Case No. 20-56233

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JONAH MARTINEZ, et al.
Plaintiffs/Appellants,

v.

ALEX VILLANUEVA, et al.
Defendants/Appellees

Appeal From The United States District Court
for the Central District of California
Honorable André Birotte Jr.
Lower Court Docket No. 2:20-cv-02874-AB-SK

APPELLEES' ANSWERING BRIEF

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JURISDICTIONAL STATEMENT

Defendants/Appellees County of Los Angeles, Sheriff Alex Villanueva (in his official capacity only), and County Public Health Director Barbara Ferrer (in her official capacity only) agree with Plaintiffs/Appellants'[1] jurisdictional statement, pursuant to Ninth Circuit Rule 28-2.2.

STATEMENT OF ISSUES

1. With COVID-19 cases and deaths in the County of Los Angeles steadily declining, does Plaintiffs' contention that the County of Los Angeles will reverse course by closing firearms retailers because COVID-19 infections and deaths are purportedly rising have any statistical validity?

2. Did the District Court correctly rule that there was a reasonable fit between the five-day closure of firearms retailers in the County of Los Angeles at the onset of the COVID-19 pandemic and the governmental objective of reducing the spread of COVID-19 in the community?

3. Did Plaintiffs' Second Amendment claim lose its character as a present and live controversy since firearms retailers in the County of Los Angeles have been continuously open for business since March 30, 2020?

[1] Plaintiffs/Appellants will hereinafter be referred to as "Plaintiffs".

STANDARD OF REVIEW

Dismissals on the pleadings pursuant to Federal Rules of Civil Procedure, Rule(c) are reviewed *de novo*. *Daewoo Elecs. Am. Inc. v. Opta Corp.*, 875 F.3d 1241, 1246 (9th Cir. 2017); *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 978 (9th Cir. 1999).

INTRODUCTION AND STATEMENT OF CASE

Plaintiffs seek to reverse the District Court's ruling that the five-day closure of firearms retailers in the County of Los Angeles in March 2020 (when public officials faced the unrelenting onset of the most calamitous public health emergency in modern world history) was substantially related to an important governmental interest. (Appellants' Excerpts of Record ["ER"] at 17-23.)

Plaintiffs' arguments reek of cynicism and desperation, and are devoid of any factual or legal merit. Relying on blatant distortions of fact, with total disregard of the public record, Plaintiffs play Monday Morning Quarterback, while using the entirely wrong game film. It is as if Plaintiffs have resided in a parallel COVID-19 universe in which effective vaccines were never developed and distributed, and COVID-19 cases and deaths only escalated during the past year of this pandemic.

Indeed, the County of Los Angeles has been on the road back for months, with COVID-19 metrics trending favorably, no matter what Plaintiffs say.

Plaintiffs' arguments about the purported destruction of their Second Amendment rights and the supposed inevitability of the closure of firearms retailers in the County must be examined against the irrefutable facts about the nature of the COVID-19 pandemic and the County's progress against it. No matter how hard Plaintiffs try to confine themselves to a factual bubble that has long ago burst, they cannot make any showing as to how the District Court erred in finding that the five-day closure did not violate the Second Amendment, let alone as to how their injunctive and declaratory relief claims have not been moot for over a year. Accordingly, the judgment below should be affirmed in its entirety.

ARGUMENT

1. PLAINTIFFS' DIRE ASSESSMENT OF CURRENT COVID-19 TRENDS IN THE COUNTY OF LOS ANGELES IS DEMONSTRABLY FALSE, AS IS PLAINTIFFS' PREDICTION ABOUT THE IMPENDING CLOSURE OF FIREARMS RETAILERS IN THE COUNTY.

Every country on Earth has struggled mightily with the unprecedented public health emergency caused by the COVID-19 pandemic. Fortunately, in many areas of the United States, with the development and distribution of effective vaccines, combined with the public's adherence to COVID-19 guidelines (such as social distancing, limiting of indoor and outdoor gatherings, wearing of facial coverings, etc.), there have been vast and measurable improvements, opening the door for the gradual and broad re-openings of local economies and communities. These improvements are reflected, in part, by the number of COVID-19 infections, positivity rates, hospitalizations, and deaths. Public health officials continue to rely on such objective data to calibrate the further re-opening of their respective jurisdictions and economies.

In recent months, most Counties in the State of California, including the County of Los Angeles ("the County"), have consistently documented and reported positive news regarding COVID-19 trends. Not surprisingly, these

improvements have occurred as multiple effective vaccines have become available, with millions of California residents having received the recommended dosages.

Plaintiffs, however, paint a much more grim and morbid picture — because it supports their unsubstantiated contention that the County could "reverse" course and close firearms retailers in conjunction with its fight against the COVID-19 pandemic. In their Opening Brief ("AOB"), filed on March 4, 2021, Plaintiffs declared, "Even with the recent advent of vaccines, the number of ***new COVID-19 infections and deaths from the disease continue to rise in Los Angeles County***." (AOB at p. 22; emphasis added.) How Plaintiffs could make this assertion is entirely unclear since it is directly contradicted by the readily available public data.

