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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(Oakland Division)

JANICE ALTMAN, et al.,

Plaintiffs,

v.

COUNTY OF SANTA CLARA, et al.

Defendants.

No. 20CV02180JST

DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' SUPPLEMENTAL BRIEF

I. INTRODUCTION

Plaintiffs previously argued that Defendants, by barring face-to-face transactions, completely prevented them from acquiring or practicing proficiency with firearms. Defendants now allow retailers (including firearms dealers) to sell goods in person—either at the storefront or by delivery—and they permit outdoor businesses (including shooting ranges) to operate. Thus, Plaintiffs now articulate a new theory: that they cannot exercise their rights because federal and state laws require firearms retailers to operate exclusively inside licensed buildings. But Plaintiffs adopt incorrect and formalistic interpretations of laws regulating firearms dealers, misapply various California Penal Code provisions, and overlook solutions to the obstacles they insist stand in their way. Plaintiffs also ignore federal guidance—specifically drafted for the COVID-19 pandemic—that allows firearm transactions to occur "curbside."

As a result, Plaintiffs fail to overcome the presumption of mootness that arises from the termination of the health orders they originally sought to enjoin. Even if enough of the case survives to support jurisdiction, the nature of the dispute has changed dramatically. No longer can Plaintiffs credibly claim to be suffering categorical deprivations. Instead, at most, they now have less convenient opportunities to acquire firearms and fewer places to practice proficiency than before the pandemic began. That is not enough to establish a Second Amendment claim, let alone a request for extraordinary injunctive relief. Plaintiffs would apparently rather be aggrieved than made whole, but their refusal to admit their rights have been restored is no reason to upend orders that continue to protect the Bay Area from a deadly disease.

II. ARGUMENT

A. PLAINTIFFS' REQUEST FOR A PRELIMINARY INJUNCTION IS MOOT

"[T]he repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal." *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc). Here, Plaintiffs sought to enjoin enforcement of health orders issued in March 2020 because those orders allowed only "Essential Businesses" to sell retail goods in person but did not deem firearms retailers essential. Each of the four county defendants has since superseded the challenged directives with new orders ("Revised

Health Orders") that are "essentially the same" as one another for purposes of Plaintiffs' motion. Supp. Br. at 4:28.[1] The Revised Health Orders differ from their predecessors, however, in three key respects: First, they allow "Additional Businesses," including retailers, to sell goods by delivery and "curbside"—the latter term defined broadly to include any transaction in which the customer does not enter a store, regardless of whether the retail employee remains inside. *See, e.g.*, Dkt. No. 50, Ex. A, at App'x C-1(1). Second, they permit "Outdoor Businesses," defined as entities that "primarily operate[] outdoors," to open. *Id.* at ¶¶ 3, 15l. And, third, they allow individuals to travel to provide or access any "Additional Businesses" or "Outdoor Businesses." *Id.* at ¶ 15(i). Plaintiffs insist that, despite these differences, the Revised Health Orders do not moot their request for injunctive relief because: (i) they still cannot acquire or practice proficiency with firearms; (ii) Defendants are likely to resurrect the more restrictive rules; and (iii) the restrictions may both recur and evade review. They are wrong on all counts.

1. Plaintiffs Can Acquire and Practice Proficiency with Firearms

According to Plaintiffs, the Revised Health Orders "do not allow [them] to engage in the constitutionally protected conduct at stake." Supp. Br. at 4:5-6. They even claim the situation today is "the same as it was on day one." *Id.* at 7:19-22. But that is clearly not so. Plaintiffs misrepresent and exaggerate any obstacles to firearms acquisition under federal and state law. They also identify no obstacle to visiting outdoor shooting ranges.

a) Federal Regulations of Firearms Retailers Do Not Prevent Curbside Transactions

Plaintiffs first insist federal law stands in their way because it requires firearms dealers to operate from their "business premises," which 27 C.F.R. § 478.11 defines as "the property on which the dealing of firearms is or will be conducted." Supp. Br. at 6:13-16. But, inexplicably, Plaintiffs

