No. 20-56233

In the
United States Court of Appeals
for the Ninth Circuit

JONAH MARTINEZ, et al.,

Plaintiffs–Appellants,

v.

ALEX VILLANUEVA, et al.,

Defendants–Appellees.

On Appeal From The United States District Court
For The Central District of California
Case No. 2:20-cv-02874-AB-SK
The Honorable André Birotte Jr.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Other Authorities

INTRODUCTION

The questions presented in this appeal are succinctly stated in the Opening Brief, and they remain the same: 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 Defendants are entitled to judgment on the pleadings as a matter of law? And, does the mootness doctrine bar Plaintiffs from any possible relief on their claim even though (a) Defendants ceased the challenged conduct only after this lawsuit was filed, (b) Defendants have reserved broad discretion to resume the challenged conduct at any time, and (c) Plaintiffs have sought nominal damages for the past constitutional injuries?

Defendants do not answer these questions in their Answering Brief. Rather, they pose a set of different questions, which attempt to recast the nature of this appeal in a more favorable light by centering the issues around the unsupported notion that their prior shutdowns of the firearms industry in Los Angeles County lasted "at most five days" (something they never claimed until now), the absence of *another* such shutdown to date, and the lack of "statistical" proof that one will occur in the future.

Predictably, Defendants' answers to these questions produce better results for them than they could expect in addressing the real questions. But Defendants are still dead wrong in their analysis of the facts, the controlling standards, and the application of those standards. Under a proper analysis, the right answers inevitably compel the conclusion that Plaintiffs have pleaded a viable claim of a redressable constitutional injury for which they are entitled to relief—or, in the least, that they must be afforded the opportunity to *prove* their entitlement to such relief through their *facially plausible* allegations.

More pointedly, Defendants have failed to carry *their* burden—as the movant on the motion for judgment on the pleadings—of demonstrating "it is clear that *no* relief *could* be granted under *any* set of facts that *could* be proved consistent with the allegations." *Deveraturda v. Globe Aviation Sec. Servs.*, 454 F.3d 1043, 1046 (9th Cir. 2006) (italics added). The district court erred in short-circuiting Plaintiffs' viable claim for relief by awarding judgment for Defendants as "a matter of law."

ARGUMENT

I. Defendants' Appellate Maneuvering Underscores How a Straightforward Application of the General Standard of Review on Appeal Alone Compels Reversal of the Judgment.

The proper analysis starts and stops with the standard of review on appeal from a grant of a motion for judgment on the pleadings. This standard has two essential elements: the judgment is proper only when the movant "'clearly establishes on the face of the pleadings'" that (1) "'no material issue of fact remains to be resolved'" and (2) that the movant "'is entitled to judgment as a matter of law.'" *Threshold Enterprises Ltd. v. Pressed Juicery, Inc.*, 445 F. Supp. 3d 139, 144 (N.D. Cal. 2020) (quoting *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)). These determinations must be made while "accept[ing] all factual allegations in the complaint as true," "construe[ing] the pleadings in the light most favorable" to Plaintiffs, and "draw[ing] all reasonable inferences in their favor." *Association for Los Angeles Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). The district court's conclusions of law underlying a judgment on the pleadings are reviewed *de novo* on appeal, while any factual findings are reviewed for "clear error." *Acosta v. Brain*, 910 F.3d 502, 512 (9th Cir. 2018).

Defendants' appellate maneuvering designed to insulate the judgment in their favor spotlights the fundamental problems with both the district court's and their own analysis under this standard of review. A major premise of the district court's analysis, on which Defendants place equal reliance in advancing all their appellate arguments, is that the shutdown of the local firearms industry only "lasted a total of five days from March 25 to March 30." ER-22. This premise was central to the court's assessment of the nature and extent of the burdens imposed against the Second Amendment rights of County residents, and thus drove the court's analysis leading to its crucial conclusions that (1) nothing more than intermediate scrutiny was warranted, (2) the shutdowns survived such scrutiny as "reasonably fit[ting] the County's stated objectives," and (3) Plaintiffs thus have no claim for relief. ER-22–23. And Defendants have made this premise the centerpiece of their Answering Brief, as it is now central to every aspect of their analysis in support of the judgment. Answering Brief ("Ans. Br.") 1, 9, 11, 12, 18–19, 30.