The County regularly and publicly maintains and updates an array of COVID-19 statistics, and the extensive panoply of data can be found on its online COVID-19 Dashboard.[2] The Dashboard includes a "Table: Cases/Death by Date" which lists daily totals for Cumulative Cases, Daily Cases, 7 Day Avg. Daily Cases, Cumulative Deaths, Daily Deaths, and 7 Day Avg. Daily Deaths. The table

[2] http://dashboard.publichealth.lacounty.gov/covid19_surveillance_dashboard/

below lists the figures for daily cases and deaths for a representative set of dates from March 1, 2020 to May 3, 2021, including March 4, 2021[3]:

Date	New COVID-19 Cases	COVID-19-related Deaths
5/3/2021	20	0
4/1/2021	455	12
3/4/2021	**641**	**44**
2/1/2021	4,532	177
1/4/2021	21,660	279
12/29/2020	21,705	180
12/1/2020	10,445	49
11/1/2020	1,333	18
10/1/2020	1,222	13
9/1/2020	1,080	28
8/1/2020	1,520	41
7/1/2020	3,543	30
6/1/2020	1,208	38
5/1/2020	927	36
4/1/2020	615	19
3/19/2020	218	4
3/1/2020	25	0

These statistics demonstrably refute Plaintiffs' contention that COVID-19 infections and deaths were on the rise in the County on or about March 4, 2021, while also making obvious the massive surge which occurred in December 2020 through January 2021, as well as the steady ***decline*** in new cases and deaths since that time. Thus, Plaintiffs' bald contention that as of March 4, 2021, COVID-19 cases and deaths were on the rise in the County is patently false.

[3] This online dashboard was last accessed on May 5, 2021.

Plaintiffs' blatant mischaracterization of the status of COVID-19 cases and deaths is inextricably tied to their unfounded prediction that "it is certainly conceivable—***indeed quite likely***—[firearms] retailers remain at risk of further closure". (AOB at p. 22; emphasis added.) Contrary to Plaintiffs' argument that due to the "risks [which] continue to persist to this day, undeniably, a legitimate rationale exists for inferring ***this is bound to happen again***" (AOB at p. 23; emphasis added), no rational assessment of both past and current trends warrants the extreme pessimism upon which Plaintiffs base their arguments.[4] Plaintiffs' self-serving forecast is only further undermined by the widespread distribution

[4] Consistent with the steady decline in these numbers is the fact that the County has reached the least-restrictive yellow tier of the State's four-tier Blueprint for a Safer Economy system. https://covid19.ca.gov/safer-economy/ (identifying Los Angeles County as being on the "Minimal" yellow tier) (last accessed on May 5, 2021). On April 5, 2021, the County had eased its COVID-19 restrictions in light of its having been moved to the "Moderate" orange tier. https://abc7.com/los-angeles-county-moves-to-orange-tier-la-red-what-is/10487293/; *see also* https://www.latimes.com/california/story/2021-04-28/la-reopening-boosts-economy-covid-19-cases-plummet. The County's incremental moves downward on the State's four-tier system further undermine Plaintiffs' contention that COVID-19 numbers are on the rise in the County and that the County will, therefore, likely close firearms retailers as a result.

and availability of multiple COVID-19 vaccines throughout the County and the State.[5]

Simply put, the hard data proves the fundamental fallacy of Plaintiffs' predictions. The County dealt with an initial surge of COVID-19 cases in the summer of 2020 (several months ***after*** the temporary five-day closure of firearms retailers in the County from March 26 to March 30, 2020), and then a much larger surge through December 2020 and January 2021, during which time the numbers of cases and deaths dwarfed the numbers in March 2020. Yet, ***at no time since March 2020 has the County taken any of the restrictive actions Plaintiffs now speculate will assuredly happen sometime in the future***. Therefore, Plaintiffs' contentions about the increasing rates of COVID-19 infections and deaths in the County are irrefutably false, and any argument contingent upon these contentions, should be rejected.

[5] As of April 28, 2021, 53.9% of eligible County residents had received at least one dose, and 35.8% had been fully vaccinated. *See*, http://publichealth.lacounty.gov/media/Coronavirus/vaccine/vaccine-dashboard.htm (last accessed May 5, 2021). Furthermore, the CDC has recently announced the reintroduction of the single-dose Johnson & Johnson vaccine, which should substantially increase the rate of vaccinations and nation-wide herd immunity. *See*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/JJUpdate.html (last accessed May 5, 2021).

2. THE CLOSURE OF FIREARMS RETAILERS IN THE COUNTY LASTED, AT MOST FIVE DAYS, AND CLEARLY SURVIVES INTERMEDIATE SCRUTINY.

2.1. Firearms Retailers In The County Were Closed For At Most Five Days And Have Been Open Continuously For Over 13 Months.

Plaintiffs' argument as to how the District Court committed reversible error in applying the controlling Second Amendment analysis is based on an entirely incorrect factual predicate — i.e. the number of days for which firearms retailers were allegedly closed. Plaintiffs contend that for "11 consecutive days, Los Angeles County Defendants deprived millions of Los Angeles County residents of their Second Amendment rights" and that "[n]o one could acquire a firearm or ammunition from any retailer within the County while the prior Orders were in effect …." (AOB at p. 26.) Plaintiffs' math, however, simply does not compute.

The pertinent dates and events include:

- March 4, 2020: Governor Newsom announced a State of Emergency due to the COVID-19 pandemic (ER at 215:5-7);
- March 19, 2020: Governor Newsom signed Executive Order N-33-20, the State's stay-at-home order (ER at 215:8-12);
- March 19, 2020: the County of Los Angeles Department of Public Heath issued its Safer at Home Order for Control of COVID-19 ("the March 19

Order"), as the County experienced its initial surge of COVID-19 cases and COVID-19 related deaths (ER at 216:25-217:1, 186-191);

- the March 19 Order did not specifically identify firearms retailers in the County as businesses that were required to be closed (ER at 48:6-7 [in opposing the motion for judgment on the pleadings, Plaintiffs stated that the March 19 Order "did not expressly require the closure of firearm retailers or ammunition vendors."], 186-191);

