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' REPLY BRIEF

JOSEPH G.S. GREENLEE
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

RAYMOND M. DIGUISEPPE
THE DIGUISEPPE LAW FIRM, P.C.
4320 Southport-Supply Road
Suite 300
Southport, NC 28461
(910) 713-8804
law.rmd@gmail.com

RONDA BALDWIN-KENNEDY
LAW OFFICE OF RONDA BALDWIN-KENNEDY
5627 Kanan Rd. #614
Agoura Hills, CA 91301
(951) 268-8977
ronda@lorbk.com

Counsel for Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF CITED AUTHORITIES ii
ARGUMENT 1
I. The Supreme Court has repeatedly made clear that the *Jacobson* framework does not apply in a case like this. 3
II. The destruction of core Second Amendment rights for 48 consecutive days is an extreme and unprecedented burden compelling categorical invalidation. 9
III. Defendants cannot satisfy heightened scrutiny because they failed to demonstrate any sort of tailoring to minimize the burdens that their shutdown orders broadly imposed against core Second Amendment rights. 16
CONCLUSION 21
CERTIFICATE OF COMPLIANCE 23
CERTIFICATE OF SERVICE 24

TABLE OF CITED AUTHORITIES

Cases

Bd. of Trustees of State Univ. of New York v. Fox,
492 U.S. 469 (1989) 17

Big Tyme Invs., L.L.C. v. Edwards,
985 F.3d 456 (5th Cir. 2021) 7

Church of Lukumi Babalu Aye, Inc. v. Hialeah,
508 U.S. 520 (1993) 2

District of Columbia v. Heller,
554 U.S. 570 (2008) 5, 6, 9

Dominguez v. Mutual Life Ins. Co. of New York,
14 F. App'x 810 (9th Cir. 2001) 12

Elrod v. Burns,
427 U.S. 347 (1976) 13

Frisby v. Schultz,
487 U.S. 474 (1988) 17

Gateway City Church v. Newsom,
592 U.S. ___, 209 L. Ed. 2d 178 (2021) 2

Geraci v. Homestreet Bank,
347 F.3d 749 (9th Cir. 2003) 21

Gish v. *Newsom*,
592 U.S. ___, 209 L. Ed. 2d 30 (2021) 2

Gish v. Newsom,
Nos. 20-55445, 20-56324, 2020 WL 7752732 (9th Cir. 2020) 1

Harvest Rock Church v. Newsom,
592 U.S. ___, 141 S. Ct. 889, 208 L. Ed. 2d 448 (2020) 2

Harvest Rock Church, Inc. v. Newsom,
977 F.3d 728 (9th Cir. 2020) 1

Ill. Republican Party v. Pritzker,
973 F.3d 760 (7th Cir. 2020) 7

In re Abbott,
954 F.3d 772 (5th Cir. 2020) 7

Jacobson v. Commonwealth of Massachusetts,
197 U.S. 11 (1905) .... *passim*

Klein v. City of San Clemente,
584 F.3d 1196 (2009) 13

League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer,
814 F. App'x 125 (6th Cir. 2020) 7

Luis v. United States,
__ U.S. __, 136 S. Ct. 1083 (2016) 11

Mai v. United States,
952 F.3d 1106 (9th Cir. 2020) 5, 6

McCullen v. Coakley,
573 U.S. 464 (2014) 16

McDonald v. City of Chicago,
561 U.S. 742 (2010) 13

Robinson v. AG,
957 F.3d 1171 (11th Cir. 2020) 7

Roman Catholic Diocese v. Cuomo,
__ U.S. __, 141 S. Ct. 63 (2020) .... *passim*

Silvester v. Harris,
843 F.3d 816 (9th Cir. 2016) .... *passim*

South Bay United Pentecostal Church v. Newsom,
592 U.S. at ___, 141 S. Ct. 716, 209 L. Ed. 2d 22 (2021) 2, 3, 5, 20

