No. 20-56220

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD MCDOUGALL, an individual; JULIANA GARCIA, an individual; SECOND AMENDMENT FOUNDATION; CALIFORNIA GUN RIGHTS FOUNDATION; and FIREARMS POLICY COALITION, INC.

Plaintiffs-Appellants,

v.

COUNTY OF VENTURA, CALIFORNIA; BILL AYUB, in his official capacity; WILLIAM T. FOLEY, in his official capacity, ROBERT LEVIN, in his official capacity; and VENTURA COUNTY PUBLIC HEALTH CARE AGENCY,

Defendants-Appellees.

APPELLEES' ANSWERING BRIEF

On Appeal from the United States District Court
For the Central District of California
No. D.C. 2:20-cv-02927-CBM(AS)
Hon. Consuelo B. Marshall

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INTRODUCTION

Plaintiffs' appeal from an order granting defendants' motion to dismiss the First Amended Complaint ("FAC") challenging restrictions on non-essential businesses' industry gun stores imposed by the Ventura County Health Officer, defendant Robert Levin, M.D. ("Health Officer") to curb the spread of COVID-19 in the early months of the COVID-19 pandemic. Plaintiffs claim such necessary and temporary restrictions violated their Second Amendment rights to bear arms.

The Health Officer issued a series of temporary, specific and emergency "Stay Well at Home" orders on March 17, 20, and 31, 2020, and April 9, 18 and 20, 2020 (collectively, "Health Order"), to slow the spread of the COVID-19 pandemic in Ventura County. The Health Order, which the Health Officer carefully monitored and amended to preserve the health and safety of persons within Ventura County, required the closure of any business the Health Officer deemed non-essential effective March 20, 2020, including gun stores, because such businesses did not support the ability of people to remain sheltered in their homes to the maximum extent possible. Once the Health Officer determined there was no longer a need for such local orders, the Health Order was repealed. Thus, effective May 7, 2020, firearm stores within Ventura County were able to reopen. At no time did the Health Order prohibit anyone from using firearms to defend themselves in the home. Nor did the Health Order forbid anyone from owning or possessing a firearm. Thus,

as the district court correctly concluded, at no time were plaintiffs' Second Amendment rights to bear arms shelved during the brief time the Health Orders were in place.

Appellees the County of Ventura, William Ayub, Robert Levin, M.D., and William T. Folley (collectively "Defendants") submit this answering brief in reply to appellants' opening brief filed by Appellants Donald McDougall, Juliana Garcia, Second Amendment Foundation, California Gun Rights Foundation and Firearms Policy Coalition (collectively, "Plaintiffs").

STATEMENT OF JURISDICTION

Defendants concur with the jurisdictional statement in Plaintiffs' opening brief.

ISSUE PRESENTED

Did the District Court correctly conclude that Plaintiffs' FAC failed to state a claim that the County's Health Orders violated Plaintiffs' Second Amendment rights?

STATEMENT OF THE CASE

I. The COVID-19 Pandemic and the County's Response

A. The Novel Coronavirus and the COVID-19 Disease

There is no question that COVID-19 is now the world's deadliest disease. To date, it has killed over 530,000 Americans, more than the number killed in combat

during World War II, including more than 56,000 Californians.[1/] From early March through May 31, 2020, there were 1,116 confirmed cases and 33 deaths occurring within Ventura County attributable to COVID-19. (Plaintiffs' excerpt of record ("ER") 80.) It is undisputed that the virus is easily transmissible and spreads through respiratory droplets that remain in the air and may be transmitted unwittingly by individuals who exhibit no symptoms. (See *South Bay United Pentecostal Church v. Newsom* (2020) 140 S.Ct. 1613 ("*South Bay*") (Roberts, C.J., concurring).) There is no cure and no widely effective treatment. (*Id.*) Measures that limit physical contact, such as closure of places where people gather and physical distancing, have been "the most effective way to stop COVID-19's spread." (*Best Supplement Guide, LLC v. Newsom* (E.D. Cal., May 22, 2020, No. 2:20-cv-00965-JAM-CKD) ___ U.S. ___ [2020 WL 2615022 at *6].)

B. The State's Early COVID-19 Directives

On March 4, 2020, Governor Gavin Newsom declared that a state of emergency existed in the State of California due to the COVID-19 pandemic.

On March 19, Governor Newsom issued Executive Order N-33-20, which required all persons living in California to stay at their places of residence except as

[1/] *See* https://COVID.cdc.gov/COVID-data-tracker/#cases_casesper100klast7days; https://COVID-19.ca.gov/state-dashboard/.

needed to maintain continuity of operations in "critical infrastructure sectors" specified by the state health officer ("State Shelter-in-Place Order").

In early May, the Governor and state public health officer cautioned that there was a continuing threat of COVID-19, but recognized there had been significant progress, based on statewide COVID-19 data, on mitigation efforts, the stabilization of new infections and hospitalizations, and an improved ability to test, contact trace, and support infected individuals. This progress supported the "gradual movement" toward reopening the state while following the State Shelter-in-Place Order in according with a four-phase plan known as the "Pandemic Roadmap" (collectively referred to as the "State Order"). The State Order allows for variation in the speed at which local jurisdictions can progress through phases of reopening and does not restrict local health officers from enacting more stringent measures to the extent local conditions warrant them.