- March 26, 2020: Governor Newsom issued a public statement that the County Sheriffs of the State had the discretion to determine whether firearms and ammunition retailers were essential businesses (ER at 221:11-15);

- March 26, 2020: pursuant to the discretion accorded to California Sheriffs by Governor Newsom, Sheriff Villanueva issued an announcement that firearms and ammunition stores were not considered essential businesses and must close to the general public, in compliance with Governor Newsom's Executive Order N-33 and the March 19 Order, subject to specified exceptions (ER at 146:22-147:2);

- March 28, 2020: the United States Department of Homeland Security published an Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response which included workers

supporting the operation of firearms or ammunition product manufacturers, retailers, importers, distributors, and shooting ranges (ER at 147:9-17, 151-163);

- Based on the additional information provided by the federal government, on March 30, 2020, Sheriff Villanueva publicly announced that the LASD will not order or recommend closure of businesses that sell or repair firearms, or sell ammunition (ER at 147:17-20); and
- On April 1, 2020, Sheriff Villanueva further attested that he will treat those businesses in the firearms industry (including Plaintiffs) as essential businesses under the pending public health orders applicable to COVID-19 (ER at 147:20-24).[6]

Notwithstanding their present claim of an 11-day closure of firearms retailers, Plaintiffs have not and cannot show that any firearms retailers in the County actually closed at any time prior to March 26, 2020, pursuant to the

[6] Plaintiffs acknowledge that the County's COVID-19 Public Health Orders of June 18, 2000, August 12, 2000, and September 4, 2000 "were consistent with Sheriff Villanueva's March 30 Order in no longer precluding the operation of firearms and ammunition retailers." (AOB at p. 9.) Indeed, in each of these Orders, only "higher-risk businesses, recreational sites, commercial properties, and activities, where more frequent and prolonged person-to-person contacts are likely to occur" were required to remain closed, and firearms retailers were never identified for such closure in those Orders. (ER at 19, 27-28, 69-70, 86.)

March 19 Order.[7] Plaintiffs also have not and cannot contend that there has been any such closure in the County since March 30, 2020. Thus, Plaintiffs falsely contend that there was an 11-day closure of firearms retailers in the County, from March 19, 2020 to March 30, 2020.

This Court's examination should therefore be limited to the review of the District Court's ruling that Plaintiffs failed to plausibly allege a viable Second Amendment claim based on the following findings:

(1) the stated objective of "reducing the spread of a deadly pandemic—unequivocally constitutes a significant government objective" (ER at 22);

(2) "a ***five day-closure*** of non-essential businesses, including firearms and ammunition retailers, reasonably fit the County's stated objectives of reducing the spread of this disease" (ER at 22-23; emphasis added); and

(3) "current restrictions such as social distancing or face masks also reasonably fit the County objectives such that no [First Amendment] violation has occurred—regardless, such restrictions do not prohibit, restrict, or otherwise limit the sale of firearms" (ER at 23).

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[7] In their First Amended Complaint, Plaintiff Gun World did not allege that it was forced to close at any time prior to March 26, 2020. (ER at 225:16-226:25.) Furthermore, Plaintiff Match Grade alleged that it only "retained counsel to obtain legal advice in relation to Defendant Sheriff Villanueva's March 26 Order to determine whether it could continue to operate" and it "ceased new sales due to Defendant Sheriff Villanueva's March 26 Order". (ER at 227:1-5.)

Plaintiffs do not challenge the first and third findings listed above. Plaintiffs' argument that the District Court committed reversible error by applying intermediate scrutiny cannot be reconciled with the controlling case law governing the application of intermediate scrutiny to Second Amendment actions such as the instant case, and the rulings in similar Second Amendment cases where firearms retailers were closed in response to the COVID-19 pandemic.

2.2. Intermediate Scrutiny Was Properly Applied Below Because The Five-Day Closure Did Not Impose A Sufficiently Substantial Burden On Plaintiffs' Second Amendment Rights.

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the seminal United States Supreme Court case interpreting the Second Amendment, the plaintiff challenged statutes which banned the possession of all handguns and required any lawful firearm stored in the home to be "disassembled or bound by a trigger lock at all times, rendering it inoperable." *Id.* at 628. In holding that the statutes violated the Second Amendment, the Court explained that the rights preserved by the Second Amendment are "not unlimited" while rejecting the government's argument that the Second Amendment only protected the right to bear arms for military purposes. *Id.* at 626-27.

Since *Heller*, this Court has utilized a two-step inquiry in Second Amendment cases: the first step is to determine whether the challenged law

burdens conduct protected by the Second Amendment; and the second step is to determine and apply the appropriate level of scrutiny. *Jackson v. City & County of San Francisco*, 746 F.3d 953 (9th Cir. 2014); *United States v. Chovan*, 735 F.3d 1127, 1134-37 (9th Cir. 2013); *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016); *Penal v. Lindley*, 898 F.3d 969, 976 (9th Cir. 2018).

The challenged action in the instant case is fundamentally distinguishable from the complete prohibition against handgun ownership and the storage of any operable firearms in the home, which were at issue in *Heller*. Indeed, the instant case does not involve the enactment of any permanent statute or ordinance barring the possession or use of any type of firearm or ammunition in the home or elsewhere. Instead, the alleged Second Amendment violation is limited to the five-day closure of firearms retailers in the County in conjunction with an unprecedented effort to minimize the spread of a highly contagious, often-fatal virus which the world's scientists had barely started studying, and for which there was no vaccine. It is against this backdrop of the advent of this massive public health emergency, at which time public health officials knew relatively very little about COVID-19 but did know that reducing the person-to-person spread of this contagion was paramount, that the five-day closure must be examined.

