No. 20-56220

In the United States Court of Appeals for the Ninth Circuit

DONALD MCDOUGALL, et al.,

Plaintiffs–Appellants,

v.

COUNTY OF VENTURA, et al.,

Defendants–Appellees.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:20-cv-02927-CBM-AS
The Honorable Consuelo B. Marshall

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellants submit this corporate disclosure and financial interest statement pursuant to Federal Rule of Appellate Procedure 26.1.

Second Amendment Foundation, Inc., has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

California Gun Rights Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Firearms Policy Coalition, Inc., has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

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INTRODUCTION

This case is another example of the dangers that our Supreme Court has warned against in this era of public health orders broadly infringing on fundamental constitutional rights in the name of combatting the COVID-19 health crisis: "[E]ven in a pandemic, the Constitution cannot be put away and forgotten," *Roman Catholic Diocese of Brooklyn v. Cuomo*, __ U.S. __, 141 S. Ct. 63, 68 (2020), and the courts "may not shelter in place when the Constitution is under attack," for "[t]hings never go well when [courts] do," *id.* at 72.

The Ventura County Defendants in this case issued public health orders that effectively shelved the core Second Amendment rights of millions of law-abiding citizens over an extensive period of time—48 consecutive days—even when substantially less restrictive alternatives existed, and the district court's order granting Defendants' motion to dismiss Plaintiffs' case for failure to sufficiently state a claim effectively shelters the Defendants from any responsibility for their unconstitutional orders that deprived so many of fundamental civil rights at a time when those rights were (and remain) at their zenith.

Plaintiffs invoke their right of appeal, seeking reversal of the district court's erroneous judgment against them and the opportunity to pursue their righteous claim based on these public health orders that placed their Second Amendment rights under attack.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 in that this action arises under the Constitution and laws of the United States, specifically the Second Amendment to the United States Constitution, and relief is sought under 28 U.S.C. §§ 2201, 2202 and 42 U.S.C. §§ 1983 and 1988. The district court granted the Defendants' motion to dismiss on October 21, 2020, dismissing Plaintiffs' First Amended Complaint with prejudice, which was a final appealable order disposing of all the parties' claims. ER5. The court entered final judgment accordingly the same day. ER-4. Plaintiffs timely filed a notice of appeal on November 19, 2020. ER-1-2; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291, in that Plaintiffs are appealing a final judgment of the district court.

PERTINENT AUTHORITIES

The constitutional authority pertinent to this appeal is the Second Amendment to the United States Constitution, which provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ISSUE PRESENTED

Can it be said, beyond doubt, that Plaintiffs' First Amended Complaint fails to prove any set of facts that would entitle them to relief on their Second Amendment claim, such that the complaint could properly be dismissed for failure to state a claim on which relief may be granted?

STATEMENT OF THE CASE

I. The Ventura County Orders Shuttering All Firearms and Ammunition Retailers for 48 Consecutive Days from March 20, 2020 to May 7, 2020.

On March 17, 2020, Defendant Robert Levin issued an order as the Ventura County Health Officer directing certain Ventura County residents considered particularly vulnerable to COVID-19—everyone 75 and older and those 70 and older with comorbidities—to shelter in place until April 1, 2020. ER-171("March 17 Order"). The only exceptions were "to seek medical care, nutrition, or to perform essential work in

healthcare or government." ER-172. Certain businesses where people tend to gather and socialize in large groups for extended periods of time, like movie theaters, live performance venues, bars, and night clubs, were ordered to cease operations throughout this period. ER-172. The March 17 Order warned residents that any violation of or failure to comply with its terms and conditions would constitute a criminal offense punishable by a fine, imprisonment, or both. ER-171.

On March 20, 2020, Defendant Levin supplemented the March 17 Order with a "Stay Well At Home" order ("March 20 Order"). The March 20 Order declared that, "All persons currently living within Ventura County are ordered to stay at their places of residence." ER-164. Those citizens deemed particularly vulnerable under the March 17 Order were permitted to leave their homes only to engage in physical activities, like walking or biking, and all other residents were permitted to leave home "only for Essential Activities and Essential Government Functions or Services or to operate or work at Essential Businesses." ER-164-65. Further, "[a]ll businesses with a facility in the County, except Essential Businesses, [were] required to cease all activities at facilities located within the County. . . ." ER-165. "All Essential Businesses [were] strongly

encouraged to remain open," and "[t]o the greatest extent feasible . . . comply with Social Distancing Requirements, including for any customers standing in line." ER-165. Additionally, "[a]ll travel" was forbidden, "except for Essential Travel and Essential Activities." ER-165.

The March 20 Order limited "Essential Activities" to activities and tasks essential to "health and safety," such as obtaining food, medical necessities, and essential household consumer products, exercising outdoors, providing care for someone else, and performing services for Essential Business, Essential Infrastructure, or Essential Governmental organizations. ER-166. "Essential Infrastructure" was limited to industries like public works of construction, airports, and companies that provided transportation and telecommunication services. ER-166. Essential Governmental organizations were limited to those that provided law enforcement and emergency services. ER-166-67.

The March 20 Order limited "Essential Businesses" to Essential Infrastructure, healthcare providers, grocery stores, hardware stores, social services agencies, media outlets, mail carriers, banks, education and childcare providers, and other establishments that supplied consumer products and services "necessary to maintaining the safety,

sanitation and essential operation of places of residence." ER-167-68. Similarly, "Essential travel" was limited to travel for purposes of pursuing Essential Activities or accessing Essential Businesses, Essential Infrastructure, and Essential Governmental services. ER-169. The March 20 Order was effective through April 19, 2020, and the March 17 Order otherwise remained "in full force and effect" until it was "extended, superseded, rescinded or amended in writing by the Health Officer." ER-170.

On March 28, 2020, while the March 20 Order was still in effect, the Director of the United States Department of Homeland Security, Cybersecurity & Infrastructure Agency (CISA), issued an "Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response." ER-106. The Advisory Memorandum listed all those who work in "supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges as among "essential critical infrastructure workers." ER-109.

Thereafter, on March 31, 2020, Defendant Levin issued another order continuing the March 17 and March 20 Orders, and "impos[ing]

additional limitations on persons and entities," under the continuing threat of criminal sanctions for any violation of or failure to comply with the most "restrictive" conditions of the various limitations unless and until they were "extended, rescinded, superseded or amended" by Defendant Levin. ER-160, 163 ("March 31 Order"). The March 31 Order further narrowed the definition of "Essential Businesses" to specifically prohibit the operation, and thus mandate the closure of, all businesses except those that sold "food, beverages, pet supplies or household products (such as cleaning and personal care products)," and those that provided automotive repair services. ER-161. The Order made no mention of the CISA Advisory Memorandum.

