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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA—WESTERN DIVISION**

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<p>ADAM BRANDY, an individual; et al.,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>ALEX VILLANUEVA, in his official capacity as Sheriff of Los Angeles County, California, and in his capacity as the Director of Emergency Operations; et al.,</p> <p style="text-align: center;">Defendants.</p>	<p>Case No. 2:20-cv-02874-AB-SK</p> <p>Honorable André Birotte, Jr.</p> <p>DEFENDANTS COUNTY OF LOS ANGELES, SHERIFF ALEX VILLANUEVA AND BARBARA FERRER’S REPLY TO OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF</p> <p><i>[Defendants’ Supplemental Request for Judicial Notice filed concurrently herewith]</i></p> <p>Date: October 2, 2020 Time: 10:00 a.m. Crtm.: First Street, 7B</p>
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1 Defendants County of Los Angeles, Sheriff Alex Villanueva (in his official
2 capacity), and Barbara Ferrer (in her official capacity) (collectively, “the County
3 Defendants”) hereby submit the following reply memorandum of points and
4 authorities in support of their Motion for Judgment on the Pleadings.

5
6 Dated: September 18, 2020

LAWRENCE BEACH ALLEN & CHOI, PC

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By /s/ Jin S. Choi

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Attorneys Defendants County of Los
Angeles, Sheriff Alex Villanueva,
and Barbara Ferrer

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. The Most Recently Issued Safer At Home Order Further Demonstrates**
3 **The Absence Of Any Infringement Of Plaintiffs’ Second Amendment**
4 **Rights.**

5 Plaintiffs acknowledge that the County’s March 19, 2020 Safer at Home
6 Order was issued “[i]n an effort to abate the spread of the COVID-19 coronavirus
7 pandemic”. (Opp. at p. 1:27-28.) Plaintiffs must also acknowledge that the
8 County’s subsequent Safer at Home Orders have been issued, in accordance with
9 the most up-to-date scientific and medical data gathered and examined by public
10 health professionals, in an effort to achieve the same purpose — the limiting of
11 the community spread of COVID-19 to help avoid the depletion of medical
12 resources while hopefully reducing the rate of COVID-19 related fatalities, as the
13 world waits for a widely available, effective vaccine.¹

14 At the same time, however, Plaintiffs continue with their factually
15 unfounded and self-serving predictions about the purported, imminent trampling
16 of their Second Amendment rights during the course of this pandemic. They
17 baldly declare that it is “indeed quite likely” that firearms and ammunitions
18 retailers “remain at risk of further closure” (Opp. at 11:5-6), while completely
19 ignoring the fact that the subject County Orders have specifically and consistently
20 identified lower risk retailers as businesses that may continue to operate as long
21 as they comply with infection control protocols implemented to slow the spread
22 of COVID-19 within the community. Indeed, Plaintiffs do not, because they
23 cannot, dispute that the County Orders’ provisions regarding lower risk retailers
24 apply to the firearms and ammunitions retailers. Although Plaintiffs refuse to say
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26 ¹ As of September 18, 2020, the County of Los Angeles has reported 256,148
27 COVID-19 cases and 6,303 COVID-19-related deaths.
28 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/county-map.html>; last
visited September 18, 2020.

1 it, since Sheriff Villanueva’s explicit announcement on March 30, 2020 that
2 firearms and ammunition retailers in the County would not be subject to closure,
3 the individual and retailer Plaintiffs in the instant case have been free to lawfully
4 exercise their Second Amendment rights within the County.²

5 The currently operative Reopening Safer at Work and in the Community
6 for Control of COVID-19 Order issued on September 4, 2020³ further illustrates
7 the detachment between Plaintiffs’ argument and the factual reality. Consistent
8 with the prior County Orders, the September 4 Order states, “this Order requires
9 the immediate temporary closure of *specific* activities and business sectors” and
10 “orders the closure of ... *higher-risk businesses*, recreational sites, commercial
11 properties, and activities, *where more frequent and prolonged person-to-person*
12 *contacts are likely to occur*”. None of these specifically defined business
13 categories includes lower-risk retailers such as firearms retailers, which may
14 operate if they “prepare, implement and post the Reopening Protocols for Retail
15 Establishments: Opening for In Person Shopping”. (Exhibit “11” at ¶ 9(a).)

