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 7

8 UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 10 OAKLAND DIVISION

12 JANICE ALTMAN, et al.,
 13 Plaintiffs,
 14 v.
 15 COUNTY OF SANTA CLARA, *et al.*,
 16 Defendants.

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

**[PROPOSED] ORDER ON DEFENDANTS
 COUNTY OF ALAMEDA, GREGORY J.
 AHERN, AND ERICA PAN’S NOTICE OF
 MOTION AND MOTION TO DISMISS
 PLAINTIFFS’ FIRST AMENDED
 COMPLAINT**

[FRCP Rule 12(b)(1) and (b)(6)]

Hearing Date: August 12, 2020
 Hearing Time: 2:00 p.m.
 Courtroom: 6; 2nd Floor
 Location: 1301 Clay St., Oakland, CA
 Judge: The Hon. Jon S. Tigar

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 22 The Motion of Defendants County of Alameda, Gregory J. Ahern, and Erica Pan, moved the
 23 Court for an Order dismissing Plaintiffs’ First Amended Complaint (“FAC”), ECF No. 19, pursuant to
 24 Federal Rules of Civil Procedure (“FRCP”) Rule 12(b)(1) and 12(b)(6), and was duly noticed for
 25 hearing.

26 The Court has considered the papers filed in connection with that Motion and good cause
 27 appearing, grants Defendants’ Request for Judicial Notice and finds as follows:
 28

1 **I. BACKGROUND AND COUNTY’S PUBLIC HEALTH ORDERS**

2 The State of California, our country, and the entire world are in the midst of an unparalleled
 3 public health emergency due to the novel coronavirus and the disease it causes, COVID-19. *See* Ct.
 4 Order at 2, June 2, 2020, ECF No. 61¹. In California, as of Monday, June 29, 2020, there have been
 5 216,550 confirmed cases of COVID-19, and 5,936 deaths. *See* State of California, COVID-19
 6 Dashboard, <https://covid-19.ca.gov/> (June 29, 2020). In Alameda County alone (not including the City
 7 of Berkeley, which has its own Public Health Department), as of June 28, 2020, there have been 5,615
 8 confirmed cases and 132 deaths. *See* County of Alameda, COVID-19 Dashboard, [https://ac-](https://ac-hcsa.maps.arcgis.com/apps/opsdashboard/index.html#/1e0ac4385cbe4cc1bffe2cf7f8e7f0d9)
 9 [hcsa.maps.arcgis.com/apps/opsdashboard/index.html#/1e0ac4385cbe4cc1bffe2cf7f8e7f0d9](https://ac-hcsa.maps.arcgis.com/apps/opsdashboard/index.html#/1e0ac4385cbe4cc1bffe2cf7f8e7f0d9) (June 28,
 10 2020). As shocking as they are, these numbers understate the damage inflicted by the virus.

11 In response to this extraordinary challenge, both the State of California and local health officers
 12 across the state have issued “shelter in place” orders under the broad powers granted them by the
 13 California Legislature to control the spread of communicable diseases. Ct. Order at 3, June 2, 2020,
 14 ECF No. 61; Cal. Health & Safety Code §§101085, 120175. To slow the spread of COVID-19, on
 15 March 16, 2020 Alameda County’s health officer, in concert with six other Bay Area health officers,
 16 issued the first shelter in place orders in the United States. FAC ¶ 93, ECF No. 19; E. Pan Decl. Ex. A,
 17 at 11-17, ECF No. 46-6 (The County’s complete Public Health Orders are found that
 18 <http://www.acphd.org/2019-ncov/health-officer-orders.aspx>). The County’s March 16, 2020 Order has
 19 been previously filed with the Court at E. Pan Decl. Ex. A, at 11-17, ECF No. 46-6; a copy is also
 20 attached as **Exhibit A** to the Declaration of Counsel, Raymond L. MacKay, filed and served herewith
 21 (“MacKay Declaration”).

22 The March 16, 2020 Order required nonessential businesses to cease all activities at facilities
 23 located within the County except for minimal basic operations. E. Pan Decl. Ex. A, at 2, ECF No. 46-6;
 24 MacKay Decl. Ex. A. There were 21 categories of essential businesses, such as grocery stores,
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26 _____
 27 ¹ In the Court’s June 2, 2020 Order denying Plaintiffs’ Application for a Preliminary Injunction, the
 28 Court outlined the background and history the COVID-19 pandemic. *See* Ct. Order, June 2, 2020, ECF
 No. 61.

1 healthcare operations, and banks. E. Pan Decl. Ex. A, at 5-7, ECF No. 46-6; MacKay Decl. Ex. A, at 5-
2 7. Firearm and ammunition retailers were not among those listed categories. *Id.*

3 On March 31, 2020, the County Public Health Officer (“PHO”) issued an Order superseding the
4 March 16, 2016 Order and extending the shelter in place until May 3, 2020. E. Pan Decl. Ex. B, at 1-13,
5 ECF No. 46-6; MacKay Decl. Ex. B.

