

1 JAMES R. WILLIAMS, County Counsel (S.B. #271253)
MELISSA R. KINIYALOCTS, Lead Deputy County Counsel (S.B. #215814)
2 JASON M. BUSSEY, Deputy County Counsel (S.B. #227185)
HANNAH KIESCHNICK, Legal Fellow (S.B. #319011)
3 OFFICE OF THE COUNTY COUNSEL
70 West Hedding Street, East Wing, Ninth Floor
4 San José, California 95110-1770
Telephone: (408) 299-5900
5 Facsimile: (408) 292-7240

6 Attorneys for Defendants
COUNTY OF SANTA CLARA, SARA H. CODY,
7 LAURIE SMITH and JEFF ROSEN

8
9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SANTA CLARA

11
12 LOKEY FIREARMS, et al.,
13 Plaintiffs,
14 v.
15 COUNTY OF SANTA CLARA, et al.,
16 Defendants.

No. 20CV365840
**DEFENDANTS' RESPONSE TO ORDER
TO SHOW CAUSE AS TO WHY A
PRELIMINARY INJUNCTION SHOULD
NOT ISSUE**
Date: May 19, 2020
Time: 10:00 A.M.
Dept.: 19

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION 5

II. FACTUAL BACKGROUND 5

III. LEGAL STANDARD..... 8

IV. ARGUMENT 8

 A. THE BALANCE OF HARMS WEIGHS DECIDEDLY AGAINST AN
 INJUNCTION..... 8

 B. PLAINTIFFS WILL NOT SUCCEED ON THE MERITS OF THEIR
 CLAIMS 11

 1. The presumption against preemption applies..... 11

 2. The County Health Officer’s Order does not contradict the Statewide
 Orders..... 12

 a. The Statewide Orders do not retroactively incorporate federal
 guidance..... 12

 b. The Statewide Orders do not require critical infrastructure
 sectors to remain open..... 14

 3. State laws regulating firearms do not preempt the County Health
 Officer’s Order 15

 4. The County Health Officer’s Order comports with due process..... 17

 a. The Order does not violate procedural due process 17

 b. The Order also does not violate substantive due process..... 18

V. CONCLUSION 19

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Big Creek Lumber Co. v. County of Santa Cruz</i> (2006) 38 Cal.4th 1139	11
<i>Bottini v. City of San Diego</i> (2018) 27 Cal.App.5th 281	17
<i>California Veterinary Medical Assn. v. City of West Hollywood</i> (2007) 152 Cal.App.4th 536	15, 16
<i>City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.</i> (2013) 56 Cal.4th 729	10, 11, 13
<i>Common Cause v. Bd. of Supervisors</i> (1989) 49 Cal.3d 432	13
<i>Fiscal v. City & County of San Francisco</i> (2008) 158 Cal.App.4th 895	15
<i>Horn v. County of Ventura</i> (1979) 24 Cal.3d 605	16, 17
<i>In re Jovan B.</i> (1993) 6 Cal.4th 801	12
<i>Kasler v. Lockyer</i> (2000) 23 Cal.4th 472	17
<i>Love v. State Dept. of Edu.</i> (2018) 29 Cal.App.5th 980	17
<i>O’Connell v. Superior Court</i> (2006) 141 Cal.App.4th 1452	8
<i>Palermo v. Stockton Theatres</i> (1948) 32 Cal.2d 53	12
<i>People ex rel. Deukmejian v. County of Mendocino</i> (1984) 36 Cal.3d 476	11
<i>People v. Mueller</i> (1970) 8 Cal.App.3d 949	15
<i>Shoemaker v. County of Los Angeles</i> (1995) 37 Cal.App.4th 618	8
<i>Tahoe Keys Prop. Owners’ Assn. v. State Water Res. Control Bd.</i> (1994) 23 Cal.App.4th 1459	7
<i>White v. Davis</i> (2003) 30 Cal.4th 528	7, 9, 10

1 **Statutes**

2 Health and Safety Code Section 101030 15

3 Health and Safety Code Section 131080 15

4 **California Constitution**

5 Article I, section 7 16

6 Article XI, section 7 10

7 **Other**

8 78 Ops.Cal.Atty.Gen. 171 (1995) 16

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

I. INTRODUCTION

Plaintiffs in this case—a licensed firearms dealer and two organizations—argue that the emergency shelter-in-place order of the Santa Clara County Health Officer violates orders of the Governor and State Public Health Officer; is preempted by state law regulating the sale of guns; and violates procedural and substantive due process. These violations purportedly flow from the fact that although the County Health Officer’s Order allows “Essential Businesses” to operate during the COVID-19 pandemic, it does not deem gun stores essential. As it did with Plaintiffs’ application for a temporary restraining order, the Court should deny their request for a preliminary injunction.

Plaintiffs must demonstrate both that the balance of harms weighs in favor of relief and that they are likely to succeed on the merits. This is the rare case in which the Court need not even delve into Plaintiffs’ convoluted merits arguments because they so utterly fail to meet their burden of showing imminent and irreparable harm. Any claim of urgency is undermined by Plaintiffs’ five-week delay to seek this Court’s intervention. And while the harms they claim are speculative or temporary at best, the threat to public health is real and grave. Taking Plaintiffs’ arguments to their logical conclusion, the relief Plaintiffs demand would bar the County from enforcing its shelter-in-place order against any business or institution that has not been able to shift online, effectively undermining the progress made towards flattening the curve. This would cost lives.

