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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

DONALD MCDUGALL, ET AL.,
Plaintiffs,
vs.
COUNTY OF VENTURA,
CALIFORNIA, ET AL.,
Defendants.

Case No.: 2:20-cv-02927-CBM-AS

**ORDER RE: MOTION TO
DISMISS CASE (DKT. NO. 42)**

The matter before the Court is Defendants County of Ventura, William Ayub, Dr. Robert Levin, and William T. Foley’s (collectively, “Defendants”) motion to dismiss the first amended complaint (“FAC”).¹ (See Dkt. No. 42.) Plaintiffs Donald McDougall, Juliana Garcia, Second Amendment Foundation, California Gun Rights Foundation, and Firearms Policy Coalition (collectively, “Plaintiffs”) oppose the Motion. (See Dkt. No. 43 (“Opp.”).)

Also pending before the Court are Defendants’ Request for Judicial Notice with Exhibits (“Defendants’ RJN”), Plaintiffs’ Request for Judicial Notice In Support of Plaintiffs’ Opposition (“Plaintiffs’ RJN”), and Defendants’ Supplemental Request for Judicial Notice with Exhibit 1 (“Defendants’

¹ Hereinafter referred to as the “Motion.”

1 Supplemental RJN”). (See Dkt. No. 42-1 (Defendants’ RJN), 44 (Plaintiffs’ RJN),
2 45-1 (Defendants’ Supplemental RJN).)

3 **I. BACKGROUND**

4 **A. Factual Background**

5 This is an action under 42 U.S.C. § 1983 for one count of violation of the
6 Second Amendment.² (See Dkt. No. 19 (FAC).) As of June 1, 2020, the novel
7 coronavirus, COVID-19, has infected 1,787,680 people and killed 104,396 people
8 across the nation. (Defendants’ RJN at Ex. 2, p.1.) “Because people may be
9 infected but asymptomatic, they may unwittingly infect others.” *S. Bay Pentecostal*
10 *Church v. Newsom*, ---- U.S. ----, 140 S.Ct. 1613 (2020) (mem.) (Roberts, C.J.,
11 Concurring). The COVID-19 pandemic “has thrust humankind into an
12 unprecedented global public health crisis.” *Altman v. County of Santa Clara*, No.
13 20-cv-02180-JST, 2020 WL 2850291, at *1 (N.D. Cal. June 20, 2020) (citation
14 omitted).

15 On or about March 4, 2020, Governor Gavin Newsom proclaimed a state of
16 emergency in California due to COVID-19. (FAC at ¶ 34.) Beginning on March
17 17, 2020, defendant Dr. Robert Levin (“Levin”), the Ventura County Health
18 Officer, issued a series of “stay well at home” orders on behalf of defendant
19 County of Ventura (the “County”). (FAC at ¶¶ 50-53.) The stay well at home
20 orders generally required individuals living within the County to stay at their
21 places of residence and cease business activities, but exempted certain “essential
22 businesses” from those prohibitions. Although the scope of the stay well at home
23 orders varied as the County amended the order, it is undisputed that firearms
24 retailers were not deemed “essential businesses” and were therefore mandated to

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² Plaintiffs assert a violation of the “Right to Travel” as Count II of the FAC. (FAC at ¶¶ 82-88.)
28 In their Opposition, Plaintiffs dismiss Count II “[i]n the interest of economy and efficiency.”
(Opp. at p. 1, n.1.) Therefore, the Court considers only Count I in this order.

1 be closed from at least March 20, 2020 to May 7, 2020. (*See* Dkt. No. 45 (Reply)
2 at p. 4:9-17.)

3 Plaintiffs Donald McDougall (“McDougall”) and Juliana Garcia (“Garcia”)
4 are residents of the County. (FAC at ¶¶ 7-8.) McDougall purchased a firearm
5 from a licensed firearm dealer and left another firearm with a licensed gunsmith,
6 but was unable to retrieve those firearms or acquire ammunition due to the stay
7 well at home orders. (*Id.* at ¶ 59.) Garcia desired to purchase a firearm and
8 ammunition, but was unable to acquire a Firearm Safety Certificate (“FSC”) or
9 purchase a firearm and ammunition due to the stay well at home orders. (*Id.* at ¶
10 lers and ranges nocond Amendment Foundation, Inc. (“SAF”), California Gun
11 Rights Foundation (“CGF”), and Firearms Policy Coalition, Inc. (“FPC”)
12 (collectively, the “Institutional Plaintiffs”) are nonprofit organizations whose
13 members in the County were affected by the stay well at home orders. (*Id.* at ¶¶ 9-
14 11.)