6 On April 29, 2020, in light of the progress achieved in slowing the spread of COVID-19, the
7 County PHO issued a superseding Order allowing additional essential businesses and outdoor
8 businesses to resume operating and extending the deadline until May 31, 2020. E. Pan Decl. Ex. C, at
9 1-16, ECF No. 46-6; MacKay Decl. Ex. C, at 1, 6-15 of 16.

10 Subsequently, on May 18, 2020, due to the further progress achieved in slowing the spread of
11 COVID-19, the County PHO issued a superseding Order allowing a limited number of “Additional
12 Businesses” to resume operating, subject to specified conditions and precautions to reduce associated
13 risk of COVID-19 transmission. Def. Supplemental Req. for Judicial Notice Ex. B, at 1-17, Appendix
14 C-1, ECF No. 50; *see also* MacKay Decl. Ex. D, at 2-3, 16, Appendix C-1. As part of this Order, the
15 PHO permitted curbside or storefront pick up and/or delivery by retail stores. This May 18, 2020 Order
16 specified that the County’s PHO would continue to review whether modifications of the Order were
17 warranted based on County-specific “COVID-19 Indicators,” including the trend of new cases and
18 hospitalizations per day; the capacity of hospitals and health care facilities in the region, including
19 acute and intensive care beds; the supply of personal protective equipment (“PPE”) available for
20 hospital and healthcare staff; the ability and capacity to quickly test for COVID-19 infection; and the
21 capacity to conduct contact-tracing. Def. Supplemental Req. for Judicial Notice Ex. B, at 1-2, 5-6;
22 Appendix C-1, ECF No. 50; *see also* MacKay Decl., Ex. D at 1-2, 5-6, Appendix C-1.

23 On June 5, 2020, the County PHO issued two new Orders, Order No. 20-13 requiring every
24 person residing in the County to wear face coverings, with limited exceptions, and Order No. 20-14
25 extending the Shelter in Place Order with additional modifications of the prior Shelter in Place Order,
26 including allowing small social gatherings (called “Social Bubbles”) and the expansion of retail
27 services. *See* MacKay Decl. Ex. F; MacKay Decl. Ex. G.

1 On June 18, 2020, the County PHO revised Order No. 20-14 to, among other things, permit all
 2 retail businesses to resume in-store retail sales. *See* MacKay Decl. Ex. H, at 3, 16, Appendix C. The
 3 June 18, 2020 Order, Order No. 20-14a, permitted indoor retail effective 8:00 a.m. on June 19, 2020,
 4 subject to “applicable industry guidance issued by the State of California” limits on maximum
 5 occupancy, and social distancing protocols, such as physical distancing, frequent hand-washing, and the
 6 use of face coverings. *See* MacKay Decl. Ex. H, Appendix C at 2-3.

7 **II. ALLEGATIONS IN PLAINTIFF’S FAC**

8 **A. Plaintiffs**

9 As applicable to these County Defendants, Plaintiffs include:

10 (1) a County resident (Albert Lee Swann) who wishes to “practice and exercise his right to keep
 11 and bear arms ... and would do so, but for the reasonable and imminent fear of arrest and criminal
 12 prosecution under Defendant[’s] laws, policies, orders, customs, and enforcement and because
 13 Defendant[’s] orders and actions have closed firearm and ammunition retailers and ranges.” FAC ¶ 13,
 14 ECF No. 19. According to the FAC, under the County’s Public Health Orders, Mr. Swann “cannot
 15 purchase either firearms or ammunition except the relicensed firearms dealer and/or licensed
 16 ammunition vendor [and] “[he] and others similarly situated... are being prevented from exercising the
 17 right to keep and bear loaded, operable firearms for self-defense, including in the home.” FAC ¶ 101,
 18 ECF No. 19; and,

19 (2) five (5) nonprofit entities focused on Second Amendment rights (“Institutional Plaintiffs”)
 20 who bring the action on behalf of themselves and their members. FAC ¶¶ 22-26, ECF No. 19.

21 **B. County Defendants**

22 In the FAC, Plaintiffs name as Defendants the County of Alameda, the County Sheriff Gregory
 23 J. Ahern, responsible for enforcement of County laws and orders, and the County Interim Health
 24 Officer Erica Pan, M.D., responsible for public health in the County. FAC ¶¶ 36-38, ECF No. 19.

25 In its Order dated June 2, 2020, the Court observed that the Public Health Officers for the other
 26 County Defendants (Santa Clara, San Mateo and Contra Costa County) had issued Orders permitting
 27 retail businesses to resume socially distanced in-store sales. Ct. Order at 4-5, June 2, 2020, ECF No. 61.

1 Accordingly, the Court dismissed those Counties (as well as those Counties' Sheriffs and Public
2 Health Officers, and City Defendants located in those Counties) from the lawsuit because the Plaintiffs
3 were able to purchase firearms and ammunition in those Counties, and the Court determined that the
4 case was moot as to those Defendants. Ct. Order at 8, June 2, 2020, ECF No. 61; Ct. Order at 1, June
5 18, 2020, ECF No. 65.