[1] Plaintiffs note that the City Defendants have filed neither requests for judicial notice attaching updated city policies (Supp. Br. at 3:4-6) nor "evidence…that they have enacted or are enforcing any different policies" than those issued in March (*id.* at 3:24-28). But the City Defendants have always only enforced the County-issued orders. There are no separate City policies. *See, e.g.*, Dkt. No. 50, Ex. A ¶ 3 (stating order applies to "[a]ll individuals currently living within the County," not just individuals in unincorporated areas of County).

ignore April 10, 2020 guidance from the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"), which was written expressly to address COVID-19 shelter-in-place orders, and which interprets the same provision they cite as permitting drive-through and curbside transactions. *See* Supp. Bussey Decl., Ex. A (ATF Letter). Specifically, according to the ATF, federal regulations permit dealers to conduct business: (i) "through a drive-up or walk-up window or doorway where the customer is on the licensee's property on the exterior of the brick-and-mortar structure;" or (ii) from "a temporary table or booth located in a parking lot or other exterior location on the licensee's property…." *Id.* at 2. Plaintiffs do not explain why, as a practical matter, those options do not exist here. They say nothing, for example, about the configurations of their own businesses or other firearms retailers, at least many of which appear to be sited in privately owned strip malls with access to private outdoor spaces. *See* Dkt. No. 20-2 (Lee Decl.), Ex. 6 (photo of third-party gun shop); *id.*, Ex. 9 (photo of City Arms East).

b) State Regulations of Firearms Retailers Do Not Prevent Curbside Transactions

Second, Plaintiffs rely on two state law regulations of firearms retailers in Penal Code section 26805. The first requires that the "business of the licensee" be conducted "only in the buildings designated in the license." Penal Code § 26805(a). Plaintiffs offer no evidence or argument that "building," which the statute does not define, is strictly limited to the space inside a store's four exterior walls. California courts have construed "building" in other Penal Code provisions more broadly. *See People v. LaDuke*, 30 Cal. App. 5th 95, 103 (2018) (holding that stand-alone sign at front of property exterior to primary structure was part of "building" for purposes of vandalism statute; rejecting definition limiting "building" to "structure that has four walls and a roof"); *People v. Thorn*, 176 Cal. App. 4th 255, 263 (2009) (rejecting argument that "carports are not part of the inhabited building under the burglary statutes"). The "in-the-building" language, which dates to the statute's initial enactment in 1953 (Supp. Bussey Decl., Ex. B), appears intended to ensure dealers operate where they can store firearms securely, maintain a register of sales, post legal notices, and be inspected. *See* Penal Code §§ 26810; 26835; 26885; 26890; 26900. Those aims are met by allowing sales in front of or behind a store—for example in an outdoor walkway covered by the same roof.

See Lee Decl. Ex. 6 (depicting such a space).

But even if section 26805(a) requires firearms retail business to occur inside a store's four exterior walls, the requirement could still be met as the ATF describes: with the customer and dealer on opposite sides of an open door or window. In that case, the dealer would conduct his or her business inside the "building" under any definition of that term (thereby satisfying the Penal Code), while the customer remains outside (consistent with the Revised Health Orders). Plaintiffs do not explain why this sales model would violate the statute and can point to no actual or threatened enforcement against it. They also cannot credibly argue the 1950s-era language requires *every* aspect of "the business of the licensee" (including actions taken by customers) to occur in the building. Customers, having placed orders online for decades now, can presumably perform that same act while standing immediately outside the store; no cited provision prevents them from presenting their identification or taking a written test there either.[2]

Plaintiffs insist such a sales model would violate state law because firearms delivery must happen "at…[t]he building designated in the license." Cal. Penal Code § 26805(d). But the language they quote does not require anyone to be *in* the building; a walk-up customer could take delivery "at" a doorway or window. And they cite only subsection (1) while ignoring subsection (3), which permits delivery "at…[t]he place of residence of, …or on private property owned or lawfully possessed by, the purchaser…." *Id.* The latter provision, added by the Legislature in 1995, means just what it says, as its legislative history confirms:

> Finally, it is an open question whether dealers can deliver guns to purchasers at their homes, fixed places of business or on land they own or lawfully possess. These places are all places where a person can possess guns without the need for carry permits under Penal Code Section 12026....Former President Reagan was, in fact, delivered a gun and filled out a Federal Form 4473 at his ranch in Santa Barbara County under this procedure. In so far as there is a question whether this is allowed under state law, this bill would clarify that it is legal.