16 Thus, the current (and prior County Orders) have drawn material
17 distinctions between higher-risk businesses (the ordinary operations of which
18 necessarily involve extended person-to-person contact, thereby amplifying the
19 risk of the spread of COVID-19) and lower-risk businesses (such as most
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21 ² Assuming *arguendo* Plaintiffs’ allegation that Sheriff Villanueva’s
22 announcements on March 26, 2020 had the effect of closing firearms and
23 ammunition retailers in certain parts of the County of Los Angeles is true, any
24 such closures lasted no more than four calendar days. (See First Amended
25 Complaint, ¶¶ 54-55; ECF No. 23-2 [Villanueva Decl., ¶ 20 (explaining that on
26 March 30, 2020, public announcement was made that the LASD “will not order
27 or recommend closure of businesses that sell or repair firearms, or sell
28 ammunition”)].)

³ See Exhibit “11” to Defendants’ Supplemental Request for Judicial Notice filed
concurrently herewith.

1 retailers, the ordinary operations of which do not necessitate extended person-to-
2 person contact). Plaintiffs do not recognize the significance of these common-
3 sense and scientifically-driven distinctions presumably because such recognition
4 would directly undermine their dire predictions about how firearms and
5 ammunitions retailers in the County face immediate closure. Plaintiffs' purported
6 fears are wholly unfounded and do not justify the continuing of this action for
7 injunctive and declaratory relief. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287
8 (2000) ("A case is moot when the issues presented are no longer 'live' or the
9 parties lack a legally cognizable interest in the outcome."); *County of Los Angeles*
10 *v. Davis*, 440 U.S. 625, 631 (1979) (if "the issues presented are no longer 'live' or
11 the parties lack a legally cognizable interest in the outcome", the case is moot);
12 *see also United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 698 (9th
13 Cir. 1984) ("[a] claim is moot if it has lost its character as a present, live
14 controversy."); *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992) (an injunctive
15 relief claim loses all viability if "(1) there is no reasonable expectation that the
16 [alleged] wrong will be repeated, and (2) interim relief or events have completely
17 and irrevocably eradicated the effects of the alleged violation.").

18 **II. Plaintiffs' Second Amendment Claim Fails As A Matter Of Law**
19 **Because The Alleged Temporary Closure Of Firearms Retailers**
20 **Served Compelling Government Interests And Was Substantially**
21 **Related To The Goal Of Curbing The Spread Of COVID-19.**

22 This Court has already held that the alleged closure of firearms retailers in
23 the County in conjunction with the COVID-19 pandemic response did not violate
24 the Second Amendment. (ECF No. 29 [April 6, 2020 Order Denying Plaintiffs'
25 Application for Temporary Restraining Order].) Plaintiffs, nevertheless, maintain
26 that this Court's Order and the instructive Second Amendment orders issued in
27 *McDougall v. Cty. of Ventura Cal.*, 20-CV-02927-CBM-ASx (C.D. Cal. April 1,
28 2020) and *Altman v. County of Santa Clara*, __ F.Supp.3d __, 2020 WL 2850291

1 (N.D. Cal. June 2, 2020) should be ignored entirely. Plaintiffs’ suggestion that
2 the Second Amendment analysis in these three orders is somehow irrelevant
3 because they were issued at the temporary restraining order stage is belied by an
4 even more recent federal court ruling in which the Court specifically cited this
5 Court’s order, and the orders in *McDougall* and *Altman*, in dismissing another
6 Second Amendment action arising from the COVID-19 pandemic-related closure
7 of firearms retailers in the State of New York.

8 In *Dark Storm Industries LLC v. Cuomo*, __F.Supp.3d __, 2020 WL
9 3833107 (N.D.N.Y. July 8, 2020), the plaintiffs – a firearms and ammunition
10 retailer and two of the retailer’s customers – sued New York Governor Cuomo
11 and other state agencies after the retailer “was forced to close in response to the
12 COVID-19 pandemic.” *Id.* at *2. Starting on March 7, 2020, Governor Cuomo
13 issued a series of emergency executive orders, the purpose of which was “to slow
14 the spread of COVID-19 within the State by compelling New Yorkers to stay
15 home and preventing person-to-person contact”. *Id.* In conjunction with these
16 orders, the Empire State Development (“ESD”) was tasked with identifying
17 “essential” businesses that could remain open during the pandemic. On March
18 21, 2020, the plaintiff retailer inquired with ESD as to whether its business was
19 “essential” and was advised that its business was only essential “with respect to
20 work directly related to police and/or national defense matters”. *Id.* at *3. The
21 plaintiff then closed its retail business and ceased selling firearms and
22 ammunition to the general public, and was unable to fulfill an order placed by one
23 of the individual plaintiffs. *Id.*