South Bay United Pentecostal Church v. Newsom,
959 F.3d 938 (9th Cir. 2020) 1

South Bay United Pentecostal Church v. Newsom,
983 F.3d 383 (9th Cir. 2020) 1

Stewart v. Justice,
__ F. Supp. 3d __, 2021 WL 472937 (S.D. W. Va. 2021) 8

Tandon v. Newsom,
__ U.S. __, __ S. Ct. __, 2021 WL 1328507 (Apr. 9, 2021) .... *passim*

Tandon v. Newsom,
No. 21-15228, 2021 WL 1185157 (9th Cir. 2021) 1

Uzuegbunam v. Preczewski,
__ U.S. __, 141 S. Ct. 792 (2021) 12

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 17

Constitutional Provisions

U.S. Const. amend. I .... *passim*

U.S. Const. amend. II .... *passim*

Statutes and Regulations

Cal. Penal Code § 27535(a) 14

Cal. Penal Code § 28220(f) 14, 15

ARGUMENT

Defendants argue that "[t]his 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," and that "Plaintiffs have failed to present any cognizable rationale for this Court to deviate from that precedent now." Answer Br. 15 (citing *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020); *South Bay United Pentecostal Church v. Newsom*, 983 F.3d 383 (9th Cir. 2020); *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728 (9th Cir. 2020); *Gish v. Newsom*, Nos. 20-55445, 20-56324, 2020 WL 7752732 (9th Cir. 2020)).

But every case upholding the restrictions Defendants cite has been reversed by the Supreme Court of the United States. Earlier this month, while reversing this Court's denial of injunctive relief in a challenge to "California's Covid-19 restrictions on private gatherings and various limitations on businesses," *Tandon v. Newsom*, No. 21-15228, 2021 WL 1185157, at *1 (9th Cir. 2021), the Supreme Court spotlighted these cases as illustrating a troublesome pattern of jurisprudence in need of correction:

> This is the fifth time the Court has summarily rejected the Ninth Circuit's analysis of California's COVID restrictions on religious exercise. See *Harvest Rock Church v. Newsom*, 592 U. S. ___, 141 S. Ct. 889, 208 L. Ed. 2d 448 (2020); *South Bay* [*United Pentecostal Church v. Newsom*], 592 U. S. at ___, 141 S. Ct. 716, 718, 209 L. Ed. 2d 22 [(2021)]; *Gish* v. *Newsom*, 592 U. S. ___, 209 L. Ed. 2d 30 (2021); *Gateway City* [*Church v. Newsom*], 592 U. S. ___, 209 L. Ed. 2d 178 [(2021)]. It is unsurprising that such litigants are entitled to relief. California's Blueprint System contains myriad exceptions and accommodations for comparable activities, thus requiring the application of strict scrutiny. And historically, strict scrutiny requires the State to further "interests of the highest order" by means "narrowly tailored in pursuit of those interests." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U. S. 520, 546, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993) (internal quotation marks omitted). That standard "is not watered down"; it "really means what it says." *Ibid.* (quotation altered).

Tandon v. Newsom, __ U.S. __, __ S. Ct. __, 2021 WL 1328507, at *5 (Apr. 9, 2021).

Tandon's lesson for this case is that government-imposed restrictions on civil liberties cannot be justified through a watered-down analysis—even in the event of a pandemic—which is what Defendants seek in advocating for what is essentially rational basis review of the restraints they imposed on the right to keep and bear arms under the Second Amendment. The pandemic is no justification or excuse for government officials to infringe constitutional rights based on their policy judgments

about which rights are and are not "essential" enough to respect. The Constitution, and all the civil liberties it guarantees, maintains its teeth at all times, *especially* in the event of a pandemic like COVID-19. *See South Bay*, S. Ct. at 718 (Statement of Gorsuch, J., joined by Thomas and Alito, JJ.) ("Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution.") (emphasis in original).

