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BY S. VERA DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA CLARA

Case No.: 20CV365840

LOKEY FIREARMS, a sole proprietorship;  
FFLGUARD, LLC, a Delaware limited  
liability company; and CALIFORNIA RIFLE  
& PISTOL ASSOCIATION,  
INCORPORATED, a California corporation,

Petitioners-Plaintiffs,

v.

COUNTY OF SANTA CLARA; SARA H.  
CODY, M.D., in her official capacity as  
Health Officer of the County of Santa Clara;  
LAURIE SMITH, in her official capacity as  
Sheriff of the County of Santa Clara;  
JEFFREY ROSEN, in his official capacity as  
District Attorney for the County of Santa  
Clara; and DOES 1-25,

Respondents-Defendants.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF EX  
PARTE APPLICATION TO STAY  
ENFORCEMENT OF SANTA CLARA  
ORDER REQUIRING LICENSED  
FIREARM DEALERS TO CLOSE OR  
ALTERNATIVELY, FOR TEMPORARY  
RESTRAINING ORDER AND ORDER TO  
SHOW CAUSE**

Hearing Date: TBA  
Hearing Time: TBA  
Department: TBA

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Petitioners-Plaintiffs wish to begin by noting that they are aware of and appreciate the  
3 unprecedented challenges that municipalities across the globe, including and perhaps particularly  
4 the County of Santa Clara, are facing as a result of the current COVID-19 pandemic. They  
5 understand that officials are doing their best in uncharted waters, a daunting endeavor to be sure.  
6 That said, even in trying times like these, we remain a country governed by law and order. Indeed,  
7 an ordered legal system is potentially more important in times of crisis and should not be  
8 abandoned during them. It should instead be firmly asserted not only to prevent abuse and  
9 indiscretion by those entrusted with the power to regulate, but also to reassure the citizenry that we  
10 remain secure in our institutions. While government has, and should have, more leeway in times of  
11 emergency, it cannot abrogate limits on its authority in the name of public safety, even if its  
12 intentions are noble. That, however, is precisely what Respondents have done regardless of their  
13 intentions. Petitioners-Plaintiffs respectfully urge this Court to restore those limits.

14 The County of Santa Clara, County Health Officer Sara H. Cody, M.D., Sheriff Laurie  
15 Smith, and District Attorney Jeffrey Rosen (collectively “Defendants” or “Respondents” or “the  
16 County”) recently enacted and are now enforcing a county-wide prohibition on the operation of  
17 stores that sell firearms. Stores licensed to sell firearms in Santa Clara County, an organization  
18 dedicated to representing the interests of licensed firearm dealers, and a civil rights organization  
19 representing individuals who seek to buy or have bought but cannot take receipt of a firearm in the  
20 County, sued for a writ of mandate and declaratory and injunctive relief to bar the County from  
21 enforcing the prohibition because it directly contravenes a state-issued order for certain businesses  
22 to remain operational during the COVID-19 crisis, is unequivocally preempted under this Court’s  
23 precedent, and violates the California Constitution’s due process mandates. To be clear, this case is  
24 not about whether the County’s policy being challenged is a good idea or whether it is likely to  
25 serve its laudable goal of preventing the spread of COVID-19. Instead, this case presents the  
26 narrow legal question of whether local officials remain subject to general state law on their  
27 authority to act when acting under emergency powers limitations.

28 Petitioners are subject to criminal and civil penalties for continuing to operate gun stores

1 under the County's current policy. Ex parte relief is necessary to prevent Petitioners from being  
2 irreparably harmed by having to choose between the risk of criminal and civil penalties or  
3 compliance with an unlawful measure that could mean their permanent demise for some of them or  
4 the unreasonable and indefinite deprivation of their property for others.

## 5 STATEMENT OF FACTS

### 6 I. CALIFORNIA'S STATUTORY SCHEME FOR FIREARM SALES

7 Virtually all lawful firearm transactions conducted in California must be processed by a  
8 properly licensed firearms dealer ("FFL"). (Pen. Code, §§ 26500, 27545.) To become an FFL, one  
9 must obtain a federal license, any necessary local license, a valid seller's from the State Board of  
10 Equalization, and a valid certificate of eligibility from the California Department of Justice,  
11 Bureau of Firearms ("DOJ"), and be listed on DOJ's Centralized List of Firearm Dealers. (Pen.  
12 Code, §§ 27600-27705; see also Cal. Code Regs. tit. 11, §§ 4016-4024.) Such licenses must be  
13 renewed annually. (Pen. Code, §§ 27600-26705; see also Cal. Code Regs. tit. 11, §§ 4016-4024.)