Defendant Levin issued a fourth order on April 9, 2020, again continuing and supplementing the prior Orders. ER-156 ("April 9 Order"). This April 9 Order further limited social gatherings outside the home, required Essential Businesses to implement certain infectious disease prevention protocols, and, subject to such protocols, permitted certain additional businesses to reopen as "essential." ER-156-58. These additional businesses were expressly limited to bicycle shops, automotive dealers, and real estate service providers. ER-157.

Defendant Levin issued another order on April 20, 2020, amending and restating the prior Orders ("April 20 Order"). ER-131. The April 20 Order declared that "[a]ny and all prior violations of previous orders remain prosecutable, criminally or civilly," and "all prior closure or cease and desist orders directed at specific persons or business [*sic*] shall remain in effect." ER-131. This Order augmented the list of "Essential Businesses" to include additional commercial enterprises, such as home-based businesses, shoe repair shops, boat repair businesses, and household appliance stores, but continued to make no exception for firearms or ammunition retailers. ER-133-37, 144-47. Instead, the April 20 Order expressly mandated that firearms retailers "*remain* closed to the general public"—confirming that the prior Orders had deemed all such establishments *not* "essential" and thus had imposed a continuing closure mandate against them since March 20, 2020. ER-137 (italics added). The Order created a narrow exception for the completion of firearm purchases that were initiated at a firearms store within the County "before March 20, 2020 (i.e., the day firearm stores were ordered to be closed by the Health Officer)," on an appointment-only basis. ER-

137. No exceptions were made for any purchases or transfers of ammunition, or for firing ranges. ER-137.

As with Defendant Levin's prior Orders, the April 20 Order warned that all residents must comply with the most restrictive version of the orders to date and that "the Sheriff and all chiefs of police in the County [would] ensure compliance with and enforce this Order" against all residents unless and until it was "extended, rescinded, superseded or amended" by the Health Officer. ER-150.

On May 7, 2020, Defendant Levin issued a new order, mitigating the restrictions in the prior Orders in various ways, including by permitting businesses previously deemed not "essential" to reopen so long as they first submitted a registration form with the County attesting to their preparedness to implement the prevailing infectious disease prevention and safety protocols. ER-119-122 ("May 7 Order"). The Order stipulated, however, that only retail businesses "whose primary line of business qualifie[d] as "critical infrastructure," in that their "primary business [was] the sale of food, beverages, pet supplies, and household cleaning products, etc.," were permitted to "fully open to the public." ER-120. While the May 7 Order did not expressly permit firearms retailers to

reopen, around the same time the Order issued, Ventura County published a set of "Frequently Asked Questions" on its website, indicating that such retailers could reopen:

> With the elimination of the essential business model in the local health order, and reliance on the State health order model for critical infrastructure, the Sheriff and local health officer have determined that the gun stores may fully open to the public provided they implement and register site-specific prevention plans as described www.vcreopens.com.

ER-61.[1]

Later orders and public notices issued by Defendant Levin and the County were generally consistent with the May 7 Order and the foregoing public statement, in that they no longer prohibited operation of firearms or ammunition retailers. ER-47-56; ER-41-46; ER 37-40; ER-32-34; ER-30-31; ER-28-29; ER-27; ER-25.

[1] The evidence of this public notice was introduced through an exhibit presented by Defendants (reproduced at ER-61), the contents of which did not include the date of its publication, but which Defendants represented as having been published or as having become effective as a policy of the County on or about the same day, ER-85 (Defendants' Motion to Dismiss First Amended Complaint).

II. The Impact on the Plaintiffs and All Other Similarly Situated Individuals Whom They Represent.

Plaintiffs Donald McDougall and Juliana Garcia are residents of the County. ER-178. McDougall purchased a firearm from a licensed firearms dealer and left another firearm with a licensed gunsmith, but he was unable to retrieve those firearms or acquire ammunition due to the prior Orders shutting down these businesses. ER-193. Garcia desired to purchase a firearm and ammunition during the period that the prior Orders were in effect, but she was unable to acquire a Firearm Safety Certificate ("FSC") or purchase a firearm and ammunition due to those Orders. ER-193. Plaintiffs Second Amendment Foundation, Inc., California Gun Rights Foundation, and Firearms Policy Coalition, Inc. (collectively, the "Institutional Plaintiffs") are nonprofit organizations who have numerous members and supporters in the County similarly situated to Plaintiffs McDougall and Garcia, who were thus similarly prohibited under the prior Orders from selling and transferring firearms and ammunition, as well as from training for proficiency with firearms at firing ranges within the County during the pendency of the Orders. ER-179-180, 193-95.

III. Procedural History

Plaintiffs initiated this action on March 28, 2020, in the midst of the initial orders compelling the closure of firearms and ammunition retailers. ER-206. The complaint challenged the March 20 Order and Defendants' enforcement of it as unconstitutional under the Second Amendment to the United States Constitution. ER-206-213.[2]

Plaintiff McDougall applied for an ex parte temporary restraining order on March 30, 2020, on behalf of himself and similarly situated County residents. Dkt. No. 9. The district court denied the application on April 1, 2020. ER-205-05. The court held that "the burden of the County Order on the Second Amendment, if any, is not substantial, so intermediate scrutiny is appropriate." ER-205. In applying this standard, the court reasoned that Plaintiff McDougall had "offer[ed] no evidence or argument disputing the County's determination that its mitigation effort

[2] The Complaint also raised a second cause of action under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. ER-211-12. In the First Amended Complaint, that cause of action was substituted with a claim under the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution. ER-199-201. Ultimately, Plaintiffs elected to focus solely on the Second Amendment claim and relinquished the second cause of action before the matter reached a final judgment. Dkt. No. 43, p. 1, n. 1.

would be as effective without closure of non-essential businesses." ER-205. Therefore, the court opined, "Plaintiff ha[d] not demonstrated he is likely to succeed on the merits of his claim" and "ha[d] not demonstrated that the balance of the equities and public interest favors the injunction." ER-205.

On April 14, 2020, Plaintiffs filed their First Amended Complaint ("FAC"), specifically seeking injunctive relief against the orders that had then issued to date—the March 17, March 20, March 31, and April 9 Orders. ER-174-203.[3] While those orders and the later April 20 Order remained in effect, Plaintiffs filed a second ex parte application for a temporary restraining order. Dkt. No. 27. The district court denied this application as well on April 30, 2020, again finding that Plaintiffs failed to demonstrate a likelihood of success on the merits and that the balance of equities weighed against a temporary restraining order. ER-129-130.[4]

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[3] Plaintiffs contemporaneously filed a motion for preliminary injunction against these Orders. Dkt. No. 20. They ultimately withdrew that motion in light of the later May 7 Order. Dkt. No. 40.

[4] The court noted that the parties had since developed additional evidence concerning the propriety of injunctive relief pending adjudication of the merits, but it deferred consideration of any additional evidence until the hearing on Plaintiffs' motion for a preliminary injunction, ER-130, which motion, as noted, was later withdrawn.