I. The Supreme Court has repeatedly made clear that the *Jacobson* framework does not apply in a case like this.

Although Defendants continue to cling to it as a controlling authority, the Supreme Court has now decided several cases involving COVID-19 restrictions and has *not once* applied the framework of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In fact, when Justice Gorsuch expressly rejected *Jacobson* in *Roman Catholic Diocese v. Cuomo*, cogently explaining why it is entirely inapplicable in cases like this, __ U.S. __, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring), no justice questioned Justice Gorsuch's analysis or otherwise defended *Jacobson* there, and since then, no justice of the high court has so much as mentioned *Jacobson* in any case challenging a restriction based on COVID-19. Instead, the *Roman Catholic Diocese* majority analyzed the

Governor of New York's "very severe restrictions" limiting attendance at religious services to 10 or 25 persons under strict scrutiny—the "traditional legal test" for restrictions on the First Amendment's Free Exercise Clause—with no mention of *Jacobson*. *Id.* at 65–66, 80. Justice Gorsuch's concurring opinion denouncing *Jacobson*, even declaring as "*mistaken*" any prior reliance on the case as a viable framework for COVID-19-related liberty restrictions, was left to stand unscathed. *Id.* at 70 (italics added).

To the extent *Jacobson* has remaining vitality in the modern constitutional age, it has no import in this case. As Justice Gorsuch explained, "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Id.* Rather, *Jacobson* "essentially applied rational basis review," which was "the traditional legal test associated with the right at issue" there. *Id.* *Jacobson*'s rational basis test cannot apply to a "textually explicit right" such as "religious exercise." *Id.* at 71. Nor, for that matter, would it ever properly apply to the right to keep and bear arms—particularly when the Supreme Court has already expressly rejected any use of such a test in evaluating the constitutionality of a restraint upon that right. *District of*

Columbia v. Heller, 554 U.S. 570, 627 n.27 (2008). Thus, the "traditional legal test"—strict scrutiny—applied in *Roman Catholic Diocese*, and the traditional legal test must apply here as well. *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring); *see also Mai v. United States*, 952 F.3d 1106, 1115 (9th Cir. 2020) ("laws burdening Second Amendment rights must withstand more searching scrutiny than rational basis review").

In fact, Chief Justice Roberts "downplay[ed] the relevance of *Jacobson*" in his *Roman Catholic Diocese* dissent and distanced himself from that case by suggesting he "never really relied in significant measure on *Jacobson*." *Roman Catholic Diocese*, 141 S. Ct. at 71 (Gorsuch, J., concurring); *see also id.* at 75–76 (Roberts, C.J., dissenting). He did so for good reason.

Then, in *South Bay*, where the Supreme Court enjoined the California Governor's prohibition on indoor worship services, the majority again applied the traditional legal test—strict scrutiny—and *Jacobson* was not mentioned anywhere in the majority opinion, the two concurring opinions, or the dissenting opinion. 141 S. Ct. 716 (2021).

Most recently, on April 9, 2021, in reversing this Court's decision concerning the restrictions on the free exercise of religion at issue in *Tandon*, the Supreme Court emphasized its "decisions have made . . . clear" that "strict scrutiny" applies to COVID-19 regulations on the Free Exercise Clause whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 2021 WL 1328507, at *1 (citing *Roman Catholic Diocese*, 141 S. Ct. at 67). Again, notably, *Jacobson* was not mentioned at all.

Defendants try to spin the stark *absence* of *Jacobson* in the high court's most recent authorities as somehow amounting to proof that *Jacobson* not only applies but controls the outcome here. Answer Br. 19. Failing to even mention a case and instead applying a different framework is a peculiar way of making "clear" that a case's framework applies. Self-evidently, and as the Supreme Court just made clear in *Tandon*, the absence of *Jacobson* stems from the absence of its significance, for what controls is the traditional legal test that applies to the specific right in question. Here, that is the test established in *Heller* and its progeny, which demands a much "more searching scrutiny than rational basis review." *Mai*, 952 F.3d at 1115; *see also Heller*, 554 U.S. at 628 n.27

(rational basis review "[o]bviously . . . could not be used to evaluate the extent to which a legislature may regulate . . . the right to keep and bear arms").

