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9

10 UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
11 (Oakland Division)

12

13 JANICE ALTMAN, et al.,

14 Plaintiffs,

15 v.

16 COUNTY OF SANTA CLARA, et al.

17 Defendants.

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No. 20CV02180JST

**DEFENDANTS' JOINT OPPOSITION TO
PLAINTIFFS' SUPPLEMENTAL BRIEF**

I. INTRODUCTION

1
2 Plaintiffs previously argued that Defendants, by barring face-to-face transactions, completely
3 prevented them from acquiring or practicing proficiency with firearms. Defendants now allow
4 retailers (including firearms dealers) to sell goods in person—either at the storefront or by
5 delivery—and they permit outdoor businesses (including shooting ranges) to operate. Thus,
6 Plaintiffs now articulate a new theory: that they cannot exercise their rights because federal and state
7 laws require firearms retailers to operate exclusively inside licensed buildings. But Plaintiffs adopt
8 incorrect and formalistic interpretations of laws regulating firearms dealers, misapply various
9 California Penal Code provisions, and overlook solutions to the obstacles they insist stand in their
10 way. Plaintiffs also ignore federal guidance—specifically drafted for the COVID-19 pandemic—
11 that allows firearm transactions to occur “curbside.”

12 As a result, Plaintiffs fail to overcome the presumption of mootness that arises from the
13 termination of the health orders they originally sought to enjoin. Even if enough of the case survives
14 to support jurisdiction, the nature of the dispute has changed dramatically. No longer can Plaintiffs
15 credibly claim to be suffering categorical deprivations. Instead, at most, they now have less
16 convenient opportunities to acquire firearms and fewer places to practice proficiency than before the
17 pandemic began. That is not enough to establish a Second Amendment claim, let alone a request for
18 extraordinary injunctive relief. Plaintiffs would apparently rather be aggrieved than made whole, but
19 their refusal to admit their rights have been restored is no reason to upend orders that continue to
20 protect the Bay Area from a deadly disease.

II. ARGUMENT

A. PLAINTIFFS’ REQUEST FOR A PRELIMINARY INJUNCTION IS MOOT

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23 “[T]he repeal, amendment, or expiration of challenged legislation is generally enough to
24 render a case moot and appropriate for dismissal.” *Bd. of Trustees of Glazing Health & Welfare Tr.*
25 *v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc). Here, Plaintiffs sought to enjoin
26 enforcement of health orders issued in March 2020 because those orders allowed only “Essential
27 Businesses” to sell retail goods in person but did not deem firearms retailers essential. Each of the
28 four county defendants has since superseded the challenged directives with new orders (“Revised

1 Health Orders”) that are “essentially the same” as one another for purposes of Plaintiffs’ motion.
 2 Supp. Br. at 4:28.¹ The Revised Health Orders differ from their predecessors, however, in three key
 3 respects: First, they allow “Additional Businesses,” including retailers, to sell goods by delivery and
 4 “curbside”—the latter term defined broadly to include any transaction in which the customer does
 5 not enter a store, regardless of whether the retail employee remains inside. *See, e.g.*, Dkt. No. 50,
 6 Ex. A, at App’x C-1(1). Second, they permit “Outdoor Businesses,” defined as entities that
 7 “primarily operate[] outdoors,” to open. *Id.* at ¶¶ 3, 15l. And, third, they allow individuals to travel
 8 to provide or access any “Additional Businesses” or “Outdoor Businesses.” *Id.* at ¶ 15(i). Plaintiffs
 9 insist that, despite these differences, the Revised Health Orders do not moot their request for
 10 injunctive relief because: (i) they still cannot acquire or practice proficiency with firearms; (ii)
 11 Defendants are likely to resurrect the more restrictive rules; and (iii) the restrictions may both recur
 12 and evade review. They are wrong on all counts.