Thereafter, on June 2, 2020, Defendants filed a motion to dismiss the FAC, arguing that the Complaint was "entirely mooted by the May 7 Order," and that Plaintiff McDougall's claim was specifically mooted by the April 20 Order that permitted the completion of firearms purchases initiated before the March 20 Order, since he was thereafter permitted to complete his pending purchase. Dkt. No. 41, pp. 1, 10. Defendants further contended that, even so, the FAC should be dismissed for failure to state a claim under Rule 12(b)(6) because the prior Orders passed constitutional muster under the framework of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) ("*Jacobson*"), and also "did not implicate nor violate an individual's right to bear arms" under a "traditional" constitutional analysis. Dkt. No. 42, pp. 1, 11–23.

The district court issued its order on October 21, 2020. ER-5. First, the court rejected Defendants' mootness claim, holding "there is a possibility that Plaintiffs can obtain relief for their claim, and the claim is not moot" because, "in addition to declaratory and injunctive relief, Plaintiffs seek nominal damages" for the period of time before the May 7 Order "during which the stay well at home orders prohibited" the purchasing of firearms and ammunition and accessing firing ranges. ER-11-12. The court

further noted that Defendants had failed to acknowledge the dimension of the claim based on the effect of the prior Orders on Plaintiff McDougall's ability to retrieve his firearm that was in the possession of a gunsmith, to practice with firearms at a firing range, or to purchase ammunition within the County, ER-12, n. 4, none of which he could lawfully pursue until at least May 7, 2020.

But the court agreed with Defendants' argument that the FAC failed to state a claim for which relief could be granted both under the *Jacobson* framework and under a "traditional" constitutional analysis. ER-13-15. The court reasoned that "*Jacobson* applies to the Second Amendment claim in this case" and compelled the conclusion that "the manner in which the state decides to combat an epidemic is entitled to deference." ER-13 (citing *Jacobson*, 197 U.S. at 30). The court cited recent cases in which other federal courts had relied on *Jacobson* as an appropriate framework for resolving constitutional challenges to governmental restraints imposed on fundamental rights in response to the COVID-19 pandemic. ER-14-19.

Specifically, the district court cited *S. Bay United Pentecostal Church v. Newsom*, __ U.S. __, 140 S. Ct. 1613 (2020), in which the Supreme

Court denied an injunction in a First Amendment challenge to the Governor of California's Executive Order "'limit[ing] attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.'" ER-14 (quoting *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring)). The district court found Chief Justice Roberts's concurring opinion persuasive insofar he reasoned, based on the *Jacobson* line of authority, that "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States to 'guard and protect,'" ER-14 (quoting *S. Bay*, 140 S. Ct. at 1613), and where the "'broad limits'" generally afforded those officials "'are not 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,'" ER-14 (quoting *S. Bay*, 140 S. Ct. at 1613–14).

Under what it viewed as the controlling "standard of review set forth in *Jacobson*," the district court opined that it must determine whether the County's prior Orders that denied access to firearms retailers, ammunition retailers, and firing ranges either (1) had "'no real or substantial relation'" to the asserted objective of preventing the spread

of COVID-19 or (2) "'beyond all question,'" effected "'a plain, palpable invasion of rights secured by' the Constitution." ER-16 (quoting *Jacobson*, 197 U.S. at 31).

The court concluded that the first prong of the *Jacobson* test was satisfied because "deeming certain businesses, travel, and services 'essential' and restricting businesses, travel, and services that were not deemed essential . . . restrict[ed] in-person contact," and was thus "substantially related" to the County's asserted objective. ER-16. The court further concluded that the prior Orders did not contravene the second prong of the *Jacobson* test because the court viewed the infringement as "temporary" and relatively insignificant, analogizing the burden to that imposed by California's 10-day waiting period for the acquisition of new firearms, which this Court construed as "very small" in upholding the waiting period against a Second Amendment challenge in *Silvester v. Harris*, 843 F.3d 816 (9th Cir. 2016). ER-16-18. Thus, the district court held that the prior Orders did not effect "a plain, palpable invasion" of Second Amendment rights. ER-18-19.

The district court proceeded to apply this Court's "traditional framework for Second Amendment claims" as well. "This inquiry '(1) asks

whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.'" ER-19 (quoting *Duncan v. Becerra*, 970 F.3d 1133, 1145 (9th Cir. 2020)[5] (internal citations omitted)). The court assumed the prior Orders burdened the Second Amendment and proceeded to step two of the test. ER-20. It reasoned that mere intermediate scrutiny was appropriate because the orders were temporary, did not specifically target Second Amendment activities for restriction, and did not impose "a categorical ban on the ownership of arms." ER-20. They were, the court opined, "less restrictive" than the waiting period that this Court upheld under intermediate scrutiny in *Silvester*. ER-20. Applying this form of scrutiny, the court recognized that "'(1) the government's stated objective must be significant, substantial, or important; and (2) there must be a "reasonable fit" between the challenged regulation and the asserted objective.'" ER-21 (quoting *Duncan*, 970 F.3d at 821–22). But the court summarily concluded that the necessary "reasonable fit" existed because

[5] The Ninth Circuit recently granted the California Attorney General's petition for a rehearing *en banc* on the opinion of the appellate panel in this case and vacated that opinion pending such review. *Duncan v. Becerra*, 2021 WL 728825 (Feb. 25, 2021).

the County considered the closure of firearms retailers and ranges throughout the period in question to be "useful as a tool to control the spread of the pandemic viral infections," and, "even though Defendants may have been able to adopt less restrictive means of achieving its [*sic*] goal of reducing the spread of COVID-19," they were not required to do so under the applicable form of scrutiny. ER-21. The district court entered judgment the same day, October 21, 2020, dismissing the FAC with prejudice. ER-4. Plaintiffs timely appealed the judgment. ER-2-3.

SUMMARY OF THE ARGUMENT

The district court erred in concluding that Plaintiffs have failed to sufficiently state a plausible claim for which relief may be granted, because the allegations in the FAC strongly support the asserted constitutional violations inflicted by Defendants' orders effectively shuttering the local firearms industry for 48 days straight—especially under the lenient standards of review that govern the case.

STANDARD OF REVIEW

This Court applies a *de novo* standard of review to a district's grant of a defendant's motion to dismiss for failure to state a claim under Rule 12(b)(6), *Dougherty v. City of Covina*, 654 F.3d 892, 897 (9th Cir. 2011),

as well as to the district court's underlying "[c]onclusions of law and the application of the law to the facts," *Olson v. United States*, 980 F.3d 1334, 1337 (9th Cir. 2020). In deciding such motions, "we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable" to Plaintiffs, and "draw[] all reasonable inferences in their favor." *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 990 (9th Cir. 2011). The complaint "need not contain detailed factual allegations; rather, it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Cousins v. Lockyer*, 568 F.3d 1063, 1067–68 (9th Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And the complaint does that so long as it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The complaint should not be dismissed on this ground "unless it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle [them] to relief." *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

Thus, such motions are "viewed with disfavor and rarely granted." *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997).

