

1 DONNA R. ZIEGLER [SBN 142415]
 County Counsel
 2 RAYMOND L. MACKAY [SBN 113230]
 Senior Deputy County Counsel
 3 Office of the County Counsel
 4 COUNTY OF ALAMEDA
 1221 Oak Street, Suite 450
 5 Oakland, California 94612
 Telephone: (510) 272-6700
 6 *Attorneys for Defendants County of Alameda,*
 7 *Gregory J. Ahern and Erica Pan*

8 UNITED STATES DISTRICT COURT
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 10 OAKLAND DIVISION

12 JANICE ALTMAN, et al.,
 13 Plaintiffs,
 14 v.
 15 COUNTY OF SANTA CLARA, *et al.*,
 16 Defendants.

Case No.: 4:20-cv-02180-JST

**DEFENDANTS COUNTY OF ALAMEDA,
 GREGORY J. AHERN, AND ERICA PAN'S
 NOTICE OF MOTION AND MOTION TO
 DISMISS PLAINTIFFS' FIRST AMENDED
 COMPLAINT; AND SUPPORTING
 MEMORANDUM OF POINTS AND
 AUTHORITIES**

[FRCP Rule 12(b)(1) and (b)(6)]

Hearing Date: August 12, 2020
 Hearing Time: 2:00 PM
 Courtroom: 6; 2nd Floor
 Location: 1301 Clay St., Oakland, CA
 Judge: The Hon. Jon S. Tigar

TO PLAINTIFFS AND COUNSEL OF RECORD:

23 **NOTICE IS HEREBY GIVEN** that, on the above date and time in the above Courtroom, and
 24 pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(1) and 12(b)(6), the Defendants
 25 County of Alameda, Gregory J. Ahern, and Erica Pan, will move the Court for an Order dismissing
 26 Plaintiffs' First Amended Complaint ("FAC"), ECF No. 19, against these Defendants.

27 Alternatively, Defendants will move to dismiss the Due Process claim, Count Two in Plaintiffs'
 28 FAC. FAC ¶¶ 147-155, ECF No. 19.

1 The Motion is made because, on June 18, 2020, the County Public Health Officer issued a
 2 revised Public Health Order further opening retail business within the County, rendering moot the case
 3 against these Defendants. Alternatively, should the Court determine the case against these Defendants
 4 is not moot, the Motion is made because Plaintiffs fail to allege facts in the FAC establishing a
 5 plausible Due Process claim against these Defendants.

6 7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. BACKGROUND AND COUNTY’S PUBLIC HEALTH ORDERS**

9 The State of California, our country, and the entire world are in the midst of an unparalleled
 10 public health emergency due to the novel coronavirus and the disease it causes, COVID-19. *See* Ct.
 11 Order at 2, June 2, 2020, ECF No. 61¹. In California, as of Monday, June 29, 2020, there have been
 12 216,550 confirmed cases of COVID-19, and 5,936 deaths. *See* State of California, COVID-19
 13 Dashboard, <https://covid-19.ca.gov/> (June 29, 2020). In Alameda County alone (not including the City
 14 of Berkeley, which has its own Public Health Department), as of June 28, 2020, there have been 5,615
 15 confirmed cases and 132 deaths. *See* County of Alameda, COVID-19 Dashboard, [https://ac-](https://ac-hcsa.maps.arcgis.com/apps/opsdashboard/index.html#/1e0ac4385cbe4cc1bffe2cf7f8e7f0d9)
 16 [hcsa.maps.arcgis.com/apps/opsdashboard/index.html#/1e0ac4385cbe4cc1bffe2cf7f8e7f0d9](https://ac-hcsa.maps.arcgis.com/apps/opsdashboard/index.html#/1e0ac4385cbe4cc1bffe2cf7f8e7f0d9) (June 28,
 17 2020). As shocking as they are, these numbers understate the damage inflicted by the virus.