14 To even attempt to purchase a firearm in California, one must have a valid firearm safety  
15 certificate ("FSC") obtained from a DOJ certified FSC instructor. (Pen. Code, §§ 27540, 31610-  
16 31670.) Obtaining an FSC requires passing a written test and paying a fee. (Pen. Code, § 31645,  
17 subd. (a), 31650.) A prospective firearm purchaser must provide the FFL with evidence of an FSC,  
18 identity, and age. (Pen. Code, § 27540.) This information is entered into a Dealer Record of Sale  
19 ("DROS"). (Pen. Code, § 28205 subd. (c).) A DROS is submitted to DOJ through the DROS Entry  
20 System ("DES"). (Pen. Code, § 28205 subd. (c); see also Cal. Code Regs., tit. 11 §§ 4200-4240.)  
21 Generally, only FFLs have access to DES and can submit a DROS to DOJ. (Cal. Code Regs., tit.  
22 11 § 4210, subd. (a).) DOJ uses the DROS to examine records to determine the purchaser's  
23 eligibility to possess firearms for the mandatory background check. (Pen. Code, § 28220.) The  
24 purchaser must pay a \$31.19 fee together with other required fees for this process. (Pen. Code, §  
25 28233, subd. (a).) After purchasing a firearm, one usually must return to the FFL at least 10 days  
26 later before taking receipt. (Pen. Code, § 27540, subd. (a).) If the purchaser passes the background  
27 check and completes a safe-handling demonstration, the FFL will release the firearm to the  
28 purchaser, along with a DOJ-approved firearm safety device. (Pen. Code, § 23635.)



1 Nothing in state law expressly grants local government or officials the authority to ban  
2 firearm sales within their jurisdictions. State law does, however, make clear that “[n]o permit or  
3 license to *purchase*, own, possess, keep, or carry, either openly or concealed, shall be required of  
4 any United States Citizen or legal resident over the age of 18” in California who is not otherwise  
5 prohibited from owning or possessing firearms. (Pen. Code, § 25605, subd. (b).)

## 6 **II. STATE EMERGENCY ORDERS**

7 In response to the novel coronavirus (COVID-19) pandemic, Governor Gavin Newsom  
8 proclaimed a State of Emergency on March 4, 2020. (See Req. for Jud. Not. (“RJN”), Ex. A.) On  
9 March 19, 2020, Governor Newsom issued Executive Order N-33-20 directing Californians “to  
10 immediately heed the current State public health directives” developed by the Department of  
11 Public Health. (RJN, Ex. B.) Executive Order N-33-20 contains an order from the State Public  
12 Health Officer and Director indefinitely ordering “all individuals living in the State of California to  
13 stay home or at their place of residence except as needed to maintain continuity of operations of  
14 the federal critical infrastructure sectors . . .” (*Ibid.*) That order clarified that workers in “16  
15 critical infrastructure sectors” identified by the federal government “may continue their work  
16 because of the importance of these sectors to Californian’s health and well-being.” (*Ibid.*; see also  
17 RJN, Ex. C.) At the time of the Governor’s order, firearm retailers were not expressly listed in the  
18 federal guidelines his order references. Instead, the federal guidelines broadly included all “retail”  
19 businesses in the “Commercial Facilities Sector,” one of the “16 critical infrastructure sectors.”

20 (RJN, Ex. M.) Even so, some local agencies ordered firearm retailers closed. As a result, on March  
21 28, 2020, the Director of the federal Cybersecurity and Infrastructure Security Agency (“CISA”),  
22 issued an advisory memorandum clarifying that CISA considers “workers supporting the operation  
23 of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting  
24 ranges” to be part of the nation’s “Essential Critical Infrastructure Workforce.” (RJN, Ex. D.)

25 On March 25, 2020, Governor Newsom was asked if his office would clarify whether  
26 California FFLs are “essential businesses” allowed to remain open during the COVID-19 crisis. In  
27 response, the Governor stated that he would “defer to the sheriff in this instance, and [] defer to  
28 sheriffs in their respective jurisdictions for that clarification.” (See Brady Decl., Ex. 2.)

1 **III. SANTA CLARA’S POLICY ORDERING GUN STORES TO CLOSE**

2 The County’s Public Health Officers announced a legal order directing residents to shelter  
3 at home for three weeks beginning March 17, 2020, except for conducting “essential activities.”  
4 (See RJN, Ex. E.) At the time, the order defined “essential activities” as those “necessary for the  
5 health and safety for individuals and their families.” (*Ibid.*) The order did not expressly list FFLs  
6 operating in Santa Clara County among these activities. (*Ibid.*)

7 On March 30, 2020, the County issued a joint press release with neighboring counties  
8 stating they updated their existing shelter at home order to be extended until at least May 1, 2020.  
9 (See RJN, Ex. F.) The next day, the County issued an updated order extending it until May 3,  
10 2020. (RJN, Ex. G.) This new order also added “clarifying language around essential business and  
11 activities, as well as some new directives.” (*Ibid.*) Once again, however, the order did not  
12 expressly list FFLs operating in the County among those activities considered essential. (*Ibid.*)  
13 Failure to comply with the County’s order “constitutes an imminent threat and menace to public  
14 health, constitutes a public nuisance, and is punishable by fine, imprisonment, or both.” (*Ibid.*)