ARGUMENT

I. The *Jacobson* Framework Has No Application.

Recent Supreme Court authority has made clear that the *Jacobson* framework does not control in a case like this. As Justice Gorsuch has explained, any reliance on *Jacobson* in the Chief Justice's concurring opinion in the first *S. Bay* case was "mistaken." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring). "*Jacobson* hardly supports cutting the Constitution loose during a pandemic. That decision involved an entirely different mode of analysis, an entirely different right, and an entirely different kind of restriction." *Id.* at 70. "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Id.* "Instead, *Jacobson* applied what would become the traditional legal test associated with the right at issue," which is "rational basis review." *Id.* And not only was that test appropriate given the nebulous nature of the "implied 'substantive due process' right to 'bodily integrity'" at stake there, but the

restriction "easily survived rational basis review" because the imposition on this claimed right "was avoidable and relatively modest." *Id.* at 71.

As Justice Gorsuch further observed, any inclination of courts to view *Jacobson* as some sort of "towering authority that overshadows the Constitution during a pandemic" may stem from "judicial impulse to stay out of the way in times of crisis." *Roman Catholic Diocese*, 141 S. Ct. at 71. "But if that impulse may be understandable or even admirable in other circumstances, we may not shelter in place when the Constitution is under attack. Things never go well when we do." *Id.* No other Justice disputed Justice Gorsuch's analysis of *Jacobson's* limitations in the current climate, and no other Justice argued that "anything other than our usual constitutional standards should apply during the current pandemic." *Id.*

Indeed, as Justice Gorsuch observed, the *Jacobson* framework devolves into mere "rational basis review," *id.* at 70, and the Supreme Court years ago squarely rejected any such form of review for restraints on the Second Amendment. In the seminal *Heller* case of 2008, the Court expressly forbade it, in counseling: "If all that was required to overcome the right to keep and bear arms was a rational basis, the Second

Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect." *District of Columbia v. Heller*, 554 U.S. 570, 627 n.27 (2008). Thus, "'laws burdening Second Amendment rights must withstand more searching scrutiny than rational basis review.'" *Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020) (quoting *United States v. Torres*, 911 F.3d 1253, 1262 (9th Cir. 2019)). *Jacobson* is no constitutional measure here.

II. The Prior Orders Utterly Destroyed Core Second Amendment Rights.

A. The Nature of the Second Amendment Right.

The Second Amendment declares in no uncertain terms: "the right of the people to keep and bear Arms, *shall not* be infringed." U.S. Const. amend. II (italics added). Incorporated against the states through the Fourteenth Amendment, *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010), the Second Amendment confers "an individual right to keep and bear arms," *Heller*, 554 U.S. at 595. It is a fundamental constitutional right guaranteed to the people, which is key to "our scheme of ordered liberty." *McDonald*, at 767–68. The Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Heller*, at 592. And it "elevates above all" governmental

interests in restricting the right, "the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Id* at 635. "The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634 (emphasis original).

B. The prior Orders completely denied access to the acquisition of firearms and ammunition and the use of firing ranges throughout the County.

For seven weeks straight, Ventura County Defendants deprived hundreds of thousands of Ventura County residents of their core Second Amendment rights. No one could acquire a firearm or ammunition from any retailer anywhere within the County while the prior Orders were in effect. Firearm retailers were mandated to close; private transfers were unavailable because California requires all private transfers to be processed through a licensed dealer; and the orders forbade any travel outside the home except to engage in the narrowly defined forms of "essential" activities, to perform "essential" government functions or services, or to access "essential" businesses, which excluded firearms and ammunition retailers and excluded firing ranges. Anyone who did not

possess both a firearm and ammunition on March 19, 2020 was denied the ability to exercise the fundamental rights protected by the Second Amendment until May 7, 2020, and those who happened to have a firearm and ammunition were denied the corollary right to pursue training and proficiency with those arms at firing ranges. For those 48 days, Defendants effectively erased these fundamental constitutional rights in Ventura County. The individual Plaintiffs, Institutional Plaintiffs' members and supporters, and the other similarly situated residents of the County were among those whose rights were denied.

The Second Amendment prohibition here is even more burdensome than the COVID-19 restrictions that the Supreme Court has recently deemed unconstitutional. In *Roman Catholic Diocese*, the Court struck down the Governor of New York's order restricting attendance at religious services to 10 people in "red" zones and 25 people in "orange" zones. 141 S. Ct. at 66. The Court held this "drastic measure" was "far more severe than has been shown to be required to prevent the spread of the [corona]virus. . . ." *Id.* at 67, 68. Even in red zones—where New York's threat level was the highest—a 10-person limit was "far more severe" than necessary. *Id.* at 67. By comparison, here, not a single person was

allowed in a Ventura County gun store for *seven weeks* straight—with the single, narrow exception created *after a solid month* of the total shutdowns that merely permitted, on an appointment-only basis, the completion of purchase transactions initiated before March 20.

Moreover, religion can be practiced to *some* extent—inadequate as it may be—outside houses of worship, but the prohibitions here forbade *all* access to firearms and ammunition retailers and firing ranges for County residents. Thus, if the restrictions "effectively barring many from attending religious services" in *Roman Catholic* "strike at the very heart of the First Amendment's guarantee of religious liberty," *id.* at 68, then the restrictions here barring all Ventura County residents from the necessary means to acquire firearms and ammunition and access firing ranges in the lawful exercise of the fundamental right of self-defense strike at the very heart of the Second Amendment's guarantees.

C. The 48-day prohibition effected a severe deprivation of constitutional rights.

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)). The loss of Second Amendment freedoms, for even minimum periods of time, can be

fatal. Every second counts when the need for self-defense arises. The Founders "understood the [Second Amendment] right to enable individuals to defend themselves." *Heller*, 554 U.S. at 594. Indeed, one cannot assume local law enforcement can or will come to the rescue in time. *See Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005) (A woman whose children were murdered by her estranged husband after police failed to respond to her calls, "did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband.").

The Second Amendment guarantees a "'right of self-preservation'" "permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Heller*, 554 U.S. at 595 (quoting 1 BLACKSTONE'S COMMENTARIES 145–46 n.42 (1803)); *see also Caetano v. Massachusetts*, __ U.S. __, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) ("The Commonwealth of Massachusetts was either unable or unwilling to do what was necessary to protect Jaime Caetano, so she was forced to protect herself" with a stun gun against her abusive ex-boyfriend "waiting for [her] outside" one night after work).