The premise that the shutdowns persisted no more than five days is flawed and thus cannot support this judgment for three reasons: (1) it is not supported by the record and thus any "factual finding" of a five-day

shutdown must be set aside as "clear error"; (2) even if the premise finds support in the record, the contrary evidence controls for these purposes because the record must be viewed in the light most favorable to Plaintiffs; and (3) the very existence of a dispute over the actual length of the shutdowns demonstrates that a "material issue" remains in dispute.

Regarding the first problem, the best indicator that the record does not reasonably support a finding that the shutdowns persisted no more than five days is that Defendants—who stand to benefit most if this were true—never once interpreted the record this way until *after* the district court awarded a judgment in their favor that was based on this idea. *Everything* they previously said about the length of the shutdowns indicated they construed their own shutdown orders as having stayed in effect—and thus as having functioned to continually ban operations of firearms retailers—from March 19, 2020 until *June 18, 2020*. Defendants argued in their motion for judgment on the pleadings that the March 19 Order was "old news" because it was superseded by the *June 18, 2020* and *August 12, 2020* orders, which narrowed the categories of prohibited "non-essential businesses" to exclude firearms retailers *at that point*. ER-

113–14. Similarly, they argued, "Plaintiffs cannot dispute that the linchpin of their claims against the County Defendants, i.e. the March 19 Safer at Home Order, has been completely replaced" *because* "the two most recent COVID-19 related County public health orders"—i.e., *the June 18 and August 12 orders*—"did not interrupt the operations of firearms retailers in the County." ER-116.

That is, Defendants themselves consistently identified *June 18, 2020* as the *earliest* point at which the shutdowns were lifted—some *90 days* after the initial shutdown order of March 19, 2020. At no point did they even suggest the shutdowns persisted "at most five days," as they repeatedly insist on appeal now that they have a judgment from the district court that says so. Plaintiffs have adopted a more conservative interpretation of the evidence by affording appropriate weight to Sheriff Villanueva's public declaration on March 30, 2020, that he would no longer actively enforce the County's March 19 Order against the firearms industry after that point. At the very least, the record must be interpreted to mean the March 19 Order was in effect and placed the firearms industry under a continuing threat of enforcement for

conducting any operations until the Sheriff's declaration of March 30. And that is 11 days, not five days.

Second, even assuming the record may lend itself to an interpretation that the shutdowns were in effect only five days, the far weightier contrary evidence that they persisted at least 11 days is what must control in the context of Defendants' motion because the record must be construed in the light most favorable to Plaintiffs. Thus, any factual finding of the district court that the shutdowns were in effect no more than five days, despite the deference it was required to afford Plaintiffs in light of the contrary evidence, was clear error. *Fisher v. Tucson Unified School Dist.*, 652 F.3d 1131, 1136 (9th Cir. 2011) (quoting *Cohen v. U.S. Dist. Court for N. Dist. of Cal.*, 586 F.3d 703, 708 (9th Cir. 2009) (clear error occurs when "the reviewing court is left with a 'definite and firm conviction that a mistake has been committed'").

Lastly, even assuming the district court's finding does not rise to the level of a "clear error" that must be set aside, the existence of the parties' dispute over the actual length of the shutdowns alone precludes a judgment on the pleadings in this case. Again, the movant must "clearly establish[]" that "no material issue of fact remains to be resolved" before

a court may properly award it judgment on the pleadings as "a matter of law." *Dworkin*, 867 F.2d at 1192. Given that Defendants' entire argument (*now*) hangs on the premise that the shutdowns were in effect "at most five days," a premise Plaintiffs directly contest, this debate over the actual effective period is clearly a "material issue of fact" that "remains to be resolved" and can only be resolved if Plaintiffs are afforded the opportunity to pursue their claim that the district court short-circuited.

Consequently, Defendants' own Answering Brief brings into clearer focus how a straightforward application of the applicable standard of review, with nothing more, demonstrates that the district court's judgment as a matter of law in favor of Defendants was reversible error.

II. Defendants' Flawed Analysis of the Second Amendment Claim in Defending the Judgment on the Pleadings Further Highlights Why the Claim Must be Allowed to Proceed.