C. The County of Ventura Issued Early Emergency, Temporary and Specific Health Orders to Slow the Spread of COVID-19

On March 12, 2020, on the confirmation of COVID-19 cases in Ventura County, the Health Officer declared that a local health emergency existed in Ventura County.

On March 17, 2020, the Health Officer issued a local order that required persons living, working and doing business in Ventura County to take a number of

precautions to prevent or slow the spread of the disease ("March 17 Order"). Among other provisions, the March 17 Order required the immediate closure of businesses that present a higher risk of transmitting COVID-19 among the public, such as bars, nightclubs, movie theaters, gyms, and restaurants except for take-out and delivery. (ER 171.)

On March 20, March 31 and April 9, 2020, the Health Officer issued supplemental orders that imposed local requirements tailored to Ventura County public health needs ("Further Orders"). (ER 156-164.) The Further Orders sought to slow the spread of COVID-19 by ensuring, among other things, that all persons living in Ventura County stay at their places of residence, except for the purpose of engaging in essential activities, engaging in essential travel, and working at essential businesses. The Further Orders defined "Essential Travel," in part, as that which is undertaken to engage "in interstate commerce and otherwise subject to the provisions of the Commerce Clause of the United States Constitution." (ER 169.) Under the Further Orders, "essential businesses" included those deemed "critical infrastructure" by the State Shelter-in-Place Order, but excluded businesses that were not necessary to stop the spread of COVID-19 or that did not enable persons to shelter at home. Non-essential businesses, including firearm stores, were ordered to close effective March 20, 2020. (ER 171.)

On March 28, 2020, while the Further Order was still in effect, the Director of the United States Department of Homeland Security, Cybersecurity & Infrastructure Security Agency ("CISA") issued an "Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response" ("Advisory Memorandum"). (ER 104.) The Advisory Memorandum specifically stated in bold that "[t]his list is advisory in nature. It is not, nor should it be considered, a federal directive or standard. . . . Individual jurisdictions should add or subtract essential workforce categories based on their own requirements and discretion." (ER 104.) Thus, the Health Officer was not obligated to adopt any of the essential workforce categories identified in the Advisory Memorandum for Ventura County.

On April 20, 2020, based on a determination that COVID-19 continued to present an imminent and continuing threat to Ventura County, the Health Officer issued a new Stay Well at Home Order ("April 20 Order"). The April 20 Order superseded all prior orders and broadly applied to "all persons in the cities and the entire unincorporated area of Ventura County" without regard to a person's state residency. (ER 131-150.) All provisions of the April 20 Order were "interpreted to effectuate" the intent and purpose of the Order: "to cause persons to stay at their places of residence to the maximum extent feasible with the minimum disruption to their social, emotional and economic well-being consistent with the overarching

goal of eliminating the COVID-19 pandemic." (ER 132.) While firearm stores could not operate under such constraints while complying with state gun store laws,[2/] the April 20 Order made a "[s]pecial allowance for completion of firearm sales:"

> "Under California law persons wishing to purchase a firearm must complete a background check and waiting period, and all sales must be completed in-person. It is not feasible, therefore, for the Health Officer to require that firearm sales be conducted on-line only. To accommodate persons who initiated the purchase of a firearm at a store located within the County before March 20, 2020 . . . , firearm stores and purchasers may engage in the actions necessary to complete firearm purchases initiated before March 20, 2020, provided that: [¶] a. All activities, including the transfer of possession of any firearm, occur by appointment only, and only the purchaser and one person on behalf of the store shall be present; [¶] b. The firearm store shall remain closed to the general public; and [¶] c. Social Distancing Requirements shall be followed to the greatest extent feasible." (ER 137.)

The April 20 Order prohibited "Non-Essential Travel" within Ventura County but *expressly* "allow[ed] travel into or out of [Ventura] County." (ER 133.) And, like the Further Orders, the April 20 Order expressly provided that "Essential Travel" included "[t]ravel engaged in interstate commerce and otherwise subject to

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[2/] See e.g., Penal Code sections 26850-26860 (requiring prospective purchasers of firearms must perform a "safe handling demonstration" of proper loading and unloading techniques using readily identifiable dummy rounds).

the provisions of the Commerce Clause of the United States Constitution." (ER 148.)

On May 7, the Health Officer issued a new order ("May 7 Order"). (ER 119.) The May 7 Order repealed the previous Health Order. Since May 7, the Health Officer has continued to ease local restrictions, by orders issued on May 12, 20, 22 and 29, 2020. Because neither the State Order nor the Local Reopen Order mentioned firearms, the Health Officer published a "Frequently Asked Questions" guide to address the issue:

> "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 [*sic*] gun stores may fully open to the public provided they implement and register site-specific prevention plans as described www.vcreopens.com." (ER 85.)