The non-binding, extraterritorial cases that Defendants cite in support of their effort to keep *Jacobson* alive make no difference. Answer Br. 19. Three of the cases—*League of Indep. Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125 (6th Cir. 2020); *Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020); and *Robinson v. AG*, 957 F.3d 1171 (11th Cir. 2020)—were decided before the Supreme Court's *Roman Catholic Diocese* decision, where Justice Gorsuch's entirely unchallenged and unquestioned concurring opinion declared *Jacobson* dead for all intents and purposes. In *Big Tyme Invs., L.L.C. v. Edwards*, 985 F.3d 456 (5th Cir. 2021), the court never actually resolved the question whether *Jacobson* was controlling or remained good law, because the plaintiffs "concede[d] that at most rational basis review applies to their equal protection claim," and "[c]onsequently, [the court] need not have consider[ed] their broader critique that *Jacobson* or [*In re*] *Abbott*[, 954 F.3d 772 (5th Cir. 2020)] compel a lower standard of review when heightened scrutiny applies," *id.* at 467. So the court applied the rational

basis standard of review that is "the traditional legal test associated with the right at issue." *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring).

Lastly, while the West Virginia district court in *Stewart v. Justice*, __ F. Supp. 3d __, 2021 WL 472937 (S.D. W. Va. 2021) applied *Jacobson*, the court hedged its reliance on the case by acknowledging "it is clear that *Jacobson's* ultimate fate is unsettled." *Id.* at *3. Further, unlike here where it is undisputed that the restrictions implicated a fundamental constitutional right, it was questionable there whether the claim even sounded in a protected constitutional liberty. *Id.* at *5 (questioning as dubious the plaintiffs' First Amendment challenge to a face-mask mandate because it is not established that refusing to wear a face mask even constitutes protected "political speech" as plaintiffs claimed).

Jacobson does not apply, and certainly does not control, the analysis of whether the restrictions at issue here—which directly implicated the textually explicit right to keep and bear arms—are constitutional. The traditional legal test applies and controls here.

II. The destruction of core Second Amendment rights for 48 consecutive days is an extreme and unprecedented burden compelling categorical invalidation.

Under the "traditional legal test" established by the Supreme Court, a law that "makes it impossible for citizens to use [firearms] for the core lawful purpose of self-defense" is categorically unconstitutional. *Heller*, 554 U.S. at 630. And this Court too has recognized that "[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 v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016).

Defendants dramatically understate the burden imposed by the shutdown orders, claiming they were "very small," "did not limit or regulate the ability of persons to possess firearms or what they may do with those firearms in their homes," and "at no time" operated to "shelve" the right to keep and bear arms. Answer Br. 1, 2, 22.[1] But their 48-day

---

[1] Defendants also *suggest* the shutdown orders were subject to a "travel" exception starting April 20, 2020—a full month into the shutdowns—which would have allowed Ventura County residents to simply drive to a neighboring county to take care of any firearm and ammunition needs. Answer Br. 7 ("The April 20 Order prohibited 'Non-Essential Travel' within Ventura County but *expressly* 'allow[ed] travel

long prohibition on the transfer of firearms and ammunition as well as range training destroyed core Second Amendment rights, *including* the right to armed self-defense in the home for everyone who did not already have a firearm, who had not already initiated a firearms purchase before March 20, 2020, or who did not have the ammunition necessary to actually *use* the firearms they had for such protection while Defendants' orders were in effect.