Range training is also an important Second Amendment right. "Constitutional rights . . . implicitly protect those closely related acts necessary to their exercise. . . . The right to keep and bear arms, for example, implies a corresponding right to obtain the bullets necessary to use them, and to acquire and maintain proficiency in their use." *Luis v. United States*, __ U.S. __, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring in the judgment) (quotations and citations omitted). The Seventh Circuit explained why firing ranges and training are essential to the Second Amendment in *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011) ("*Ezell I*"). Declaring unconstitutional a ban on target ranges within city limits, the court wrote: "[T]he core right wouldn't mean much without the training and practice that make it effective." *Id.* at 704. Because maintaining proficiency with firearms is "an important corollary to the meaningful exercise of the core right to possess firearms for self-defense," the court struck down the range restriction, even under "not quite 'strict scrutiny.'" *Id.* at 708.

A firearms prohibition that blocks access to all firearms and ammunition retailers and all firing ranges throughout the entire county of a person's residence for 48 days straight—nearly 15% of a calendar

year—is a severe burden that jeopardizes the core Second Amendment right of self-defense. It effectively eliminates the right to keep and bear arms for self-defense of everyone who does not already possess a firearm and ammunition at the time the prohibition is enacted. And the ability to readily employ *firearms* for self-defense purposes—and do so proficiently—is crucial to the guarantees of the Second Amendment. As *Heller* itself emphasized in this context, "the American people have considered *the handgun* to be the quintessential self-defense weapon," and thus "*handguns* are the most popular weapon chosen by Americans for self-defense in the home." 554 U.S. at 629 (italics added).

The district court here relied heavily on *Silvester*, naming it "the closest analog to the temporary closure of firearms retailers and ranges at issue here." ER-18. In *Silvester*, this Court upheld California's 10-day waiting period for all lawful gun purchases, determining that "delays of a week or more" in the founding era were unremarkable:

> There is, moreover, nothing new in having to wait for the delivery of a weapon. Before the age of superstores and superhighways, most folks could not expect to take possession of a firearm immediately upon deciding to purchase one. As a purely practical matter, delivery took time. Our 18th and 19th century forebears knew nothing about electronic transmissions. Delays of a week or more were not the product

> of governmental regulations, but such delays had to be routinely accepted as part of doing business.

ER-18 (quoting *Silvester*, 843 F.3d at 827).

If anything, the decision in *Silvester* effectively renders the burden on Second Amendment rights here *more* severe. Rather than a 48-day prohibition on the Second Amendment, Plaintiffs were left facing a 58-day prohibition. Anyone in the county who sought to acquire a firearm on May 7, 2020—the first day since March 19, 2020 that they could under the prior Orders (save for a brief window opened on April 20 to complete transactions already initiated before the closures)—had to wait an *additional* 10 days to possess it because of the waiting period upheld in *Silvester*. And to be sure, Defendants have pointed to no examples of anyone in the founding era waiting 58 days to acquire any firearm.

The same is true concerning the ammunition purchases that County residents were prevented from making during this time: such transactions are now subject to a pre-purchase background check, which alone already exacts a substantial burden on law-abiding citizens attempting to acquire the ammunition they need for their firearms. *See Rhode v. Becerra*, 445 F. Supp. 3d 902, 931 (S.D. Cal. 2020) (in granting a preliminary injunction against this background check requirement,

Judge Benitez found "the background check system is not working well," as "[t]housands of law-abiding citizen residents have been completely and unjustifiably rebuffed" and "[o]thers are delayed days and weeks while trying to overcome bureaucratic obstacles"). So, the law-abiding citizens of Ventura County who were precluded from initiating ammunition purchases during the County's shutdowns of the firearm industry were denied the ability to even begin the process of overcoming these "bureaucratic obstacles" and were that much further delayed in ultimately obtaining the means necessary to arm themselves. *See id.* ("When one needs to defend herself, family, or property right now, but is defenseless for lack of ammunition, it is the heaviest kind of irreparable harm.")[6]

Moreover, the government's interest that justified the 10-day waiting period in *Silvester*—merely 1/6 of the delay at issue here—was to provide the purchaser with a sufficient "cooling off" period before acquiring the arm. *Silvester*, 843 F.3d at 824. The government has claimed no such

[6] Although Judge Benitez issued a preliminary injunction against the background check requirement for ammunition, at the request of the California Attorney General, the injunction was stayed pending further order of this Court. *Rhode v. Becerra*, Ninth Circuit Case No. 20-55437, 2020 WL 2049091, April 24, 2020.

interest here, and as explained below, the claim that it needed to close every firearm retailer and firing range in the county to prevent the spread of COVID-19 is undermined by the fact that it permitted many other businesses clearly *not* "essential" to the exercise of any constitutional rights—like bicycle shops and shoe repair shops—to operate without interruption. *See Roman Catholic Diocese*, 141 S.Ct. at 72 (Gorsuch, J., concurring) ("while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques").

D. Pandemic or Not, Courts Cannot "Shelter in Place" While the Constitution is under attack.

The Supreme Court has repeatedly made clear, and has pointedly reminded us again during the pandemic, that the Constitution itself cannot be placed on lockdown. As Chief Justice Marshall explained long ago, the Constitution was "intended to endure for ages to come" and designed to be enforced *through* the "various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). Indeed, the high court's message on these matters has always been clear, even during the infancy of its jurisprudence back in 1866: "The Constitution of the United States

is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866). "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." *Id.* at 121.

The Founders "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring). Rightly, "they made no express provision for exercise of extraordinary authority because of a crisis," *id.*, because enumerated and fundamental rights, including the right to keep and bear arms, remain in full force even in times of crisis.

In fact, Second Amendment rights often reach the pinnacle of their importance during emergencies, specifically because the right is designed to ensure Americans can defend themselves when the government cannot—i.e., to preserve and foster the "'right of self-preservation'" in "permitting a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *Heller*, 554

U.S. at 594–95 (quoting 1 BLACKSTONE'S COMMENTARIES at 145–46 n.42); *see also McDonald*, 561 U.S. at 777 n.27.

Moreover, "[t]he right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence—and psychic comfort—that comes with knowing one could protect oneself if necessary." *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1135 (S.D. Cal. 2017), *aff'd*, 742 F. App'x 218 (9th Cir. 2018) (quoting *Grace v. D.C.*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016)). That peace of mind is particularly important during times of crises and public unrest—just like that which has been spurred by the COVID-19 pandemic. The prior Orders robbed Ventura County residents of this psychological comfort and peace of mind by directly and severely restraining their ability to acquire firearms and ammunition in the lawful exercise of their Second Amendment rights.

"[E]ven in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese*, 141 S. Ct. at 68. Just as "[g]overnment is not free to disregard the First Amendment in times of crisis," *id.* at 69, government is not free to disregard the Second Amendment either. The emergencies that this country has endured are great and varied—including pandemics, natural disasters, financial

depressions, world wars, and even a civil war—and surely COVID-19 is not the last great obstacle. To allow the Constitution to be violated except during times of peace and prosperity would transform rights into privileges. The founders recognized that "[s]uch a doctrine leads directly to anarchy or despotism," *Ex parte Milligan*, 71 U.S. at 121, and the high court has always wisely avoided it.