13 **1. Plaintiffs Can Acquire and Practice Proficiency with Firearms**

14 According to Plaintiffs, the Revised Health Orders “do not allow [them] to engage in the
 15 constitutionally protected conduct at stake.” Supp. Br. at 4:5-6. They even claim the situation today
 16 is “the same as it was on day one.” *Id.* at 7:19-22. But that is clearly not so. Plaintiffs misrepresent
 17 and exaggerate any obstacles to firearms acquisition under federal and state law. They also identify
 18 no obstacle to visiting outdoor shooting ranges.

19 **a) *Federal Regulations of Firearms Retailers Do Not Prevent Curbside***
 20 ***Transactions***

21 Plaintiffs first insist federal law stands in their way because it requires firearms dealers to
 22 operate from their “business premises,” which 27 C.F.R. § 478.11 defines as “the property on which
 23 the dealing of firearms is or will be conducted.” Supp. Br. at 6:13-16. But, inexplicably, Plaintiffs
 24

25
 26 ¹ Plaintiffs note that the City Defendants have filed neither requests for judicial notice attaching
 27 updated city policies (Supp. Br. at 3:4-6) nor “evidence...that they have enacted or are enforcing any
 28 different policies” than those issued in March (*id.* at 3:24-28). But the City Defendants have always
 only enforced the County-issued orders. There are no separate City policies. *See, e.g.*, Dkt. No. 50,
 Ex. A ¶ 3 (stating order applies to “[a]ll individuals currently living within the County,” not just
 individuals in unincorporated areas of County).

1 ignore April 10, 2020 guidance from the Bureau of Alcohol, Tobacco, Firearms, and Explosives
2 (“ATF”), which was written expressly to address COVID-19 shelter-in-place orders, and which
3 interprets the same provision they cite as permitting drive-through and curbside transactions. *See*
4 *Supp. Bussey Decl., Ex. A (ATF Letter)*. Specifically, according to the ATF, federal regulations
5 permit dealers to conduct business: (i) “through a drive-up or walk-up window or doorway where the
6 customer is on the licensee’s property on the exterior of the brick-and-mortar structure;” or (ii) from
7 “a temporary table or booth located in a parking lot or other exterior location on the licensee’s
8 property....” *Id.* at 2. Plaintiffs do not explain why, as a practical matter, those options do not exist
9 here. They say nothing, for example, about the configurations of their own businesses or other
10 firearms retailers, at least many of which appear to be sited in privately owned strip malls with
11 access to private outdoor spaces. *See Dkt. No. 20-2 (Lee Decl.), Ex. 6 (photo of third-party gun*
12 *shop); id., Ex. 9 (photo of City Arms East).*

13 ***b) State Regulations of Firearms Retailers Do Not Prevent Curbside***
14 ***Transactions***

15 Second, Plaintiffs rely on two state law regulations of firearms retailers in Penal Code section
16 26805. The first requires that the “business of the licensee” be conducted “only in the buildings
17 designated in the license.” Penal Code § 26805(a). Plaintiffs offer no evidence or argument that
18 “building,” which the statute does not define, is strictly limited to the space inside a store’s four
19 exterior walls. California courts have construed “building” in other Penal Code provisions more
20 broadly. *See People v. LaDuke*, 30 Cal. App. 5th 95, 103 (2018) (holding that stand-alone sign at
21 front of property exterior to primary structure was part of “building” for purposes of vandalism
22 statute; rejecting definition limiting “building” to “structure that has four walls and a roof”); *People*
23 *v. Thorn*, 176 Cal. App. 4th 255, 263 (2009) (rejecting argument that “carports are not part of the
24 inhabited building under the burglary statutes”). The “in-the-building” language, which dates to the
25 statute’s initial enactment in 1953 (*Supp. Bussey Decl., Ex. B*), appears intended to ensure dealers
26 operate where they can store firearms securely, maintain a register of sales, post legal notices, and be
27 inspected. *See Penal Code §§ 26810; 26835; 26885; 26890; 26900*. Those aims are met by allowing
28 sales in front of or behind a store—for example in an outdoor walkway covered by the same roof.