15 On April 1, the Office of the District Attorney of Santa Clara County ordered Petitioner  
16 Lokey Firearms to close its retail store or face civil and criminal penalties (“County’s Order”).  
17 (Decl. David Lokey Supp. Ex Parte Appn. For OSC & TRO (“Lokey Decl.”), ¶ 6.) An attorney at  
18 the District Attorney’s office late told Petitioner-Plaintiff’s counsel that if Lokey opens for retail  
19 sales, it will be subject to civil and criminal penalties. (Lokey Decl., ¶ 6.) Fearing such penalties  
20 for refusing to comply with the County’s order, Petitioner Lokey closed its store. (Lokey Decl., ¶  
21 7.) Respondents also maintain a website that, as of April 6, 2020, states that firearm retailers “are  
22 not essential businesses under [the County’s] Order.” (RJN Ex. L.)

23 **ARGUMENT**

24 **I. LEGAL STANDARD**

25 The primary purpose of interim injunctive relief—whether a stay of enforcement or a  
26 temporary or preliminary injunction—is to preserve the status quo until a court can make a final  
27 determination on the merits of the action. (See *Contl. Baking Co. v. Katz* (1968) 68 Cal.2d 512.)  
28 The test most often used by California trial courts in deciding whether to issue such relief requires

1 the evaluation of two interrelated factors: (1) the likelihood that plaintiff will succeed on the merits  
2 of its claims; and (2) the harm that plaintiff is likely to suffer if injunctive relief does not issue,  
3 balanced against the harm that the defendant is likely to suffer if it does issue. (*Cohen v. Bd. of*  
4 *Supervisors* (1985) 40 Cal.3d 277, 286 (*Cohen*.) When addressing these factors, the plaintiff must  
5 prove the likelihood that it will suffer immediate and irreparable harm. (*Triple A Mach. Shop, Inc.*  
6 *v. California* (1989) 213 Cal.App.3d 131, 138.)

7 **II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS**

8 **A. The County Is in Violation of a State Order**

9 The County's Order barring lawful firearm sales violates the State Public Health Officer  
10 and Director's March 19, 2020 order that Californians working in "16 critical infrastructure  
11 sectors" identified by the federal government "may continue their work because of the importance  
12 of these sectors to Californian's health and well-being" ("Health Department's Order"). (RJN, Ex.  
13 B.) Gun stores fall within those federally identified critical sectors. Any doubt on that score has  
14 been removed by the memorandum CISA issued clarifying what it considers among those sectors,  
15 which lists "workers supporting the operation of firearm or ammunition product manufacturers,  
16 retailers, importers, distributors, and shooting ranges." (RJN, Ex. D.)

17 To be sure, under federal law, CISA's "list is advisory in nature" and "is not, nor should it  
18 be considered, a *federal* directive." (RJN D, italics added.) In California, however, it has the effect  
19 of a mandatory directive. This is because the Health Department's Order incorporates federal  
20 guidelines as mandates by stating that Californians working in the "16 critical infrastructure  
21 sectors" the federal government has identified must be allowed to continue working. (RJN, Ex. B.)  
22 Because federal guidelines include firearm stores among those critical sectors, the Health  
23 Department's Order protects Petitioner Lokey's' operation of its store.

24 State law compels Respondents' compliance with the Health Department's Order allowing  
25 gun stores to operate. That order was mandated by the Governor's Executive Order N-33-20. (See  
26 RJN, Ex. B [directing residents to "heed the current State public health directives," which the  
27 Governor "ordered the Department of Public Health to develop."] ) As such, it is part of the  
28 Governor's order and controlling over all public entities per the statutes expressly referenced in the

1 Governor's order. (RJN, Ex. B, citing Gov. Code, § 8627 ["During a state of emergency *the*  
2 *Governor shall*, to the extent he deems necessary, *have complete authority* over all agencies of the  
3 state government and the right to exercise within the area designated all police power vested in the  
4 state by the Constitution and laws of the State of California in order to effectuate the purposes of  
5 [the California Emergency Services Act]. In exercise thereof, he shall promulgate, issue, and  
6 enforce such orders and regulations as he deems necessary, in accordance with the provisions of  
7 [Government Code] Section 8567"], and Gov. Code, § 8567, subd. (a) ["The Governor may make,  
8 amend, and rescind orders and regulations necessary to carry out the provisions of [the California  
9 Emergency Services Act]. The orders and regulations *shall have the force and effect of law.*"],  
10 italics added.) "Orders . . . issued during a . . . state of emergency shall be in writing and shall take  
11 effect immediately upon their issuance." (Gov. Code, § 8567, subd. (b).)

12 Even if the Health Department's Order does not carry the force of the Governor's order, it  
13 independently compels local authorities' compliance with its provisions. (See Health & Saf. Code,  
14 § 120195 ["Each health officer *shall* enforce all orders, rules, and regulations concerning  
15 quarantine or isolation prescribed or directed by the [State Department of Health Services]],"  
16 italics added.)<sup>1</sup> Indeed, the order incorporates Government Code section 8665, making it a crime  
17 for *anyone* to violate it. (RJN, Ex. B.) The lack of any exemption for local officials here suggests  
18 none exists. (*Safer v. Superior Court (Trom)* (1975) 15 Cal.3d 230.) The legislature knows how to  
19 exempt municipal officials from criminal statutes. (See, e.g., Pen. Code, § 27600, subd. (a).)