Thus, since May 7, firearms stores have been able to fully reopen and persons desiring to engage in firearm transactions have not been restricted from doing so within the County. (ER 119.)

II. Procedural History

A. The Initial Request for Emergency Relief

Shortly after filing suit in late March 2020, Plaintiffs moved for a temporary restraining order against the initial March 20 Health Order. (Dkt. No. 9.) On April 1, 2020, the district court denied the motion finding that "[a]lthough the

[Health] Order may implicate the Second Amendment by impacting 'the ability of law-abiding citizens to possess the "quintessential self-defense weapon" – the handgun,' [*Fyok v. Sunnyvale* (9th Cir. 2015) 779 F.3d 991, 999 ("*Fyok*"), quoting *District of Columbia v. Heller* (2008) 554 U.S. 570, 629 ("*Heller*")]," the court found that "intermediate scrutiny [was] appropriate because the [Health] Order 'is simply not as sweeping as the complete handgun ban at issue in *Heller*.' (*Id*.) The [Health] Order does not specifically target handgun ownership, does not prohibit the ownership of a handgun outright, and is temporary. Therefore, the burden of the [Health] Order on the Second Amendment, if any, is not substantial, so intermediate scrutiny is appropriate." (ER 205.) In applying this standard, the court found that in order for the Health Order to survive intermediate scrutiny, the Health Order "must promote a 'substantial government interest that would be achieved less effectively absent the regulation.' [citing *Fyok*, *supra*, 779 F.3d at p. 1000.]" The court reasoned that while Plaintiffs did not dispute that preventing the spread of the COVID-19 virus was a compelling interest, Plaintiffs "offer[ed] no evidence or argument disputing [Defendants'] determination that its mitigation effort would be as effective without closure of non-essential businesses." (ER 205.) Thus, finding Plaintiffs have not demonstrated they are likely to succeed on the merits of their claim. The court further opined that "while the public interest is served by

protecting Second Amendment rights, the public interest is also served by protecting the public health by limiting the spread of a virulent disease." (ER 205.)

B. The Second Request for Emergency Relief

Shortly after filing the FAC in April 2020, Plaintiffs again moved for a temporary restraining order against the Health Orders. (Dkt. No. 27.)[3/] The district court again denied the request finding that Plaintiffs failed to demonstrate they are likely to succeed on their Second Amendment claim and that the balance of equities did not favor a temporary restraining order. (ER 130.) The Court granted the order to show cause why the temporary restraining order should not be issued and set the matter for hearing. (ER 130.)[4/] However, Plaintiffs withdrew their ex parte motion prior to the hearing on the order to show cause.

C. The Ruling Presently on Appeal

On June 2, 2020, Defendants filed a motion to dismiss Plaintiffs' FAC for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure because the Health Orders pass constitutional muster under the framework of

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[3/] Plaintiffs also filed a motion for an expediated hearing on a preliminary injunction on April 14, 2020. (Dkt. No. 20.) However, Plaintiffs withdrew their motion prior to the hearing. (Dkt. No. 40.)

[4/] The district court consolidated the hearings on the order to show cause why the temporary restraining order should not be issued and Plaintiffs' motion for a preliminary injunction per the court's scheduling order on April 27, 2020. (Dkt. No. 28.) However, Plaintiffs withdrew both motions prior to the hearing.

Jacobson v. Commonwealth of Massachusetts (1905) 197 U.S. 11 [25 S.Ct. 358] ("*Jacobson*") and under traditional constitutional analysis. (Dkt. No. 42; ER 72.)[5/]

On October 21, 2020, the district court issued its order granting Defendants motion to dismiss Plaintiffs' FAC. (ER 5.) The court held that the FAC failed to state a claim under rule 12(b)(6) under both the *Jacobson* framework and traditional constitutional analysis. (ER 13-15.) The court reasoned that "under the *Jacobson* framework, judicial review of constitutional challenges to emergency measures taken by the state during a public health crisis is narrow" and "entitled to deference." (ER 13.) The court found Plaintiffs' argument that *Jacobson* "'must be read with its historical limitations in mind,'" as it was decided "'long before the evolution of modern constitutional scrutiny'" unavailing since "the weight of authority from both the United States Supreme Court and Circuits indicates the *Jacobson* framework is valid authority." (ER 15.) The district court also rejected Plaintiffs' argument that the *Jacobson* framework applies to "'legislative-enacted restraints on general liberty interests not specifically protected by enumerated fundamental rights'" on the grounds that: (1) "the Supreme Court in *Jacobson* considered a challenge to state law and a regulation promulgated by the local board of health, so its holding is not limited to 'legislatively-enacted restraints.' [Citation];

[5/] Defendants also argued that the FAC was mooted by the May 7, 2020, Health Order. However, this issue is not part of the appeal.

[(2)] the holding of *Jacobson* is not limited to 'general liberty interests' as opposed to 'enumerated fundamental rights,' nor do Defendants point to language from *Jacobson* supporting such an interpretation." (ER 15 (italics omitted).) The district court pointed out that the Supreme Court "framed its holding in *Jacobson* broadly, reasoning 'the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.'" (*Jacobson*, *supra*, 197 U.S. at p. 26.) (ER 15.) The district court found that because Plaintiffs' claim involves a constitutional challenge to the Health Order issued by the County of Ventura in response to the COVID-19 pandemic, the *Jacobson* framework applies. (ER 15.)