18 In response to this extraordinary challenge, both the State of California and local health officers
 19 across the state have issued “shelter in place” orders under the broad powers granted them by the
 20 California Legislature to control the spread of communicable diseases. Ct. Order at 3, June 2, 2020,
 21 ECF No. 61; Cal. Health & Safety Code §§101085, 120175. To slow the spread of COVID-19, on
 22 March 16, 2020 Alameda County’s health officer, in concert with six other Bay Area health officers,
 23 issued the first shelter in place orders in the United States. FAC ¶ 93, ECF No. 19; E. Pan Decl. Ex. A,
 24 at 11-17, ECF No. 46-6 (The County’s complete Public Health Orders are found that
 25 <http://www.acphd.org/2019-ncov/health-officer-orders.aspx>). The County’s March 16, 2020 Order has
 26

27 ¹ In the Court’s June 2, 2020 Order denying Plaintiffs’ Application for a Preliminary Injunction, the
 28 Court outlined the background and history the COVID-19 pandemic. *See* Ct. Order, June 2, 2020, ECF
 No. 61.

1 been previously filed with the Court at E. Pan Decl. Ex. A, at 11-17, ECF No. 46-6; a copy is also
2 attached as **Exhibit A** to the Declaration of Counsel, Raymond L. MacKay, filed and served herewith
3 (“MacKay Declaration”).

4 The March 16, 2020 Order required nonessential businesses to cease all activities at facilities
5 located within the County except for minimal basic operations. E. Pan Decl. Ex. A, at 2, ECF No. 46-6;
6 MacKay Decl. Ex. A. There were 21 categories of essential businesses, such as grocery stores,
7 healthcare operations, and banks. E. Pan Decl. Ex. A, at 5-7, ECF No. 46-6; MacKay Decl. Ex. A, at 5-
8 7. Firearm and ammunition retailers were not among those listed categories. *Id.*

9 On March 31, 2020, the County Public Health Officer (“PHO”) issued an Order superseding the
10 March 16, 2016 Order and extending the shelter in place until May 3, 2020. E. Pan Decl. Ex. B, at 1-13,
11 ECF No. 46-6; MacKay Decl. Ex. B.

12 On April 29, 2020, in light of the progress achieved in slowing the spread of COVID-19, the
13 County PHO issued a superseding Order allowing additional essential businesses and outdoor
14 businesses to resume operating and extending the deadline until May 31, 2020. E. Pan Decl. Ex. C, at
15 1-16, ECF No. 46-6; MacKay Decl. Ex. C, at 1, 6-15 of 16.

16 Subsequently, on May 18, 2020, due to the further progress achieved in slowing the spread of
17 COVID-19, the County PHO issued a superseding Order allowing a limited number of “Additional
18 Businesses” to resume operating, subject to specified conditions and precautions to reduce associated
19 risk of COVID-19 transmission. Def. Supplemental Req. for Judicial Notice Ex. B, at 1-17, Appendix
20 C-1, ECF No. 50; *see also* MacKay Decl. Ex. D, at 2-3, 16, Appendix C-1. As part of this Order, the
21 PHO permitted curbside or storefront pick up and/or delivery by retail stores. This May 18, 2020 Order
22 specified that the County’s PHO would continue to review whether modifications of the Order were
23 warranted based on County-specific “COVID-19 Indicators,” including the trend of new cases and
24 hospitalizations per day; the capacity of hospitals and health care facilities in the region, including
25 acute and intensive care beds; the supply of personal protective equipment (“PPE”) available for
26 hospital and healthcare staff; the ability and capacity to quickly test for COVID-19 infection; and the
27 capacity to conduct contact-tracing. Def. Supplemental Req. for Judicial Notice Ex. B, at 1-2, 5-6;
28 Appendix C-1, ECF No. 50; *see also* MacKay Decl., Ex. D at 1-2, 5-6, Appendix C-1.