Intermediate scrutiny was properly applied below because the five-day closure did not sufficiently implicate the core Second Amendment rights, nor did

it place a substantial burden on any such rights. In *Jackson v. City and County of San Francisco*, 746 F.3d 953 (9th Cir. 2014), this Court examined the constitutionality of two San Francisco firearm and ammunition regulations, after the denial of the plaintiff's motion for preliminary injunction. One regulation required handguns to be either stored in a locked container or disabled with a trigger lock. The other regulation prohibited the sale of hollow point ammunition. *Id.* at 958.

This Court addressed the application of the *Heller* Second Amendment framework to these regulations and explained:

> A law that imposes such a severe restriction on the core right of self-defense that it "amounts to a destruction of the [Second Amendment] right," is unconstitutional under any level of scrutiny. *Heller,* 554 U.S. at 629, 128 S.Ct. 2783 (internal quotations omitted). ***By contrast, if a challenged law does not implicate a core Second Amendment right, or does not place a substantial burden on the Second Amendment right, we may apply intermediate scrutiny***. *See, e.g., v. Chovan,* 735 F.3d at 1138–39; *cf. Heller v. District of Columbia* (*Heller II*), 670 F.3d 1244, 1257 (D.C.Cir.2011) ("[A] regulation that imposes a substantial burden upon the core right of self-defense protected by the Second Amendment must have a strong justification, whereas a regulation that imposes a less substantial burden should be proportionately easier to justify.").

Id. at 961 (emphasis added).

This Court then applied this analysis to both regulations. With respect to the regulation requiring handguns to be stored in locked containers when not carried on the person, this Court held that it burdened rights protected by the

Second Amendment, and explained that the appropriate level of scrutiny is controlled by how closely the law comes to the core of the Second Amendment and the severity of the law's burden on the right. *Id.* at 963. This Court further explained that the regulation "implicates the core because it applies to law-abiding citizens, and imposes restrictions on the use of handguns within the home." *Id.* This finding, however, did not end the inquiry because the severity of the burden on the Second Amendment right also had to be examined, and unlike the handgun ban in *Heller*, the San Francisco regulation "d[id] not substantially prevent law-abiding citizens from using firearms to defend themselves in the home." *Id.* at 964 (discussing *Moore v. Madigan*, 702 F.3d 933, 940 (7th Cir. 2012) (level of scrutiny higher than intermediate scrutiny applied to "blanket prohibition" on carrying an operable gun in public)).

Accordingly, this Court applied intermediate scrutiny to the handgun storage regulation, and held that the stated governmental objective of reducing gun-related injuries and deaths due to having unlocked guns in the home was sufficiently significant, and that the regulation was substantially related to this objective. *Id.* at 966; *see also Chovan*, 735 F.3d at 1138 (regulation of firearm possession by individuals with criminal convictions does not implicate a core Second amendment right and is subject to intermediate scrutiny).

This Court utilized the same approach as to the hollow-point ammunition regulation, and held that it burdens the core of the Second Amendment, that the prohibition "burdens the core of keeping firearms for self-defense only indirectly, because [the plaintiff] is not precluded from using the hollow-point bullets in her home if she purchases such ammunition outside of San Francisco's jurisdiction", and no substantial burden was imposed because it did not prevent the use of handguns or other firearms in self-defense. *Jackson*, 746 F.3d. at 968. Therefore, intermediate scrutiny was applied, and again, this Court held that the regulation was substantially related to the governmental interest of reducing the lethality of ammunition sold in San Francisco. *Id.* at 969.

Similarly, in *Fyock v. Sunnyvale*, 779 F.3d 991, 999 (9th Cir. 2015), this Court held that the challenged measure's restriction on "the ability of law-abiding citizens to possess large-capacity magazines within their homes for the purpose of self-defense" implicates the "core of the Second Amendment" but that intermediate scrutiny was appropriate because the measure was "simply not as sweeping as the complete handgun ban at issue in *Heller* and does not warrant a finding that it cannot survive constitutional scrutiny of any level." *Id.* at 999.

Measured against the breadth of the permanent regulations challenged in these Second Amendment cases, in which this Court applied intermediate scrutiny in each instance, the five-day closure of firearms retailers during the County's

initial efforts to stem the spread of COVID-19, is certainly subject to intermediate scrutiny as well. Accordingly, the District Court was not only correct in applying intermediate scrutiny, so was its ruling that no Second Amendment violation occurred because the challenged action was substantially related to the indisputably compelling governmental interest.

2.3. The District Court Properly Found A Reasonable Fit Between The Five-Day Closure And Compelling Governmental Interests.

The District Court strictly followed this Court's well-established Second Amendment framework. The District Court assumed that the five-day closure of firearms retailers in the County burdened Second Amendment conduct and noted that this temporary action was "'simply not as sweeping as the complete handgun ban at issue'" in *Heller*. (ER at 22 [quoting *Fyock*, 779 F.3d at 999].) The District Court specifically noted the duration of the closure in distinguishing the breadth of the alleged Second Amendment infringement in the instant case from the handgun ban in *Heller*: "Indeed, the alleged temporary closure of firearms retailers lasted a ***total of five days*** from March 25 to March 30, 2020 in the height of a global pandemic which has killed over 200,000 individuals in the United States alone—this circumstance is wholly distinguishable from a complete handgun ban or other possible governmental infringement on Second Amendment rights." (ER at 22; emphasis added.)