1 See Lee Decl. Ex. 6 (depicting such a space).

2 But even if section 26805(a) requires firearms retail business to occur inside a store's four
3 exterior walls, the requirement could still be met as the ATF describes: with the customer and dealer
4 on opposite sides of an open door or window. In that case, the dealer would conduct his or her
5 business inside the "building" under any definition of that term (thereby satisfying the Penal Code),
6 while the customer remains outside (consistent with the Revised Health Orders). Plaintiffs do not
7 explain why this sales model would violate the statute and can point to no actual or threatened
8 enforcement against it. They also cannot credibly argue the 1950s-era language requires *every*
9 aspect of "the business of the licensee" (including actions taken by customers) to occur in the
10 building. Customers, having placed orders online for decades now, can presumably perform that
11 same act while standing immediately outside the store; no cited provision prevents them from
12 presenting their identification or taking a written test there either.²

13 Plaintiffs insist such a sales model would violate state law because firearms delivery must
14 happen "at...[t]he building designated in the license." Cal. Penal Code § 26805(d). But the
15 language they quote does not require anyone to be *in* the building; a walk-up customer could take
16 delivery "at" a doorway or window. And they cite only subsection (1) while ignoring subsection (3),
17 which permits delivery "at...[t]he place of residence of, ...or on private property owned or lawfully
18 possessed by, the purchaser...." *Id.* The latter provision, added by the Legislature in 1995, means
19 just what it says, as its legislative history confirms:

20 Finally, it is an open question whether dealers can deliver guns to purchasers at
21 their homes, fixed places of business or on land they own or lawfully possess.
22 These places are all places where a person can possess guns without the need for
23 carry permits under Penal Code Section 12026....Former President Reagan was, in
24 fact, delivered a gun and filled out a Federal Form 4473 at his ranch in Santa
25 Barbara County under this procedure. In so far as there is a question whether this is
26 allowed under state law, this bill would clarify that it is legal.

27 Supp. Bussey Decl., Ex. C (California Bill Analysis, S.B. 23 Sen., 6/13/1995). And, importantly, the

28 ² For this reason, and because (as Plaintiffs' counsel pointed out at the hearing), firearms dealers also
sell unregulated accessories, Plaintiffs' circular suggestion that those entities cannot operate at all
and thus "by definition" fail to qualify as "Additional [B]usinesses to which residents may lawfully
travel" under the Revised Health Orders, is inaccurate. Supp. Br. at 4:19-5:5.

1 Revised Health Orders allow “Additional Businesses” to deliver goods to customers’ homes. *See*,
 2 *e.g.*, Dkt. No. 50, Ex. A at App’x C-1 (“Goods may be provided to customers only by
 3 curbside/outside pickup *or by delivery.*”) (emphasis added).

4 **c) *State Firearms Possession Laws Do Not Prevent Curbside Delivery or***
 5 ***Delivery at Purchaser’s Home***

6 Third, Plaintiffs—continuing to search for an obstacle to that which they purportedly want to
 7 do—fret that customers could face criminal penalties for performing firearms safety demonstrations
 8 outside, citing Penal Code Sections 26350(a)(1)(A) and 26400, both of which bar carrying exposed
 9 firearms in a “public place or public street.” But Plaintiffs ignore separate statutory provisions
 10 providing that safety demonstrations and other firearms transfer processes are exempt from open
 11 carry laws when conducted on the premises of a firearms retailer. *See* Cal. Penal Code § 26374
 12 (“Section 26350 does not apply to, or affect, the open carrying of an unloaded handgun by a person
 13 engaged in firearms-related activities, while on the premises of a fixed place of business that is
 14 licensed to conduct ... activities related to the sale ... of firearms....”); Cal. Penal Code § 26405
 15 (same with respect to § 26400 and non-handguns). Defendants are unaware of any authority limiting
 16 “premises” here to within the four walls of a building. These exceptions presumably exist because
 17 open carry provisions aim to avoid instances where firearms “alarm[] unsuspecting individuals and
 18 caus[e] issues for law enforcement.” *Flanagan v. Harris*, No. LACV1606164JAKASX, 2018 WL
 19 2138462, at *7 (C.D. Cal. May 7, 2018) (discussing legislative history). The sight of a gun is not
 20 particularly alarming on the premises of a gun retailer.³