15 The FAC alleges the Defendants violated Plaintiffs’ rights under the Second
16 Amendment because the issuance and enforcement of the stay well at home orders
17 prevented McDougall, Garcia, and members of the Institutional Plaintiffs from
18 buying, selling, and transferring firearms and ammunition, and as well as training
19 with firearms at firing ranges (“Count I”). (FAC at ¶¶ 65-66, 81.) Plaintiffs seek
20 declaratory relief, injunctive relief, and nominal damages against Defendants.
21 (FAC at Prayer for Relief.)

22 **B. Procedural Background**

23 The complaint was filed on March 28, 2020. (*See* Dkt. No. 1.) McDougall
24 applied for an *ex parte* temporary restraining order on March 30, 2020 (*see* Dkt.
25 No. 8, 9), which the Court denied on April 1, 2020. (*See* Dkt. No. 12.) In that
26 order, the Court held McDougall was not entitled to a temporary restraining order
27 because his Second Amendment claim was unlikely to succeed on the merits under
28 intermediate scrutiny. (*Id.*) On April 14, 2020, Plaintiffs filed the FAC, which

1 added additional plaintiffs and a cause of action for violation of the right to travel.
2 (Dkt. No. 20.) Plaintiffs filed a second *ex parte* application for a temporary
3 restraining order on April 24, 2020 (*see* Dkt. No. 27), which the Court denied on
4 April 30, 2020. (*See* Dkt. No. 30.) The Court set Plaintiffs’ request for an order to
5 show cause why a preliminary injunction should not issue for hearing on May 19,
6 2020. (Dkt. No. 35.) After receiving and considering briefs from both parties,
7 Plaintiffs withdrew the motion for preliminary injunction on May 18, 2020. (Dkt.
8 No. 40.)

9 **II. JURISDICTION**

10 The Court has jurisdiction over this action under 28 U.S.C. § 1331.

11 **III. LEGAL STANDARD**

12 **A. Fed. R. Civ. P. 12(b)(6)**

13 Rule 12(b)(6) allows a court to dismiss a complaint for “failure to state a
14 claim upon which relief can be granted.” To survive a motion to dismiss, the
15 complaint “must contain sufficient factual matter, accepted as true, to ‘state a
16 claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663
17 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). All
18 well-pleaded facts are taken as true, with all reasonable inferences in favor of the
19 plaintiff. *Twombly*, 550 U.S. at 570. Labels, conclusions, or formulaic recitation
20 of the elements of a cause of action will not suffice. *Twombly*, 550 U.S. at 555. A
21 complaint must state “evidentiary facts which, if true, will prove [the claim].”
22 *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008).

23 **B. Fed. R. Civ. P. 12(b)(1)³**

24 The Court may dismiss a complaint for lack of subject matter jurisdiction.
25 *See* Fed. R. Civ. P. 12(b)(1). The plaintiff has the burden to establish that subject

26 _____
27 ³ Defendants did not move to dismiss the FAC under Rule 12(b)(1) in this Motion. Defendants
28 concede, however, that their challenge based on mootness arises under Rule 12(b)(1).
Defendants argue in the Reply that the Court should consider the mootness arguments because
“Plaintiffs suffer no prejudice for Defendants’ inadvertent error in omitted 12(b)(1) as a basis for

1 matter jurisdiction is proper. *See Ass’n of Am. Med. Colls. v. United States*, 217
2 F.3d 770, 778-779 (9th Cir. 2000). To meet this burden, the plaintiff must show
3 “affirmatively and distinctly the existence of whatever is essential to federal
4 jurisdiction.” *Tosco Corp. v. Cmty. for a Better Env’t*, 236 F.3d 495, 499 (9th Cir.
5 2001), *overruled on other grounds*, *Hertz Corp. v. Friend*, 559 U.S. 77, 82 (2010).
6 A motion to dismiss for lack of subject matter jurisdiction may be a facial attack,
7 where the allegations of the complaint are insufficient on their face to invoke
8 federal jurisdiction, or a factual attack, where “the challenger disputes the truth of
9 the allegations that, by themselves, would otherwise invoke federal jurisdiction.”
10 *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) (citation and quotation
11 marks omitted).