Plaintiffs fare no better on the merits. The County Health Officer’s Order is consistent with the statewide orders because those orders do not mandate that gun stores remain open. In fact, the Governor has expressly declared that the statewide orders establish a regulatory floor that does not preempt stricter orders by local jurisdictions. State gun laws likewise do not preempt the Order, which is properly understood as a generally applicable health measure. Any effect it may have on gun sales is incidental to its purpose of protecting public health. And, because the Order is not adjudicative, Plaintiffs’ procedural due process claim stops before it starts. That leaves only their substantive due process claim, which fails because the Order easily passes rational basis review.

II. FACTUAL BACKGROUND

27 The world is facing a pandemic of unprecedented scale. (Decl. of Sara H. Cody, M.D.
28 (“Cody Decl.”) ¶ 6.) Santa Clara County was an initial hotspot for COVID-19, the disease caused by

1 the novel coronavirus first identified last year. (*Id.* ¶ 10.) In early March, its Public Health
2 Department had confirmed 31 cases; by March 16, it had confirmed 92 more. (*Id.* ¶ 11.) The virus
3 is highly contagious even when a person is asymptomatic. (*Id.* ¶ 9.) There is no vaccine for the
4 virus and no specific treatment for COVID-19, which can in severe cases lead to death. (*Id.* ¶ 7.)

5 On March 16, under authority granted by the California Health and Safety Code, the Santa
6 Clara County Health Officer issued an emergency order directing residents to shelter in place.
7 (Cody Decl. Ex. A.) This order sought “to slow the spread of COVID-19 to the maximum extent
8 possible” by permitting residents to leave home only for specified reasons, including to operate or
9 patronize “Essential Businesses.” (*Id.* ¶¶ 1, 2.) The order identified a narrow list of such businesses,
10 which provide goods and services related to basic needs like healthcare, food, shelter, and hygiene.
11 (*Id.* ¶ 10.f.) The order was set to expire April 7. (*Id.* ¶ 12.)

12 On March 19, the Governor issued Executive Order N-33-20, which incorporates an order of
13 the same date from the State Public Health Officer (together, “Statewide Orders”). (Pls. RJN Ex. B.)
14 The Statewide Orders express no intent to preempt the existing orders of local jurisdictions,
15 including Santa Clara County’s. They direct residents “to stay home . . . except as needed to
16 maintain continuity of operations of the federal critical infrastructure sectors, as outlined” in
17 advisory guidance by the federal Cybersecurity and Infrastructure Security Agency (“CISA”). (*Id.* at
18 p. 11.) Although the Statewide Orders say they are “consistent with the March 19, 2020” CISA
19 guidance, they also say the State Public Health Officer “may designate additional sectors.” (*Id.* at
20 pp. 11–12). They provide that “Californians working in these [] critical infrastructure sectors may
21 continue their work[.]” (*Id.* at p. 12.)

22 On March 22, the State Public Health Officer set forth a comprehensive list of “Essential
23 Critical Infrastructure Workers,” which departs from the CISA guidance by including additional
24 workers like taxi drivers and veterinarians. (*Compare* Defs. RJN Ex. A, *with* Defs. RJN Ex. B.)
25 Neither the Statewide Orders, nor the State Public Health Officer’s list, nor the March 19 CISA
26 guidance expressly included gun stores as part of a critical sector. When specifically asked whether
27 gun stores were considered critical, the Governor said he would leave such questions to individual,
28 local jurisdictions. (Pls. Mot. at p. 9.)

1 On March 28, CISA revised its guidance to include workers in “the operation of firearm or
2 ammunition product [] retailers[.]” (Pls. RJN Ex. D at p. 21.) Since then, the Statewide Orders have
3 not been changed and so continue to reference the March 19 CISA guidance. On April 28, the State
4 Public Health Officer revised her list of “Essential Critical Infrastructure Workers.” (See Defs. RJN
5 Ex. C.) The list still does not reference firearms.

6 On March 31, the County Health Officer issued a new order (“County Health Officer’s
7 Order”). (Cody Decl. Ex. B.) This Order identified two objectives: to further slow the spread of
8 COVID-19 and to “mitigate the [disease’s] impact” on “critical healthcare services.” (*Id.* ¶ 2.) To
9 that end, the Order extended the shelter period until May 3 (*id.* ¶ 16), narrowed which businesses
10 qualify as “essential” (*id.* ¶ 13.f), and required those businesses to follow “Social Distancing
11 Protocols” (*id.* ¶ 13.h). The Order still applied to all County residents and “business[es]” (*id.* ¶¶ 2,
12 3), defined broadly to include “any for-profit, non-profit, or educational entity . . . regardless of the
13 nature of the service, the function it performs, or its corporate or entity structure” (*id.* ¶ 13.e). The
14 Order still did not exempt, among others, gun stores, bookstores, or houses of worship.