The fundamental problems with the district court's analysis identified above fatally infect its ruling, just as they infect the Defendants' arguments on appeal. The faulty premise that the shutdowns of the firearms industry were in effect only five days is at the heart of the district court's reasoning—and Defendants' arguments on appeal—that

the shutdowns had a negligible impact so as to warrant mere intermediate scrutiny and ultimately the conclusion that Plaintiffs have no viable constitutional claim. And this analysis is fundamentally flawed for several independent reasons, which Defendants' Answering Brief only further highlights.

A. The Shutdown Orders Unquestionably Violated the Second Amendment.

What Defendants entirely miss (or just ignore) in harping on their claim that the prohibition was of no constitutional significance because it lasted "no more than five days" is that the length of the prohibition defines *the degree of the burden* imposed by the constitutional violation; it does and cannot negate *the existence* of the violation. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1102 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). There is no temporal requirement or minimal period of deprivation that must occur as a predicate to the existence of a constitutional violation or injury. *Elrod* at 373. It is the deprivation of the right, for any period of time, that constitutes the violation and inflicts the redressable injury. Were it otherwise, government actors could randomly and capriciously deprive

citizens of fundamental civil rights without any consequence solely on the basis that the deprivations persisted for limited periods of time. Surely no one would tolerate policies that "temporarily" deny jury trials in criminal cases, permit random warrantless home searches, or suspend parental rights just because the policies last "no more than five days."

Indeed, "[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.'" *Klein v. City of San Clemente*, 584 F.3d 1196, 1207–08 (9th Cir. 2009) (quoting *Elrod*, 427 U.S. at 373). The loss of Second Amendment freedoms even for minimal periods of time is equally significant and potentially fatal given their purpose. The Second Amendment guarantees a "'right of self-preservation,'" which enables "a citizen to 'repe[l] force by force' when 'the intervention of society in his behalf, may be too late to prevent an injury.'" *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008) (quoting 1 William Blackstone, COMMENTARIES 145–46 n. 42 (1803)). In this context, the temporal significance of a deprivation is measured in *seconds*, not days. *See Caetano v. Massachusetts*, __ U.S. __, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) (Jamie Caetano was forced to take matters

into her own hands and protect herself with a stun gun against her abusive ex-boyfriend before anyone with law enforcement ever stepped in).

So, *even if* Defendants' orders shutting down the firearms industry across Los Angeles County were in effect "no more than five days," the deprivation was real, it was significant, and it was a violation of the fundamental Second Amendment rights of Plaintiffs and all similarly situated citizens of the County who were subjected to the orders. And, in reality, the prohibitions were in effect *at least 11 days*—more than twice as long. Further, as noted in the Opening Brief, when coupled with California's 10-day waiting period for all lawful firearm purchases, the shutdown orders effectively resulted in a 21-day prohibition against the acquisition of firearms, and also effectively imposed a concomitant delay in the acquisition of ammunition given the new background check requirement for such purchases—another point that Defendants simply ignore. This blatant constitutional injury cannot be simply swept aside based on the theory that the deprivation did not persist *long enough* to matter.

B. The Constitutional Violation Severely Deprived the People of their Second Amendment Rights.

Not only is there constitutional injury but the injury is substantial. It erected an absolute bar to the lawful acquisition of firearms and ammunition from any retailer in the County—the only real avenue for the average law-abiding citizen to acquire firearms or ammunition in California—subject only to a narrow exception to complete the purchase of a firearm for those who *already* had a Firearms Safety Certificate and *already* initiated the purchase before March 19, 2020. ER 140–41. And the bar against ammunition purchases and the use of ranges for training and proficiency was absolute throughout the entire 11-day period. *Id.*

Defendants attempt to minimize the significance of the burden by drawing purported analogies to various cases where Second Amendment challenges to firearms-related restrictions were unsuccessful. Ans. Br. 15, 17, 19, 21–23. But once again, their arguments backfire and end up underscoring the comparative severity of the burden in this case.

The primary authority on which Defendants rely here is *Dark Storm Industries LLC v. Cuomo*, 471 F. Supp. 3d 482 (N.D. N.Y. 2020). There, emergency orders required Dark Storm's firearms retail store to close as a "non-essential" business for a period of time last year during the

pandemic. *Id.* at 489. But as the district court emphasized in upholding the action against a Second Amendment challenge, "numerous" other firearms and ammunition stores remained open and accessible across the state throughout the entire period Dark Storm was required to remain closed, including some within close proximity to Dark Storm itself. *Id.* & n.10.