12 IV. DISCUSSION

13 A. Requests for Judicial Notice

14 “The court may judicially notice a fact that is not subject to reasonable
15 dispute because it (1) is generally known within the trial court’s territorial
16 jurisdiction; or (2) can be accurately and readily determined from sources whose
17 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). The Court may
18 take judicial notice of a document that is a government publication and a matter of
19 public record. *See Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

20 Defendants’ RJN requests judicial notice of orders of various federal courts
21 (Ex. 1, 4, 28), publications from state and federal agencies (Ex. 2, 3, 9-14, 16-27),
22 scientific publications (Ex. 5-8), and a newspaper article (Ex. 15). (*See* Dkt. No.
23 42-1 (Defendants’ RJN) at p. 2:3-5:7.) Here, the publications from state and
24 federal agencies are matters of public record that are not subject to reasonable
25 dispute. *See U.S. ex rel. Modglin v. DJO Global Inc.*, 48 F.Supp.3d 1362, 1381

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dismissal in their notice of motion” because Plaintiffs fully briefed the mootness argument in
their Opposition. (Reply at p.2, n.1.) The Court considers the motion to dismiss under Rule
12(b)(1).

1 (C.D. Cal. 2014) (“Under Rule 201, the court can take judicial notice of ‘[p]ublic
2 records and government documents available from reliable sources on the
3 Internet,’ such as websites run by governmental agencies.”). Moreover, this Court
4 may consider the opinions of other federal courts without reliance on the doctrine
5 of judicial notice. In contrast, Defendants provide no authority for this Court to
6 take judicial notice of the truth of newspaper articles and scientific publications.
7 “This is because often, the accuracy of information in newspaper articles and press
8 releases cannot be readily determined and/or can be reasonably questioned.”
9 *Gerritsen v. Warner Bros. Entertainment Inc.*, 112 F.Supp.3d 1011, 1028 (C.D.
10 Cal. 2015). Therefore, the Court **GRANTS** Defendants’ RJN as to Exhibits 2, 3,
11 9-14, and 16-27, but **DENIES** the request for judicial notice as to Exhibits 1, 4, 5-
12 8, and 28.

13 Plaintiffs’ RJN requests judicial notice of newspaper articles and
14 publications (Ex. 1-4, 9-11), and publications from state and federal agencies (Ex.
15 5-8). (*See* Dkt. No. 44 (Plaintiffs’ RJN) at p. 1:25-3:11.) As explained above,
16 publications from state and federal agencies are matters of public record that are
17 not subject to reasonable dispute. *See DJO Global Inc.*, 48 F.Supp.3d at 1381.
18 Therefore, the Court **GRANTS** Plaintiffs’ RJN as to Exhibits 5-8. In contrast, the
19 Court **DENIES** the request for judicial notice related to the truth of newspaper
20 articles and publications contained in Ex. 1-4, 9-11. *See Gerritsen*, 112 F.Supp.3d
21 at 1028 (“The cases in which courts take judicial notice of newspaper articles and
22 press releases, however, are limited to a narrow set of circumstances not at issue
23 here – e.g., in securities cases for the purpose of showing that particular
24 information was available to the stock market.”).

25 Defendants’ Supplemental RJN asks the Court to take judicial notice of an
26 order of the Ventura County Health Officer, dated June 11, 2020. (Dkt. No. 45-1
27 (Defendants’ Supplemental RJN) at Ex. 1.) Because this a publication from a
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1 state government and a matter of public record, the Court **GRANTS** Defendants’
2 Supplemental RJN.

3 **B. Motion to Dismiss**

4 **1. Mootness**

5 “Mootness is a jurisdictional issue, and federal courts have no jurisdiction
6 to hear a case that is moot, that is, where no actual or live controversy exists.”
7 *MetroPCS Cal., LLC v. Picker*, 970 F.3d 1106, 1115-1116 (9th Cir. 2020) (citations
8 and quotation marks omitted). “When ‘there is no longer a possibility that [a
9 party] can obtain relief for [its] claim, that claim is moot.’” *Id.* at 1116 (quoting
10 *Ruvalcaba v. City of Los Angeles*, 167 F.3d 514, 521 (9th Cir. 1999)) (brackets in
11 original).