III. The Prior Orders Destroyed Core Second Amendment Rights and Are Therefore Categorically Unconstitutional.

A. A restriction that amounts to the destruction of core Second Amendment rights is categorically invalid.

As this Court has recognized, some firearm restrictions are so severe that heightened scrutiny is not even warranted: "A law that imposes such a severe restriction on the fundamental right of self defense of the home that it amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny." *Silvester*, 843 F.3d at 821 (citing *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 961 (9th Cir. 2014)).

"A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Id.* "Otherwise, intermediate scrutiny is appropriate. *Id.*; *see also Bauer v. Becerra*, 858

F.3d 1216, 1222 (9th Cir. 2017) ("A law that . . . amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny . . . Further down the scale [is] . . . strict scrutiny. Otherwise, intermediate scrutiny is appropriate.").

In other words, "what was involved in *Heller*" is categorically invalid, *Silvester*, 843 F.3d at 821, "[f]urther down the scale" is strict scrutiny, *Bauer*, 858 F.3d at 1222, and "intermediate scrutiny is appropriate" for all other laws, *id.*

The prior Orders at issue here are analogous to "what was involved in *Heller*." *Heller* held a ban on inoperable firearms categorically unconstitutional. The ban, the Court held, "ma[de] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and [was] hence unconstitutional." *Heller*, 554 U.S. at 630. Similarly, the prior Orders "ma[de] it impossible for citizens to use [firearms] for the core lawful purpose of self-defense and [are] hence unconstitutional." *Id.*

The *Heller* Court applied no tiered scrutiny analysis, considered no social science evidence, included no data or studies about the costs or benefits of the ban, and expressly rejected the intermediate scrutiny–like balancing test proposed by Justice Breyer's *Heller* dissent. After all, the

Court explained, "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach." *Id.* at 634.

In *McDonald*, the Court reaffirmed its rejection of an interest-balancing approach for bans on core Second Amendment rights. 561 U.S. at 785 ("In *Heller* . . . we expressly rejected the argument that the scope of the Second Amendment right should be determined by judicial interest balancing.").

The Seventh Circuit has also recognized that both *Heller* and *McDonald* deem such bans on the exercise of core Second Amendment rights to be "categorically unconstitutional." *Ezell I*, 651 F.3d at 703. The Seventh Circuit has held a prohibition on carrying arms in public categorically invalid, because it destroyed the right to self-defense outside the home. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012). The court appropriately dismissed the idea of even applying a heightened scrutiny analysis for such a severe ban. *Id.* at 941 ("Our analysis is not based on degrees of scrutiny").

Justice Alito's concurring opinion in *Caetano* is in accord with this framework. He explained that Massachusetts's categorical ban on stun

guns was flatly unconstitutional based on the simple, yet fundamental fact that "stun guns are widely owned and accepted as a legitimate means of self-defense across the country," and are thus neither dangerous nor unusual so as to fall outside the protection of the Second Amendment. *Caetano*, 136 S. Ct. at 1033 (Alito, J., concurring).[7]

Heller explained that "[f]ew laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." 554 U.S. at 629. But the prohibitions here did just that in denying access to all firearms and ammunition retailers and firing ranges crucial to the exercise of core Second Amendment rights. Under the simple, yet fundamental *Heller* test, they effectively destroyed core rights, rendering them categorically unconstitutional without resort to further scrutiny. *Heller*, 554 U.S. at 629 (quoting *State v. Reid*, 1 Ala. 612, 616–17 (1840)) ("A statute which, under the pretence of regulating, amounts to a destruction of the right . . . would be clearly unconstitutional"); *see also*

[7] Similar bright-line rules of categorical unconstitutionality are common in the jurisprudence concerning other fundamental rights. *See* David B. Kopel & Joseph G.S. Greenlee, *The Federal Circuits' Second Amendment Doctrines*, 61 ST. LOUIS U. L.J. 193, 303–04 (2017) (providing examples for the First, Fifth, Sixth, Eighth, Tenth, and Fourteenth Amendments).

Rhode, 445 F. Supp. 3d at 931("Under the simple *Heller* test, judicial review could end right here.").

Again, "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636. Among them is the absolute prohibition for 48 consecutive days against accessing firearms and ammunition retailers as well as firing ranges essential to the lawful exercise of Second Amendment rights within Ventura County (save for the small sliver of transactions that were allowed to be completed after a solid month of the shutdowns) regardless of the nature of the justification the government may claim. If the handgun ban in *Heller* "would fail constitutional muster" under "any of the standards of scrutiny," then the complete prohibition here must fail under any standard as well. *Id.* at 628–29.

IV. The Prohibition Fails Any Level of Heightened Scrutiny.

A. If heightened scrutiny is applied, strict scrutiny is required.

"A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny." *Silvester*, 843 F.3d at 821 (citing *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)).

Heller held that the "core lawful purpose of" the Second Amendment is "self-defense." 554 U.S. at 630. *See also id.* at 628 ("the inherent right of self-defense has been central to the Second Amendment right.").

The prior Orders infringed upon the right to keep and bear arms for self-defense within the home, "where the need for defense of self, family, and property is most acute." *Heller*, 554 U.S. at 628; *see also McDonald*, 561 U.S. at 780 ("our central holding in *Heller*" was "that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home.").

The prior Orders not only "implicate[d] the core of the Second Amendment right and severely burden[ed] that right," they erected a 48-day roadblock against the means essential to lawfully exercising the Second Amendment guarantees in absolutely prohibiting access to firearms and ammunition retailers and firing ranges, and during a time when the need to preserve and protect those rights was at its pinnacle. Strict scrutiny is the only appropriate standard, assuming any scrutiny is warranted. *See Bateman v. Perdue*, 881 F. Supp. 2d 709, 715 (E.D.N.C. 2012) (applying strict scrutiny to North Carolina's emergency declaration statutes that "prohibit[ed] law abiding citizens from purchasing and

transporting to their homes firearms and ammunition needed for self-defense.").

By parity of reasoning, this Court has applied strict scrutiny to restrictions on indoor religious worship services in *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020) and *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1140 (9th Cir. 2021); *cf. S. Bay*, 141 S. Ct. at 717–18 (Gorsuch, J., concurring) ("As the Ninth Circuit recognized, regulations like these violate the First Amendment unless the State can show they are the least restrictive means of achieving a compelling government interest.") (citing *S. Bay*, 985 F.3d at 1142).

The same rationale applies here, where every gun shop in the county was mandated to close but "'hundreds of people' could shop at" many other businesses totally unnecessary or unrelated to the exercise of constitutional rights, "on any given day," like shoe, bicycle, or boat repair shops. *S. Bay*, 985 F.3d at 1141 (quoting *Roman Catholic Diocese*, 141 S. Ct. at 66–67). "Such dichotomous and 'troubling results'" are "subject to strict scrutiny." *Id.* (quoting *Roman Catholic Diocese*, 141 S. Ct. at 66–67).