Under the *Jacobson* standard of review, the district court opined that it must determine "(1) whether the County's orders 'ha[ve] no real or substantial relation' to the County's objective of preventing the spread of COVID-19; or (2) whether the County of Ventura's orders affect 'beyond all question, a plain, palpable invasion of rights secured by' the Constitution. [Citation]." (ER 16.) The district court concluded that the first prong of *Jacobson* was satisfied. (ER 16.) The district court applied the second prong of the *Jacobson* framework and found the Health Orders "did not amount to a plain and palpable violation of the Second Amendment, as required by *Jacobson*. Unlike the total prohibition of handguns at issue in *Heller*,

the [Health Orders] are temporary and do not violate the Second Amendment." (Citing *Silvester v. Harris* (9th Cir. 2016) 843 F.3d 816, 827 ("*Silvester*"); *Altman v. County of Santa Clara* (N.D. Cal. 2020) 464 F.Supp.3d 1106 [2020 WL 2850291 at *11-12] ("*Altman*").) (ER 18.)

The district court also applied this Court's traditional Constitutional "framework for Second Amendment claims. . . . [¶] '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."'" (*Duncan v. Bacerra* (9th Cir. 2020) 970 F.3d 1133, 1145 ("*Duncan*"), quoting *U.S. v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1136 ("*Chovan*").)[6/] (ER 19.) For purposes of the motion, the district court assumed the Health Orders burdened the Second Amendment and proceeded "to the second prong of analysis." (ER 20.)

In order to determine the appropriate level of scrutiny, the district court applied the test set forth in *Silvester* and asks "'how "close" the challenged law comes to the core right of law-abiding citizens to defend hearth and home;' and 'whether the law imposes substantial burdens on the core right.'" (Citing *Silvester*,

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[6/] Although this court 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, the rational set forth by the court and adopted by the District Court in this case remains valid and applicable. (*Duncan*, *supra*, 970 F.3d 1133.)

supra, 843 F.3d at p. 821.) "Only where both questions are answered in the affirmative will strict scrutiny apply." (*Duncan*, *supra*, 970 F.3d at p. 1146, citing *Silvester*, 843 F.3d at p. 821, internal quotations omitted.) (ER 20.) The district court found the Health Orders "do not substantially burden the Second Amendment. The stay well at home orders are analogous to and less restrictive than the waiting periods upheld in *Silvester* . . . because the stay well at home orders are temporary, do not specifically target Second Amendment activities for restriction, and do not impose a categorical ban on the ownership of arms." (ER-20.)

Because the Health Orders do not substantially burden the "core right of the Second Amendment," the district court concluded that "intermediate scrutiny is the appropriate standard of review if *Jacobson* did not apply." (ER 20-21.) Under intermediate scrutiny, the district court applied the second-step of *Chovan* which requires two elements be met: "(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*, *supra*, 735 F.3d at p. 1139.) Applying the second-step of *Chovan*, the district court concluded that "there is a reasonable fit between the County's objective of slowing the spread of COVID-19 and the temporary closure of non-essential businesses, including firearms retailers." The district court further concluded that "even though Defendants may have been able to adopt less restrictive means of achieving its goal of reducing the spread of

COVID-19, [they] were not required to do so" since "intermediate scrutiny does not require the least restrictive means of furthering a given end." (Citing *Silvester*, *supra*, 843 F.3d at p. 827, internal quotations omitted.) (ER-21.)

The district court entered judgment on April 21, 2020, dismissing the FAC with prejudice.

SUMMARY OF ARGUMENT

This Court has repeatedly upheld the validity and constitutionality of the restrictions imposed by California and local governments on businesses, individuals, and even houses of worship to combat the spread of COVID-19, including twice since *Roman Catholic Diocese of Brooklyn v. Cuomo* (Nov. 25, 2020) 141 S.Ct. 63 [208 L.Ed.2d 206] ("*Roman Catholic Diocese*").[7/] Plaintiffs have failed to present any cognizable rationale for this Court to deviate from that precedent now.

Defendants set forth ample evidence in support of the Health Orders compliance with the *Jacobson* framework. The evidence presented by Defendants confirms that the Health Orders have a "real or substantial relation" to Defendants' objective of preventing the spread of COVID-19 and do not affect "beyond all

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[7/] *South Bay United Pentecostal Church v. Newsom* (9th Cir. Dec. 24, 2020), 983 F.3d 383 (Mem); *Harvest Rock Church v. Newsom* (2020) 977 F.3d 728, vacated, [2020 WL 7061630]; *South Bay United Pentecostal Church v. Newsom* (9th Cir. May 22, 2020) 959 F.3d 938; *Gish v. Newsom* (9th Cir. Dec. 23, 2020, Nos. 20-55445, 20-56324) 2020 WL 7752732.

question, a plain, palpable invasion of rights secured by" the Constitution. (*Jacobson*, *supra*, 197 U.S. at p. 31.) Thus, the Health Orders are consistent with the *Jacobson* framework and do not impinge on Plaintiffs' Second Amendment rights. While this Court need not analyze Plaintiffs' Second Amendment claim under traditional constitutional analysis since *Jacobson* applies, even if traditional constitutional scrutiny is applied to analyze Plaintiffs' Second Amendment claim, the claim still fails.