12 Defendants move to dismiss Count I under Fed. R. Civ. P. 12(b)(1), arguing
13 the Second Amendment claim became moot as to all Plaintiffs on May 7, 2020,
14 when the County amended the stay well at home order such that it “no longer
15 prohibits firearm stores from opening.” (Mot. at p. 10:18-20.) Moreover,
16 Defendants argue McDougall’s claim became moot on April 20, 2020, when the
17 stay well at home order “was amended to expressly allow gun purchasers ... to
18 complete the purchases of firearms.” (*Id.* at p. 10:20-21.)

19 The stay well at home order dated April 20, 2020 (“April 20 County Order”)
20 required the closure of all non-essential businesses in the County. (Defendants’
21 RJN, Ex. 20 at ¶ 7.) The list of essential businesses in the April 20 County Order
22 did not include firearm retailers, ammunition retailers, or firing ranges. (*Id.* at ¶
23 17(e).) The April 20 County Order made a “[s]pecial allowance for completion of
24 firearm sales,” whereby individuals “who initiated the purchase of a firearm at a
25 store located within the County before March 20, 2020 (i.e., the day firearm stores
26 were ordered to be closed by the Health Officer)” were permitted to acquire the
27 firearm at the retailer. (*Id.* at ¶ 11.) McDougall purchased a firearm sometime
28 before the issuance of the stay well at home orders, and that firearm was in the

1 possession of a firearm dealer. (FAC at ¶ 59.) Therefore, McDougall was
2 permitted to retrieve that firearm under the April 20 County Order.⁴

3 The stay well at home order dated May 7, 2020 was expressly made no
4 more restrictive than the State Stay at Home Order and permitted “[o]nly retail
5 businesses whose primary line of business qualifies as critical infrastructure under
6 the State Stay at Home Order” to be fully open to the public. (Defendants’ RJN,
7 Ex. 23 at ¶ 8.)

8 “As a general rule, amending or repealing an ordinance will not moot a
9 damages claim because such relief is sought for ‘a past violation of [the plaintiff’s]
10 rights.’ *Epona LLC v. County of Ventura*, No. CV 16-6372, 2019 WL 7940582, at
11 *5 (C.D. Cal. Dec. 12, 2019) (quoting *Outdoor Media Grp. v. City of Beaumont*,
12 506 F.3d 985, 902 (9th Cir. 2007)). Here, in addition to declaratory and injunctive
13 relief, Plaintiffs seek nominal damages. Nominal damages are available to remedy
14 a constitutional violation, even if “actual provable injury” has not occurred. *Id.*
15 (citing *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986)). Thus,
16 even if Defendants are correct that Plaintiffs could purchase firearms, ammunition,
17 and visit firing ranges at least by May 7, 2020, Defendants do not dispute that
18 there was a period of time during which the stay well at home orders prohibited
19 those activities. Assuming such actions by the Defendants violated the Second
20 Amendment (discussed below), Plaintiffs would be entitled to nominal damages.
21 Therefore, there is a possibility that Plaintiffs can obtain relief for their claim, and
22 the claim is not moot.⁵ *See MetroPCS Cal., LLC*, 970 F.3d at 1116.

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24 ⁴ Defendants do not address whether McDougall could retrieve another firearm he owned that
25 was left with a gunsmith consistent with the April 20 County Order, nor do Defendants address
26 whether McDougall could practice at a firing range or purchase ammunition within the County.

27 ⁵ In the Reply, Defendants argue that “Plaintiffs are not entitled to damages from any of the
28 named government officials, nominal or otherwise, under the doctrine of qualified immunity.”
(Dkt. No. 45 (Reply) at p. 10:26-28.) This argument is raised for the first time in the Reply.
Moreover, Plaintiffs bring claims against the named government officials in their official
capacity, such that qualified immunity would not be available. *See Comm. House, Inc. v. City of
Boise*, 623 F.3d 945, 965 (9th Cir. 2010) (“Qualified immunity, however, is a defense available

1 **2. Merits of the Second Amendment Claim**

2 The parties contest the standard of review for the Second Amendment claim.
3 Defendants argue the framework set out in *Jacobson v. Commonwealth of*
4 *Massachusetts*, 197 U.S. 11, 30-31 (1905) should apply, while Plaintiffs rely on
5 tiered scrutiny, *see, e.g., U.S. v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013).