20 The County may argue that because the Health Department's Order was issued before  
21 CISA expressly clarified that gun stores are within the "critical infrastructure sectors," the order  
22 does not cover gun stores because CISA's clarification constitutes a later modification to the  
23 incorporated federal guidelines. (See *Gonzalez v. City of Norwalk*, (2018) 17 Cal.App.5th 1295,  
24 1311 [stating the general rule that "where a statute adopts by specific reference the provisions of  
25 another statute, regulation, or ordinance, such provisions are incorporated in the form in which  
26 they exist at the time of the reference and not as subsequently modified"].) But that argument must  
27 fail for at least two reasons.

28 <sup>1</sup> See Health & Safety Code sections 20-21, for definitions of "Department" and "Director."

1 First, gun stores were never expressly excluded from federal guidelines and were, at least  
2 arguably, already included in CISA's guidelines when the Health Department's Order originally  
3 issued. (See *supra*, Statement of Facts, Section II, p. 8; RJN, Ex. M [noting the federal guidelines  
4 broadly included all "retail" businesses in the "Commercial Facilities Sector," one of the "16  
5 critical infrastructure sectors"].) CISA's clarification thus did not modify federal guidelines.  
6 Second, the general rule disallowing retroactive incorporation does not apply here. Instead, the rule  
7 "that where the reference is general instead of specific, such as a reference to a system or body of  
8 laws or to the general law relating to the subject in hand, the referring statute takes the law or laws  
9 referred to not only in their contemporary form, but also as they may be changed from time to time  
10 . . ." applies. (*Palermo v. Stockton Theatres*, (1948) 32 Cal.2d 53, 59.) The Health Department's  
11 Order does not reference a fixed federal provision, but merely cites an interactive link to CISA's  
12 website, which can be, and was, updated. (See RJN, Exs. B, C.)

13 Construing the Health Department's Order as incorporating later changes to CISA's  
14 guidelines is also consistent with state policy that emergency measures take into account federal  
15 action. (See Gov. Code, § 8567, subd. (a) ["Due consideration shall be given to the plans of the  
16 federal government in preparing the orders and regulations" for an emergency].) Significantly, Los  
17 Angeles County Sheriff Villanueva and Culver City have retracted their respective orders to close  
18 gun stores given CISA's memorandum. (RJN, Exs. H, I, J.) And, the State has kept its firearm-  
19 transfer workforce and systems at DOJ functioning. (Lokey Decl., ¶ 10.)

20 In short, the State of California has issued an order that Californians must follow federal  
21 guidelines in closing down segments of the economy because of the threat from COVID-19. The  
22 federal guidelines include gun stores among those crucial parts of the federal infrastructure that  
23 should remain open. Petitioners are thus likely to succeed in showing that the County's Order  
24 requiring gun stores to close contradicts the State's order and is void and unenforceable.

#### 25 **B. The County's Order Is Preempted by State Law**

26 The California Constitution commands that a county or city must take care not to fall "in  
27 conflict with general laws." (Cal. Const. art. XI, § 7.) Courts have interpreted this as a limitation  
28 on local government's ability to interfere with the proper operation of state law through local

1 legislation. (*Agnew v. City of Los Angeles* (1958) 51 Cal.2d 1.) In short, a local law “[i]s invalid if  
2 it attempts to impose additional requirements in a field that is preempted by the general law.” (*In*  
3 *re Lane* (1962) 58 Cal.2d 99, 102.) In determining whether a measure is preempted, courts ask if it  
4 “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by  
5 legislative implication.” (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.)

6 Because California law generally requires firearm transfers be processed through  
7 California-licensed FFLs (see *supra*, Statement of Facts, Part I, p. 3), the County’s Order requiring  
8 all FFL stores to close is effectively a ban on the sale of firearms. Well over a decade ago, the  
9 California Court of Appeal held that state law preempts local bans on selling firearms on various  
10 grounds. (*Fiscal v. City and County of San Francisco* (2008) 158 Cal.App.4th 895, 911-914.) Of  
11 particular note here, the *Fiscal* Court held that to sell firearms a business must have a federal and  
12 state license and that a local ban on selling firearms “effectively cancels all of these licenses” and  
13 thus “contravenes Government Code section 5307.” (*Id.* at p. 912.) That the County’s Order is  
14 temporary does not change this. It remains a ban that is now in place, and it is indefinite. In any  
15 event, Government Code section 53071 does not merely seek to preempt firearm bans. Rather, it  
16 preempts any local regulation even “relating” to licensing firearms. The County’s Order relates to  
17 Petitioner Lokey’s license and to the registration of the firearms it will not allow to be released to  
18 their owners. The only question remaining, therefore, is whether there is any other state law  
19 provision that exempts the County’s Order from *Fiscal*’s preemptive effect. There is not.