1 On June 5, 2020, the County PHO issued two new Orders, Order No. 20-13 requiring every
 2 person residing in the County to wear face coverings, with limited exceptions, and Order No. 20-14
 3 extending the Shelter in Place Order with additional modifications of the prior Shelter in Place Order,
 4 including allowing small social gatherings (called “Social Bubbles”) and the expansion of retail
 5 services. *See* MacKay Decl. Ex. F; MacKay Decl. Ex. G.

6 On June 18, 2020, the County PHO revised Order No. 20-14 to, among other things, permit all
 7 retail businesses to resume in-store retail sales. *See* MacKay Decl. Ex. H, at 3, 16, Appendix C. The
 8 June 18, 2020 Order, Order No. 20-14a, permitted indoor retail effective 8:00 a.m. on June 19, 2020,
 9 subject to “applicable industry guidance issued by the State of California” limits on maximum
 10 occupancy, and social distancing protocols, such as physical distancing, frequent hand-washing, and the
 11 use of face coverings. *See* MacKay Decl. Ex. H, Appendix C at 2-3.

12 **II. ALLEGATIONS IN PLAINTIFF’S FAC**

13 **A. Plaintiffs**

14 As applicable to these County Defendants, Plaintiffs include:

15 (1) a County resident (Albert Lee Swann) who wishes to “practice and exercise his right to keep
 16 and bear arms ... and would do so, but for the reasonable and imminent fear of arrest and criminal
 17 prosecution under Defendant[’s] laws, policies, orders, customs, and enforcement and because
 18 Defendant[’s] orders and actions have closed firearm and ammunition retailers and ranges.” FAC ¶ 13,
 19 ECF No. 19. According to the FAC, under the County’s Public Health Orders, Mr. Swann “cannot
 20 purchase either firearms or ammunition except the relicensed firearms dealer and/or licensed
 21 ammunition vendor [and] “[he] and others similarly situated... are being prevented from exercising the
 22 right to keep and bear loaded, operable firearms for self-defense, including in the home.” FAC ¶ 101,
 23 ECF No. 19; and,

24 (2) five (5) nonprofit entities focused on Second Amendment rights (“Institutional Plaintiffs”)
 25 who bring the action on behalf of themselves and their members. FAC ¶¶ 22-26, ECF No. 19.²

26 _____
 27 ² Plaintiffs also include certain “Retailer Plaintiffs.” FAC ¶¶ 19-21, ECF No. 19. However, none of the
 28 identified Retailer Plaintiffs are allegedly located within the County of Alameda and there are no
 allegations that County of Alameda laws or orders forbid or otherwise interfere with those Retailers’
 businesses. *Ibid.*

1 **B. County Defendants**

2 In the FAC, Plaintiffs name as Defendants the County of Alameda, the County Sheriff Gregory
3 J. Ahern, responsible for enforcement of County laws and orders, and the County Interim Health
4 Officer Erica Pan, M.D., responsible for public health in the County. FAC ¶¶ 36-38, ECF No. 19.³

5 In its Order dated June 2, 2020, the Court observed that the Public Health Officers for the other
6 County Defendants (Santa Clara, San Mateo and Contra Costa County) had issued Orders permitting
7 retail businesses to resume socially distanced in-store sales. Ct. Order at 4-5, June 2, 2020, ECF No. 61.

8 Accordingly, the Court dismissed those Counties (as well as those Counties’ Sheriffs and Public
9 Health Officers, and City Defendants located in those Counties) from the lawsuit because the Plaintiffs
10 were able to purchase firearms and ammunition in those Counties, and the Court determined that the
11 case was moot as to those Defendants. Ct. Order at 8, June 2, 2020, ECF No. 61; Ct. Order at 1, June
12 18, 2020, ECF No. 65.