6 **a. *Jacobson* applies to the Second Amendment claim in this case**

7 *Jacobson* involved a constitutional challenge to a state law and a rule
8 promulgated by the board of health of Cambridge, Massachusetts, which required
9 inhabitants of the city to be vaccinated against smallpox. *Jacobson*, 197 U.S. at
10 12-13. The United States Supreme Court reasoned that to hold in favor of the
11 plaintiff “would practically strip the legislative department of its function to care
12 for the public health and the public safety when endangered by epidemics of
13 disease.” *Id.* at 37. Under the *Jacobson* framework, judicial review of
14 constitutional challenges to emergency measures taken by the state during a public
15 health crisis is narrow:

16 If there is any such power in the judiciary to review legislative action
17 in respect of a matter affecting the general welfare, it can only be when
18 that which the legislature has done comes within the rule that, if a
19 statute purporting to have been enacted to protect the public health, the
20 public morals, or the public safety, has no real or substantial relation to
21 those objects, or is, beyond all question, a plain, palpable invasion of
rights secured by the fundamental law, it is the duty of the courts to so
adjudge, and thereby give effect to the Constitution.

22 *Id.* at 31. The *Jacobson* Court emphasized that the manner in which the state
23 decides to combat an epidemic is entitled to deference. *See id.* at 30 (“It is no part
24 of the function of a court or a jury to determine which one of two modes was
25 likely to be the most effective for the protection of the public against disease.”).

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28 _____ only to government officials sued in their individual capacities. It is *not* available to those sued
only in their official capacities.”).

1 More recently, federal courts have relied on *Jacobson* in cases bringing
2 constitutional challenges to state and local orders aimed at curbing the spread of
3 COVID-19. In *S. Bay United Pentecostal Church*, 140 S.Ct. at 1613-1614, a
4 plurality of the United States Supreme Court denied an injunction brought on First
5 Amendment grounds against an Executive Order of the Governor of California
6 which “limit[ed] attendance at places of worship to 25% of building capacity or a
7 maximum of 100 attendees.” Although four justices dissented, Chief Justice
8 Roberts authored an opinion concurring with the four-justice majority. Amongst
9 other things, the Chief Justice wrote:

10 The precise question of when restrictions on particular social activities
11 should be lifted during the pandemic is a dynamic and fact-intensive
12 matter subject to reasonable disagreement. Our Constitution
13 principally entrusts “[t]he safety and the health of the people” to the
14 politically accountable officials of the States to “guard and protect.”
15 *Jacobson v. Massachusetts*, 197 U.S. 11, 38, 25 S.Ct. 358, 49 L.Ed.
16 643 (1905). When those officials “undertake[] to act in areas fraught
17 with medical and scientific uncertainties,” their latitude “must be
18 especially broad.” *Marshall v. United States*, 414 U.S. 417, 427, 94
19 S.Ct. 700, 38 L.Ed.2d 618 (1974). Where those broad limits are not
20 exceeded, they should not be subject to second-guessing by an
“unelected federal judiciary,” which lacks the background,
competence, and expertise to assess public health and is not
accountable to the people. See *Garcia v. San Antonio Metropolitan
Transit Authority*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016
(1985).

21 *S. Bay United Pentecostal Church*, 140 S.Ct. at 1613-1614. Although the Ninth
22 Circuit has not directly addressed the standard of review for constitutional claims
23 challenging health orders during a pandemic, other circuit courts have applied the
24 *Jacobson* framework in that context. See, e.g., *Adams & Boyle, P.C. v. Slatery*,
25 956 F.3d 913, 925-27 (6th Cir. 2020) (affirming preliminary injunction of
26 Tennessee emergency order halting procedural abortions); *In re Abbott*, 954 F.3d
27 772, 783-788 (5th Cir. 2020) (granting writ of mandamus directing vacatur of
28 temporary restraining order of Texas emergency order halting abortions);

1 *Robinson v. Attorney General*, 957 F.3d 1171, 1179-80 (11th Cir. 2020); *In re*
2 *Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (holding district court erred by not
3 using *Jacobson* to evaluate Arkansas abortion restrictions).