Even individuals fortunate enough to have already possessed a firearm at the time the shutdowns went into effect, or who happened to have initiated a firearm purchase transaction that they were able to complete within the brief window that opened after a month into the

into or out of [Ventura] County."') (emphasis original). Defendants' hesitation to actually *argue* this point is understandable. The fundamental intent and purpose of the orders was to force County residents to "shelter at home" *unless* engaged in "Essential Activities" or accessing "Essential Businesses," "Essential Infrastructure," and "Essential Governmental services." ER-169. And this proscription was enforced with the threat of criminal sanctions. ER-160, 163. Because the entire firearms industry was deemed "*non*-essential" for these purposes, anyone who left home to purchase a firearm or ammunition, or to train at a range, whether within or without the County, was subject to the criminal sanctions. *See* ER-138 ("The purpose of this Order is [to] … requir[e] persons to stay home, while allowing them to engage in essential activities," and "[a]ll provisions of this Order shall be interpreted to effectuate this intent.").

shutdowns, were unable to engage in any proficiency training with their firearms. *See Luis v. United States*, __ U.S. __, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) ("The right to keep and bear arms … implies a corresponding right to obtain the bullets necessary to use them, *and to acquire and maintain proficiency in their use*.") (italics added). Nor was anyone able to acquire any different or additional firearms as may have been necessary or useful for purposes of exercising their constitutionally guaranteed rights of armed self-defense as effectively and safely as possible during the shutdown period.

Defendants also repeatedly mischaracterize the situation by emphasizing the supposedly "temporary" nature of the restrictions. For starters, the ban was only temporary in the sense that it was eventually lifted—at least for now[2]—and then only after Defendants were sued.

---

[2] Below, Defendants argued that Plaintiffs' Second Amendment claim was mooted by the May 7, 2020 Order. The district court rejected this argument, holding that the "claim is not moot" because "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 of firing ranges. Opening Br. 14–15; ER-17–18. Defendants do not contest this holding on appeal, saying nothing about it except in a footnote where they declare "this issue is not part of the appeal." Answer Br. 11 n.5. Thus, they have forfeited any challenge to the holding. *See Dominguez v. Mutual Life Ins. Co. of New York*, 14 F.

Could a year-long shutdown of firearms and ammunition retailers be deemed permissible just because it would someday end or just because it would be "carefully monitored" by the governmental officers imposing it, as Defendants suggest? Answer Br. 1. Surely not, and yet that is what the logic of Defendants' position would dictate.

Unquestionably, no one would tolerate a government policy that denied jury trials every December for all defendants whose cases were set for trial during that month, that called for random warrantless home searches each Sunday, or that permitted the imposition of cruel and unusual punishments each spring—despite these being "temporary" violations of the constitutional rights at stake. Indeed, in the First Amendment context, "[b]oth this court and the Supreme Court have repeatedly held that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'"

App'x 810, 811 (9th Cir. 2001) ("it is well established that a failure to raise and argue an issue on appeal constitutes a waiver of that issue"). Moreover, the district court was right here. Just last month, the Supreme Court confirmed that "a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right," even where the challenged policy has been changed and no longer applies to the plaintiffs. *Uzuegbunam v. Preczewski*, __ U.S. __, 141 S. Ct. 792, 801–02 (2021).

Klein v. City of San Clemente, 584 F.3d 1196, 1207–08 (2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *accord Roman Catholic Diocese*, 141 S. Ct. at 67. The rights secured under the Second Amendment are of equal importance and must be afforded the same degree of protection. *See McDonald v. City of Chicago*, 561 U.S. 742, 778–79, 780 (2010) (the Second Amendment is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment").

Defendants heavily rely on *Silvester*, 843 F.3d 816, in advancing their themes of inappreciable injury due to the "temporary" nature of their shutdown orders. They emphasize that "California has had some kind of waiting period statute for firearm purchases continuously since 1923." Answer Br. 26 (citing *Silvester*, 843 F.3d at 823). But California has never had anything close to a 48-day waiting period. From 1923 to 1953, California had a one-day waiting period for handguns only (not long guns). *Silvester*, 843 F.3d at 823. In 1955, this one-day waiting period—for handguns only—was extended to three days, and in 1965, to five days. *Id.* at 824. Because more time was needed to conduct a background check back then, the handgun waiting period was extended to 15 days in 1975. *Id.* The law was extended to all firearms in 1991, but once background

checks could be processed electronically, the period was reduced back to 10 days. *Id.* All *Silvester* did was uphold the constitutionality of the 10-day waiting period, which is barely one-fifth the duration of the ban at issue here. And, in fact, because the 10-day waiting period still applied to Plaintiffs and all those similarly situated, it effectively resulted in a 58-day burden.