Supp. Bussey Decl., Ex. C (California Bill Analysis, S.B. 23 Sen., 6/13/1995). And, importantly, the

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[2] For this reason, and because (as Plaintiffs' counsel pointed out at the hearing), firearms dealers also sell unregulated accessories, Plaintiffs' circular suggestion that those entities cannot operate at all and thus "by definition" fail to qualify as "Additional [B]usinesses to which residents may lawfully travel" under the Revised Health Orders, is inaccurate. Supp. Br. at 4:19-5:5.

Revised Health Orders allow "Additional Businesses" to deliver goods to customers' homes. *See, e.g.*, Dkt. No. 50, Ex. A at App'x C-1 ("Goods may be provided to customers only by curbside/outside pickup *or by delivery*.") (emphasis added).

c) State Firearms Possession Laws Do Not Prevent Curbside Delivery or Delivery at Purchaser's Home

Third, Plaintiffs—continuing to search for an obstacle to that which they purportedly want to do—fret that customers could face criminal penalties for performing firearms safety demonstrations outside, citing Penal Code Sections 26350(a)(1)(A) and 26400, both of which bar carrying exposed firearms in a "public place or public street." But Plaintiffs ignore separate statutory provisions providing that safety demonstrations and other firearms transfer processes are exempt from open carry laws when conducted on the premises of a firearms retailer. *See* Cal. Penal Code § 26374 ("Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a person engaged in firearms-related activities, while on the premises of a fixed place of business that is licensed to conduct … activities related to the sale … of firearms…."); Cal. Penal Code § 26405 (same with respect to § 26400 and non-handguns). Defendants are unaware of any authority limiting "premises" here to within the four walls of a building. These exceptions presumably exist because open carry provisions aim to avoid instances where firearms "alarm[] unsuspecting individuals and caus[e] issues for law enforcement." *Flanagan v. Harris*, No. LACV1606164JAKASX, 2018 WL 2138462, at *7 (C.D. Cal. May 7, 2018) (discussing legislative history). The sight of a gun is not particularly alarming on the premises of a gun retailer.[3]

The open carry statutes—which prohibit carrying visible firearms in a "public place or public street"—are also not implicated by deliveries to private houses or apartment complexes. And Plaintiffs cite no authority preventing the statutorily-mandated safety demonstration from occurring

[3] Plaintiffs also speculate that "raised eyebrows" might result should safety demonstrations occur outside, on their premises. Supp. Br. at 6:23. But the demonstrations could take place discreetly at the front or rear of a business, where a customer may remain outside a store on a private sidewalk or parking lot, reach into the store to pick up a firearm that remains within that building, and conduct the safe handling demonstration at arms' length. Based on the pictures Plaintiffs previously submitted, the private entrances to firearms stores are often located in private shopping centers and meaningfully separated from public streets and sidewalks.

at such a residence, incident to delivery. On the contrary, they say the demonstration must happen "at the time of transfer." Supp. Br. at 6:20-21. Given that delivery can legally occur at a "place of residence," it follows that the safety demonstration can as well. The open carry laws also apply only when a person carries a firearm "outside a vehicle" (Penal Code 26350(a)(1)(A)); thus, to the extent any local firearms dealers can provide drive-through services, which the Revised Health Orders permit (*see* Dk. 50 Ex. A at App'x C-1 (allowing pickup through "any mode of travel"), they would avoid the statutes for that reason as well.

d) Gun-Free School Zones Do Not Prevent Curbside Purchases

Finally, Plaintiffs raise the specter that potential customers might unwittingly violate statutes barring firearms possession near school zones if they were forced to conduct the safe-handling demonstration or other purchase requirements outside. But Plaintiffs identify no firearms retailer within 1000 feet of a school zone and certainly do not claim all—or most—such stores are located within that radius. Regardless, neither state nor federal law affects the "curbside" transactions contemplated here. Both California and federal gun-free school zone laws do not apply to firearm possession "[w]ithin…a place of business or on private property." Penal Code § 626.9(c)(1); *see also* 18 U.S.C. § 922(q)(2)(B)(i). Potential customers may possess a firearm on the private property owned or leased by firearms retailers, so neither provision creates any meaningful risk to customers. Plaintiffs attempt to rely on a distinguishable case imposing criminal liability for possessing a firearm on a public sidewalk in front of a house within a school zone, *People v. Tapia*, 129 Cal.App.4th 1153, 1160 (2005). Supp. Br. at 7. But Plaintiffs fail to address the fact that the court's holding turned on the fact that the possession occurred on a publicly owned easement, not on private property. *Tapia*, 129 Cal. App. 4th at 1163-65.