Similarly, in *Teixeira v. County of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017), which Defendants also cite, this Court rejected the Second Amendment challenge to a zoning ordinance that prohibited the plaintiffs from establishing a gun store within a certain commercial area because the evidence demonstrated that the local residents "may freely purchase firearms within the County" at ten other stores, including one nearby the site where the plaintiffs proposed their store. *Id.* at 679. And, in the Illinois case Defendants cite, the district court rejected the plaintiffs' challenge to Chicago's zoning ordinances limiting the number and location of firearms retailers within the city on the basis that their only effect was residents "*might* have to drive a marginally longer distance to visit a firearm store," which might delay their acquisition "by

a matter of minutes." *Second Amendment Arms v. City of Chicago*, 135 F. Supp. 3d 743, 747–48, 754–55 (N.D. Ill. 2015) (italics added).

This Court's opinions in *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), and *Fyock v. Sunnyvale*, 779 F.3d 991 (9th Cir. 2015), also can only undermine Defendants' position. Initially, both cases concerned a denial of a motion for preliminary injunctive relief, where the *plaintiffs* bore the burden of proving entitlement to that "extraordinary remedy," and this Court conducted a limited review under the substantially deferential "abuse of discretion" standard, *Jackson*, 746 F.3d at 958; *Fyock*, 779 F.3d at 995, not a *de novo* review of a judgment on the pleadings where, as here, *Defendants* bear the burden of proving they are entitled to judgment "as a matter of law."[1]

Even so, the factors leading the Court to view the restrictions at issue in those cases as imposing insubstantial burdens are not present here. The *Jackson* court found the handgun storage ordinance at issue did not

[1] The district court opinions in *Altman v. County of Santa Clara*, 464 F. Supp. 3d 1106 (N.D. Cal. 2020), and *McDougall v. County of Ventura*, 2020 WL 2078246 (C.D. Cal. 2020), which Defendants cite as further support, also involved motions for preliminary injunctive relief and, in any event, the litigation there is ongoing as each case is currently on appeal. *See Altman, et al. v. County of Ventura, et al.*, Case No. 21-15602, and *McDougall, et al. v. County of Ventura, et al.*, Case No. 20-56220.

substantially burden protected conduct because it only regulated how residents "must store their handguns" and thus burdened "only the '*manner* in which persons may exercise their Second Amendment rights.'" *Jackson*, 746 F.3d at 964–65 (quoting *United States v. Chovan*, 735 F.3d 1127, 1138 (9th Cir. 2013)). And the *Fyock* court found a city ordinance restricting possession of "large-capacity magazines" did not substantially burden protected conduct because it did not "restrict the possession of magazines in general" or "the number of magazines that an individual may possess," and it ultimately did not "affect the ability of law-abiding citizens to possess the 'quintessential self-defense weapon'—the handgun." *Fyock*, 779 F.3d at 999 (quoting *Heller*, 554 U.S. at 629).

Unlike in any of these other cases where the facts arguably supported findings that the restrictions left open numerous readily accessible alternatives, only regulated the manner in which firearms were stored, or otherwise did not directly affect citizens' ability to possess firearms in the lawful exercise of their Second Amendment rights, the shutdown orders at issue here exacted a broad prohibition against the core operations of the firearms industry throughout Los Angeles County. For the entire period of at least 11 days, residents who had no firearm were

barred from buying one (unless they happened to have already initiated a purchase), those who did already have firearms were barred from buying any of the ammunition necessary for their use, and everyone was barred from the ranges designed to provide training and ensure proficiency.

Notably, just as Defendants' Answering Brief does on appeal, the district court's opinion below entirely ignores the closure of firearms ranges and the inability to obtain the necessary firearms ammunition, in purportedly assessing the degree of the burden imposed; the analysis focuses solely on the closure of firearms retailers. *See e.g.,* ER-22 (discussing only "the alleged temporary closure of firearms retailers"). That additional burden certainly matters, as it substantially increased the severity of the prohibitions' impact. *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.").

C. The Orders are Categorically Unconstitutional and Cannot Pass Muster Under Any Heightened Scrutiny.

Given the severity of the burdens imposed by the shutdown orders, the proper framework for disposing of the constitutional question is simple and straightforward: they must be struck down as categorically unconstitutional, because any 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; *id.* 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'"); *accord Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016) (A "law that . . . amounts to a destruction of the Second Amendment right is unconstitutional under any level of scrutiny.").