20 Respondents are expected to point to the following state law provisions as exempting the  
21 County’s Order from *Fiscal*’s preemptive effect:

- 22 • “The local health officer may take any preventive measure that may be necessary to  
23 protect and preserve the public health from any public health hazard during any . . .  
24 ‘state of emergency . . . within his or her jurisdiction.” (Health & Saf. Code, §  
25 101040, subd. (a).)
- 26 • “*Each health officer* knowing or having reason to believe that any case of the  
27 diseases made reportable by regulation of the department, or any other contagious,  
28 infectious or communicable disease exists, or has recently existed, within the  
territory under his or her jurisdiction, *shall take measures as may be necessary to*  
*prevent the spread of the disease or occurrence of additional cases.*” (Health & Saf.  
Code, § 120175, italics added.)
- “[T]he local health officer may issue orders to other governmental entities within

1 the local health officer’s jurisdiction to take any action the local health officer  
2 deems necessary to control the spread of the communicable disease.” (Health &  
Saf. Code, § 120175.5, subd. (b).)<sup>2</sup>

3 While on their face these provisions seemingly confer unfettered discretion on local officials (i.e.,  
4 health officers) to act in combating dangerous infectious-diseases like COVID-19, that is not the  
5 case. There are indeed limits, which the County’s Order has exceeded.

6 A 1995 Attorney General Opinion explained in detail why the first of the three provisions  
7 referenced above, section 101040,<sup>3</sup> remains subject to preemption principles, despite its broad  
8 language. (78 Ops.Cal.Atty.Gen. 171 (1995).) The opinion analyzes language from two statutes,  
9 stating that a health officer: (1) “may promulgate orders and regulations necessary to provide for  
10 the protection of life and property . . .”; and (2) “may take any preventive measure which may be  
11 necessary to protect and preserve the public health . . .” (*Id.* at p. 174, citations omitted.)

12 In finding that those provisions remain subject to general law preemption, the opinion first  
13 notes that “the broad powers based on a declaration of local emergency cannot be construed  
14 literally to encompass ‘any’ orders, regulations, or preventive measures in violation of state law or  
15 policy.” (78 Ops.Cal.Atty.Gen. at p. 175.) Rather, “in the execution of a particular statutory  
16 responsibility imposed by [the two provisions analyzed], those charged with their administration  
17 must take cognizance of and effectuate, or at least refrain from acting in derogation of, other valid  
18 governmental policies.” (*Ibid.*) And, “[i]t is well settled that statutory provisions must be construed  
19 with reference to the whole system of law of which they are a part so that all may be harmonized  
20 and have effect.” (*Ibid.*, citing *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991)  
21 54 Cal.3d 245, 268.) Having effectively identical language as the provisions the opinion analyzes,  
22 the three above provisions are subject to these same principles, they are limited by general law.

23 Relatedly, the opinion next points out that the two provisions it analyzes concern actions by

24 \_\_\_\_\_  
25 <sup>2</sup> “Health officer” includes county, city, and district health officers, and city and district  
health boards, including their designees. (Health & Saf. Code, §§ 120100, 120115.)

26 <sup>3</sup> The Opinion refers to section 101040’s predecessor “§ 458” which section 101040  
27 replaced in 1995. (See Sen. Bill No. 1360 (1995-1996 Reg. Sess.)) Relevant here, the Opinion  
28 also refers to “section 3110” which is the predecessor to Health & Safety Code section 120175 (the  
second of the three potentially relevant provisions noted above) and does not try to distinguish it  
from section 101040, suggesting it would be treated similarly. (*Id.* at p. 174, fn. 3.)

1 county health officers and that counties' authority is limited to only adopting "orders not in  
2 conflict with general laws." (78 Ops.Cal.Atty.Gen. at p. 173 [referencing "450" which is the  
3 former iteration of Health and Safety Code section 101025], see Sen. Bill No. 1360 (1995-1996  
4 Reg. Sess.)) Such a limitation, the Attorney General Opinion concludes, "do[es] not suggest an  
5 authority to disregard the general laws of the state," despite the broad terms of the individual  
6 provisions. (*Id.* at p. 175.) To the contrary, as explained above, local health officers *shall* enforce  
7 state orders about isolation. (Cal. Health & Saf. Code, § 120195.)