13 **C. Alleged Claims against the County Defendants**

14 **1. Second Amendment Claim**

15 According to the FAC, “Defendant[s]’ orders, policies, practices, customs, and enforcement
16 actions prohibit law-abiding individuals from purchasing firearms and ammunition for the purpose of
17 protecting themselves and their families (or for any other purpose). Independently and collectively,
18 these stand as a bar on firearms acquisition, ownership, and proficiency training at shooting ranges, and
19 thus amount to a categorical ban on and infringement of the right to keep and bear arms and the
20 privileges and immunities of citizenship.” FAC ¶ 130, ECF No. 19.

21 Plaintiffs further allege that “Plaintiffs, Plaintiffs’ Members and customers, and those similarly
22 situated to them, seek to exercise the right to keep and bear arms for self-defense of themselves and
23 their families, especially in times of crisis such as this.” FAC ¶ 131, ECF No. 19.

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27 ³ In this Motion, these three Defendants are collectively sometimes referred to as “the County
28 Defendants.” The Defendant County of Alameda is sometimes referred to as “the County” unless
otherwise specified.

1 **2. Due Process Claim**

2 According to the FAC, the County Defendants’ orders, policies, practices, customs, and
3 enforcement actions also are arbitrary and capricious, overbroad and violate Plaintiffs’ right to due
4 process of law. FAC ¶ 149, ECF No. 19.

5 **III. RELEVANT PLEADING STANDARDS**

6 A complaint must contain a “short and plain statement of the claim showing that the pleader is
7 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds upon which
8 they rest. *See* Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
9 Plaintiff’s obligation is to provide the grounds of his entitlement to relief beyond mere “labels and
10 conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual
11 allegations must be enough to raise a claim for relief above the speculative level...” *Twombly*, 550 U.S.
12 at 555 (internal citations omitted).

13 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, accepted
14 as true, “to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
15 (2009) (quoting *Twombly*, 550 U.S. at 570) (internal quotations omitted). “A claim has facial
16 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
17 inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not
18 akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has
19 acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are
20 ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and
21 plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557).

22 In ruling on a Motion to Dismiss, a court need not accept as true legal conclusions or
23 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements...”
24 *Iqbal*, 556 U.S. at 678.

25 **IV. ARGUMENT**

26 **A. The Claims Raised in Plaintiffs’ FAC are Moot**

27 The doctrine of mootness requires a Court to dismiss a case “when the issues presented are no
28 longer live or the parties lack a legally cognizable interest in the outcome.” *Already, LLC v. Nike, Inc.*,

1 568 U.S. 85, 91 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (*per curiam*) (internal
2 quotations omitted)). To avoid mootness, a dispute “must be extant at all stages of review, not merely at
3 the time the complaint is filed.” *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Moreover, “the repeal,
4 amendment, or expiration of challenged legislation is generally enough to render a case moot and
5 appropriate for dismissal.” *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d
6 1195, 1198 (9th Cir. 2019) (*en banc*).

7 In its June 2, 2020 Order, this Court noted that “[t]he party alleging mootness bears a heavy
8 burden in seeking dismissal. Ct. Order at 7, June 2, 2020, ECF No. 61 (citing *Rosemere Neighborhood*
9 *Ass’n v. U.S. Evtl. Prot. Agency*, 581 F.3d 1169, 1173 (9th Cir. 2009) (quoting *Friends of the Earth,*
10 *Inc. v. Laidlaw Evtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal quotations omitted))). The
11 Court further noted that “[a] case becomes moot only when it is impossible for a court to grant any
12 effectual relief whatever to the prevailing party.” Ct. Order at 7, June 2, 2020, ECF No. 61 (citing
13 *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567
14 U.S. 298, 307 (2012) (internal quotations omitted))).

