiscal*, at p. 918, italics added; see *Calguns Foundation, Inc. v. County of San Mateo* (2013) 218 Cal.App.4th 661, 673 [recognizing that *Fiscal* is an outlier, and only held as it did “because of the extreme breadth of the ordinance being challenged”].) The Mayor’s Order is not an “absolute and total ban” on the sale of firearms, either on

1 its face or in practice. Trader’s, which is open to provide essential financial services, can continue to
2 sell firearms.³

3 The fact that Turner’s in Reseda is closed doesn’t change the analysis. That store isn’t closed
4 because of what it does, i.e., sell firearms. It’s closed because of what it does *not* otherwise do:
5 engage in or support an essential activity. That the effect of the Mayor’s Order is Turner’s closure
6 doesn’t change the Order from an emergency public health measure into a gun sales ban. If it did, a
7 hypothetical emergency order forcing everyone to stay home, without exception, would likewise be a
8 gun sales ban—it, too, would have the effect of closing Turner’s (and Trader’s). But whatever else
9 one might think of such an order, thinking of it as a ban on gun sales would be absurd.

10 Avoiding that kind of outcome, the law does not analyze measures like the Mayor’s Order for
11 preemption based solely on the fact that they trench incidentally on areas governed by state law.
12 “Where local legislation clearly serves local purposes, and state legislation that appears to be in
13 conflict actually serves different, statewide purposes, preemption will not be found.” (*Garcia v. Four*
14 *Points Sheraton LAX* (2010) 18 Cal.App.4th 364, 374, cleaned up; see also *T-Mobile, supra*, 6 Cal.5th
15 at p. 1116 [local measures are presumed to serve local purposes].) That is why, for example, a city can
16 impose conditions and restrictions on liquor stores without fear of preemption—even though article
17 XX, section 22 of the California Constitution vests the state with “the exclusive right and power to
18 license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic
19 beverages within the state.” (*Korean Am. Legal Advocacy Found. v. City of Los Angeles* (1994) 23
20 Cal.App.4th 376.) If a city observes “negative conduct which tends to occur on premises immediately
21 surrounding retail establishments selling alcoholic beverages for off-site consumption,” it might rely
22 on its police powers to impose planning conditions like “graffiti removal, trash removal, adequate
23 lighting, security guards, protective fences and modified hours of operation” on such establishments.”
24 (*Id.* at pp. 387, 389.) That those conditions “may have some indirect impact on the sale of alcoholic
25 beverages does not transmute the purpose and scope of the ordinance into a regulation merely seeking
26

27 ³ Plaintiffs spill a lot of ink anticipating an argument that the Mayor’s Order *cannot* be
28 preempted. (P.’s Mem. at 13:8-15:23.) But no one is yet making that argument, because it
needn’t yet be made: Applying ordinary preemption principles, the Mayor’s Order simply *is not*
preempted by state gun laws.

1 to control alcohol sales.” (*Id.* at p. 389; see also *Santa Monica Pines, Ltd. v. Rent Control Board*
2 (1984) 35 Cal.3d 858, 868-869 [a local rent control restriction on condominium conversions serves a
3 different purpose than the Subdivision Map Act’s conditions for condominium conversions, so the
4 former is not preempted by the latter].)

5 So too here: The Mayor’s Order, a temporary and emergency public health measure, does not
6 become a ban on firearms sales, preempted by state gun laws, just because it has the effect of
7 closing—among other things—various firearms sellers.

8 **III. Plaintiffs are unlikely to succeed on the merits of their California Constitutional claim.**

9 Plaintiffs’ fallback position is to claim that the Mayor’s Order violates the California
10 Constitution’s due process protections. Article I, section 7 of the California Constitution declares that
11 “[a] person may not be deprived of life, liberty, or property without due process of law.” That
12 declaration protects against two things: First, as a matter of substantive due process, it protects against
13 “arbitrary legislative action.” (*Bottini v. City of San Diego* (2018) 27 Cal.App.5th 281, 315.) Second,
14 as a matter of procedural due process, it can require notice and an opportunity to be heard before the
15 government deprives someone of a protected liberty or property interest. (*Ibid.*)

16 **A. There is no substantive due process violation here.**

17 The California Constitution has nothing to say about guns. (*Kasler v. Lockyer* (2000) 23
18 Cal.4th 472, 481.) There is no fundamental right to sell them, leaving “ordinances regulating the sale
19 of weapons” to “be scrutinized,” for substantive due process purposes, “under no higher standard than
20 that applied to ordinances regulating the sale of any other product.” (*Suter v. City of Lafayette* (1997)
21 57 Cal.App.4th 1109, 1130 (*Suter*).) The fact that plaintiffs are licensed to sell guns doesn’t change
22 the analysis, as there has been no demonstration that their licenses confer a “fundamental right” on
23 them to keep their stores open during a public health emergency any more than a cosmetology license
24 (Bus. & Prof. Code, § 7301 et seq.) confers that right on a cosmetologist or a liquor license (*id.*,
25 § 23300 et seq.) confers that right on a bar. Nor do plaintiffs offer any authority whatsoever for the
26 blithe assertion that the temporary and emergency closure of their stores is tantamount to a revocation
27 of their licenses, with the panoply of extra protections that might bring them.