8 Finally, the opinion finds relevant that neither provision it analyzes contains an express  
9 exemption from general law. (78 Ops.Cal.Atty.Gen. at p. 176.) It explains that "when the  
10 Legislature has intended to authorize the suspension of state laws, it has done so in specific and  
11 unmistakable terms, rather than by inference or implication." (*Ibid.*) The lack of express authority  
12 to act beyond general law in those provisions, the opinion concludes, "indicates an intent not to  
13 confer such authorization upon local entities." (*Ibid.*) None of the three potentially relevant  
14 provisions here contains such an express exemption. To the contrary, as noted above, they are  
15 arguably subject to an express limitation to adhere to general law. Revealingly, the opinion cites  
16 the statute prescribing the Governor's powers during a state of emergency as "an illuminating  
17 example of the language [the Legislature] uses when it grants an exemption from compliance with  
18 state law." (*Ibid.*, citing Gov. Code, § 8627 ["During a state of war emergency or a state of  
19 emergency the Governor may suspend any regulatory statute, or statute prescribing the procedure  
20 for conduct of state business . . . where the Governor determines and declares that strict  
21 compliance with any statute . . . would in any way prevent, hinder, or delay the mitigation of the  
22 effects of the emergency."].) This not only establishes that the three provisions analyzed here  
23 should not be read as exempt from general law restrictions in the abstract, but also shows there is a  
24 mechanism by which cities can be unrestrained from general law in this specific context, by order  
25 of the Governor—an order the Governor has not made to date.

26 Each of the points raised in the opinion contradicts any argument that Respondents are  
27 exempt from general law preemption principles in exercising their emergency powers. While  
28 Attorney General opinions are not binding on this Court, they generally are persuasive authority.



1 (See *Cal. Assn. of Psych. Providers v. Rank* (1990) 51 Cal.3d 1, 17.) This particular opinion is  
2 persuasive in its reasoning, and the Court should follow it here. In sum, the County's Order is  
3 preempted under *Fiscal*. None of the emergency powers the Respondents may enjoy changes that.  
4 Thus, Petitioners are likely to succeed on the merits of their Third through Eighth causes of action.

5 **C. The County's Order Violates California's Due Process Requirements**

6 The California Constitution provides that: "A person may not be deprived of life, liberty, or  
7 property without due process of law . . ." (Cal. Const., art. I § 7(a).) "The concept of 'due process  
8 of law' guarantees both procedural and substantive rights." (*Bottini v. City of San Diego* (2018) 27  
9 Cal.App.5th 281, 315 (*Bottini*); see Cal. Const. Art. I, § 7(a).) The County's Order violates both  
10 these due process protections.

11 "At a minimum, whenever property is taken, [procedural] due process requires some form  
12 of notice and hearing." (*Tyler v. County of Santa Clara* (1995) 34 Cal.App.4th 777, 783.) By  
13 prohibiting firearm sales, the County's Order indefinitely deprives Petitioner Lokey use of its  
14 federal and state licenses to sell firearms. FFLs like Lokey can only have their license revoked  
15 following a hearing. (Cal. Code Regs., tit. 11, § 4024, subd. (b); see also Govt. Code, §§ 11500-  
16 11530.) In general, the holder of a license that cannot be revoked without cause has a property  
17 interest in that license. (See, e.g., *Sulla v. Bd. of Regis. Nursing* (2012) 205 Cal.App.4th 1195.) Yet  
18 the County provided Lokey neither notice nor hearing before ordering it to cease operations. The  
19 County has thus effectively revoked Lokey's duly acquired licenses without due process.

20 Additionally, individuals are being denied their property without either notice or hearing,  
21 nor any reasonable explanation. When a firearm is purchased, the purchaser must return to the FFL  
22 no sooner than 10 days to take possession of it. (See *supra*, Statement of Facts, Part I, p. 3.)  
23 Individuals who bought firearms before the County's Order took effect that are now in the  
24 possession of an FFL are being deprived of access to their property by the County's Order because  
25 they cannot take receipt of lawfully purchased firearms. (See Lokey Decl., ¶¶ 8-9.)

26 The County may argue that its order is not "adjudicative" but "legislative," and because  
27 procedural due process does not generally apply to legislative action, Petitioners' claim must fail.  
28 (*Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613, 622-623.) But the County's Order is not

1 “a broad, generally applicable rule of conduct on the basis of a general public policy.” (*San Diego*  
2 *Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 212-213 [defining legislative  
3 action].) Rather, the County has chosen to affect individuals “determined by facts peculiar to the  
4 individual case.” (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 613 [defining adjudicative  
5 action].) The County’s Order targets gun sales specifically as an impermissible consumer activity  
6 during the COVID-19 crisis while permitting all sorts of other consumer activities. (RJN, Ex. G.)

7 The County’s Order also violates due process because it is the epitome of arbitrariness.  
8 “Substantive due process protects against ‘arbitrary legislative action, . . .’ [Citation.] To satisfy  
9 substantive due process concerns, ‘the law must not be unreasonable, arbitrary or capricious but  
10 must have a real and substantial relation to the object sought to be attained.’” (*Bottini, supra*, 27  
11 Cal.App.5th at 315; see also *420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th  
12 1316, 1342; and *Jew Ho v. Williamson* (1900) 103 F.10.) Respondents have no legitimate basis for  
13 denying some their constitutional right to self-defense and property, while allowing others to  
14 frequent liquor or hardware stores. (RJN, Ex. H.) The County’s Order is thus invalid for violating  
15 the California Constitution’s due process requirements and Petitioners are likely to succeed on  
16 their Ninth Cause of Action.