15 As noted above, the Public Health Officers in Santa Clara, San Mateo and Contra Costa
16 Counties issued Orders permitting retail businesses to resume in-store retail sales with social distancing
17 and other safety protocols intended to stop the spread of COVID-19. *See* ECF #58 (20), Req. for
18 Judicial Notice, June 1, 2020, ECF No. 59; and #60. As a result of their updated Orders, the Court
19 found that Santa Clara, San Mateo and Contra Costa Counties met this “heavy burden” for dismissal on
20 mootness grounds as Plaintiffs were found to be clearly able to purchase firearms and ammunition
21 under the revised Orders, and thus the Court held that the case was moot as to those Defendants. Ct.
22 Order at 8, June 2, 2020, ECF No. 61; Ct. Order at 1, June 18, 2020, ECF No. 65.

23 The County of Alameda Defendants now similarly meet this burden in seeking dismissal on
24 mootness grounds. Through the June 18, 2020 Order, the County now permits on-site, indoor retail
25 with social distancing and other safety protocols, just like the Orders issued just a few weeks earlier by
26 the Health Officers in Santa Clara, San Mateo and Contra Costa Counties. MacKay Decl. Ex. H, at 2-3,
27 Appendix C, at 2. As such, like its claims against Santa Clara, San Mateo, and Contra Costa, Plaintiffs’
28 claims against the County Defendants are now moot based on the County’s June 18, 2020 Order.

1 MacKay Decl. Ex. H. The June 18, 2020 Order (MacKay Decl. Ex H) unequivocally permits on-site,
 2 indoor retail and thus clearly permits Plaintiff Swann and others similarly situated to purchase firearms
 3 within the County. MacKay Decl. Ex. H, at 3, Appendix C, at 2.

4 In addition, since April 29, 2020, the Health Officer Orders have permitted access to outdoor
 5 facilities important to health and safety or for recreation. E. Pan Decl. Ex. C, at 1, 6-8, ECF No. 46-6;
 6 MacKay Decl. Ex C, at 1, 6-8. Thus, the County's Order permits Plaintiff Swann to meet proficiency
 7 needs. In the County, since May 2020, the Livermore Pleasanton Rod and Gun Club has been open to
 8 Mr. Swann for those purposes. *See* MacKay Decl. Ex I, J.

9 Consequently, here, Plaintiff Swann and others similarly situated lack a legally cognizable
 10 interest in the outcome of the litigation against the County Defendants, and there are no justiciable
 11 issues left to be decided. For those reasons, the Court should dismiss the FAC as moot and dismiss
 12 these County Defendants.

13 **B. Should the Court Determine That the Case Against These County Defendants is**
 14 **Not Moot, Plaintiffs' Due Process Claim Should be Dismissed for Failure to State a**
 15 **Plausible Due Process Violation**

16 In the Due Process claim, Plaintiffs allege in conclusory fashion that the County Orders "do not
 17 define critical terms; they encompass protected and unprotected action; they omit definitions of key
 18 terms; they operate as complete ban; they do not require specific intent to commit an unlawful act; and
 19 they permit and encourage arbitrary and erratic arrests and convictions with too much discretion
 20 committed to law enforcement." FAC ¶ 153, ECF No. 19.⁴

21 The Fourteenth Amendment protects individuals against governmental deprivations of life,
 22 liberty or property without due process of law. The amendment has both procedural and substantive
 23 aspects. *See, e.g., United States v. Salerno*, 481 U.S. 739, 746 (1987).

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25 _____
 26 ⁴ As noted in fn. 1, *supra*, Plaintiffs include "Retailer Plaintiffs" who suggest a "due process" violation
 27 for failing "to accord" those Retailers. FAC ¶ 153, ECF No. 19. However, none of those Retailer
 28 Plaintiffs are allegedly located within the County of Alameda and there are no allegations that County
 of Alameda laws or orders forbid or otherwise interfere with those Retailers' businesses. FAC ¶¶ 19-21,
 ECF No. 19.

1 “To prevail on a claim for a procedural due process violation, the party must prove 3 elements:
 2 1) a protectable [life,] liberty or property interest, 2) government deprivation of that interest, and 3) a
 3 denial of adequate procedural protections.” *Holman v. City of Warren*, 242 F. Supp. 2d 791, 803 (D.
 4 Or. 2002) (citing *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998)).