The District Court then applied intermediate scrutiny, finding that the "County's stated objective—reducing the spread of a deadly pandemic—unequivocally constitutes a significant government objective", and that the "five-day closure of non-essential businesses, including firearms and ammunition retainers, reasonably fits the County's stated objectives of reducing the spread of this disease." (ER at 22-23.) The District Court also found that "any current restrictions such as social distancing or face masks also reasonably fit the County objectives such that no violation has occurred—regardless, such restrictions do not prohibit, restrict, or otherwise limit the sale of firearms."[8] (ER at 23.)

The District Court's intermediate scrutiny analysis, which justifiably took into account the extraordinary circumstances under which the challenged action was taken, is consistent with other recent rulings which upheld the constitutionality of temporary closures of firearms retailers during the initial stages of this unprecedented global public health emergency. Plaintiffs, however, do not discuss any of them here.

For example, in *Dark Storm Industries LLC v. Cuomo*, 471 F.Supp.3d 482 (N.D.N.Y. July 8, 2020), the plaintiffs – a firearms and ammunition retailer and two of the retailer's customers – sued New York Governor Cuomo and other state

[8] Plaintiffs do not argue on appeal that social distancing and facial covering restrictions violated the Second Amendment.

agencies after the retailer "was forced to close in response to the COVID-19 pandemic." *Id.* at 487. Starting on March 7, 2020, Governor Cuomo issued a series of emergency executive orders, the purpose of which was "to slow the spread of COVID-19 within the State by compelling New Yorkers to stay home and preventing person-to-person contact". *Id.* at 488. In conjunction with these orders, the Empire State Development ("ESD") was tasked with identifying "essential" businesses that could remain open during the pandemic. On March 21, 2020, the plaintiff retailer inquired with ESD as to whether its business was "essential" and was advised that its business was only essential "with respect to work directly related to police and/or national defense matters". *Id.* at 489. The plaintiff then closed its retail business and ceased selling firearms and ammunition to the general public, and was unable to fulfill an order placed by one of the individual plaintiffs. *Id.*

On March 30, 2020, the plaintiffs filed their action, which included a cause of action for violation of their Second Amendment rights, and on May 12, 2020, the plaintiffs moved for summary judgment seeking declaratory relief against ESD – specifically, "'a simple judicial declaration of the unconstitutionality of ESD's determination that gun stores are not 'essential' and therefore [could not] remain open for business' during the depth of New York's COVID-19 related shutdown."

Id. at 490. The defendants opposed the motion, and their cross-motion for summary judgment sought the dismissal of the action.

The Court assumed that there was a triable issue as to whether the executive orders burdened conduct protected by the Second Amendment and examined whether the orders survived intermediate scrutiny. The Court determined that the "governmental interests at stake are important", and the executive orders were "substantially related to the goal of curbing the transmission of COVID-19". *Id.* at 500.

The Court also expressed agreement with the District Court's order in the instant case, as well as the Second Amendment rulings in *Altman v. County of Santa Clara*, 464 F.Supp.3d 1106 (N.D. Cal. June 2, 2020) (Alameda County's shelter-in-place order, which ordered the closure of firearms retailers and shooting ranges as non-essential businesses, survived intermediate scrutiny due to the reasonable fit between the goal of reducing COVID-19 transmission and the burden on Second Amendment rights)[9] and *McDougall v. County of Ventura*,

[9] In *Altman*, the Court explained: "Plaintiffs argue that [the Second Amendment burden] merits strict scrutiny, but they cite no case in which the Ninth Circuit – or any other circuit – has applied anything but intermediate scrutiny to a law that burdens a Second Amendment right. Presumably, this is because '[t]here is … near unanimity in the post-*Heller* case law that ***when considering regulations that fall within the scope of the Second Amendment, intermediate scrutiny is appropriate***.'" *Id.* at 1127 (quoting *Silvester v. Harris*, 843 F.3d 816, 823 (9th Cir. 2016) (emphasis added)).

2020 WL 2078246 (C.D. Cal. April 1, 2020) (denial of injunctive relief the county order closing firearms retailers). *Dark Storm*, 471 F.Supp.3d at 501-502 ("The Court's conclusion accords with those of other courts that have considered similar regulations during this pandemic. . . . [T]he fit between the Executive Orders and the State's interest in protecting public health amply satisfies the requirements of intermediate scrutiny."). *Id.* at 502.[10]

Moreover, the Court's constitutional examination was properly placed into the extraordinary factual context – "Defendants made a policy decision about which businesses qualified as 'essential' and which did not. ***In the face of a global pandemic, the Court is loath to second-guess those policy decisions***." *Id.* at *503 (emphasis added) (citing *S. Bay United Pentecostal Church v. Newsom*, __ U.S. __, 140 S.Ct. 1613 (2020) (Roberts, C.J., concurring) ("Our Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States to guard and protect. ***When those officials***

[10] The Court also noted that heightened scrutiny was not triggered because "alternatives remained for Plaintiffs and others like them in New York to acquire firearms for self-defense", since stores such as Walmart remained open and such stores were within a half-hour's drive of the plaintiff retailer's location. *Id.* at 498 (citing *Teixeira v. County of Alameda*, 873 F.3d 670, 680 (9th Cir. 2017) ("gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully restrained"); *Second Amendment Arms v. City of Chicago*, 135 F.Supp.3d 753, 754 (N.D. Ill. Sept. 28, 2015) ("a slight diversion off the beaten path is no affront to … Second Amendment rights").

undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad.") (emphasis added)).

The balancing of competing interests in the instant case weighs even more against Plaintiffs because the burden on their Second Amendment rights lasted at most five days. *See Altman*, 464 F.Supp.3d at 124 ("Because this ***short-term restriction [which has a limited duration] falls short of the permanent ban*** in *Heller*, it is not 'unconstitutional ***under any level of scrutiny***.'") (quoting *Silvester*, 843 F.3d at 821) (emphasis added).