Moreover, as detailed in the Opening Brief, if the shutdown orders are not deemed categorically invalid, the burdens were 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."). In attempting to rebuff application of strict scrutiny, Defendants just suggest that the cases Plaintiffs cite involving restrictions on the free exercise of religion are inapposite, because those

cases involve the First Amendment instead of "the Second Amendment jurisprudence" of this Circuit. Ans. Br. 27–30 (referring to Plaintiffs' reliance on *Roman Catholic Diocese of Brooklyn v. Cuomo*, __ U.S. __, 141 S. Ct. 63 (2020), *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1232 (9th Cir. 2020), and *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1140 (9th Cir. 2021)). But it is well established, in this Circuit too, that courts are "guided by First Amendment principles" in analyzing the nature and degree of burdens on Second Amendment freedoms. *Jackson*, 746 F.3d at 961; *McDonald v. Chicago*, 561 U.S. 742, 780 (2010) (The Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights.").

In addition to the Free Exercise Clause cases cited in the Opening Brief, which directly bolster Plaintiffs' position that only the highest degree of scrutiny is appropriate for any tiers-of-scrutiny analysis, Opening Br. 42–45, the Supreme Court recently reiterated the importance of applying strict scrutiny to government regulations like those at issue here, which target the exercise of fundamental civil liberties while creating "myriad exceptions and accommodations" for

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

Predictably, Defendants run straight to intermediate scrutiny as the default framework for assessing the constitutionality of the shutdown orders, and primarily based on the faulty premise that the orders imposed only a "five-day closure of firearms retailers." Ans. Br. 18–19. But, as already explained in the Opening Brief, the orders cannot pass muster regardless of whether strict or intermediate scrutiny is applied.

Even under intermediate scrutiny, Defendants bear the burden of affirmatively establishing with "substantial evidence" that the restriction is "narrowly tailored to serve a significant governmental interest," *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017), i.e., that it reasonably fits the claimed interest "to a material degree," *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 505 (1996). And this essential "narrowly tailored" requirement can be met "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).

The shutdown orders prohibited the operation of all gun stores and firing ranges of all sizes, types, and locations, broadly targeting law-

abiding citizens seeking to exercise fundamental civil liberties, and "no matter the precautions taken, including social distancing, wearing masks, leaving doors and windows open . . . and disinfecting" between customers. *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring). Defendants have presented no evidence at all that these broad prohibitions were materially necessary or even materially effective in serving the claimed interest of reducing the spread of COVID-19. Indeed, they could have simply followed the same disease prevention protocols implemented at the scores of other businesses allowed to remain open. Defendants have not even argued, much less produced any evidence, that the claimed public health interest would have been "achieved less effectively" in this way or that the total shutdowns advanced this interest to any comparatively "material degree."

And all this goes to the additional essential requirement that the government must demonstrate substantially less burdensome measures would fail to achieve its objectives. *McCullen v. Coakley*, 573 U.S. 464, 495 (2014). The County fails to explain "why the narrower options it thinks adequate in many [other] settings—such as social distancing requirements, masks, cleaning, plexiglass barriers, and the like—cannot

suffice here." *South Bay United Pentecostal Church v. Newsom*, 592 U. S. at ___, 141 S. Ct. 716, 718–19 (2021); *see also Tandon*, 2021 WL 1328507 at *2–3 ("Where 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."). Significantly, in the district court, when describing their current orders regulating businesses during the pandemic, Defendants themselves said firearms retailers "certainly fall" under the category of "'lower-risk' retailers" who can operate and are operating safely under standard disease prevention protocols. ER-120.

Coupled with the lack of any evidence that the total shutdowns were in any way materially necessary or effective, this acknowledgment reveals that Defendants made a *policy choice* to shutter the firearms industry county-wide while favoring other rights and interests. *See Roman Catholic Diocese*, 141 S. Ct. at 69 (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."). But, "[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 worth *insisting* upon." *Heller*, 554 U.S. at 634 (italics original).