21 The open carry statutes—which prohibit carrying visible firearms in a “public place or public
 22 street”—are also not implicated by deliveries to private houses or apartment complexes. And
 23 Plaintiffs cite no authority preventing the statutorily-mandated safety demonstration from occurring

24
 25 ³ Plaintiffs also speculate that “raised eyebrows” might result should safety demonstrations occur
 26 outside, on their premises. Supp. Br. at 6:23. But the demonstrations could take place discreetly at
 27 the front or rear of a business, where a customer may remain outside a store on a private sidewalk or
 28 parking lot, reach into the store to pick up a firearm that remains within that building, and conduct
 the safe handling demonstration at arms’ length. Based on the pictures Plaintiffs previously
 submitted, the private entrances to firearms stores are often located in private shopping centers and
 meaningfully separated from public streets and sidewalks.

1 at such a residence, incident to delivery. On the contrary, they say the demonstration must happen
 2 “at the time of transfer.” Supp. Br. at 6:20-21. Given that delivery can legally occur at a “place of
 3 residence,” it follows that the safety demonstration can as well. The open carry laws also apply only
 4 when a person carries a firearm “outside a vehicle” (Penal Code 26350(a)(1)(A)); thus, to the extent
 5 any local firearms dealers can provide drive-through services, which the Revised Health Orders
 6 permit (*see* Dk. 50 Ex. A at App’x C-1 (allowing pickup through “any mode of travel”), they would
 7 avoid the statutes for that reason as well.

8 **d) Gun-Free School Zones Do Not Prevent Curbside Purchases**

9 Finally, Plaintiffs raise the specter that potential customers might unwittingly violate statutes
 10 barring firearms possession near school zones if they were forced to conduct the safe-handling
 11 demonstration or other purchase requirements outside. But Plaintiffs identify no firearms retailer
 12 within 1000 feet of a school zone and certainly do not claim all—or most—such stores are located
 13 within that radius. Regardless, neither state nor federal law affects the “curbside” transactions
 14 contemplated here. Both California and federal gun-free school zone laws do not apply to firearm
 15 possession “[w]ithin...a place of business or on private property.” Penal Code § 626.9(c)(1); *see*
 16 *also* 18 U.S.C. § 922(q)(2)(B)(i). Potential customers may possess a firearm on the private property
 17 owned or leased by firearms retailers, so neither provision creates any meaningful risk to customers.
 18 Plaintiffs attempt to rely on a distinguishable case imposing criminal liability for possessing a
 19 firearm on a public sidewalk in front of a house within a school zone, *People v. Tapia*, 129
 20 Cal.App.4th 1153, 1160 (2005). Supp. Br. at 7. But Plaintiffs fail to address the fact that the court’s
 21 holding turned on the fact that the possession occurred on a publicly owned easement, not on private
 22 property. *Tapia*, 129 Cal. App. 4th at 1163-65.

23 **2. Outdoor Shooting Ranges May Operate and Have Opened**

24 Finally, Plaintiffs do not actually dispute that the Revised Health Orders allow outdoor
 25 shooting ranges to operate. *See* Dkt. No. 50 at Ex. A ¶¶ 3, 16.1 (permitting “Outdoor Businesses” to
 26 operate). Defendants have confirmed that several such businesses recently resumed operations. *See*
 27 Supp. Bussey Decl. Exs. D-F. Accordingly, Plaintiffs can “practice and remain proficient” with
 28 firearms at appropriate locations and need not—as their brief suggests—do so “curbside.” Supp. Br.

1 at 7:19-20. That right clearly has been restored.