Any burden imposed by the five-day closure is significantly outweighed by the compelling interests served by the challenged action taken in conjunction with the County's emergency response to a global pandemic, at a time when scientists knew very little about COVID-19's contagiousness and other most basic properties. If any of the Plaintiffs were temporarily impeded with respect to the exercise of their Second Amendment rights during this five-day period, any such interruption paled in comparison to the significance of the public and governmental interests at stake.

Accordingly, there were ample legal and factual grounds for the District Court's ruling that the five-day closure survived the requisite intermediate scrutiny.

2.4. The Dismissal Of Plaintiffs' Second Amendment Claims May Also Be Affirmed Under *Jacobson v. Commonwealth of Massachusetts*.

Although the District Court framed its Second Amendment analysis to this Court's Second Amendment framework pursuant to *Heller*, the dismissal of Plaintiffs' claims may also be affirmed under *Jacobson v. Commonwealth of* Massachusetts, 197 U.S. 11 (1905). *See, e.g. McQuillon v. Schwarzenegger*, 369 F.3d 1091, 1096 (9th Cir. 2004) (Court of Appeals "may affirm on any ground supported by the record").

In *Jacobson*, the Supreme Court upheld a mandatory vaccination law enacted by a local board of health during a smallpox epidemic. In addressing the Fourteenth Amendment challenge to the law, the Supreme Court explained that "the liberty secured by the Constitution … does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint", and held that if the public health statute "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Id.* at 31. The Supreme Court further explained, "It is no part of the function of a court or a jury to determine which one

of two modes was likely to be the most effective for the protection of the public against disease." *Id.* at 30.

In the last year, courts have applied the *Jacobson* framework, including the deference that must be accorded government officials dealing with the COVID-19 pandemic. For example, in *Altman v. County of Santa Clara*, 464 F.Supp.3d 1106 (N.D. Cal. June 2, 2020), the plaintiffs (firearms retailers, Second Amendment-related nonprofit organizations and private individuals) sought a preliminary injunction requiring four Bay Area Counties to permit in-store retail transactions, and they argued that *Jacobson* was arcane and inapplicable.[11] The *Altman* Court addressed this issue at length and rejected their contention:

> [T]he case remains alive and well – including during the present pandemic. *See S. Bay United Pentecostal Church v. Newsom*, [140 S.Ct. 1613, 1613-14 (May 29, 2020) (mem.) (Roberts, C.J., concurring)] (citing *Jacobson* in denying injunctive relief regarding California's COVID-19-related restrictions on religious gatherings). Two circuits have recently held that district courts erred by not using *Jacobson* to evaluate pandemic-related restrictions on constitutional rights. [Citing *In re Abbott*, 954 F.3d 772, 785 (5th Cir. 2020) (evaluating temporary restraining order on Texas pandemic restrictions as they related to abortion); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (same as to Arkansas restrictions).] … And while the Ninth Circuit has not yet announced a rule, district courts within the circuit have relied on *Jacobson* to evaluate the burdens that

[11] In *Altman*, the Court ruled that the injunctive relief action was "now moot as to those counties" which "now permit in-store retail". *Id.* at 1111. Similarly, the injunctive and declarative relief claims in the instant action have been moot for over a year since firearms retailers in the County have operated without interruption since March 30, 2020. *See* Argument Section 3, *infra*.

> California and Arizona's pandemic orders have placed on religious exercise and travel. *See McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at *5 (D. Ariz. May 8, 2020); *Cross Culture Christian Ctr. v. Newsom*, [445 F.Supp.3d 758, 766-67 (E.D. Cal. Jan. 26, 2021)]; *Gish v. Newsom*, No. EDCV 20-755 JGB (KKx), 2020 WL 1979970, at *5 (C.D. Cal. Apr. 23, 2020).

Altman, 464 F.Supp.3d at 1118-19.[12]

While noting that the Court had not found any authority for applying *Jacobson* in the Second Amendment context, the Court saw "significant overlap between the 'plain, palpable invasion'" prohibited by *Jacobson* and the "'complete prohibition' on the Second Amendment right that *Heller* deemed categorically unconstitutional", and considered "whether the Order effects such a prohibition in order to determine whether it can be upheld under *Jacobson*." *Id.* at 1121. The Court explained further that Alameda's Order requiring the closure of non-essential businesses was "facially neutral", that there was no evidence of selective enforcement, and under *Jacobson*, the Court ruled that the Order could not be in palpable conflict with the Second Amendment. *Id.* at 1124-25.

[12] In *Cross Culture Christian Center v. Newsom*, 445 F.Supp.3d 758 (E.D. Cal. May 5, 2020), the plaintiffs sought to enjoin the defendants from enforcing the State and County stay-at-home orders against the church's biweekly in-person services. *Id.* at 765. The Court relied on *Jacobson* in explaining, "But sometimes, normalcy is lost. … This Court finds the State and County stay at home orders being challenged here bear a real and substantial relation to public health." *Id.* at 766. Furthermore, the plaintiffs had ignored "*Jacobson*'s mandate that, during public health crises, 'it is no part of the function of a court … to determine which of two modes was likely to be the most effective for the protection of the public against disease.'" *Id.* at 767 (quoting *Jacobson*, 197 U.S. at 30).

Therefore, the Court ruled that the plaintiffs had failed to demonstrate a likelihood of success on their Second Amendment claim. *Id.* at 1125.