B. The prior Orders fail intermediate scrutiny, and consequently, also strict scrutiny.

Even if intermediate scrutiny applies, the orders fail because they were poorly tailored—indeed, not tailored at all—and substantially less burdensome alternatives existed.

Intermediate scrutiny requires "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Chovan*, 735 F.3d at 1139. To satisfy intermediate scrutiny, a law must be "narrowly tailored to serve a significant governmental interest." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (internal quotations omitted). In this context, "the [government] bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit." *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 647 (1985)).[8] Here, Defendants cannot to do so. While the objective of preventing the spread of COVID-

[8] While the foregoing cases involved restrictions on free speech under the First Amendment, as this Court has recognized, we are "guided by First Amendment principles" in resolving challenges to Second Amendment restrictions. *Jackson*, 746 F,3d at 961.

19 is an important interest, *see Roman Catholic Diocese*, 141 S. Ct. at 67, the fit is unreasonable, overbroad, and undermined by the fact that numerous other businesses clearly *not* "essential" to the exercise of any constitutional rights were permitted to operate while all gun stores and firing ranges were mandated to close.

C. The prior Orders were not narrowly tailored to serve the claimed interests.

As the Supreme Court has explained, a total ban on the exercise of fundamental constitutional rights satisfies the "narrowly tailored" requirement "only if each activity within the proscription's scope is an appropriately targeted evil." *Ward v. Rock Against Racism*, 491 U.S. 781, 799–800 (1989) (quoting *Frisby v. Schultz,* 487 U.S. 474, 485 (1988)). The scope of Defendants' orders here encompassed the full panoply of Second Amendment rights in completely blocking access to the industry essential for the acquisition, use, and training in the exercise of the right to keep and bear arms—the antithesis of an "appropriately targeted evil."

The County Orders prohibited the operation of all gun stores and firing ranges, of all sizes, in all locations within the county. "And the restrictions appl[ied] no matter the precautions taken, including social distancing, wearing masks, leaving doors and windows open, . . . and

disinfecting spaces between" customers, *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring), even though there has been no showing (and no reason exists to believe) these establishments could not have implemented the same disease prevention protocols that the other businesses followed in being permitted to continue their enterprises.

Moreover, unlike people who were simply seeking to pursue leisurely activities, like riding bicycles, Defendants' orders were aimed at law-abiding citizens seeking to pursue the exercise of fundamental constitutional rights. Defendants have put forth no reason why people could supposedly safely visit places like shoe repair stores but could not safely patronize gun stores or firing ranges while observing identical precautions—and presumably because no reason exists. *Cf. Roman Catholic Diocese*, 141 S. Ct. at 73 (Kavanaugh, J., concurring) ("once a State creates a favored class of businesses . . . the State must justify why houses of worship are excluded from that favored class"). "The only explanation for treating" gun stores "differently seems to be a judgment that what happens there just isn't as 'essential' as what happens" in places unrelated to the exercise of Second Amendment rights. *Id.* at 69 (Gorsuch, J., concurring). *See id.* at 73 (Kavanaugh, J., concurring) ("New

York's restrictions on houses of worship not only are severe, but also are discriminatory," because "a grocery store, pet store, or big-box store down the street does not face the same restriction."). That is, it was a *policy* judgment. But, again, "[t]he very enumeration of the right [to keep and bear arms] takes out of the hands of government . . . the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

D. Defendants must provide *substantial* evidence of proper tailoring, but they have provided no evidence at all in support of the prior Orders.

Under intermediate scrutiny, "the [government] bears the burden of showing not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996) (quoting *Edenfield v. Fane*, 507 U.S. 761, 771 (1993)). "This burden is not satisfied by mere speculation or conjecture." *Edenfield*, at 770. The government cannot "get away with shoddy data or reasoning." *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 438 (2002). Rather, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them." *Edenfield*, at 771. The demonstration must be based on

"substantial evidence." *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 666 (1994) ("*Turner I*"); *Turner Broad. Sys. v. F.C.C.*, 520 U.S. 180, 195 (1997) ("*Turner II*").

For example, in *City of Renton v. Playtime Theatres, Inc.*, the Supreme Court upheld a zoning ordinance where the record contained "substantial evidence" that led to "detailed findings," based on "a long period of study and discussion," as well as "extensive testimony" that supported the claimed interests. 475 U.S. 41, 51 (1986) (citation omitted). Also, *Turner II* was heard after the Court had remanded *Turner I* for 18 months of additional factfinding. The *Turner II* Court determined that the record supported Congress's predictive judgments where it included "[e]xtensive testimony," "volumes of documentary evidence and studies," and "extensive anecdotal evidence." *Id.* at 198, 199, 202.

By comparison, in *44 Liquormart, Inc.*, the government failed to justify a ban on price advertising for alcoholic beverages "without any findings of fact," 517 U.S. at 505, and in *Edenfield*, the Court struck down a ban on in-person solicitation by certified public accountants because the government "present[ed] no studies" or "any anecdotal evidence," 507 U.S. at 771.

Here, Defendants have failed to provide any evidence that COVID-19 was more likely to spread at gun stores or ranges than at the litany of other "essential" businesses they allowed to operate. Nor have they linked the spread of COVID-19 to any firearms retailers or firing ranges. *See Roman Catholic Diocese*, 141 S. Ct. at 68 ("the State has not claimed that attendance at the applicants' services has resulted in the spread of the disease."); *S. Bay*, 141 S. Ct. at 717 (Roberts, C. J., concurring) ("the State's present determination—that the maximum number of adherents who can safely worship in the most cavernous cathedral is zero—appears to reflect not expertise or discretion, but instead insufficient appreciation or consideration of the interests at stake").

Similar to the insufficient showings in *44 Liquormart* and *Edenfield*, Defendants offered no findings of fact, studies, or even anecdotal evidence purporting to demonstrate that a complete closure of firearms retailers and firing ranges was in any way *narrowly tailored* to achieve the goal of minimizing the spread of COVID-19—especially when there is no reason to believe, and certainly no evidence to suggest, that the risks of the virus could not have been adequately addressed or abated by following the same safety protocols as the "essential" businesses. *See Heller v. District*

of Columbia, 670 F.3d 1244, 1259 (D.C. Cir. 2011) ("*Heller II*") ("the District needs to present some meaningful evidence, not mere assertions, to justify its predictive judgments"); *Ezell v. City of Chicago*, 846 F.3d 888, 895 (7th Cir. 2017) ("*Ezell II*") (the government cannot "invoke [its] interests as a general matter and call it a day"). *S. Bay*, 141 S. Ct. at 718–19 ("Nor, again, does California explain why the narrower options it thinks adequate in many secular settings—such as social distancing requirements, masks, cleaning, plexiglass barriers, and the like—cannot suffice here."). The government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner I*, 512 U.S. at 664 (quotations omitted). It must prove that "the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 782–83.