2 **B. THE VOLUNTARY CESSATION DOCTRINE DOES NOT APPLY**

3 Plaintiffs next claim that even if their rights have been restored, “the voluntary cessation
4 doctrine would intercede to preserve this Court’s jurisdiction over the controversy.” Supp. Br. at
5 8:3-9. Not so. The Ninth Circuit recently clarified the framework that applies when determining
6 whether the repeal, amendment, or expiration of an enactment moots related litigation. *Welfare*
7 *Trust*, 941 F.3d at 1199. It explained that because courts should treat “the voluntary cessation of
8 challenged conduct by government officials...with more solicitude than similar action by private
9 parties,” they must “presume that the repeal... of legislation” moots related litigation “unless there is
10 a reasonable expectation that the legislative body will reenact the challenged provision or one similar
11 to it.” *Id.* at 1197 (quoting *America Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th
12 Cir. 2010)). While “[t]he party challenging the presumption of mootness need not show” that
13 reenactment “is a virtual certainty,” any determination that a reasonable expectation exists “must be
14 founded in the record ... rather than on speculation alone.” *Id.*

15 Plaintiffs fail to cite *Welfare Trust*, relying instead on precedent that case overruled.
16 Applying the correct test, the Court should presume Plaintiffs’ application for a preliminary
17 injunction is moot because the challenged public health orders were superseded by orders that
18 restore their rights. Plaintiffs, moreover, cannot overcome the presumption. They say “there is
19 certainly no guarantee that the challenged actions will not recur,” and that there could be a “second
20 wave” of COVID-19 cases that lead to stricter orders. Supp. Br. at 8:28-10:1. But those
21 possibilities—“speculation alone”—are insufficient. As of now, all indications are to the contrary,
22 as the number of new cases is declining and hospital capacity, testing, and contact tracing are all
23 increasing. It is thus more likely that the orders will continue to become more lenient, consistent
24 with the “gradual and measured resumption of activity” that has already begun and is intended “to
25 prevent a surge in COVID-19 cases.” Dkt. No. 50, Ex. A ¶ 1. Even if the disease does resurge, it is
26 not likely, given the progress that has been and will be made, that anything like the March orders
27 will result. For that reason, and because, here, repeal occurred due to new data about COVID-19
28 cases, testing, and treatment capacity—not the “prodding effect of litigation”—the voluntary

1 cessation doctrine does not apply. *Welfare Trust*, 941 F.3d at 1199.

2 **C. THE MARCH RESTRICTIONS ARE NOT “CAPABLE OF REPETITION, YET**
 3 **EVADING REVIEW”**

4 Plaintiffs also claim “mootness would not deprive this Court of jurisdiction because the
 5 controversy is ... ‘capable of repetition, yet evading review.’” Supp. Br. at 10:2-4; *see also*
 6 *Hamamoto v. Ige*, 881 F.3d 719, 722 (9th Cir. 2018). But this exception applies only where: “(1) the
 7 challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and
 8 (2) there is a reasonable expectation that the same complaining party will be subject to the same
 9 action again.” *Id.* Because mootness concerns whether courts have power to hear a case, the
 10 “capable of repetition, yet evading review” exception must be applied sparingly, and only in
 11 “exceptional situations.” *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836-37 (9th Cir.
 12 2014). The exception applies only “where the type of injury involved inherently precludes judicial
 13 review, not ... where review is precluded as a practical matter.” *Id.*

14 Here, the first prong (short duration) is arguably met because the prior health orders that
 15 sparked Plaintiffs’ application for a preliminary injunction remained extant for less than two months.
 16 But the reasonable expectation prong is not because, for reasons set forth above, Defendants are not
 17 likely to reimpose the original restrictions.

18 **D. EVEN IF THE REVISED HEALTH ORDERS DO NOT MOOT THE CASE, THEY**
 19 **MAKE INJUNCTIVE RELIEF INAPPROPRIATE**

20 At the May 20, 2020 hearing, the Court asked whether defense counsel would stipulate that
 21 an analysis of the March 16 and March 31, 2020 Health Orders applies to the Revised Health Orders
 22 as well.⁴ It would be inappropriate to extend any such analysis without accounting for the
 23 qualitative differences between those orders. Plaintiffs sought injunctive relief claiming the earlier
 24 orders completely prevented them from acquiring and practicing proficiency with firearms. Now,
 25 even if the Court determines enough of dispute remains to support jurisdiction, that dispute has taken
 26 a markedly different complexion. At most, Plaintiffs can claim the Revised Health Orders create

27 _____
 28 ⁴ The operative complaint still does not challenge any orders issued since March.