D. *Jacobson* Has Absolutely No Application.

Lastly, Defendants make a pitch for the application of the standards in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), as an alternate framework for the constitutional analysis here, Ans. Br. 24–27, even though the district court itself never ventured into such territory. It is clear *Jacobson* has no proper application here. In fact, Justice Gorsuch expressly rejected the notion that *Jacobson* supplies any kind of framework for analyzing restrictions on enumerated constitutional rights like this one. *Roman Catholic Diocese*, 141 S. Ct. at 70 (Gorsuch, J., concurring). And, since then, the high court has decided several cases involving COVID-19 restrictions on enumerated constitutional rights without once applying *Jacobson* as a framework, with the *Tandon* case being the most recent example.

Moreover, to whatever extent *Jacobson* may retain vitality in the modern age, it unquestionably cannot be applied to regulations that burden the Second Amendment. As Justice Gorsuch has explained,

Jacobson "essentially applied rational basis review," because that was the test applicable to the inchoate rights at stake there. *Roman Catholic Diocese*, 141 S. Ct. at 70. As this Court has observed, the high court itself expressly rejected any use of such a test in evaluating the constitutionality of a restraint on the rights guaranteed under the Second Amendment. *Jackson*, 746 F.3d at 960 (quoting *Heller*, 554 U.S. at 628 n.27) ("While *Heller* did not specify the appropriate level of scrutiny for Second Amendment claims, it nevertheless confirmed that rational basis review is not appropriate, explaining that '[i]f 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.'").

Ultimately, what matters is that "even in a pandemic, the Constitution cannot be put away and forgotten," because the "[g]overnment is not free to disregard" fundamental rights in times of crisis. *Roman Catholic Diocese*, 141 S. Ct. at 68; *South Bay*, 141 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."). Upholding those rights here

means declaring the orders at issue categorically unconstitutional, applying the highest form of scrutiny in any tiers-of-scrutiny analysis, or at a minimum finding they fail any testing under intermediate scrutiny. In all events then, the orders violate the Second Amendment.

III. Defendants Fall Far Short of the Mark in Attempting to Portray This Live Justiciable Controversy as "Moot."

Finally, in seeking to avoid adjudication of the merits and responsibility for the constitutional injury inflicted by their previous orders shuttering the firearms industry throughout the County, Defendants strenuously seek a declaration that Plaintiffs' claim is no longer legally cognizable because the later public health orders lifting the prohibitions have rendered it "moot as a matter of law." Ans. Br. 30–35.

Initially, it is simply perverse for Defendants to lambaste Plaintiffs for supposedly pushing unsubstantiated and overblown "cynicism," "desperation," and "pessimism" in describing the general health risks associated with the coronavirus that could form the basis of future orders shutting down the firearms industry. Ans. Br. 2, 7. Plaintiffs are pointing to the very same sort of health risks on which *Defendants* themselves relied in justifying the prior shutdown orders. In fact, while Defendants

highlight statistics showing the trend in the number of new cases and new deaths over the last 14 months, arguing the data show no likelihood of any such further shutdowns because there were only 641 new cases and 44 deaths in March of 2021, Ans. Br. 5, they overlook the significance of the data from March of 2020. On March 1, 2020, only 25 new cases had been recorded and no deaths, and on March 19, 2020, only 218 new cases and four deaths had been reported. Ans. Br. 5. That is, the number of new cases and deaths in March 2020 was *substantially less* "grim and morbid" than the March 2021 data that Defendants cite to diffuse the likelihood of any further shutdown orders, and yet they *still* kept such orders in effect throughout this period—until they were sued.

Moreover, while Defendants lifted the shutdown orders after being sued and have so far not reinstated such orders while this litigation has remained pending, they continue to reserve such power unto themselves and continue to speak in the same terms about the potential perils of the ongoing health crisis that led to the shutdowns being challenged. In the County's most recent order dated May 14, 2021, the order warns about the ongoing threats of COVID-19: "New variants that may spread more easily or cause more severe illness are present in our county; however,

their impact on our local pandemic remains largely unknown. Several other states, including Oregon, Nevada, Utah, and Arizona, are experiencing a recent increase in case and hospitalization rates." *Reopening Safer at Work and in the Community for Control of COVID-19*, COUNTY OF LOS ANGELES PUBLIC HEALTH, http://publichealth.lacounty.gov/media/Coronavirus/docs/HOO/HOO_SaferatHomeCommunity.pdf (p. 1). It goes on to warn that "[e]xisting community transmission in Los Angeles County is at a lower level but continues to present a substantial and significant risk of harm to residents' health," and "[t]here remains a strong likelihood of an increased number of cases of community transmission" as social interactions increase with the general easing of restrictions. *Id.* at pp. 2, 14. Thus, the County declares the order "will be revised in the future" as the data change and it "may also progressively close specific activities and business sectors based on increases in daily reported COVID-19 cases, hospitalizations, and the testing positivity rates." *Id.* at p. 2.