Similarly, Plaintiffs have not and cannot show that the five-day closure resulted in the palpable conflict with the Second Amendment. Combined with the deference to local government officials the Supreme Court requires, with respect to deliberative actions taken during a public health emergency, the District Court's ruling that the five-day closure did not result in an actionable Second Amendment violation may be affirmed under *Jacobson* as well.

2.5. Plaintiffs Rely On Inapposite Free Exercise Clause COVID-19 Cases In Arguing That Strict Scrutiny Should Have Been Applied.

In arguing that the District Court should have applied heightened or strict scrutiny, Plaintiffs point to recent cases where this Court addressed the constitutionality of COVID-19-related restrictions on indoor religious worship services. *See Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020) and *S. Bay United Pentescostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2020). These cases, however, are readily distinguishable.

In *Cavalry Chapel*, the petitioner appealed the denial of a preliminary injunction against the enforcement of the State of Nevada's emergency directive which imposed a fifty-person cap on indoor in-person services at houses of

worship. *Id.* at 1231. The petitioner argued that directive was subject to strict scrutiny and that the State had failed to demonstrate a compelling interest or that the directive was narrowly tailored. *Id.* This Court relied on *Roman Catholic Diocese of Brooklyn v. Cuomo*, __ U.S. __, 141 S.Ct. 63 (2020) (wherein two houses of worship sought an injunction against Governor Cuomo's executive order that imposed caps of 10 and 25 people for religious services). The Supreme Court concluded that the plaintiffs had shown a likelihood of success on the merits, holding that the New York order was not neutral because houses of worship were singled out for harsh treatment. *Id.* at 65-66. The Supreme Court applied strict scrutiny review, holding that the governmental interest was compelling but that the challenged order was not narrowly tailored. *Id.* at 66-67.

In *Calvary Chapel*, this Court held that Nevada's directive treated "secular activities and entities significantly better than religious worship services" in that "[c]asinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities are limited to 50% of fire-code capacity, yet houses of worship are limited to fifty people regardless of their fire-code capacities." *Calvary Chapel*, 982 F.3d at 1233. This Court applied strict scrutiny review and held that the directive was not narrowly tailored because the attendance cap could have been tied to the fire-code capacity of the houses of worship, "like the limitation it imposed on retail stores and restaurants, and … casinos." *Id.* at 1234.

In *S. Bay United*, this Court affirmed the denial of the plaintiffs' motion for preliminary injunction as to the plaintiffs' claim that California's emergency orders had temporarily halted all indoor religious services in high-risk areas of the State in violation of the Free Exercise Clause. *Id.* at 1144 (disparate treatment between houses of worship and retail and grocery stores was justified because "these establishments do not involve individuals congregating to participate in a group activity"). This Court also reversed the denial of injunctive relief as to the plaintiffs' claim that 100 and 200 person attendance limits on indoor worship under Ties 1 and 2 of the State's Blueprint system violated the Free Exercise Clause of the First Amendment. This Court applied strict scrutiny to this claim "because California has imposed different capacity restrictions on religious services relative to non-religious activities and sectors." *Id.* at 1151 (citing *Roman Catholic Diocese*, 141 S.Ct. at 66-67).

The facts and strict scrutiny analysis in these cases do not help Plaintiffs' Second Amendment argument. During the subject five-day closure in March 2020, firearms retailers were not treated differently from other retail businesses categorized as non-essential and required to close. Nightclubs, bars, cardrooms and bowling alleys, for example, were not subject to more lenient restrictions than firearms retailers.

Moreover, Second Amendment jurisprudence is well-established in this Circuit, with intermediate scrutiny having been consistently applied in cases involving far more restrictive regulations, both prior to and during the COVID-19 pandemic. And unlike the restrictions challenged in the Free Exercise cases, the alleged Second Amendment infringement in the instant case lasted at most five days. This indisputable fact necessarily impacts the required balancing calculus (burden vs. compelling interest), regardless of whether the scrutiny is intermediate or strict, and warrants the affirmance of the judgment below.

3. THE ABSENCE OF ANY ORDER REQUIRING THE CLOSURE OF FIREARMS RETAILERS IN THE COUNTY SINCE MARCH 30, 2020, AND THEIR CONTINUOUS OPERATION TO DATE, HAVE RENDERED PLAINTIFFS' SECOND AMENDED CLAIM MOOT AS A MATTER OF LAW.

The District Court found that "Plaintiffs' Second Amendment claim … has likely lost its character as a present, live controversy and should be dismissed as moot" but elected to address the merits of Plaintiffs' claims for declaratory and injunctive relief. (ER at 21.) In reaching this finding, the District Court noted Defendants' argument that the County's Stay at Home Orders of June, August and September 2020 clearly exempted firearms retailers from closure and Plaintiffs' argument that the alleged Second Amendment violation is capable of repetition.

(ER at 21.) The District Court concluded that during the prior six months, the County has demonstrated "it will not close firearm retailers even in the absence of a temporary restraining order, nor has the County even hinted at any plans to close firearm retailers in the future", and that Plaintiffs' "fears and speculation about future possible closures cannot sustain an otherwise moot claim". (ER at 21, citing *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992).)

While the District Court did not dismiss Plaintiffs' claims on the basis of their mootness, the District Court's conclusions were still entirely correct. Indeed, since that date, firearms retailers have remained continuously open in the County, subject to COVID-19 safety protocols; otherwise, Plaintiffs certainly would have made that known.[13] Nevertheless, having had the benefit of the District Court's mootness related observations and the actual significant progress against the spread of COVID-19 in the County, Plaintiffs argue at length on appeal about "the risk of an updated order closing firearms retailers and firing ranges" and that

[13] The County's June 18, 2020, August 12, 2020 and September 4, 2020 COVID-19 Reopening Safer at Work and in the Community for Control of COVID-19 Orders specifically identified higher-risk businesses which had to be closed to help slow the spread of COVID-19, and these Orders did not identify firearms retailers or shooting ranges as being subject to such closure. (ER at 27-28, 69-70, 86.)