4 Defendants argue that *Jacobson* “must be read with its historical limitations
5 in mind,” as it was decided “long before the evolution of modern constitutional
6 scrutiny.” (Opp. at p. 16.) This argument is unavailing because the weight of
7 authority from both the United States Supreme Court and Circuits indicates the
8 *Jacobson* framework is valid authority. Defendants next argue the *Jacobson*
9 framework applies to “*legislative-enacted* restraints on *general* liberty interests
10 not specifically protected by enumerated fundamental rights.” (Opp. at 16 (italics
11 in original).) The Court rejects that argument on two grounds. First, the Supreme
12 Court in *Jacobson* considered a challenge to state law *and* a regulation
13 promulgated by the local board of health, so its holding is not limited to
14 “legislatively-enacted restraints.” *Jacobson*, 197 U.S. at 12-13. Second, the
15 holding of *Jacobson* is not limited to “general liberty interests” as opposed to
16 “enumerated fundamental rights,” nor do Defendants point to language from
17 *Jacobson* supporting such an interpretation. Indeed, the United States Supreme
18 Court framed its holding in *Jacobson* broadly, reasoning “the liberty secured by
19 the Constitution of the United States to every person within its jurisdiction does
20 not import an absolute right in each person to be, at all times and in all
21 circumstances, wholly freed from restraint.” *Id.* at 26.

22 Because this case involves a constitutional challenge to a health order
23 promulgated by the County in response to a nationwide public health crisis, the
24 Court applies *Jacobson* to determine whether the stay well at home orders violated
25 the Second Amendment.
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1 **b. The Stay Well at Home Orders Are Consistent with**
2 ***Jacobson***

3 Under the standard of review set forth in *Jacobson*, the Court must
4 determine (1) whether the County’s orders “ha[ve] no real or substantial relation”
5 to the County’s objective of preventing the spread of COVID-19; or (2) whether
6 the County of Ventura’s orders affect “beyond all question, a plain, palpable
7 invasion of rights secured by” the Constitution. *Jacobson*, 197 U.S. at 31. The
8 stay well at home orders meet the first test under *Jacobson*. The stated objective
9 of the stay well at home orders “is to ensure that the maximum number of persons
10 stay in their places of residence to the maximum extent feasible, while enabling
11 essential services to continue, to slow the spread of COVID-19 to the maximum
12 extent possible.” (Defendants’ RJN at Ex. 11, ¶ 1.) The County elected to achieve
13 this goal by deeming certain businesses, travel, and services “essential” and
14 restricting businesses, travel, and services that were not deemed essential.
15 Because those limitations restrict in-person contact, they are substantially related
16 to the objective of preventing the spread of COVID-19. Plaintiffs allege in the
17 FAC and argue in their Opposition that the County acted arbitrarily or erroneously
18 by not deeming firearm retailers, ammunition retailers, and firing ranges “essential
19 businesses.” (Opp. at p. 14:15-15:8; FAC at ¶¶ 2-3, 58, 65, 72-76, 81.) This
20 argument is unavailing. *Jacobson* holds that it is not the role of the judiciary to
21 second-guess policy choices favoring one of two modes of preventing the spread
22 of a disease, which is precisely what Plaintiffs request this Court to do. *Jacobson*,
23 197 U.S. at 30. Moreover, Plaintiffs do not dispute that the stay well at home
24 orders bear a substantial relation to the County’s objective of limiting the spread
25 of COVID-19.

26 Under the second test of *Jacobson*, the stay well at home orders must not
27 affect “beyond all question, a plain, palpable invasion of” the Second Amendment.
28 *Jacobson*, 197 U.S. at 31. In *Altman v. County of Santa Clara*, ---- F.Supp.3d ----,

1 2020 WL 2850291, at *10 (N.D. Cal. June 2, 2020), the district court found there
2 to be “significant overlap between the ‘plain, palpable invasion’ prohibited by
3 *Jacobson* and the ‘complete prohibition’ on the Second Amendment right that
4 [*District of Columbia v. Heller*, 554 U.S. 570, 629 (2008)] deemed categorically
5 unconstitutional.”⁶ Because this approach unifies the *Jacobson* framework with
6 modern constitutional jurisprudence, the Court applies the reasoning of *Altman* to
7 determine whether a “plain, palpable” invasion of the Second Amendment resulted
8 from the enactment of the stay well at home orders.

9 “[T]he Second Amendment protects the right to possess a handgun in the
10 home for purposes of self-defense.” *McDonald v. City of Chicago*, 561 U.S. 742,
11 791 (2010) (holding Second Amendment is incorporated to the states via the
12 Fourteenth Amendment). The “core” Second Amendment right to keep and bear
13 arms includes the rights to acquire firearms, purchase ammunition, and maintain
14 proficiency in firearms use. *See Teixeira v. County of Alameda*, 873 F.3d 670, 677-
15 678 (9th Cir. 2017).