5 Substantive due process protects individuals from the arbitrary deprivation of their liberty by
 6 government. *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006) [hereinafter *Brittain*]; *see also*
 7 *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (stating that substantive due process
 8 “forbids the government from depriving a person of life, liberty, or property in such a way that ‘shocks
 9 the conscience’ or ‘interferes with rights implicit in the concept of ordered liberty.’”). A substantive
 10 due process claim requires proof of two elements, *viz.*, (1) “a government deprivation of life, liberty, or
 11 property” and, (2) because “only the most egregious official conduct can be said to be arbitrary in a
 12 constitutional sense,” a plaintiff must also show “conscience shocking behavior by the government,”
 13 *e.g.*, “conduct intended to injure in some way unjustifiable by any governmental interest.” *Brittain*, 451
 14 F.3d at 991; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 847, fn. 8 (1998) (In a substantive
 15 due process claim, the threshold question is whether “the behavior of the governmental officer is so
 16 egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”).

17 Here, excluding conclusions per *Ashcroft*, 556 U.S. at 678, the FAC fails to allege facts alleging
 18 the necessary elements of either procedural or substantive Due Process:

- 19 • the FAC fails to allege how the County laws or Health Officer Orders denied Plaintiff
 20 Swann adequate procedural protections;
- 21 • the FAC fails to allege facts which identify the portion or portions of the County Orders
 22 that (allegedly) do not define critical terms or encompass protected or unprotected action
 23 or omit key terms or operate as a “complete ban” or that are otherwise constitutionally
 24 vague or arbitrary; and
- 25 • the FAC fails to allege facts identifying the portion or portions of the County Orders
 26 which allegedly encourage arbitrary or erratic arrests and convictions.

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1 In sum, the FAC alleges no facts establishing a plausible claim that the County laws or Orders
 2 denied Mr. Swann adequate procedural safeguards or that the County acted so arbitrarily that it “shocks
 3 the conscience.”

4 In fact, this Court has previously determined, based on evidence submitted in connection with
 5 Plaintiffs’ prior unsuccessful Application for a Preliminary Injunction, that the County’s May 18, 2020
 6 Order (MacKay Decl. Ex. D) easily satisfied constitutional due process requirements. Ct. Order at 31,
 7 June 2, 2020, ECF No. 61 (citing *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015)). This Court
 8 found that the May 18, 2020 Order was sufficiently clear and detailed in its wording and that “[p]rior
 9 versions of the Order have provided similar levels of detail as to what was and was not permitted
 10 throughout their duration.” Ct. Order at 31, June 2, 2020, ECF No. 61.

11 Here, the County’s subsequent June 18, 2020 Order (MacKay Decl. Ex. H) shows that it also
 12 easily satisfies constitutional due process requirements. The Order substantially follows the earlier May
 13 18, 2020 Order (which the Court as noted found met those constitutional requirements), plus the Order
 14 now clearly allows for on-site, indoor retail. *See* MacKay Decl. Ex. H, at 3, Appendix C at 2.

15 **V. CONCLUSION**

16 Based on the foregoing, the County Defendants request that this Motion to Dismiss be granted
 17 and the FAC dismissed with prejudice as moot. Alternatively, if the Court determines the case against
 18 these County Defendants is not moot, the Court should dismiss Plaintiff’s Due Process claim because it
 19 fails to plausibly establish a constitutional Due Process violation.

20
 21 Dated: July 1, 2020

Respectfully Submitted,

Office of the County Counsel for the
 County of Alameda, State of California

By /s/ *Raymond L. Mackay*

RAYMOND L. MACKAY
 Senior Deputy County Counsel

*Attorneys for Defendants County of Alameda,
 Gregory J. Ahern and Erica Pan*