Because Defendants have offered no evidence to demonstrate "the required fit," they necessarily have not and cannot show their claimed interest would have been "achieved *less* effectively" had they permitted firearms retailers and firing ranges to operate with the standard safety protocols in place. Without any such evidence or effort to carry their

burden here, Defendants' claimed interests in the need for these complete shutdowns devolve into "mere speculation" and "conjecture." *Edenfield*, 507 U.S. at 770–71; *see United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) ("The government has offered numerous plausible *reasons* why the disarmament of domestic violence misdemeanants is substantially related to an important government goal; however, it has not attempted to offer sufficient *evidence* to establish a substantial relationship between [18 U.S.C.] § 922(g)(9) and an important governmental goal").

E. Given the dearth of evidence to support a reasonable fit, substantially less burdensome alternatives indisputably existed.

Strict scrutiny requires that the County's Orders be "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (citing *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000)). While intermediate scrutiny does not demand the least restrictive means available, it does require that "the means chosen are not substantially broader than necessary to achieve the government's interest." *Ward*, 491 U.S. at 800.

In the First Amendment context, "the government must demonstrate that alternative measures that burden substantially less speech would

fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 573 U.S. at 495. In the Second Amendment context, Justice Breyer's intermediate scrutiny-like balancing test proposed in his *Heller* dissent considered "reasonable, but less restrictive, alternatives." *Heller*, 554 U.S. at 710 (Breyer, J., dissenting).

Several sister circuits have considered the existence of less burdensome alternatives as pertinent to a proper analysis of restraints imposed on Second Amendment rights. *See e.g., Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 122, 124 n.28 (3d Cir. 2018); *Heller v. District of Columbia*, 801 F.3d 264, 277–78 (D.C. Cir. 2015) ("*Heller III*"); *Ezell I*, 651 F.3d at 709; *Moore*, 702 F.3d at 940; *United States v. Reese*, 627 F.3d 792, 803 (10th Cir. 2010); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1128 (10th Cir. 2015).

The Fourth Circuit recently explained its less-burdensome-requirement rule while applying intermediate scrutiny to a content-neutral speech restriction: The government must present evidence that, before enacting the restriction, "it seriously undertook to address the problem with less intrusive tools readily available to it." *Billups v. City of Charleston, S.C.*, 961 F.3d 673, 688 (4th Cir. 2020) (citing *McCullen*,

573 U.S. at 494). "In other words, the government is obliged to demonstrate that it actually tried or considered less-speech-restrictive alternatives and that such alternatives were inadequate to serve the government's interest." *Id.* "The government's burden in this regard is satisfied only when it presents "actual evidence supporting its assertion[s]." *Id.*

Here, in simply citing a general interest in reducing the spread of COVID-19 as the basis for their prior Orders, Defendants have provided no "actual evidence" that they "actually tried or considered" less restrictive alternatives. And substantially less restrictive alternatives unquestionably existed. Defendants applied those alternatives to many other providers of goods and services—goods and services unrelated to the exercise of the fundamental right to keep and bear arms—like repair shops for shoes, bicycles, and boats.

That businesses and industries unrelated and unnecessary to the exercise of enumerated rights were not subject to the same restrictions was enough for the Supreme Court to rule in favor of the plaintiffs in *Roman Catholic Diocese*. *See* 141 S. Ct. at 66 ("In a red zone, while a synagogue or church may not admit more than 10 persons, businesses

categorized as 'essential' may admit as many people as they wish."); *id.* at 72 (Gorsuch, J., concurring) ("while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates . . . executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques."). So too in the *Calvary Chapel* case, where this Court noted the local directive could have been tailored in the same manner for religious services as it was for other industries: "instead of a fifty-person cap, the Directive could have, for example, imposed a limitation of 50% of fire-code capacity on houses of worship, like the limitation it imposed on retail stores and restaurants, and like the limitation the Nevada Gaming Control Board imposed on casinos." *Calvary Chapel*, 982 F.3d at 1234. Therefore, as in this case, "though slowing the spread of COVID-19 is a compelling interest, the Directive [was] not narrowly tailored to serve that interest." *Id.*; *see also S. Bay*, 141 S. Ct. at 717 (Barrett, J., concurring) (noting that a ban on singing would be judged more harshly depending on "whether the singing ban applies across the board (and thus constitutes a neutral and generally applicable law) or else favors certain sectors (and thus triggers more searching review)"); *id.* at 719 (Gorsuch, J., concurring) ("the State fails

to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests").

In fact, way back on March 28, 2020, in the midst of the shutdown orders, the Director of the United States Department of Homeland Security, Cyber and Infrastructure Agency (CISA) issued a guidance recommending that "[w]orkers supporting the operation of firearm or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges" be allowed to continue working during the COVID-19 pandemic. Christopher C. Krebs, *Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response*, at 6, U.S. DEPARTMENT OF HOMELAND SECURITY. ER-109. This guidance from CISA was produced "in consultation with federal agency partners, industry experts, and State and local officials," who determined that keeping the firearms industry operating would "help State, local, tribal and territorial officials as they work to protect their communities, while ensuring continuity of functions critical to public health and safety, as well as economic and national security." *Id.* at 1. ER-106. But Defendants did not follow this advice and instead

maintained the countywide shutdown orders against all firearms retailers and firing ranges—for an additional 40 days.

As in the *Roman Catholic Diocese* case, "the [government] has not shown that public health would be imperiled if less restrictive measures were imposed." Indeed, the U.S. Department of Homeland Security believed it was "critical to public health and safety" to keep firearm businesses open. Defendants have not met the demands of intermediate scrutiny, nor therefore, strict scrutiny. The County Orders were unconstitutional under measure.

CONCLUSION

Surely, with the strength of Plaintiffs' allegations, it cannot be said "beyond doubt" that the FAC fails to state a plausible claim for which relief may be granted, especially under the lenient standards of review that govern resolution of a motion to dismiss for failure to state a claim. *Geraci*, 347 F.3d at 751. The district court erred in finding that Plaintiffs' strong allegations failed to cross this low threshold for pursuing their claim. Plaintiffs respectfully request this Court to reverse the judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Currently pending before this Court is the matter of *Martinez, et al v. Villanueva, et al*, Case No. 20-56220, which concerns an appeal from the dismissal of a similar challenge under the Second Amendment to similar public health orders of Los Angeles County.

Additionally, the matter of *Altman, et al v. County of Santa Clara, et al*, N.D. Ca. Case No. 4:20-cv-02180-JST, concerns a similar challenge under the Second Amendment to similar public health orders of multiple counties in the Bay area, the final disposition of which remains pending before the district court.

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 10,810 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature: *Raymond M. DiGuiseppe* **Date:** March 4, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2021, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Ninth Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 4th day of March 2021.

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