16 Defendants argue the temporary nature of the stay well at home orders and
17 amendments thereto that were solicitous to McDougall distinguish the stay well at
18 home orders from the categorical ban of handguns at issue in *Heller*. Moreover,
19 Defendants argue the right to purchase firearms is subject to regulation without
20 violating the Second Amendment. *See Heller*, 554 U.S. at 626-27 (“[N]othing in
21 our opinion should be taken to cast doubt on ... laws imposing conditions and
22 qualifications on the commercial sale of arms.”). Although Plaintiffs do not apply
23 the *Jacobson* framework, they maintain the stay well at home orders “*completely*
24 *denied* access to, and any lawful transactions involving, firearms and ammunition
25 throughout the county.” (Opp. at p. 19:19-21.) Thus, the Court may surmise that,
26 in Plaintiffs’ view, the stay well at home orders are analogous to the complete ban

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28 ⁶ The “complete prohibition” in *Heller* refers to laws of the District of Columbia that “generally prohibit[ed] the possession of handguns.” *Heller*, 554 U.S. at 574, 629.

1 of handguns at issue in *Heller*, and therefore affected a plain and palpable
2 violation of the Second Amendment right.

3 Here, the Court finds the stay well at home orders did not amount to a plain
4 and palpable violation of the Second Amendment, as required by *Jacobson*.
5 Unlike the total prohibition of handguns at issue in *Heller*, the stay well at home
6 orders are temporary and do not violate the Second Amendment. See *Silvester v.*
7 *Harris*, 843 F.3d 816, 827 (9th Cir. 2016); *Altman v. County of Santa Clara*, ----
8 F.Supp.3d ----, 2020 WL 2850291, at *11-12. *Silvester*, 843 F.3d at 827, provides
9 the closest analog to the temporary closure of firearms retailers and ranges at issue
10 here. *Silvester* involved a challenge to California’s 10-day waiting period to take
11 possession of firearms. In upholding the law, the Ninth Circuit reasoned that
12 “[t]he waiting period does not prevent any individuals from owning a firearm” or
13 impose restrictions on the manner in which firearms are stored after they acquired.
14 *Id.* Rather, the “actual effect” caused by the delay was “very small[,]” and one
15 cognizable in the historical understanding of the Second Amendment:

16 There is, moreover, nothing new in having to wait for the delivery of a
17 weapon. Before the age of superstores and superhighways, most folks
18 could not expect to take possession of a firearm immediately upon
19 deciding to purchase one. As a purely practical matter, delivery took
20 time. Our 18th and 19th century forebears knew nothing about
21 electronic transmissions. Delays of a week or more were not the
22 product of governmental regulations, but such delays had to be
23 routinely accepted as part of doing business.

22 *Silvester*, 843 F.3d at 827. As in *Silvester*, the effect of the stay well at home
23 orders was to delay Plaintiffs’ ability to acquire and practice with firearms and
24 ammunition and not to prohibit those activities. Thus, Plaintiffs have not
25 demonstrated that the temporary closure of firearms retailers constitutes a plain
26 and palpable violation of their Second Amendment right.⁷

27
28 ⁷ At least one other district court has considered whether a facially neutral emergency order to curb COVID-19 violates the Second Amendment. In *Altman v. County of Santa Clara*, ----

1 Therefore, the Court **GRANTS** the motion to dismiss with prejudice
2 because the stay well at home orders did not amount to a violation of the Second
3 Amendment under the standard set forth in *Jacobson*.

4 **c. The Stay Well At Home Orders Satisfy Traditional**
5 **Constitutional Analysis**

6 The Court need not analyze Plaintiffs’ Second Amendment claim under
7 traditional constitutional scrutiny because *Jacobson* applies. Nonetheless, the
8 Court finds the claim does not survive a motion to dismiss under the Ninth
9 Circuit’s traditional framework for Second Amendment claims.