24 On March 30, 2020, the plaintiffs filed their action, which included a cause
25 of action for violation of their Second Amendment rights, and on May 12, 2020,
26 the plaintiffs moved for summary judgment seeking declaratory relief against
27 ESD – specifically, “a simple judicial declaration of the unconstitutionality of
28 ESD’s determination that gun stores are not ‘essential’ and therefore [could not]

1 remain open for business’ during the depth of New York’s COVID-19 related
2 shutdown.” *Id.* at *4. The defendants opposed the motion, and their cross-motion
3 for summary judgment sought the dismissal of the action. *Id.*

4 The Court assumed that there was a triable issue as to whether the
5 executive orders burdened conduct protected by the Second Amendment and
6 examined whether the orders survived intermediate scrutiny. *Id.* at *9. In
7 determining the appropriate level of scrutiny, the Court noted that heightened
8 scrutiny was not triggered because “alternatives remained for Plaintiffs and others
9 like them in New York to acquire firearms for self-defense”, since stores such as
10 Walmart remained open and such stores were within a half-hour’s drive of the
11 plaintiff retailer’s location. *Id.* at *10 (citing *Teixeira v. County of Alameda*, 873
12 F.3d 670, 680 (9th Cir. 2017) (“gun buyers have no right to have a gun store in a
13 particular location, at least as long as their access is not meaningfully
14 restrained”); *Second Amendment Arms v. City of Chicago*, 135 F.Supp.3d 753,
15 754 (N.D. Ill. Sept. 28, 2015) (“a slight diversion off the beaten path is no affront
16 to ... Second Amendment rights”).⁴

17 In applying intermediate scrutiny, the Court determined that the
18 “governmental interests at stake are important”, and the executive orders were
19 “substantially related to the goal of curbing the transmission of CVODI-19”. *Id.*
20 at *11, 12. Significantly, the Court cited this Court’s April 6, 2020 Order (ECF
21 No. 29), and the orders in *McDougall* and *Altman*, in support of its ruling that the

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⁴ Similarly, in the instant case, even assuming a temporary closure of firearms
retailers in certain portions of the County of Los Angeles occurred as a result of
Sheriff Villanueva’s March 25, 2020 announcement (which was rescinded on
March 30, 2020), reasonable alternatives for the purchase of firearms and
ammunition remained as firearms retailers in the cities of Pasadena and Long
Beach were not subject to the County’s Safer at Home Order (*see* First Amended
Complaint, ¶ 43) and firearms retailers remained open throughout the adjoining
Counties, such as the Counties of Orange, Riverside, and San Bernardino.

1 executive orders “fit tightly with the State’s goal of slowing the spread of the
2 disease”:

3
4 ***The Court’s conclusion accords with those of other courts that***
5 ***have considered similar regulations during this***
6 ***pandemic.*** See Altman, — F.Supp.3d at ——— – ———, 2020 WL
7 2850291, at *1–4 (finding that Alameda County’s shelter-in-place
8 order, which ordered closed firearms retailers and shooting ranges
9 as non-essential businesses, survived intermediate scrutiny because
10 defendants had “demonstrated a reasonable fit between the burden
11 the Order places on Second Amendment rights and Defendants’
12 goal of reducing COVID-19 transmission”); McDougall v. Cty. of
13 Ventura California, No. 20-CV-2927, 2020 WL 2078246, at *1
14 (C.D. Cal. Apr. 1, 2020) (denying request for injunctive relief
15 because plaintiff’s Second Amendment challenge to county order
16 closing gun shops was not likely to succeed on the merits); ***Brandy***
17 ***v. Villanueva***, No. 20-CV-2874, Dkt. No. 29, at 5–6, 2020 WL
18 3628709 (C.D. Cal. Apr. 6, 2020) (declining to enjoin similar
19 regulations and reasoning that, “[b]ecause [COVID-19] spreads
20 where [a]n infected person coughs, sneezes, or otherwise expels
21 aerosolized droplets containing the virus, the closure of non-
22 essential businesses, including firearms and ammunition retailers,
23 reasonably fits the [defendants’] stated objectives of reducing the
24 spread of this disease”). . . .

25 ***And as explained above, and as confirmed by other courts that***
26 ***have considered similar regulations, the fit between the***
27 ***Executive Orders and the State’s interest in protecting public***
28 ***health amply satisfies the requirements of intermediate scrutiny.***

29 *Id.* at *12, 13 (emphasis added).