"reinstatement remains more than a reasonable possibility."[14] (AOB at p. 20.)

As discussed in Argument Section 1, *supra*, Plaintiffs' entirely speculative and unfounded contentions about what the County might do, lack any factual foundation. The COVID-19 trends over the last year, and especially the prior three months (coinciding with the availability of multiple vaccines, to now all residents ages 16 and above), during which the County has moved to the least restrictive tier on the State's Blueprint for a Safer Economy system, cannot be ignored. Yet, Plaintiffs continue to do so by blindly proclaiming that there is "compelling evidence" that the County will reverse its position. (AOB at p. 23.) In fact, no such evidence exists, and all of the evidence compellingly shows that Plaintiffs' predictions are detached from the objective data upon which the County's COVID-19 responses are based.

As such, the mootness of Plaintiffs' claims has become even more pronounced since the District Court's October 20, 2020 ruling. Plaintiffs bear the burden of showing at all times that the Court has subject matter jurisdiction over

[14] On April 29, 2021, the County issued its latest Reopening Safer At Work And In The Community For Control Of COVID-19 Order. http://publichealth.lacounty.gov/media/coronavirus/docs/HOO/HOO_SaferatHomeCommunity.pdf. Section 16 of this Order identified many activities which are permitted under the Order, including the use of "shared outdoor facilities for recreational activities, including … shooting … ranges". (Section 16(i).) This Order also did not include any prohibition against the continued operation of firearms retailers, and also included protocols for the operation of establishments such as movie theaters, bars, fitness gyms and cardrooms.

the subject action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Assoc. of Med. Colls. v. United States*, 217 F.3d 770, 778-79 (9th Cir. 2000) (plaintiff has the burden of establishing the court's subject matter jurisdiction); *see also Langer v. McKelvy*, 2015 WL 13447522, at *1 (C.D. Cal. Sept. 24, 2015) ("A party may move for judgment on the pleadings based on lack of subject matter jurisdiction.") (citing *U.S. v. In re Seizure of One Blue Nissan Skyline Auto., and One Red Nissan Skyline*, 683 F.Supp.2d 1087, 1089 (C.D. Cal. 2010)).

Here, Plaintiffs do not have standing to pursue the declaratory and injunctive relief sought due to the absence of either any actionable ongoing injury or any actionable injury that is likely to recur. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). Article III of the United States Constitution limits federal court jurisdiction to "actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "A case or controversy must exist at all stages of review, not just at the time the action is filed." *Wolfson v. Brammer*, 616 F.3d 1045, 1053 (9th Cir. 2010).

"A case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)

(if "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome", the case is moot); *see also United States v. Geophysical Corp. of Alaska*, 732 F.2d 693, 698 (9th Cir. 1984) ("[a] claim is moot if it has lost its character as a present, live controversy.").

Furthermore, an injunctive relief claim loses all viability if "(1) there is no reasonable expectation that the [alleged] wrong will be repeated, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992). In other words, a claim becomes moot when it is clear that the allegedly wrongful behavior could not reasonably be expected to recur. *Friends of the Earth, Inc. v. Laidlaw Environmental Services,* 528 U.S. 167, 190 (2000); *see e.g., Hendrickson v. eBay Inc.,* 165 F. Supp.2d 1082, 1095 (C. D. Cal. 2001) (summary judgment on Lanham Act claim for injunctive relief where defendant ceased running allegedly infringing advertisements and had no intention of running the advertisements in the future). Plaintiffs must also show that a "sufficient likelihood that [they] will again be wronged in a similar way." *City of Los Angeles v. Lyons*, 461 U.S. at 102; *see also McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016) ("arguments based on conjecture or speculation are insufficient...."); *R.W. Beck & Assocs. v. City & Borough of Sitka*, 27 F.3d 1475, 1481 (9th Cir. 1994) (arguments based on conjecture or speculation are insufficient to raise a genuine

issue of material fact); *Sossamon v. Lone Star of Texas*, 560 F.3d 316, 325 (5th Cir. 2009) ("Without evidence to the contrary, we assume that formally announced changes to official governmental policy are not mere litigation posturing.").

Simply put, the dismissal of this action cannot be reversed on the basis of Plaintiffs' speculative and unsubstantiated fears of what the County might do. The present COVID-19 circumstances, thankfully, are fundamentally different from March 2020, and these changed circumstances cement the absence of any live controversy required for Plaintiffs' injunctive and declaratory relief claims. Firearms retailers in the County have been continuously open since March 30, 2020, and there is no reasonable basis to believe that the County's continuing COVID-19-related responses will somehow result in their closure. Plaintiffs are not entitled to litigate this action seeking injunctive and declaratory relief indefinitely when any actual or live controversy dissolved more than a year ago.

4. CONCLUSION.

For the foregoing reasons, Defendants/Appellees County of Los Angeles, Sheriff Alex Villanueva (in his official capacity only), and County Public Health

Director Barbara Ferrer respectfully submit that the judgment below be affirmed in its entirety.

Dated: May 5, 2021

Respectfully submitted,

LAWRENCE BEACH ALLEN & CHOI, PC

By /s/ Jin S. Choi
Jin S. Choi
Attorneys for Defendants/Appellees County of Los Angeles, Barbara Ferrer, and Alex Villanueva

UNITED STATES COURT OF APPEALS
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