### 17 **III. THE BALANCE OF HARMS TIPS SHARPLY IN PETITIONERS’ FAVOR**

18 The Court must next balance the harm Petitioners are likely to suffer if injunctive relief  
19 does not issue against the harm the County is likely to suffer if it does. (*Cohen, supra*, 40 Cal.3d at  
20 p. 286.) In striking that balance, courts can consider *any* of several factors: “(1) the inadequacy of  
21 any other remedy; (2) the degree of irreparable injury the denial of the injunction will cause; (3)  
22 the necessity to preserve the status quo; [and] (4) the degree of adverse effect on the public interest  
23 or interests of third parties the granting of the injunction will cause.” (*Id.* at p. 286, fn. 5.)

#### 24 **A. Absent Preliminary Relief, Plaintiffs Will Suffer Irreparable Harm Without** 25 **Adequate Remedy at Law**

26 “To qualify for preliminary injunctive relief plaintiffs must show irreparable injury, either  
27 existing or threatened.” (*City of Torrance v. Transl. Living Ctrs. for L.A.* (1982) 30 Cal.3d 516,  
28 526, citing *7978 Corp. v. Pitchess* (1974) 41 Cal.App.3d 42, 46; see also Code Civ. Proc., § 526,

1 subd. (a)(2).) Irreparable harm is present when a plaintiff will suffer an injury for which adequate  
2 compensation is difficult, if not impossible, to establish. (*Wind v. Herbert* (1960) 186 Cal.App.2d  
3 276, 285, citing Civ. Code, § 3422.) The City's conduct has caused and, unless enjoined, will  
4 continue to cause this very sort of injury to Petitioners-Plaintiffs.

5 **1. Petitioner Lokey Firearms Is Being Forced to Discontinue Their**  
6 **Business Practices as a Result of the County's Order**

7 The California Supreme Court has recognized that discontinuing a "method of conducting  
8 . . . business[] as alleged because of fear of arrest and prosecution" under an unlawful measure is  
9 sufficient irreparable injury. (*McKay Jewelers, Inc. v. Bowron* (1942) 19 Cal.2d 595, 599.) The  
10 County's Order indefinitely prohibits Petitioner Lokey Firearms from operating their firearm  
11 business. That alone is sufficient irreparable harm. Yet Petitioner is further irreparably harmed  
12 because being shut down indefinitely could lead to their businesses permanently ending. (Lokey  
13 Decl., ¶ 11.) Petitioners are thus irreparably harmed by the County's Order and will continue to  
14 suffer such harm should that order remain in effect while this case is pending.

15 **2. The County's Order Prevents Members of Petitioner CRPA from**  
16 **Purchasing or Taking Delivery of Their Lawfully Purchased Firearms**

17 California law generally requires California residents to purchase firearms through an FFL  
18 and to wait 10 days to take possession of a purchased firearm. (Pen. Code, §§ 27540, subd. (a),  
19 27545.) The City's Order prohibiting stores from selling firearms precludes individuals, including  
20 members and supporter of CRPA, from acquiring a firearm, depriving them of their Second  
21 Amendment right indefinitely. It also precludes those members and supporters who have already  
22 bought a firearm before the City's Order took effect from taking possession of their property. (See  
23 Lokey Decl., ¶ 8.) Those individuals will thus suffer irreparable harm if enforcement of the City's  
24 Order is not stayed pending resolution of this case on the merits.

25 **B. Preliminary Relief Is Necessary to Preserve the Status Quo**

26 "The general purpose of a preliminary injunction is to preserve the status quo until the  
27 merits of the action can be determined." (*Harbor Chevrolet Corp. v. Machinists Local Union 1484*  
28 (1959) 173 Cal.App.2d 380, 384.) The balance of harms thus tips in favor of a party seeking  
injunctive relief to preserve "the last actual peaceable, uncontested status which preceded the

1 pending controversy.” (*People v. Hill* (1977) 66 Cal.App.3d 320, 331.) To that end, the California  
2 Supreme Court has recognized that preliminary injunctions preventing enforcement of measures in  
3 effect for a short time effectively *maintain* the status quo. (*King v. Meese* (1987) 43 Cal.3d 1217,  
4 1227.) The County’s Order closing gun stores took effect mere weeks ago. (Lokey Decl., ¶ 6; see  
5 also RJN, Ex. G.) Staying its enforcement thus maintains the status quo as is necessary to prevent  
6 the various irreparable harms discussed above. (See *supra*, Argument, Part III.A.)

7 **C. The Public Interest Will Be Served, Not Harmed, by Preliminary Relief**

8 A third consideration in the balance of harms analysis is “the degree of adverse effect on  
9 the public interest or interests of third parties the granting of the injunction will cause.” (*Cohen*,  
10 *supra*, 40 Cal.3d at p. 286, fn. 5.) If the public interest would be harmed by the issuance of a  
11 preliminary injunction, courts are understandably reluctant to grant such relief. But when the  
12 injunctive relief *serves* the public interest, the balance naturally tips in the movant’s favor.