15 As of May 6, there have been nearly 3.6 million confirmed cases and 247,503 deaths
16 worldwide, though numbers are likely higher due to limited testing and incomplete reporting. (Decl.
17 of George W. Rutherford, M.D. (“Rutherford Decl.”) ¶ 7.) As of May 6, there have been nearly
18 61,000 confirmed cases in California. (*Id.* ¶ 8.) Aggregate statewide numbers do not, however,
19 reflect the geographic variation throughout the state, with some more rural counties reporting no
20 cases and more urban counties reporting thousands. (*Ibid.*) Although Santa Clara County was an
21 early COVID-19 hotspot, it is now a region with relatively few cases and fatalities compared to
22 elsewhere in the U.S. (*Id.* ¶¶ 14–20.) As a result of early and intensive sheltering in place, the
23 trajectory in the growth of total confirmed cases in the County is beginning to flatten. (*Id.* ¶ 20.)

24 To continue this progress, the County Health Officer issued an order that extends the shelter
25 period to May 31, but relaxes certain restrictions. (Cody Decl. Ex. C ¶ 19.) Plaintiffs have not
26 challenged this new order, which took effect May 4. (*Ibid.*) At around the same time, the Governor
27 announced the framework the State will follow to gradually loosen the Statewide Orders. In remarks
28 and presentation materials, the Governor emphasized he would not “preempt[] the[] right to be more

1 stringent at the local level” (Defs. RJN ¶ 6), and that “counties may choose to relax stricter local
2 orders at their own pace” (Defs. RJN Ex. D at p. 65). Consistent with these representations, the
3 Governor issued Executive Order N-60-20 on May 4. The Executive Order recognizes regional
4 variations in COVID-19 rates and directs the State Public Health Officer to establish a process for
5 jurisdictions that meet certain criteria to impose less-restrictive measures than the States’. (Defs.
6 RJN Ex. E at pp. 71–72.) It also expressly preserves “the existing authority of local health officers
7 to establish . . . public health measures within their respective jurisdictions that are more restrictive”
8 based on local community needs. (*Id.* at p. 72.)

9 **III. LEGAL STANDARD**

10 A preliminary injunction is an “extraordinary” remedy. (*Tahoe Keys Prop. Owners’ Assn. v.*
11 *State Water Res. Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 [“TKPOA”].) A party seeking such
12 relief must demonstrate both that the balance of harms weighs in favor of an injunction and that they
13 are likely to succeed on the merits of their claims. (*White v. Davis* (2003) 30 Cal.4th 528, 554.)

14 **IV. ARGUMENT**

15 **A. THE BALANCE OF HARMS WEIGHS DECIDEDLY AGAINST AN INJUNCTION**

16 Balancing the harms means weighing “the interim harm that the plaintiff is likely to sustain if
17 the injunction were denied compared to the harm that the defendant is likely to suffer if the
18 preliminary injunction were issued.” (*White, supra*, 30 Cal.4th at p. 554.) And where, as here, “the
19 plaintiff seeks to enjoin public officers and agencies in the performance of their duties[,] the public
20 interest must be considered” and “the plaintiff must make a significant showing of irreparable
21 injury.” (*TKPOA, supra*, 23 Cal.App.4th at pp. 1472–73.) Plaintiffs do no such thing.

22 On one side of the ledger, the harm to public health that would likely result from an
23 injunction is grave. As Plaintiffs acknowledge, “[p]reventing the spread of COVID-19 is undeniably
24 a critical and urgent matter.” (Pls. Mot. at p. 21.) The Health Officer’s Order reflects the considered
25 judgment of public health experts responding to once-in-a-century pandemic and is due considerable
26 deference. Exercising that judgment, the Health Officer has narrowly defined the list of essential
27 businesses that may remain open to the public because each such exception increases the risk of
28 community transmission of COVID-19. (Cody Decl. ¶ 17.) Plaintiffs may believe there is nothing

1 “particularly risky” about purchasing guns as opposed to other commerce and that gun stores could
2 simply follow the “behavioral guidelines” applicable to “other businesses operating during this
3 health crisis.” (Pls. Mot. at p. 21). But these layperson’s estimations are beside the point. The
4 narrow list of exempted businesses is based not on level of risk but on immediacy of need for the
5 services or products they provide. Plaintiffs ignore the sound epidemiological reasons to exempt the
6 smallest possible number of businesses because social distancing protocols only lower, not
7 eliminate, the increased risks of transmission associated with in-person transactions. (Cody Decl.
8 ¶ 17; Rutherford Decl. ¶ 12.) Barring the County from enforcing its Order against gun stores simply
9 because they too could implement social distancing would mean barring the County from enforcing
10 the Order against almost any institution, undermining the entire purpose of shelter in place. Thus,
11 far from being “slight” (Pls. Mot. at p. 20), the harm from enjoining the Order could include a
12 resurgence in community transmissions, an overburdened healthcare system, and more loss of life.