1 somewhat more limited opportunities for target shooting than normal, and make firearms acquisition,
2 though possible, less convenient than before.

3 Those differences matter when assessing the degree to which Plaintiffs' rights have been
4 infringed. *See Teixeira v. Cty. of Alameda*, 873 F.3d 670, 679-80 n. 13 (9th Cir. 2017) (finding fact
5 that some stores were available to customers, even if less conveniently located, and with inferior
6 services, fatal to Second Amendment claim); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953,
7 968 (9th Cir. 2014) (ordinance that only made it "more difficult to purchase certain types of
8 ammunition" did not substantially burden Second Amendment rights, in part because customers
9 could obtain ammunition elsewhere). Plaintiffs' ability to exercise their Second Amendment rights
10 also factors into the balancing of the equities and consideration of the public interest. Whereas
11 Plaintiffs' claimed injuries either no longer exist or have been significantly mitigated since they
12 sought injunctive relief, the public's interests are undiminished.

13 And while the Revised Health Orders are, as Plaintiffs emphasize, temporally indefinite
14 (Supp. Br. at 4:7-12), that difference does not make any burdens they impose more substantial. Each
15 of the three prior orders was superseded before the occurrence of the respective end dates identified
16 therein. If the Revised Health Orders had also included a definite end date, that provision likely
17 would have been prematurely mooted as well. Put differently, in context, the absence of a fixed date
18 does not suggest the current orders will be permanent or even long-lasting but the opposite: that they
19 will remain extant only briefly, as indicated by the Health Officers' commitment to "continually
20 review whether modifications to the Order[s] are warranted" based on objective COVID-19
21 indicators. Dkt. No. 50, Ex. A ¶ 11.

22 Finally, for at least three reasons, the relaxed terms of the Revised Health Orders impact the
23 merits analysis not only of those orders but of the earlier directives from March as well. First, the
24 Revised Health Orders (and their immediate predecessors) temporally bound the stricter limits that
25 were imposed in March—at about six weeks. Second, the orders that have issued since March
26 impose progressively less restrictive provisions responsive to objective indicators—a trend
27 inconsistent with the suggestion that the orders will likely be "renewed and revised *in finitum*." Supp.
28 Br. at 4:10-11. Finally, the orders that have issued since March relaxed their restrictions in a neutral

1 manner. Plaintiffs' prior complaint, for example, that golf courses and outdoor shooting ranges
 2 should be treated the same (Dkt. No. 48 at 10:25-28) missed the mark because the orders already
 3 treated them that way. This even-handed treatment belies any suggestion that the orders were
 4 ideologically driven and further supports the application of rational basis review. In fact, last Friday,
 5 the Ninth Circuit affirmed the denial of a church's request for a temporary restraining order
 6 enjoining enforcement of a COVID-19 health order. Emphasizing that the health order did not
 7 restrict religious activities because they were religious or impose burdens on them selectively, the
 8 court closed with the following observation:

9 We're dealing here with a highly contagious and often fatal disease for which
 10 there presently is no known cure. In the words of Justice Robert Jackson, if a
 11 [c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will
 12 convert the constitutional Bill of Rights into a suicide pact.

13 *South Bay Pentecostal Church v. Newsom et al.*, ___ F.3d ___, 2020 WL 2687079, at *1 (9th Cir.
 14 May 22, 2020) (internal citation omitted). Those observations apply equally to this case, and they
 15 should lead to the same result.

16 III. CONCLUSION

17 The Revised Health Orders allow Plaintiffs to acquire and practice proficiency with firearms,
 18 and Plaintiffs identify no federal or state laws that presently stand as obstacles to those activities.
 19 The restoration of Plaintiffs' rights moots their Second Amendment claim. Even if it does not end
 20 the case, it undermines their request for injunctive relief.

21 I hereby attest that I have on file all holographic signatures corresponding to any signatures
 22 indicated by a conformed signature /S/ within this and associated e-filed documents.

23 Respectfully submitted,

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25 Dated: May 27, 2020

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