Defendants are equally misguided in arguing that "the Second Amendment has never protected immediate or convenient purchase and sale of guns" because the California Department of Justice "has up to 30 days to complete a background check, and the cooling-off period extends 10 days beyond that." Answer Br. 26. Defendants are apparently referring to Cal. Penal Code § 28220(f), which allows the California DOJ to delay a background check up to 30 days if, and only if, the National Instant Criminal Background Check System indicates the purchaser has been (1) taken into custody and placed in a facility for mental health treatment or evaluation; (2) arrested for or charged with a crime that could prohibit the purchaser from possessing a firearm; or (3) is prohibited from purchasing a handgun under Cal. Penal Code § 27535(a). Rarely does this come into play, particularly for the *law-abiding* citizens

in California, like Plaintiffs, on whose behalf this action was brought. Indeed, as this Court has noted, "the application process is generally completed in less than ten days for all applicants." *Silvester*, 843 F.3d at 825.

Regardless, in the highly unlikely case this delay may have applied to any of the individuals on whose behalf this action was brought (such as if a law-abiding citizen happened to have been falsely flagged under Cal. Penal Code § 28220(f)), Defendants' shutdown orders still would have separately and significantly exacerbated the overall delay: Defendants' 48-day burden, added to the 10-day waiting period, added to the full 30-day period permitted for the background check would amount to an 88-day ban on Second Amendment rights—nearly a quarter of a year.

Even aside from the potential for an additional 40-day burden based on other California restrictions, Defendants' 48-day destruction of core Second Amendment rights is unprecedented in American history. No precedent exists for it because it is intolerable under the Constitution.

III. Defendants cannot satisfy heightened scrutiny because they failed to demonstrate any sort of tailoring to minimize the burdens that their shutdown orders broadly imposed against core Second Amendment rights.

For the reasons explained in Plaintiffs' Opening Brief and expanded on above, if the ban is not held categorically invalid, the burden on core rights is so extreme that strict scrutiny should apply. *Silvester*, 843 F.3d at 821 ("A law that implicates the core of the Second Amendment right and severely burdens that right warrants strict scrutiny."). Yet Defendants fail to satisfy even intermediate scrutiny.

Most fundamentally, Defendants fail to demonstrate any sort of tailoring to limit, or even any effort to limit, the burdens they imposed on core Second Amendment rights. As Defendants acknowledge, even under intermediate scrutiny they must prove that they "'seriously undertook to address the problem with the least intrusive tools readily available to it.'" Answer Br. 30 (quoting *McCullen v. Coakley*, 573 U.S. 464, 494 (2014)). But in defending their shutdown orders, they simply claim "*anything* less restrictive" "would not have accomplished" the goal of "curbing the community spread of the disease" by ensuring people "remain[ed] sheltered in their homes to the maximum extent possible." Answer Br. 1, 30–31 (italics added). But Defendants "must *affirmatively* establish the

reasonable fit" under this standard. *Bd. of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989)).

There was *no* tailoring—just a ban on the operation of all firearms and ammunition retailers and all training ranges throughout the 48-day shutdown (save for but the small sliver of transactions that were allowed to be completed after a solid month of the shutdowns). And a ban can be "'narrowly tailored . . . 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 core Second Amendment rights encompassed within the ban cannot be deemed "appropriately targeted evils." Defendants have failed to justify their claim that "anything less restrictive" would not have equally or sufficiently advanced the interest in preventing the spread of COVID-19—an argument that means they are essentially claiming the shutdowns were *necessary* to effectuate this interest. Surely, they cannot demonstrate any such necessity. But in any event, they cannot show the required fit in the absence of *any* tailoring.

Rather than attempting to carry *their* burden to establish a fit, Defendants attempt to shift the burden onto Plaintiffs, asserting that

"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." Answer Br. 30–31.