13 Plaintiffs try to minimize the importance of the Order in another way, characterizing what
14 they seek as “merely” an order to “delay enforcement.” (*Id.* at p. 21.) Putting aside that an order has
15 been in effect since mid-March, Plaintiffs miss that, given the nature of a viral pandemic, consistent
16 compliance is critical. Suggesting the public will suffer little harm by pausing what is essentially a
17 quarantine completely misses its point. As one expert explains, “back[ing] away from the measures
18 that are working” too early “could lead to a resurgence in COVID-19 cases and deaths.” (Rutherford
19 Decl. ¶ 22.) This risk weighs heavily against injunctive relief. (*See Shoemaker v. County of Los*
20 *Angeles* (1995) 37 Cal.App.4th 618, 638 [concluding that “the factor of interim harm strongly
21 counsels against an injunction” in part because “health of the community” would be “put at risk”].)

22 On the other side of the ledger, Plaintiffs offer little to outweigh this critical public interest in
23 staving off the exponential spread of the novel coronavirus. As a preliminary matter, and as
24 previously explained in the County’s opposition to the ex parte application, Plaintiffs’ five-week
25 delay in seeking injunctive relief undermines their assertion of imminent irreparable harm. (Defs.
26 Apr. 22, 2020 Opp. to Ex Parte Appl. at pp. 2–3; *see also O’Connell v. Superior Court* (2006) 141
27 Cal.App.4th 1452, 1481–82 [instructing courts to consider delay in seeking injunctive relief when
28 determining weight to give “claim of imminent irreparable injury”].)

1 Even had they not been dilatory, Plaintiffs do not meet their burden of demonstrating that
2 their asserted injuries outweigh the public interest here. They do not purport to rely on the Second
3 Amendment as a basis for any of their claims and so do not allege constitutional harms. Instead,
4 they allege the harms of economic loss to closed gun stores and of inconvenient delay to consumers
5 who cannot purchase guns. (Pls. Mot. at p. 19.) But the former is speculative and the latter
6 temporary, and neither is irreparable nor otherwise outweighs the interest in combatting COVID-19.

7 Plaintiffs assert that Lokey Firearms “will suffer immediate threat of irreparable harm if
8 forcibly continued to cease all operations, including furloughing or terminating staff and having no
9 choice but to cease operations permanently.” (Decl. of D. Lokey in Supp. of Ex Parte App. (“Lokey
10 Decl.”) ¶ 11.) But a plaintiff “is required to present evidence” of the imminent irreparable injury
11 they are likely to suffer. (*White, supra*, 30 Cal.4th at 554.) This conclusory sentence cannot suffice.
12 It says nothing, for example, about Lokey’s cash reserves, short-term obligations, or ability to pay
13 employees, rent, and utilities, either on its own or with funds from the federal Paycheck Protection
14 Program or grant money from the federal Economic Injury Disaster Loan Program—both of which
15 many thousands of small businesses are relying on during this pandemic. And Plaintiffs’ briefing
16 speculates only that “being shut down indefinitely *could* lead to their business permanently ending”
17 (Pls. Mot. at p. 19 [emphasis added]), not that it is likely to. What is more, Plaintiffs seek relief for
18 all gun stores in the County—even though they purport to represent these other stores, they do not so
19 much as identify the number of stores potentially impacted.

20 Plaintiffs also assert that members of the California Rifle & Pistol Association are unable to
21 start or complete the process of purchasing and transferring a firearm. (Pls. Mot. at 19.) In support,
22 Lokey declares that it has approximately 26 pending transactions, some of which have expired and
23 will need to be reinitiated. (Lokey Decl. ¶ 8.) But Plaintiffs do not say that these transactions are for
24 CRPA members or that the process cannot be restarted after the shelter period. And while they
25 complain of being deprived of “their Second Amendment right indefinitely” (Pls. Mot. at 19),
26 Plaintiffs have not pled a Second Amendment claim and are simply wrong that the shelter period is
27 “indefinite.” The challenged Order was set to expire May 3, and by its terms was expressly not
28

1 intended to be permanent. So, too, with the superseding May 4 Order, set to expire May 31. Thus,
2 the harm of inconvenience predicated on this delay is necessarily temporary rather than irreparable.

3 In essence, Plaintiffs assert—with little to no evidentiary support—the kind of economic
4 impacts currently felt across broad swaths of the economy. They then demand an injunction that
5 would effectively bar the County from enforcing its shelter-in-place order against any business that
6 has been unable to shift online, from amusement parks to gyms to spas. This would undermine the
7 County Health Officer’s ability to combat the exponential spread of a highly contagious virus for
8 which there is no vaccine. If the “ultimate goal” of balancing “is to minimize the harm which an
9 erroneous interim decision may cause” (*White, supra*, 30 Cal.4th at p. 554), there can be no doubt
10 that the public’s interest far outweighs the harms Plaintiffs cite.

11 **B. PLAINTIFFS WILL NOT SUCCEED ON THE MERITS OF THEIR CLAIMS**

12 As to the merits, Plaintiffs press three claims: that the County Health Officer’s emergency
13 order violates the Statewide Orders; is preempted by state law regulating the sale of firearms; and
14 violates both procedural and substantive due process. They are not likely to succeed on any.