Plaintiffs do not even try to rebut this analysis. Instead, they assert that the Supreme Court's decision in *Roman Catholic Diocese* compels the application of strict scrutiny to their Second Amendment claims. This assertion, however, is not supported by *Roman Catholic Diocese* or any other case. *Roman Catholic Diocese* applied to the limited factual circumstances in the context of the First Amendment Free Exercise analysis, it did not overrule *Jacobson* or prior decisions holding that the *Jacobson* Framework applies to cases challenging the COVID-19 restrictions that do not involve Free Exercise claims.

STANDARD OF REVIEW

This Court reviews an appeal of a district court's dismissal under rule 12(b)(6) of the Federal Rules of Civil Procedure de novo. (*Puri v. Khalsa* (9th Cir. 2017) 844 F.3d 1152, 1157.) This court accepts as true all well-pleaded allegations of material fact and construe them in the light most favorable to the plaintiffs.

(*Daniels-Hall v. National Educ. Ass'n.* (9th Cir. 2010) 629 F.3d 992, 998.) This Court also reviews de novo a district court's legal determinations, including constitutional rulings, and its determinations on mixed questions of law and fact that implicate constitutional rights. (*Berger v. City of Seattle* (9th Cir. 2009) 569 F.3d 1029, 1035 (en banc).)

ARGUMENT

I. *Jacobson* Applies to The Second Amendment Claim in This Case

As the District Court correctly determined, the *Jacobson* framework applies to this case. The Supreme Court has long recognized that "a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." (*Jacobson*, *supra*, 197 U.S. at p. 27; see also *Kansas v. Hendricks* (1997) 521 U.S. 346, 356 [117 S.Ct. 2072] [recognizing continuing validity of *Jacobson*], and *South Bay*, *supra*, 140 S.Ct. at p. 1613 (Roberts, C.J., concurring).) The Supreme Court has permitted states to enact "quarantine laws and health laws of every description." (*Jacobson*, *supra*, 197 U.S. at p. 27, internal quotations omitted.) Although the Constitution is not suspended during a public health emergency, the Supreme Court has held that state governments are entitled to deference, both generally in the management of their state's public health (*Jacobson*, *supra*, 197 U.S. at p. 38), and specifically in making decisions in areas of

scientific uncertainty. (*Marshall v. United States* (1974) 414 U.S. 417, 427 [94 S.Ct. 700].)

The Supreme Court recently reaffirmed the proposition, rooted in *Jacobson*, that members of the judiciary "are not public health experts, and [] should respect the judgement of those with special expertise and responsibility in this area." (*Roman Catholic Diocese*, *supra*, 141 S.Ct. at p. 68.) Indeed, a majority of the court expressly recognized the deference due states in the management of public health. (*Id*. at p. 74 (Kavanaugh, J., concurring) ["The Constitutional principally entrusts the safety and health of the people to the politically accountable officials of the States," and "[f]ederal courts therefore must afford substantial deference to state and local authorities about how best to balance competing polity considerations during the pandemic"] (quoting *South Bay*, *supra*, 140 S.Ct. at p. 1613) (Roberts, C.J., concurring)); *Id*. at p. 76 (Roberts, C.J., dissenting) (reaffirming position in *South Bay*); *Id*. at p. 78 (Breyer, J., dissenting) ["courts must grant elected officials broad discretion when they undertake to act in areas fraught with medical and scientific uncertainties" (internal quotation omitted)]; *Id*. at p. 79 (Sotomayor, J., dissenting) ["Justices of this Court play a deadly game in second guessing the expert judgment of health officials about the environments in which a contagious virus, now infecting a million Americans each week, spreads most easily"].) Thus, a court's review of temporary measures taken during such an emergency is not based on

traditional constitutional review, but instead looks to whether the challenged action has a real or substantial relation to the crisis and is not "beyond all question a plain, palpable invasion" of clearly protected rights. (*Jacobson*, *supra*, 197 U.S. at p. 31.)

Plaintiffs claim that *Jacobson* was essentially overruled (or at least severely restricted) by the Supreme Court's ruling in *Roman Catholic Diocese*. Contrary to Plaintiffs' position, the Supreme Court authority has made clear that the *Jacobson* Framework is still applicable to this case. Despite having the opportunity to do so, the Supreme Court's per curium opinion in *Roman Catholic Diocese* neither minimized nor overturned *Jacobson.* In fact, it did not cite it at all.