But Defendants' own orders refute any assertion that less burdensome restrictions would not have equally or sufficiently served the same interests. They permitted numerous other businesses to continue operations throughout the same 48-day period, even though many of them were *not* "essential" or otherwise necessary or useful to the exercise of any fundamental constitutional rights, and even though there is no evidence that the continued operation of any firearms retailers, ammunition retailers, or training ranges—which *were* essential in every way to the exercise of core Second Amendment rights—posed any greater danger of spreading the disease. *See Tandon*, 2021 WL 1328507, at *5 ("It is unsurprising that such litigants [challenging California's COVID-19 restrictions] are entitled to relief. California's Blueprint System contains myriad exceptions and accommodations for comparable activities."). Defendants' claim that no such alternatives did or could have existed for the firearms industry cannot reasonably be maintained

in the face of their broad allowances for the continued operation of constitutionally *non*-essential businesses under safety protocols that the firearms industry could have just as easily followed.

Again, the Supreme Court's jurisprudence makes clear that this disparate, "second-class" treatment of fundamental constitutional rights cannot be tolerated. *See e.g., Tandon*, 2021 WL 1328507, at *3 (granting injunction against at-home religious exercise ban because "California treats some comparable secular activities more favorably than at-home religious exercise, permitting hair salons, retail stores, personal care services, movie theaters, private suites at sporting events and concerts, and indoor restaurants to bring together more than three households at a time"); *Roman Catholic Diocese*, 141 S. Ct. at 69 ("People may gather inside for extended periods in bus stations and airports, in laundromats and banks, in hardware stores and liquor shops. No apparent reason exists why people may not gather, subject to identical restrictions, in churches or synagogues, especially when religious institutions have made plain that they stand ready, able, and willing to follow all the safety precautions required of 'essential' businesses and perhaps more besides."); *id.* at 67 ("strict scrutiny" applies under the Free Exercise

Clause "whenever [government regulations] treat *any* comparable secular activity more favorably than religious exercise"); *South Bay*, 141 S. Ct. at 719 ("California singles out religion for worse treatment than many secular activities. At the same time, the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests.").

In reviewing a First Amendment challenge in *Tandon*, the Supreme Court explained that "[w]here the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too." 2021 WL 1328507, at *2–3. Thus, the Court insisted that the State be required "to explain why it could not safely permit at-home worshipers to gather in larger numbers while using precautions used in secular activities." *Id.* at *4. That analysis applies with equal force here, and yet Defendants have not even attempted to explain why gun shops and ranges could not safely operate under the same conditions as all the other businesses allowed to continue throughout the same 48-day shutdown period. This is fatal to Defendants'

claim that they have met their constitutionally required burden to justify the clear violation of the fundamental constitutional rights at stake.

And returning full circle to the standard of review of the district court's order dismissing the First Amended Complaint for failure to state a claim on which relief can be granted, to affirm this order, the Court must find "*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) (italics added). That simply cannot be found. To the contrary, Plaintiffs have pled a strong case for relief on their claim, which is now underscored by Defendants' Answer.

CONCLUSION

Plaintiffs respectfully request that this Court reverse the district court's judgment.

Respectfully submitted,

/s/ *Raymond M. DiGuiseppe*
RAYMOND M. DIGUISEPPE
THE DIGUISEPPE LAW FIRM, P.C.
4320 Southport-Supply Road
Suite 300
Southport, NC 28461
(910) 713-8804
law.rmd@gmail.com

JOSEPH G.S. GREENLEE
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org

RONDA BALDWIN-KENNEDY
LAW OFFICE OF RONDA
BALDWIN-KENNEDY
5627 Kanan Rd. #614
Agoura Hills, CA 91301
(951) 268-8977
ronda@lorbk.com

CERTIFICATE OF COMPLIANCE

I am the attorney or self-represented party.

This brief contains 4,386 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).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated ____________.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: *Raymond M. DiGuiseppe* **Date:** April 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 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 26th day of April 2021.

/s/ *Raymond M. DiGuiseppe*
Counsel for Appellants