15 **1. The presumption against preemption applies**

16 Plaintiffs contend that the County Health Officer’s Order—issued pursuant to authority
17 granted by the California Health and Safety Code—is preempted both by the Statewide Orders and
18 by the various state laws regulating the licensing, registration, and sale of firearms. Not so.

19 Article XI, section 7 of the California Constitution provides that a county “may make and
20 enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict
21 with general law.” Under the general rule of preemption, “local legislation that conflicts with state
22 law is void.” (*City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.* (2013) 56
23 Cal.4th 729, 743.) A conflict exists where the local enactment “duplicates, contradicts, or enters an
24 area fully occupied by general law, either expressly or by legislative implication.” (*Ibid.*) Plaintiffs
25 argue that the County Health Officer’s Order contradicts the Statewide Orders and enters an area
26 fully occupied by state law governing the licensing and registration of firearms. Local action
27 contradicts general law “when it is inimical thereto”—meaning it “directly requires what the state
28 statute forbids or prohibits what the state enactment demands.” (*Ibid.*) And local action “enters an

1 area ‘fully occupied’ by general law when the Legislature has expressly manifested its intent to fully
2 occupy the area, or when it has impliedly done so in light of [recognized] indicia of intent.” (*Ibid.*)

3 There is a strong “presumption against preemption” in areas “traditionally” subject to local
4 regulation or in which “significant local interest[s] . . . differ from one locality to another.” (*Big*
5 *Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149.) This presumption
6 applies here. As explained, the County Health Officer relied on her authority as a “local health
7 officer” to “take any preventative measure that may be necessary to protect and preserve the public
8 health” when issuing the challenged Order. (Health & Saf. Code, § 101040, subd. (a).) And the
9 California Supreme Court has emphasized that “[t]raditionally, . . . counties have adopted
10 regulations for the protection and preservation of public health.” (*People ex rel. Deukmejian v.*
11 *County of Mendocino* (1984) 36 Cal.3d 476, 484.) Finally, local interests vary because the pandemic
12 has manifested differently throughout the State. As such, the Court should “presume, absent a clear
13 indication of preemptive intent . . . , that [the County Health Officer’s Order] is *not* preempted.”
14 (*Big Creek Lumber Co., supra*, 38 Cal.4th at p. 1149 [emphasis in original].)

15 Plaintiffs fail to overcome this presumption and fail to satisfy their “burden of demonstrating
16 preemption.” (*Ibid.*) They neither show that the County Health Officer’s Order is inimical to the
17 Statewide Orders nor that it invades an area of gun regulation fully occupied by the State.

18 **2. The County Health Officer’s Order does not contradict the Statewide Orders**

19 Plaintiffs base their first preemption argument on two premises: that the Statewide Orders
20 retroactively incorporate federal guidance that now deems gun stores part of a critical infrastructure
21 sector and that the Statewide Orders treat that guidance as mandatory. Neither is true. As such,
22 Plaintiffs fail to show that the County Health Officer’s Order is “inimical” to, and thus preempted
23 by, the Statewide Orders. To the contrary, the Governor has expressly declared that the Statewide
24 Orders do not preempt local health officers from maintaining more stringent health measures.

25 **a. The Statewide Orders do not retroactively incorporate federal guidance**

26 The Statewide Orders cite CISA’s March 19 advisory guidance regarding critical
27 infrastructure sectors. (Pls. RJN Ex. B at pp. 11–12.) And the CISA advisory guidance issued on
28 March 28 does list gun stores as part of a critical infrastructure. (Pls. RJN Ex. D at p. 21.) But when

1 the Statewide Orders were issued March 19, the federal guidance did *not* reference firearms. (*See*
2 Pls. Mot. at p. 12 [“[T]he Health Department’s Order was issued before CISA expressly clarified
3 that gun stores are within the ‘critical infrastructure sectors.’”].) Where a law “adopts by specific
4 reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated
5 in the form in which they exist *at the time of the reference and not as subsequently modified.*”
6 (*Palermo v. Stockton Theatres* (1948) 32 Cal.2d 53, 58–59 [emphasis added].)

7 Plaintiffs counter with a different principle from *Palermo*: “where the reference is general
8 instead of specific, such as a reference to a system or body of laws . . . , the referring statute takes the
9 law or laws referred to not only in their contemporary form, but also as they may be changed from
10 time to time.” (Pls. Mot. at p. 13 [quoting *Palermo, supra*, 32 Cal.2d at p. 59].) Without
11 elaboration, they assert that the references to the CISA guidance are general because the Statewide
12 Orders “merely cite[] an interactive link to CISA’s website, which can be, and was, updated.”
13 (*Ibid.*) But whether Plaintiffs are suggesting the reference is general because websites can be
14 changed or because the link is to the CISA landing page for critical-infrastructure materials as
15 opposed to a specific memorandum, they are wrong. The general-reference principle applies only
16 where the incorporating law does “not make clear whether it contemplates only a time-specific
17 incorporation.” (*In re Jovan B.* (1993) 6 Cal.4th 801, 816). And here, the Statewide Orders do:
18 They say they are “consistent with the March 19, 2020, Memorandum on Identification of Essential
19 Critical Infrastructure Workers During COVID-19 Response”—that is, the version that does not
20 reference workers in the firearm industry. (Pls. RJN Ex. B at p. 11; Defs. RJN Ex. B.)