Additionally, recent case law affirms that *Jacobson* is still good law. (*Stewart v. Justice* (U.S Dist. Ct. S.D. W.V. February 9, 2021) 2021 WL 472937 at *3). Several circuit courts have applied the *Jacobson* framework to COVID-19 related challenges. (*Id.*; *Big Tyme Investments, L.L.C. v. Edwards* (5th Cir. 2021) 985 F.3d 456; *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer* (6th Cir. 2020) 814 Fed.Appx. 125, 127; *Illinois Republican Party v. Pritzker* (7th Cir. 2020) 973 F.3d 760, 763; *Robinson v. Attorney General* (11th Cir. 2020) 957 F.3d 1171, 1179-1180). Thus, it is clear that the *Jacobson* framework is still the proper lens through which to analyze Plaintiffs' Second Amendment claims. As such, the District Court did not err in applying *Jacobson* to this case.

II. The Health Orders Are Consistent with *Jacobson*

Under *Jacobson*, the Health Order is subject to "judicial deference and not subject to traditional constitutional scrutiny." (*Gish v. Newsom* (C.D. Cal. April 23, 2020, No. EDCV 20-755 JGB (KKx)) 2020 WL 1979970 at * 4.) In other words, the Health Order is lawful so long as it bears a "real or substantial relation" to the public health crisis and are not, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." (*Jacobson*, *supra*, 197 U.S. at p. 31.) Under this standard of review, the court must determine (1) whether the Health Orders "ha[ve] no real or substantial relation" to the Defendants' objective of preventing the spread of COVID-19; or (2) or whether the Health Order affects "beyond all question, a plain, palpable invasion of rights secured by" the Constitution. (ER 21, citing *Jacobson, supra,* 197 U.S. at p. 31.) The Health Order meets the first prong under *Jacobson.* The Health Order bore a substantial relation to the public health crisis. The Health Order was temporary, specific and tailored to prevent the spread of a highly contagious and potentially deadly disease through a combination of targeted requirements, all of which were aimed at minimizing human-to-human contact by directing Ventura County residents to stay at their places of residence to the maximum extent feasible. (ER 131.) At all times relevant, the Health Officer has, and continues to, monitor the pandemic's impact on

persons within Ventura County and has updated the Local Orders as necessary to address the emergency. (ER 131.)

Thus, the stated objective of the Health Orders "is to ensure that the maximum number of persons stay in their places of residence to the maximum extent feasible, while enabling essential services to continue, to slow the spread of COVID-19 to the maximum extent possible." (ER 164.) To achieve this goal, the Health Officer elected to deem certain businesses, travel and services "essential" and restricted businesses, travel and services that were not deemed essential. As the District Court correctly concluded, "[b]ecause those limitations restricted in-person contact, they are substantially related to the objective of preventing the spread of COVID-19." (ER 16.) (See also, *Altman*, *supra*, 464 F.Supp.3d at p. 1121 [holding that similar "shelter-in-place" orders issued by health officers in four Northern California counties which required closure of all non-essential businesses "easily" met first step of two-step test: order bore "real or substantial relationship to the legitimate public health goal of reducing COVID-19 transmission and preserving health care resources"].) Therefore, the first prong of *Jacobson* is met.

The Health Orders also satisfy the second prong under *Jacobson.* In order to meet the second prong under *Jacobson*, the Health Orders must not affect, "beyond all question, a plain, palpable invasion of" the Second Amendment. (*Jacobson*, *supra*, 197 U.S. at p. 31.)

The Second Amendment protects the right to keep and bear arms. (*Heller*, *supra*, 554 U.S. at p. 635.) That right, however, is not unlimited. (*Id*. at p. 626.) The government may place certain limits on such rights. (*Id*. at pp. 626-627; *U.S. v. Carpio-Leon* (4th Cir. 2012) 701 F.3d 974, 977 ["the Second Amendment does not guarantee the right to possess for *every purpose*, to possess *every type of weapon*, to possess at *every place*, or to possess by *every person*"]); *U.S. v. Huitron-Guizar* (10th Cir. 2012) 678 F.3d 1164, 1166 ["The right to bear arms, however venerable, is qualified by what one might call the 'who,' 'what,' 'where,' 'when,' and 'why'"].)

Plaintiffs cannot demonstrate that the Health Orders' imposition of a temporary and emergency pause, from March 20 to May 7, on their ability to purchase or sell a gun within Ventura County is, "beyond all question, a plain, palpable invasion of rights secured by the fundamental law." (*Jacobson*, *supra*, 197 U.S. at p. 31.) Unlike the right to use, possess, or otherwise keep and bear arms in the name of self-defense (which rights the Health Order does not implicate), the law is well-established that any right to purchase or sell firearms is subject to regulation without violating the Second Amendment, as explained below.

The burden imposed by the Health Orders on the Second Amendment is "very small" and not a plain and palpable invasion of Second Amendment rights. (*Silvester*, *supra*, 843 F.3d at p. 827.) The *Silvester* court held that the law

requiring the 10-day waiting period did not place a substantial burden on the Second Amendment right because it did not prevent, restrict or place any conditions on how guns were stored or used after a purchaser took possession. (*Silvester*, *supra*, 843 F.3d at p. 827.) The court also noted that historically, the delivery of weapons took time, and that the "very small" burden of waiting 10 days before taking possession is less than the burden imposed by other challenged regulations to which Ninth Circuit courts have applied intermediate scrutiny:

> "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." (*Silvester*, *supra*, 843 F.3d at p. 827.)