2. <u>Outdoor Shooting Ranges May Operate and Have Opened</u>

Finally, Plaintiffs do not actually dispute that the Revised Health Orders allow outdoor shooting ranges to operate. *See* Dkt. No. 50 at Ex. A ¶¶ 3, 16.1 (permitting "Outdoor Businesses" to operate). Defendants have confirmed that several such businesses recently resumed operations. *See* Supp. Bussey Decl. Exs. D-F. Accordingly, Plaintiffs can "practice and remain proficient" with firearms at appropriate locations and need not—as their brief suggests—do so "curbside." Supp. Br.

at 7:19-20. That right clearly has been restored.

B. THE VOLUNTARY CESSATION DOCTRINE DOES NOT APPLY

Plaintiffs next claim that even if their rights have been restored, "the voluntary cessation doctrine would intercede to preserve this Court's jurisdiction over the controversy." Supp. Br. at 8:3-9. Not so. The Ninth Circuit recently clarified the framework that applies when determining whether the repeal, amendment, or expiration of an enactment moots related litigation. *Welfare Trust*, 941 F.3d at 1199. It explained that because courts should treat "the voluntary cessation of challenged conduct by government officials…with more solicitude than similar action by private parties," they must "presume that the repeal… of legislation" moots related litigation "unless there is a reasonable expectation that the legislative body will reenact the challenged provision or one similar to it." *Id.* at 1197 (quoting *America Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010)). While "[t]he party challenging the presumption of mootness need not show" that reenactment "is a virtual certainty," any determination that a reasonable expectation exists "must be founded in the record … rather than on speculation alone." *Id.*

Plaintiffs fail to cite *Welfare Trust*, relying instead on precedent that case overruled. Applying the correct test, the Court should presume Plaintiffs' application for a preliminary injunction is moot because the challenged public health orders were superseded by orders that restore their rights. Plaintiffs, moreover, cannot overcome the presumption. They say "there is certainly no guarantee that the challenged actions will not recur," and that there could be a "second wave" of COVID-19 cases that lead to stricter orders. Supp. Br. at 8:28-10:1. But those possibilities—"speculation alone"—are insufficient. As of now, all indications are to the contrary, as the number of new cases is declining and hospital capacity, testing, and contact tracing are all increasing. It is thus more likely that the orders will continue to become more lenient, consistent with the "gradual and measured resumption of activity" that has already begun and is intended "to prevent a surge in COVID-19 cases." Dkt. No. 50, Ex. A ¶ 1. Even if the disease does resurge, it is not likely, given the progress that has been and will be made, that anything like the March orders will result. For that reason, and because, here, repeal occurred due to new data about COVID-19 cases, testing, and treatment capacity—not the "prodding effect of litigation"—the voluntary

cessation doctrine does not apply. *Welfare Trust*, 941 F.3d at 1199.

C. THE MARCH RESTRICTIONS ARE NOT "CAPABLE OF REPETITION, YET EVADING REVIEW"

Plaintiffs also claim "mootness would not deprive this Court of jurisdiction because the controversy is … 'capable of repetition, yet evading review.'" Supp. Br. at 10:2-4; *see also Hamamoto v. Ige*, 881 F.3d 719, 722 (9th Cir. 2018). But this exception applies only where: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Id.* Because mootness concerns whether courts have power to hear a case, the "capable of repetition, yet evading review" exception must be applied sparingly, and only in "exceptional situations." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836-37 (9th Cir. 2014). The exception applies only "where the type of injury involved inherently precludes judicial review, not … where review is precluded as a practical matter." *Id.*

Here, the first prong (short duration) is arguably met because the prior health orders that sparked Plaintiffs' application for a preliminary injunction remained extant for less than two months. But the reasonable expectation prong is not because, for reasons set forth above, Defendants are not likely to reimpose the original restrictions.