21 Even if this were somehow not clear, “the determining factor” of whether a reference is time
22 specific is “intent.” (*In re Jovan B., supra*, 6 Cal.4th at p. 816.) Beyond a link to a website,
23 Plaintiffs fail to marshal evidence of an intent to retroactively incorporate amendments to the CISA
24 guidance. There is compelling evidence to the contrary. Rather than specifying they would
25 incorporate future modifications to the federal guidance, the Statewide Orders reserve to the State
26 Public Health Officer the ability to amend the list of critical sectors. (Pls. RJN Ex. B at p. 11.)
27 Indeed, she has twice exercised that ability by issuing two iterations of a list of “Essential Critical
28 Infrastructure Workers” not required under the Statewide Orders to stay home. (Defs. RJN Ex. A;

1 Defs. RJN Ex. C.) There are significant differences between the State’s list and CISA’s guidance
2 regarding the types of workers considered “critical.” And importantly, neither the March 22 nor the
3 April 28 version of the State’s list references firearms even though CISA’s March 28 guidance,
4 issued in between the two, does. If the State Public Health Officer had intended to incorporate
5 wholesale the federal guidance, her later revision would have continued to track the CISA guidance;
6 instead, her revised list diverges even further from CISA’s.

7 As a backstop, Plaintiffs assert that gun stores “were, at least arguably, already included” in
8 the March 19 CISA guidance. (Pls. Mot. at p. 13.) But if that were the case, CISA would have had
9 no need to amend its guidance to explicitly include workers in firearm retail. And, as Plaintiffs
10 themselves emphasize, the Governor stated on March 25 that he would defer to local jurisdictions to
11 determine whether gun stores should be deemed essential and allowed to remain open. (*Id.* at p. 9.)
12 This deferral would make no sense if gun stores had been included all along.

13 Consequently, the federally identified sectors—which did not originally reference firearms—
14 served only as an initial list the State would revise. Because the Statewide Orders and guidance say
15 nothing about firearms, and do not retroactively incorporate the CISA guidance that now does, they
16 do not conflict with the County Health Officer’s Order which does not treat gun stores as essential.

17 **b. The Statewide Orders do not require critical infrastructure sectors to remain open**

18 Even if the Statewide Orders did retroactively incorporate revisions to the federal guidance,
19 the County Health Officer’s Order still would not “prohibit[] what the state enactment demands.”
20 (*City of Riverside, supra*, 56 Cal.4th at p. 743.) The plain language of the Statewide Orders,
21 subsequent clarifications by the Governor, and decisions by the State Public Health Officer make
22 clear that those orders do not *mandate* that critical-infrastructure workers be permitted to work.

23 The Statewide Orders direct everyone to stay home except for critical-infrastructure workers.
24 That is, they set a floor: At least all residents not working in critical sectors must stay home. While
25 Plaintiffs declare that the Statewide Orders also mandate that critical-infrastructure workers “must be
26 allowed to continue working” (Pls. Mot. at p. 11), the Orders state permissively that such workers
27 “*may* continue their work” (Pls. RJN Ex. B. at p. 12 [emphasis added]; *see Common Cause v. Bd. of*
28 *Supervisors* (1989) 49 Cal.3d 432, 443 [“[T]he word ‘may’ is ordinarily construed as permissive.”]).

1 Subsequent clarifications by the Governor confirm that localities may impose more stringent
2 requirements above the Statewide Orders’ floor. On March 25, Governor Newsom said that he
3 would defer to local jurisdictions on whether gun stores should be deemed essential. (*See* Pls. Mot.
4 at p. 9.) And, after Bay Area jurisdictions including Santa Clara County announced they would
5 extend their shelter periods to May 31, the Governor emphasized that he would not “preempt[] the[]
6 right to be more stringent at the local level” (Defs. RJN ¶ 6), and that “counties may choose to relax
7 stricter local orders at their own pace” (Defs. RJN Ex. D at p. 65). Confirming the discretion
8 afforded to local jurisdictions, the Governor’s May 4th Executive Order—issued before some
9 statewide restrictions loosen on May 8—expressly preserves “the existing authority of local health
10 officers to establish . . . public health measures within their respective jurisdictions that are more
11 restrictive” based on local community needs. (Defs. RJN Ex. E at p. 72.)

12 Finally, although the State Public Health Officer is statutorily authorized to rescind local
13 health officers’ orders (Health & Saf. Code, §§ 101030 & 131080), the Statewide Orders make no
14 mention of the various local orders, including Santa Clara County’s, in effect when the State acted.
15 That the State Public Health Officer has not used the specific mechanism available to override local
16 health officers’ orders suggests that she did not, merely by issuing her order, intend such a result.

17 Consequently, Plaintiffs do not overcome the presumption against preemption here by
18 identifying a “clear indication of preemptive intent.” To the contrary, the Statewide Orders set a
19 floor upon which local health officers can build more prescriptive requirements to stay home. And
20 there is simply no evidence that the revised CISA guidance applies retroactively to undermine this
21 conclusion or mandate that gun stores remain open. Accordingly, the County Health Officer’s Order
22 is consistent with the Statewide Orders and not preempted on this ground.