10 “The Ninth Circuit assesses the constitutionality of firearm regulations
11 under a two-prong test. This inquiry ‘(1) asks whether the challenged law burdens
12 conduct protected by the Second Amendment and (2) if so, directs courts to apply
13 an appropriate level of scrutiny.’” *Duncan v. Bacerra*, 970 F.3d 1133, 1145 (9th
14 Cir. 2020) (quoting *Chovan*, 735 F.3d at 1136) (internal citations omitted)). The
15 Ninth Circuit “appears to ask four questions” to determine whether a challenged
16 law burdens protected conduct: (1) “whether the law regulates ‘arms’ for purposes
17 of the Second Amendment;” (2) “whether the law regulates an arm that is *both*
18 dangerous *and* unusual;” (3) “whether the regulation is longstanding and thus
19 presumptively lawful;” and (4) “whether there is an persuasive historical evidence
20 in the record showing that the regulation affects rights that fall outside the scope of
21 the Second Amendment.” *Duncan*, 970 F.3d at 1145 (citations omitted). If the
22 regulated arm is dangerous and unusual, persuasive historical evidence shows the
23 regulation affects rights outside the scope of the Second Amendment, or the
24 regulation is longstanding and presumptively lawful, then the law does not burden
25 protected conduct. *Id.*

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27 F.Supp.3d ----, 2020 WL 2850291, at *11-12, Judge Tigar of the Northern District of California
28 held the County of Alameda’s emergency orders did not violate the Second Amendment under
Jacobson because the restrictions were facially neutral and temporary.

1 For purposes of this motion, the Court assumes the stay well at home orders
2 burden protected conduct. Therefore, the Court “must proceed to the second prong
3 of analysis and determine the appropriate level of constitutional scrutiny.” *Id.* To
4 determine the appropriate level of constitutional scrutiny, the Court asks “how
5 ‘close’ the challenged law comes to the core right of law-abiding citizens to
6 defend hearth and home;” and “whether the law imposes substantial burdens on
7 the core right.” *Id.* at 1146. “Only where both questions are answered in the
8 affirmative will strict scrutiny apply.” *Duncan*, 970 F.3d at 1146 (citing *Silvester*,
9 843 F.3d at 821).

10 The Court finds the stay well at home orders do not substantially burden the
11 Second Amendment. The stay well at home orders are analogous to and less
12 restrictive than the waiting periods upheld in *Silvester*, 843 F.3d at 827, because
13 the stay well at home orders are temporary, do not specifically target Second
14 Amendment activities for restriction, and do not impose a categorical ban on the
15 ownership of arms. Plaintiffs attempt to distinguish *Silvester* by arguing the
16 statutory waiting periods apply only to “firearm transactions (not ammunition)”
17 and the stay well at home orders “impose[d] a significant and severe *additional*
18 burden on the core rights at stake.” (Opp. at p. 24, n.5.) Plaintiffs’ argument is
19 unpersuasive. In *Silvester*, the waiting period law was challenged regarding its
20 application “to those purchasers who have previously purchased a firearm or have
21 a permit to carry a concealed weapon, and who clear a background check in less
22 than ten days.” *Silvester*, 843 F.3d at 818. Thus, the waiting period law created an
23 additional layer to existing state laws regulating the manner in which firearms are
24 purchased. The Ninth Circuit rejected the argument that stricter scrutiny of the
25 waiting period law was required because the law added to existing regulations,
26 holding that the waiting period law served other interests. *Id.* at 828-29.

27 Because the stay well at home orders do not substantially burden the core
28 right of the Second Amendment, the Court finds that intermediate scrutiny is the

1 appropriate standard of review if *Jacobson* does not apply. *See Duncan*, 970 F.3d
2 at 1146. Under intermediate scrutiny, the second-step of *Chovan* requires two
3 elements be met: “(1) the government’s stated objective must be significant,
4 substantial, or important; and (2) there must be a ‘reasonable fit’ between the
5 challenged regulation and the asserted objective.” *Id.* at 821-822. Here, the
6 stated objective of the County Orders is to prevent the spread of COVID-19, and
7 the parties do not dispute that this interest is important. Therefore, the Court must
8 determine whether there is a “reasonable fit” between temporary closure of
9 firearms retailers and ranges and slowing the spread of COVID-19. The County
10 determined that “social isolation is considered useful as a tool to control the
11 spread of pandemic viral infections,” such as COVID-19. (Defendants’ RJN at
12 Ex. 11, p.1.) Thus, there is a reasonable fit between the County’s objective of
13 slowing the spread of COVID-19 and the temporary closure of non-essential
14 businesses, including firearms retailers. Plaintiffs argue that it was unnecessary
15 for the County to deem firearms retailers and ranges non-essential to slow the
16 spread of COVID-19, but “intermediate scrutiny does not require the least
17 restrictive means of furthering a given end.” *Silvester*, 843 F.3d at 827. Therefore,
18 even though Defendants may have been able to adopt less restrictive means of
19 achieving its goal of reducing the spread of COVID-19, it was not required to do
20 so.

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