6 C. Alleged Claims against the County Defendants

7 1. Second Amendment Claim

8 According to the FAC, "Defendant[s'] orders, policies, practices, customs, and enforcement
9 actions prohibit law-abiding individuals from purchasing firearms and ammunition for the purpose of
10 protecting themselves and their families (or for any other purpose). Independently and collectively,
11 these stand as a bar on firearms acquisition, ownership, and proficiency training at shooting ranges, and
12 thus amount to a categorical ban on and infringement of the right to keep and bear arms and the
13 privileges and immunities of citizenship." FAC ¶ 130, ECF No. 19.

14 Plaintiffs further allege that "Plaintiffs, Plaintiffs' Members and customers, and those similarly
15 situated to them, seek to exercise the right to keep and bear arms for self-defense of themselves and
16 their families, especially in times of crisis such as this." FAC ¶ 131, ECF No. 19.

17 2. Due Process Claim

18 According to the FAC, the County Defendants' orders, policies, practices, customs, and
19 enforcement actions also are arbitrary and capricious, overbroad and violate Plaintiffs' right to due
20 process of law. *Id.*, ¶ 149.

21 III. DISCUSSION

22 A. The Claims Raised in Plaintiffs' FAC are Moot

23 The doctrine of mootness requires a Court to dismiss a case "when the issues presented are no
24 longer live or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*,
25 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*) (internal
26 quotations omitted)). To avoid mootness, a dispute "must be extant at all stages of review, not merely at
27 the time the complaint is filed." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Moreover, "the repeal,
28 amendment, or expiration of challenged legislation is generally enough to render a case moot and

1 appropriate for dismissal.” *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d
2 1195, 1198 (9th Cir. 2019) (*en banc*).

3 In its June 2, 2020 Order, this Court noted that “[t]he party alleging mootness bears a heavy
4 burden in seeking dismissal. Ct. Order at 7, June 2, 2020, ECF No. 61 (citing *Rosemere Neighborhood*
5 *Ass’n v. U.S. Env’tl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (quoting *Friends of the Earth,*
6 *Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotations omitted))). The
7 Court further noted that “[a] case becomes moot only when it is impossible for a court to grant any
8 effectual relief whatever to the prevailing party.” Ct. Order at 7, June 2, 2020, ECF No. 61 (citing
9 *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567
10 U.S. 298, 307 (2012) (internal quotations omitted))).

11 As noted above, the Public Health Officers in Santa Clara, San Mateo and Contra Costa
12 Counties issued Orders permitting retail businesses to resume in-store retail sales with social distancing
13 and other safety protocols intended to stop the spread of COVID-19. *See* ECF #58 (20), Req. for
14 Judicial Notice, June 1, 2020, ECF No. 59; and #60. As a result of their updated Orders, the Court
15 found that Santa Clara, San Mateo and Contra Costa Counties met this “heavy burden” for dismissal on
16 mootness grounds as Plaintiffs were found to be clearly able to purchase firearms and ammunition
17 under the revised Orders, and thus the Court held that the case was moot as to those Defendants. Ct.
18 Order at 8, June 2, 2020, ECF No. 61; Ct. Order at 1, June 18, 2020, ECF No. 65.

19 The County of Alameda Defendants now similarly meet this burden in seeking dismissal on
20 mootness grounds. Through the June 18, 2020 Order, the County now permits on-site, indoor retail
21 with social distancing and other safety protocols, just like the Orders issued just a few weeks earlier by
22 the Health Officers in Santa Clara, San Mateo and Contra Costa Counties. MacKay Decl. Ex. H, at 2-3,
23 Appendix C, at 2. As such, like its claims against Santa Clara, San Mateo, and Contra Costa, Plaintiffs’
24 claims against the County Defendants are now moot based on the County’s June 18, 2020 Order.
25 MacKay Decl. Ex. H. The June 18, 2020 Order (MacKay Decl. Ex H) unequivocally permits on-site,
26 indoor retail and thus clearly permits Plaintiff Swann and others similarly situated to purchase firearms
27 within the County. MacKay Decl. Ex. H, at 3, Appendix C, at 2.

28 In addition, since April 29, 2020, the Health Officer Orders have permitted access to outdoor

1 facilities important to health and safety or for recreation. E. Pan Decl. Ex. C, at 1, 6-8, ECF No. 46-6;
2 MacKay Decl. Ex C, at 1, 6-8. Thus, the County's Order permits Plaintiff Swann to meet proficiency
3 needs. In the County, since May 2020, the Livermore Pleasanton Rod and Gun Club has been open to
4 Mr. Swann for those purposes. *See* MacKay Decl. Ex I, J.

5 Consequently, here, Plaintiff Swann and others similarly situated lack a legally cognizable
6 interest in the outcome of the litigation against the County Defendants, and there are no justiciable
7 issues left to be decided. For those reasons, the Court should dismiss the FAC as moot and dismiss
8 these County Defendants.

9 **IV. CONCLUSION**

10 Based on the foregoing, the case against the County Defendants is moot and Defendants'
11 Motion is granted.

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13 Dated: _____

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15 By _____
16 The Hon. Jon S. Tigar
17 U.S. District Court Judge
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