23 **3. State laws regulating firearms do not preempt the County Health Officer’s Order**

24 Plaintiffs next argue that state laws regulating the licensing, registration, and sale of firearms
25 separately preempt the Santa Clara County Health Officer’s emergency measure which temporarily
26 closes most businesses, including gun stores, except for a narrow list of exempted “Essential
27 Businesses.” But Plaintiffs again fail to identify the requisite “clear indication of preemptive intent”
28 that state gun laws displace local public health officers’ authority, pursuant to the Health and Safety

1 Code, to enact measures to combat the spread of a deadly communicable disease. Instead, they rely
2 exclusively on *Fiscal v. City & County of San Francisco* (2008) 158 Cal.App.4th 895, to assert that
3 because state law preempts “local bans on selling firearms,” and the County Health Officer’s Order
4 is allegedly such a ban, it is preempted under *Fiscal*. (Pls. Mot. at p. 14.) This argument both
5 misinterprets the nature of the Order and puts more weight on *Fiscal* than the case can bear.

6 By its terms, the County Health Officer’s Order is a generally applicable, time-limited
7 emergency measure designed to prevent the spread of COVID-19. Although Plaintiffs call the Order
8 “indefinite” (Pls. Mot. at p. 14), it included an express end date: May 3. (Cody Decl. Ex. B ¶ 16.)
9 Plaintiffs cannot transform this health measure into the “absolute and total ban on firearm and
10 ammunition sales on all property, public and private, within [San Francisco]” that was held to be
11 preempted in *Fiscal*. (See *Fiscal, supra*, 158 Cal.App.4th at p. 918.)

12 To be sure, an incidental effect of the County Health Officer’s Order is to temporarily close
13 gun stores—but the Order temporarily impacts a variety of conduct, including by requiring most
14 businesses and institutions to close during the shelter period. Preemption law tolerates these sorts of
15 incidental impacts that are secondary to the principle purpose of the enactment. Take the ordinance
16 challenged in *People v. Mueller* (1970) 8 Cal.App.3d 949. In that case, licensed fishermen were
17 convicted of violating an ordinance that prohibited “chumming”—using dead fish as unhooked
18 bait—in the local harbor. (*Id.* at pp. 951–53.) They argued that the California Fish and Game Code
19 “so fully occupies the field of regulation of fishing as to preempt it to the exclusion of local
20 legislation.” (*Id.* at p. 954.) The court disagreed. Although the state may have “preempted the field
21 of regulation of fishing,” the effect of the chum ban “upon fishing [was] incidental to the principal
22 purpose of the legislation, the prevention of pollution.” (*Ibid.*) As the court emphasized,
23 “[p]reemption by the state of an area of the law does not preclude local legislation enacted for the
24 public safety which only incidentally affects the preempted area.” (*Ibid.*)

25 Or consider the ordinance at issue in *California Veterinary Medical Assn. v. City of West*
26 *Hollywood* (2007) 152 Cal.App.4th 536. After the city banned any person, “licensed medical
27 professional or otherwise,” from performing nontherapeutic animal declawing, a veterinary
28 association challenged the ordinance as preempted by various state laws regulating veterinary

1 medicine. The court rejected this challenge, reasoning that “the ordinance [was] a general measure
2 to prevent animal cruelty—an area concededly not preempted by the state—not a regulation of the
3 practice of veterinary medicine.” (*Id.* at pp. 560–61.) This was the case even though the ordinance
4 had “a secondary or incidental effect on a field arguably preempted by the state” by preventing
5 veterinarians from performing nontherapeutic declawing. (*Id.* at p. 562.)

6 This principle applies with equal force here. The Health Officer’s Order is an emergency
7 measure, issued pursuant to the California Health and Safety Code, that closes most businesses in
8 order to combat the spread of COVID-19. Clearly its purpose is not to regulate firearms. True, the
9 conditions imposed by the Order temporarily close, among others, gun stores. But this effect is
10 “incidental to the principal purpose” of the Order—protecting the public from a pandemic.¹

11 **4. The County Health Officer’s Order comports with due process**

12 Plaintiffs are no more likely to succeed on the merits of their claim that the Health Officer’s
13 Order is unconstitutional. Article I, section 7 of the California Constitution provides that “a person
14 may not be deprived of life, liberty, or property without due process of law.” Plaintiffs contend that
15 the Order violates both procedural and substantive due process, but they are wrong on both counts.²

16 **a. The Order does not violate procedural due process**

17 Procedural due process “require[s] reasonable notice and opportunity to be heard before
18 governmental deprivation of a significant property interest.” (*Horn v. County of Ventura* (1979) 24
19 Cal.3d 605, 612.) Plaintiffs claim the County Health Officer’s Order violates these requirements
20 because it closes stores and denies customers access to their purchases without notice or a hearing.
21 (Pls. Mot. at p. 17.) But this argument misses the mark because the Order is not “adjudicatory.”