30 Moreover, the Court’s constitutional examination was properly placed into
31 the extraordinary factual context – “Defendants made a policy decision about
32 which businesses qualified as ‘essential’ and which did not. ***In the face of a***
33 ***global pandemic, the Court is loath to second-guess those policy decisions.***” *Id.*
34 at *14 (emphasis added). In addition to ruling that the executive orders were valid
35 under intermediate scrutiny, the Court dismissed the plaintiffs’ request for

1 declaratory relief in accordance with the dismissal of their substantive claims. *Id.*
2 at *15.

3 The *Dark Storm* Court's reliance on this Court's April 6, 2020 Order⁵, and
4 the orders from *McDougall* and *Altman*, as authorities in support of its ruling that
5 the New York executive orders did not violate the Second Amendment made
6 complete sense. The County Orders which Plaintiffs attack in this action are
7 substantively indistinguishable from the plaintiffs' attack in *Dark Storm*. In both
8 cases, the emergency public health orders were issued in response to a massive,
9 uncontrolled global pandemic threatening thousands of lives. If any of the
10 Plaintiffs in this action were temporarily impeded with respect to the exercise of
11 their Second Amendment rights during this pandemic response, any such
12 interruption pales in comparison to the significance of the public and
13 governmental interests at stake. Moreover, Plaintiffs have not and cannot refute
14 that the County Orders have been and continue to be substantially and directly
15 related to the goal of slowing the spread of the deadly COVID-19 virus within
16 and beyond the County's borders.

17 Thus, Plaintiffs' Second Amendment claim and their attendant requests for
18 declaratory and injunctive relief, and nominal damages, fail as a matter of law,
19 and therefore, this action should be dismissed in its entirety.

20 **III. Plaintiffs Do Not Oppose The Dismissal Of Defendants Villanueva And**
21 **Ferrer Who Are Sued In Their Official Capacity Only.**

22 Plaintiffs have not presented any argument against the dismissal of
23 Defendants Villanueva and Ferrer who are sued only in their official capacity, and
24 should therefore be dismissed on this additional ground. *See Kentucky v.*
25

26 ⁵ The *Dark Storm* Court's analysis more than echoed this Court's ruling that "the
27 closure of non-essential businesses, including firearms and ammunition retailers,
28 reasonably fits the City's and County's stated objectives of reducing the spread of
this disease." (ECF No. 29 at pp. 5-6.)

1 *Graham*, 473 U.S. 159, 165-66 (1985); *Butler v. Elle*, 281 F.3d 1014, 1023 n. 8
2 (9th Cir. 2002) (“Section 1983 claims against government officials in their
3 official capacity are really suits against the government employer”).

4 **IV. Plaintiffs’ Belated Request For Leave To Amend Should Be Denied.**

5 Other than asserting that Plaintiffs have a Second Amended Complaint
6 with additional individual Plaintiffs ready to be filed, Plaintiffs offer no
7 meaningful explanation as to why they should be granted leave to amend their
8 complaint. Plaintiffs’ meager explanation should be rejected because the addition
9 of individual Plaintiffs will not materially affect the controlling Second
10 Amendment analysis, and Plaintiffs do not and cannot point to any material
11 changes in circumstances, i.e. firearms retailers’ operations in the County have
12 not been interrupted as long as they abide by the COVID-19 protocols applicable
13 to other lower-risk retailers. Accordingly, the amendment of the First Amended
14 Complaint to add more individual Plaintiffs will necessarily be futile, and
15 Plaintiffs’ request for leave to amend should be denied. *See, e.g. L.A. Gem &*
16 *Jewelry Design, Inc. v. NJS.COM, LLC*, 2018 WL 6131185, at *1 (C.D. Cal.
17 March 5, 2018) (“a motion for leave to amend may be denied if it (1) is futile (2)
18 causes prejudice to the opposing party, (3) is sought in bad faith, (4) causes undue
19 delay, or (5) if the complaint was previously amended”) (citations omitted)).⁶

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26 ⁶ On May 21, 2020, Plaintiffs stipulated that they would seek leave to amend the
27 First Amended Complaint by June 5, 2020. (*See* ECF No. 39 at p. 2:21-22.) By
28 the date of the hearing of the instant Motion, almost four months will have passed
since the expiration of Plaintiffs’ own designated deadline.

1 **V. Conclusion.**

2 For the foregoing reasons, the County Defendants respectfully submit that the
3 instant Motion be granted and this action dismissed in its entirety.

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5 Dated: September 18, 2020

LAWRENCE BEACH ALLEN & CHOI, PC

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By _____ /s/ Jin S. Choi

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Jin S. Choi

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