1 Instead, whether viewed as an emergency public health measure or, indulging plaintiffs, as a
2 regulation on gun sales, the Mayor’s Order receives the *least* possible due-process scrutiny that this
3 Court can apply: rational basis review. (*Perkey v. Dep’t of Motor Vehicles* (1986) 42 Cal.3d
4 185, 189.) The Court begins from the presumption that the Mayor’s Order satisfies due process.
5 (*Suter, supra*, 57 Cal.App.4th at p. 1130.) It is then plaintiffs’ burden to show that the Mayor’s Order
6 is not “reasonably related to promoting the public health, safety, comfort and welfare” or that the
7 means by which it does so are not “reasonably appropriate to that purpose.” (*Ibid.*) On the facts of
8 this case, that is an impossible burden for plaintiffs to satisfy. It means they must ultimately
9 demonstrate “a complete absence of even a debatable rational basis” for the Mayor’s Order (*Birkenfeld*
10 *v. Berkeley* (1976) 17 Cal.3d 129, 161 (*Birkenfeld*)), or offer an “unquestionable” showing that the
11 Order lacks a reasonable relationship to its purpose (*Wilke & Holzheiser, Inc. v. Dept. of Alcoholic*
12 *Beverage Control* (1966) 65 Cal.2d 349, 359.) Plaintiffs cannot simply complain that the Mayor had
13 available “less drastic alternatives” or that the Order doesn’t “solve all related ills at once.” (*Hale v.*
14 *Morgan* (1978) 22 Cal.3d 388, 398, superseded by statute on unrelated grounds.)

15 It is hardly worth caviling over whether there is a rational basis for the Mayor’s Order. The
16 plaintiffs cannot dispute that it is—as its own prefatory language indicates (P.’s RJN Ex. G at 39)—
17 related to promoting the public health. Indeed, plaintiffs essentially concede the point. (P.’s Mem. at
18 20:7-20:8 [“preventing the spread of COVID-19 is undeniably a critical and urgent matter”].) That
19 leaves them only to dispute whether the Mayor’s Order “unquestionabl[y]” lacks even a reasonable
20 relationship to that purpose, which is likewise an absurd contention. At most, they can try to dispute
21 its wisdom, e.g., by claiming that its list of permitted “essential activities” is over- or under-inclusive
22 (P.’s Mem. at 16:20-17:9)—though they have no evidence to support their position. (See *Birkenfeld*,
23 *supra*, 17 Cal.3d at p. 159 [there is no room in rational basis review for disputes about the wisdom of a
24 policy choice].) In any event, it isn’t the place of a court to decide whether the Mayor’s Order is the
25 best policy: The Court’s only role is to determine whether the chosen policy fits somewhere in the
26 massive range of reasonable choices. It does.

Plaintiffs also hint at a procedural due process challenge to the Mayor’s Order, claiming that stores were closed, and customers temporarily deprived of access to their purchases, without notice or a hearing. (P.’s Mem. at 16:16-16:19.) But plaintiffs aren’t entitled to notice and hearing when the measure about which they’re complaining isn’t of an adjudicatory character. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 613.) The Mayor’s Order is not an action that “affect[s] an individual” based on “facts peculiar to the individual case;” it instead “establish[es] a broad, generally applicable rule of conduct on the basis of a general public policy.” (*San Diego Building Contractors Assn. v. City Council of San Diego* (1974) 13 Cal.3d 205, 212-213.) The Mayor’s Order imposes broad restrictions across massive sectors of the City’s economy. It therefore has the character of a legislative decision, even if its effects vary dramatically among the different businesses and people it touches. (*Id.* at 211.) The procedural due process protection afforded parties aggrieved by such decisions is straightforward: Vote against the decisionmaker in an upcoming election. (*Bi-Metallic Inv. Co. v. State Board of Equalization* (1915) 239 U.S. 441, 445.) Plaintiffs’ disagreement with the Mayor’s Order, a considered effort to tamp down what might otherwise prove to be a public health catastrophe, entitles them to do no more than that.

The Mayor was well within his authority to issue an Order temporarily closing non-essential businesses. Plaintiffs fail to demonstrate why gun stores should be granted preferential treatment. The Court should deny plaintiffs' application.

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15
OPPOSITION TO EX PARTE APPLICATION

PROOF OF SERVICE

Turner Operations, Inc. et al. v. Eric Garcetti, et al.

LASC Case No. 20STCP01258

I, Ava Smith, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 200 North Main Street, City Hall East, 6th Floor, Los Angeles, California 90012.

On April 12, 2020, I served the foregoing documents described as: **OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR A STAY OR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE** on the interested parties:

C.D. Michel
Sean A. Brady
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☐ **BY MAIL** – I am readily familiar with the practice of the Los Angeles City Attorney's Office for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is placed for collection and mailing. On the date referenced above, I placed a true copy of the above document(s) in a sealed envelope and placed it for collection in the proper place in our office at Los Angeles, California.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address ava.smith@lacity.org to the persons at the email addresses listed in the Service List

☐ **BY PERSONAL SERVICE:** I placed a true copy of the above document(s) in a sealed envelope for delivery via messenger by Los Angeles City Attorney's Document Services, 200 No. Main Street, 8th Floor, City Hall East, Los Angeles, CA 90012.

☐ **BY OVERNIGHT DELIVERY:** I served the documents by placing them in an envelope or package addressed to the persons listed above and providing them to UPS Courier for delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: April 12, 2020

/s/ Ava Smith