22 Even Plaintiffs acknowledge “that only those governmental decisions which are adjudicative
23 in nature are subject to procedural due process principles.” (*Horn, supra*, 24 Cal.3d at p. 612; Pls.
24

25
26 ¹ The Attorney General opinion Plaintiffs cite is beside the point. (Pls. Mot. at pp. 15–17 [citing 78
27 Ops.Cal.Atty.Gen. 171 (1995)].) That opinion concludes that preemption principles apply to local
28 health officers, but that is not the question here. The question is whether the state laws Plaintiffs cite
preempt the County Health Officer’s Order because it has the incidental effect of temporarily
closing, among other operations, gun stores. The answer, as explained, is no.

² To be clear, Plaintiffs raise no federal constitutional claims.

1 Mot. at pp. 17–18.) An adjudicative action is one where “the government’s actions affecting an
2 individual [is] determined by facts peculiar to the individual case.” (*Horn, supra*, 24 Cal.3d at p.
3 613.) A legislative action, by contrast, is “a broad, generally applicable rule of conduct on the basis
4 of a general public policy.” (*Ibid.*) The County Health Officer’s Order is legislative because it
5 imposes restrictions broadly across a variety of sectors to combat COVID-19; it is not adjudicative
6 because it does not decide the fate of individual stores based on facts peculiar to those stores.

7 Plaintiffs resist this conclusion by asserting that the Order “targets gun sales specifically”
8 while allowing “other consumer activities” to continue. (Pls. Mot. at p. 18.) But the Order says
9 nothing about firearms. And continued operations are the exception, not the norm, as the Health
10 Officer narrowly defined “Essential Business” to reach only those which she determined support
11 residents’ most basic needs. Plaintiffs fail to explain how an Order that requires large swaths of the
12 economy to close—from gyms and bars to houses of worship and libraries—specifically targets or is
13 otherwise based on “facts peculiar” to individual gun stores.

14 **b. The Order also does not violate substantive due process**

15 Plaintiffs finally attack the Order as “the epitome of arbitrariness” by “denying some their
16 constitutional right to self-defense and property, while allowing others to frequent liquor or hardware
17 stores.” (Pls. Mot. at p. 18.) In other words, they again contend the Order is fatally overinclusive
18 because it prohibits gun sales and underinclusive because it allows other retail. This argument fares
19 no better in support of a substantive, as opposed to procedural, due process claim.

20 “Where the state infringes on a fundamental constitutional right, strict scrutiny applies” to
21 determine whether substantive due process has been violated; “otherwise, the rational basis test
22 applies.” (*Love v. State Dept. of Edu.* (2018) 29 Cal.App.5th 980, 989.) Although Plaintiffs
23 reference a “constitutional right to self-defense,” the California Constitution does not confer an
24 individual right to bear arms (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481), and a passing
25 reference, without more, is not sufficient to invoke the Second Amendment. Thus, both parties
26 agree that the County Health Officer’s Order need only be “not [] unreasonable, arbitrary or
27 capricious” and “have a real and substantial relation to the object sought to be obtained.” (*Bottini v.*
28 *City of San Diego* (2018) 27 Cal.App.5th 281, 315; *see also* Pls. Mot. at p. 18 [quoting same].)

1 The Order easily passes muster. There is no doubt that “[p]reventing the spread of COVID-
2 19 is undeniably a critical and urgent matter.” (Pls. Mot. at p. 21.) The County Health Officer’s
3 Order aims to minimize COVID-19 transmissions by directing residents to leave home only for
4 limited reasons, including to operate or patronize an “Essential Business.” While those businesses
5 are required to follow social distancing protocols, scientific evidence indicates that such protocols
6 only lower, not eliminate, the increased transmission risks associated with in-person transactions.
7 The Health Officer therefore deliberately defined “Essential Business” narrowly because each
8 exception increases the risk of community transmission. And the narrow definition reasonably aims
9 to reach only businesses that meet the most basic needs, like food, medicine, and shelter.

10 The definition of “Essential Business” is not arbitrary simply because it reaches liquor and
11 hardware stores but not gun stores. Liquor stores are only allowed to remain open if they sell food,
12 and hardware stores sell basic supplies necessary to fix habitability problems, like broken pipes or
13 windows. These exceptions, therefore, only further the County Health Officer’s objectives and do
14 not render constitutionally unreasonable an Order that reflects the sound epidemiological judgment
15 of public health experts working to protect the community from the worst pandemic in a century.

16 V. CONCLUSION

17 Plaintiffs fail to demonstrate that the balance of harm tips in their favor or that they are likely
18 to succeed on the merits of their claims. To the contrary, the potential harm to public health that
19 would stem from an injunction pausing the shelter-in-place order far outweighs the temporary harm
20 Plaintiffs claim to face. And they are sure to fail on the merits of each of their claims. The Court
21 should therefore deny Plaintiffs’ application for a preliminary injunction.

22 Dated: May 8, 2020

Respectfully submitted,

JAMES R. WILLIAMS
County Counsel

23
24
25 By:

DocuSigned by:

Hannah Kieschnick

26 HANNAH KIESCHNICK
Legal Fellow

27 Attorneys for Defendants
28 COUNTY OF SANTA CLARA, SARA H.
CODY, LAURIE SMITH and JEFF ROSEN