Under these circumstances, Defendants cannot carry their "'heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again.'" *Fikre v. Fed. Bureau of*

Investigation, 904 F.3d 1033, 1037 (9th Cir. 2018) (quoting *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)). Indeed, the same was true in the *Dark Storm* case, where there was "no dispute that New York State has voluntarily relaxed the Executive Orders' shutdown requirements—and, thus, allowed Dark Storm to reopen—as part of its phased reopening plan," but the defendants could not "meet their burden on the first step of the voluntary cessation analysis" because "New York's reopening plan appears to contemplate just such a renewed shutdown" and thus the court could not conclude "it is absolutely clear that the parties will not resume the challenged conduct." *Id.* at 495. And this rigorous test requires Defendants not only show there is no reasonable expectation of a recurrence but also that "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *Fikre* at 1037 (italics added). Defendants cannot show this.

Moreover, Defendants completely ignore the crucial fact that Plaintiffs are rightfully seeking nominal damages for the past injury, which alone neutralizes any attempt to set aside the claim as "moot." The Supreme Court's recent opinion in *Uzuegbunam v. Preczewski*, __ U.S. __, 141 S. Ct. 792 (2021)—published two months before Defendants filed their

Answering Brief—makes this abundantly clear. Reaffirming the well settled common law, the high court explained that "'[t]he law tolerates no farther inquiry than whether there has been the violation of a right,'" *id.* at 799 (quoting *Webb v. Portland Mfg. Co.*, 29 F.Cas. 506, 508–09 (No. 17,322) (CC Me. 1838)), and "*every* legal injury necessarily causes damage," *id.* at 798 (italics original). "When a right is violated, that violation 'imports damage in the nature of it' and 'the party injured is entitled to a verdict for nominal damages,'" *id.* at 800 (quoting *Webb*, 29 F.Cas. at 508), even in the absence of other damages and even if there is "no apparent continuing or threatened injury for nominal damages to redress," *id.* at 798. "'If there is any chance of money changing hands, [the] suit remains live.'" *Id.* at 801 (quoting *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S. ___, 139 S. Ct. 1652, 1660 (2019)). "True, a single dollar often cannot provide full redress, but the ability 'to effectuate a partial remedy' satisfies the redressability requirement." *Id.* (quoting *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 13 (1992)); *accord Pacific Gulf Shipping Co. v. Vigorous Shipping & Trading S.A.*, 992 F.3d 893, 896 (9th Cir. 2021) (quoting *Uzuegbunam* at 801) ("'Despite being small, nominal damages are certainly concrete.'").

Further, "[b]ecause nominal damages are in fact damages paid to the plaintiff, they 'affec[t] the behavior of the defendant towards the plaintiff' and thus independently provide redress." *Uzuegbunam*, 141 S. Ct. at 801 (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)). Thus, "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." *Id.* at 802. Based on a "straightforward" application of these principles, the high court in *Uzuegbunam* held that a college and its officials responsible for campus speech policies that violated the free speech rights of the plaintiff-student could not obtain a dismissal of the lawsuit under the mootness doctrine simply because they had decided to abandon the policies after being sued. *Id.* at 797. Because "Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him," his claim for nominal damages was righteous and kept the case alive. *Id.* at 802.

So too here. Plaintiffs are seeking nominal damages for the past constitutional violation of their Second Amendment rights based on the entirely undisputed fact that Defendants shuttered the firearms industry throughout Los Angeles County for at least 11 consecutive days.

Plaintiffs are fully entitled to proceed on that claim *even assuming* there is currently "no apparent continuing or threatened injury." *Uzuegbunam*, 141 S. Ct. at 798. The clear existence of a live case and controversy despite Defendants' reversal of their previous shutdown orders after being sued is yet another fundamental reason that the district court's award of judgment on the pleadings for Defendants simply cannot stand.

CONCLUSION

For these reasons, and those set forth in the Opening Brief, Plaintiffs respectfully request that this Court reverse the judgment.

Respectfully submitted,

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I hereby certify that on May 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 May 2021.

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