13 The public interest is generally served by courts not interfering in the enforcement of  
14 measures adopted by duly elected representatives out of respect for the separation of powers. (*City*  
15 *of Santa Monica v. Superior Court (Tee Pee Enterps.)* (1964) 231 Cal.App.2d 223, 226.) That,  
16 however, is not the case with a measure imposed by a unilateral executive mandate like the  
17 County’s Order and not when the measure is clearly unlawful, as is the case here. Allowing such a  
18 measure to remain in effect invites harm to the public trust. Indeed, localities could pass preempted  
19 measures with impunity, enforcing them for extended periods while legal challenges wind through  
20 court. It is in the public’s best interest to determine the legitimacy of recently adopted measures  
21 *before* enforcement, rather than allow them to take effect and subject citizens to their provisions  
22 and penalties, only to have them undone later. This is particularly so here where the potential for  
23 government overreach in the name of a health emergency is great.

24 **D. If Relief Is Granted, Respondents Will Suffer No Harm Sufficient to Outweigh  
25 the Harm to Petitioners Absent Such Relief**

26 Given the substantial likelihood that Petitioners will succeed on the merits, the harm to  
27 Respondents in delaying enforcement of the County’s Order is slight. Respondents have no interest  
28 in enforcing the County’s Order, as an “unconstitutional law is void and is as no law.” (*Ex parte*

1 *Siebold* (1879) 100 U.S. 371, 376.) Unlike Petitioners, who face criminal and civil penalties for  
2 conduct they have a right to engage in by state law and state-issued licenses, Respondents will  
3 incur little if any injury from the Court staying enforcement of the County's Order. Petitioners  
4 merely ask that Respondents delay enforcement of a likely unlawful policy. No further action or  
5 funding is required of Respondents to cease enforcing the County's Order.

6 What's more, no government interest is served by enforcing the County's Order before this  
7 Court has had a chance to judge the merits of Petitioners' claims. Premature enforcement will  
8 serve only to indefinitely deprive law-abiding citizens of their rights and property. Preventing the  
9 spread of COVID-19 is undeniably a critical and urgent matter. However, the public is being  
10 permitted to engage in other commerce at this time. (See RJN, Ex. G.) Nothing about the process  
11 for purchasing firearms makes it particularly risky vis-à-vis COVID-19. Respondents could simply  
12 enforce the behavioral guidelines implemented for other businesses operating during this health  
13 crisis. In short, the County cannot claim that harm will be increased significantly should its Order  
14 be stayed temporarily when it has less intrusive measures to accomplish its legitimate objectives  
15 that do not unduly burden Petitioners. The balance of harms thus tilts in Petitioners' favor.

16 **CONCLUSION**

17 For these reasons, Petitioners request that this Court grant their motion to stay enforcement  
18 of the County's Order while this case is litigated. Alternatively, Petitioners ask that this Court  
19 grant their application for a TRO enjoining Respondents, their employees, agents, and persons  
20 acting on their behalf, from enforcing the County's Order and to issue an Order to Show Cause for  
21 Respondents to show why a preliminary injunction should not issue.

22 Dated: April 20, 2020

23 **MICHEL & ASSOCIATES, P.C.**

24 

25 \_\_\_\_\_  
26 Sean A. Brady  
27 Attorneys for Petitioners/Plaintiff

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA  
3 COUNTY OF SANTA CLARA

4 I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County,  
5 California. I am over the age eighteen (18) years and am not a party to the within action. My  
6 business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

7 On April 20, 2020, I served the foregoing document(s) described as

8 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE  
9 APPLICATION TO STAY ENFORCEMENT OF SANTA CLARA ORDER REQUIRING  
10 LICENSED FIREARM DEALERS TO CLOSE OR ALTERNATIVELY, FOR  
11 TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE**

12 on the interested parties in this action by placing

13 [ ] the original  
14 [X] a true and correct copy

15 thereof by the following means, addressed as follows:

16 James R. Williams  
17 Office of the County Counsel  
18 County of Santa Clara  
19 70 West Hedding Street  
20 East Wing, 9th Floor  
21 San Jose, CA 95110  
22 Email: [county.counsel@cco.sccgov.org](mailto:county.counsel@cco.sccgov.org)  
23 Email: [james.williams@cco.sccgov.org](mailto:james.williams@cco.sccgov.org)

24 Jeff Rosen  
25 District Attorney  
26 Office of the District Attorney  
27 County of Santa Clara  
28 17275 Butterfield Blvd., Ste A  
Morgan Hill, CA 95037  
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Email: [jason.bussey@cco.sccgov.org](mailto:jason.bussey@cco.sccgov.org)

29 X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic  
30 transmission to the emails shown above. Said transmission was reported and completed  
31 without error.

32 X (STATE) I declare under penalty of perjury under the laws of the State of California that  
33 the foregoing is true and correct.

34 Executed on April 20, 2020, at Long Beach, California.

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