The Health Order may have presented a similarly "very small" burden on the Second Amendment right. It did not limit or regulate the ability of persons to possess firearms or what they may do with those firearms in their homes. The Health Order closed non-essential businesses, which may have incidentally delayed the ability of a person to purchase a firearm. The Health Order was in effect for a finite period – from March 20 through May 7. As such, the minor delay is comparable to the constitutionally accepted delays resulting the 10-day cooling-off period. As the court noted in *Silvester*, much more serious limitations on the ability

to bear arms have also not been considered a substantial burden on (let alone, plain and palpable invasion of) Second Amendment rights. As such, the temporary delay in firearm and ammunition transactions caused by the Health Orders was not a plain and palpable invasion of clearly protected rights.

Indeed, because the Health Orders do not impose a complete prohibition on the right to bear arms that was deemed to be "categorically unconstitutional" in *Heller*, and did not otherwise impermissibly burden the plaintiffs' rights, the Health Orders do not constitute a plain and palpable invasion of Second Amendment rights. (*Altman, supra,* 464 F.Supp.3d at p. 1121, citing *Heller, supra*, 554 U.S. at p. 629.) The court in *Altman* found that the Alameda County order's temporal limits, well-defined criteria for the termination of the order that required county officials to "continually review whether modifications to the Order are warranted," evidence that the order was not meant to be long term, and the facial neutrality of the order all supported its conclusion that the order was not, "beyond question, in palpable conflict with the Second Amendment." (*Id*. at pp. 1123-1124, internal quotations omitted.) All of the factors relied upon by the court in the *Altman* case apply here and compel the same conclusion--the Health Orders do not amount to a plain and palpable violation of the Second Amendment and are therefore valid under *Jacobson*.

III. The Health Orders Satisfy Traditional Constitutional Analysis

While the District Court did not need to analyze Plaintiffs' Second Amendment claim under traditional constitutional analysis since *Jacobson* applies, the District Court nonetheless applied such analysis and correctly determined that Plaintiffs' claim does not survive the "Ninth Circuit's traditional framework for Second Amendment claims." (ER 19.) Thus, even if traditional constitutional scrutiny is applied to analyze Plaintiffs' Second Amendment claim, the claim still fails.

In *Chovan*, *supra*, 735 F.3d at page 1136, this Court adopted a two-step inquiry to analyze claims that a law violates the Second Amendment. This test "(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." (*Ibid*.)

The Health Orders do not burden conduct protected by the Second Amendment. The Health Orders required the temporary closure of non-essential businesses, including gun stores. Plaintiffs have argued that the temporary closure completely destroyed Plaintiffs' Second Amendment Rights. Plaintiffs' position is not supported by the law or the evidence. Since April 20, the Health Orders allowed the completion of gun purchases initiated before March 20. Would-be gun purchasers and firearms retailers were unable to engage in transactions concerning

firearms within Ventura County only temporarily, from March 20 to May 7. This temporary pause occasioned by a public health crisis does not implicate the Second Amendment, as California has a long history of delaying possession of firearms without impinging on the Second Amendment. Indeed, California has had some kind of waiting period statute for firearm purchases continuously since 1923. (*Silvester*, *supra*, 843 F.3d at p. 823.) The waiting periods encompassed both time for the California Department of Justice ("Cal DOJ") to conduct a background check and time for a cooling-off period (so that guns were not purchased in the heat of a conflict). (*Id*. at pp. 823-824.) Cal DOJ has up to 30 days to complete a background check, and the cooling-off period extends 10 days beyond that. As such, the Second Amendment has never protected immediate or convenient purchase and sale of guns.

Even if the Health Order is found to burden conduct protected by the Second Amendment, Plaintiffs' claim still fails. The second prong of *Chovan* requires the court to determine the appropriate level of constitutional scrutiny. (*Chovan*, *supra*, 735 F.3d at p. 1136.) If a challenged law does not strike at the core Second Amendment right or substantially burden that right, then intermediate scrutiny applies. (*Silvester, supra*, 873 F.3d at p. 821; *Jackson v. City and County of San Francisco* (9th Cir. 2014) 746 F.3d 953, 961; *Chovan, supra,* 735 F.3d at p. 1138.)

Only when both are answered in the affirmative will strict scrutiny apply. (*Silvester, supra*, 873 F. 3d at p. 821.)

The Health Orders do not substantially burden the Second Amendment because they are less restrictive than the waiting periods upheld in *Silvester.* Plaintiffs attempt to argue that the Health Orders are more pervasive than the 10-day waiting period in *Silvester* is unavailing. In *Silvester*, the plaintiffs challenged the ten-day waiting period law regarding its application to "those purchasers who have previously purchased a firearm or have a permit to carry a concealed weapon, and who clear a background check in less than ten days." (*Silvester*, *supra*, 873 F.3d at p. 818.) This Court rejected the argument that strict scrutiny applied to the waiting period law because the law added to existing regulations, holding that the waiting period law served other interests. (*Id*. at pp. 828-829.)