D. EVEN IF THE REVISED HEALTH ORDERS DO NOT MOOT THE CASE, THEY MAKE INJUNCTIVE RELIEF INAPPROPRIATE

At the May 20, 2020 hearing, the Court asked whether defense counsel would stipulate that an analysis of the March 16 and March 31, 2020 Health Orders applies to the Revised Health Orders as well.[4] It would be inappropriate to extend any such analysis without accounting for the qualitative differences between those orders. Plaintiffs sought injunctive relief claiming the earlier orders completely prevented them from acquiring and practicing proficiency with firearms. Now, even if the Court determines enough of dispute remains to support jurisdiction, that dispute has taken a markedly different complexion. At most, Plaintiffs can claim the Revised Health Orders create

[4] The operative complaint still does not challenge any orders issued since March.

somewhat more limited opportunities for target shooting than normal, and make firearms acquisition, though possible, less convenient than before.

Those differences matter when assessing the degree to which Plaintiffs' rights have been infringed. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 679-80 n. 13 (9th Cir. 2017) (finding fact that some stores were available to customers, even if less conveniently located, and with inferior services, fatal to Second Amendment claim); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 968 (9th Cir. 2014) (ordinance that only made it "more difficult to purchase certain types of ammunition" did not substantially burden Second Amendment rights, in part because customers could obtain ammunition elsewhere). Plaintiffs' ability to exercise their Second Amendment rights also factors into the balancing of the equities and consideration of the public interest. Whereas Plaintiffs' claimed injuries either no longer exist or have been significantly mitigated since they sought injunctive relief, the public's interests are undiminished.

And while the Revised Health Orders are, as Plaintiffs emphasize, temporally indefinite (Supp. Br. at 4:7-12), that difference does not make any burdens they impose more substantial. Each of the three prior orders was superseded before the occurrence of the respective end dates identified therein. If the Revised Health Orders had also included a definite end date, that provision likely would have been prematurely mooted as well. Put differently, in context, the absence of a fixed date does not suggest the current orders will be permanent or even long-lasting but the opposite: that they will remain extant only briefly, as indicated by the Health Officers' commitment to "continually review whether modifications to the Order[s] are warranted" based on objective COVID-19 indicators. Dkt. No. 50, Ex. A ¶ 11.

Finally, for at least three reasons, the relaxed terms of the Revised Health Orders impact the merits analysis not only of those orders but of the earlier directives from March as well. First, the Revised Health Orders (and their immediate predecessors) temporally bound the stricter limits that were imposed in March—at about six weeks. Second, the orders that have issued since March impose progressively less restrictive provisions responsive to objective indicators—a trend inconsistent with the suggestion that the orders will likely be "renewed and revised *infinitum*." Supp. Br. at 4:10-11. Finally, the orders that have issued since March relaxed their restrictions in a neutral

manner. Plaintiffs' prior complaint, for example, that golf courses and outdoor shooting ranges should be treated the same (Dkt. No. 48 at 10:25-28) missed the mark because the orders already treated them that way. This even-handed treatment belies any suggestion that the orders were ideologically driven and further supports the application of rational basis review. In fact, last Friday, the Ninth Circuit affirmed the denial of a church's request for a temporary restraining order enjoining enforcement of a COVID-19 health order. Emphasizing that the health order did not restrict religious activities because they were religious or impose burdens on them selectively, the court closed with the following observation:

> We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure. In the words of Justice Robert Jackson, if a [c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

South Bay Pentecostal Church v. Newsom et al., ___ F.3d___, 2020 WL 2687079, at *1 (9th Cir. May 22, 2020) (internal citation omitted). Those observations apply equally to this case, and they should lead to the same result.

III. CONCLUSION

The Revised Health Orders allow Plaintiffs to acquire and practice proficiency with firearms, and Plaintiffs identify no federal or state laws that presently stand as obstacles to those activities. The restoration of Plaintiffs' rights moots their Second Amendment claim. Even if it does not end the case, it undermines their request for injunctive relief.

I hereby attest that I have on file all holographic signatures corresponding to any signatures indicated by a conformed signature /S/ within this and associated e-filed documents.

Respectfully submitted,

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