Because the Health Orders are temporary, do not specifically target Second Amendment activities for restrictions, and do not impose a categorical ban on the ownership of firearms, the Health Order does not substantially burden the Second

Amendments. As such, intermediate scrutiny is the applicable standard of review if *Jacobson* does not apply. [8/]

Under intermediate scrutiny, the second prong of *Chovan* requires the following two elements to be met: "(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*, *supra*, 735 F.3d at pp. 1139.) Here, the Health Orders stated objective is to stop the spread of COVID-19. Clearly, this is a significant, substantial and important interest. Thus, the first element under the *Chovan* analysis is met. Defendants determined social isolation was the best tool in slowing the spread of COVID-19 in Ventura County. As set forth in the Health Orders, "social isolation is considered useful as a tool to control the spread of pandemic viral infections." (ER 171.) As such, there is a reasonable fit between Defendants objective to stop the spread of COVID-19 and the temporary closure of non-essential businesses, including firearms stores.

Plaintiffs contend that the closure of firearms stores was unnecessary to slow the spread of COVID-19. However, Defendants were not required to adopt the least

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[8/] Plaintiffs' reliance on a North Carolina District Court case for the proposition that strict scrutiny should apply is misplaced. (See *Bateman v. Perdue* (E.D.N.C. 2012) 881 F.Supp.2d 709.) The statute at issue in that case imposed a complete prohibition on carrying, possessing and selling guns during the state of emergency, regardless the type of emergency at issue. (*Id*.) The Stay Well at Home Order does no such thing.

restrictive means to achieve its goal of reducing the spread of COVID-19. "Intermediate scrutiny does not require the least restrictive means of furthering a given end." (*Silvester*, *supra*, 843 F.3d at p. 827.) Thus, the Health Orders survive intermediate scrutiny.

IV. The Health Orders Satisfy Strict Scrutiny

Even if the Health Orders are subject to strict scrutiny, which they are not, Plaintiffs are still unlikely to succeed because Defendants restrictions on non-essential businesses, including firearm stores, are narrowly tailored to serve its compelling interest in combatting the spread of COVID-19.

A. Defendants Have a Compelling Interest in Curbing Community Spread of COVID-19

Defendants restrictions on non-essential businesses, including gun stores, serve a compelling interest. As the Supreme Court noted, "[s]temming the spread of COVID–19 is unquestionably a compelling interest." *Roman Catholic Diocese*, 2020 WL6948354, at *2. The Health Order restrictions sought to reduce the spread of COVID-19. As discussed above, Defendants determined social isolation was the best tool in slowing the spread of COVID-19 in Ventura County. As set forth in the Health Orders, "social isolation is considered useful as a tool to control the spread of pandemic viral infections." (ER 171.) Thus, the temporary restrictions placed on

non-essential businesses by the Health Orders, including gun stores, served a compelling interest.

B. Defendants COVID-19 Restrictions Are Narrowly Tailored to Their Interest of Curbing the Spread of COVID-19

The Health Orders' restrictions on non-essential businesses were carefully calibrated to the health risks they pose. Narrow tailoring requires that a law restrict no more than necessary to advance the government's compelling interest, and that the government "seriously undertook to address the problem with the least intrusive tools readily available to it." *McCullen v. Coakley*, 573 U.S. 464, 494 (2014); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). Although this is a demanding standard, it is not impossible to satisfy (*Williams-Yulee v. Fla. Bar.*, 575 U.S. 433, 449 (2015)) Here, the Health Orders satisfy this standard because the County of Ventura was at a critical point in trying to prevent the proliferation of the virus in the community and research on the transmissibility and virulence was in its early stages when the Health Orders were implemented.

As discussed above, the restriction imposed by the Health Orders on non-essential businesses, including firearm stores, was temporary and aimed at keeping people in their homes to the maximum extent possible, and anything less restrictive would not have accomplished that goal. Plaintiffs have not and cannot show a lesser restriction during the March 20th through May 7th timeframe that the Health Orders

were in place would have achieved the County's compelling interest in curbing the community spread of the disease.

In addition, the Health Officer continuously fine-tuned the restrictions on non-essential businesses in light of changing circumstances and tried to employ less restrictive alternatives. For example, the Health Officer eased restrictions on gun stores on April 20th allowing for the completion of gun sales. Thus, not only did Defendants consider less restrictive measures, they were implemented when the Health Officer determined it was safe to do so. As such, the Health Orders were narrowly tailored to serve Defendants' compelling interest in slowing the spread of COVID-19. Therefore, even if the Health Orders are reviewed under the strict scrutiny framework they still survive constitutional muster.

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CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court.

Respectfully submitted,

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Date: APRIL 5, 2021

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I am unaware of any related cases currently pending in this Court other than the cases identified in the initial brief filed by Appellants.

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CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 6,821 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: /s/ Christine Renshaw Date: April 5, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 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.

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