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7 Health Care Agency), Sheriff William Ayub  
(erroneously sued as "Bill Ayub"), Robert Levin  
8 and William T. Foley

9

10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA

12

13	DONALD MCDUGALL, an	}	No. 2:20 cv-029927 CBM(ASX)				
14	individual; JULIANA GARCIA, an		}	DEFENDANTS' OPPOSITION TO SECOND EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER			
15	individual; SECOND AMENDMENT				}		
16	FOUNDATION; CALIFORNIA					}	
17	GUN RIGHTS FOUNDATION; and						}
18	FIREARMS POLICY COALITION,						
19	INC.,	}					
20			}				
21	Plaintiffs,			}	Date:		
22	vs.				}	Time:	
23						}	Ctrm: 8b
24	COUNTY OF VENTURA,						}
25	CALIFORNIA; BILL AYUB, in his	}					
26	official capacity; WILLIAM T.		}				
27	FOLEY, in his official capacity,			}			
28	ROBERT LEVIN, in his official				}		
	capacity; and VENTURA COUNTY					}	
	PUBLIC HEALTH CARE AGENCY,						}
		}					
	Defendants.		}				

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## I

## INTRODUCTION

1  
2  
3 The Ventura County Health Officer, defendant Robert Levin, M.D. (“Health  
4 Officer”), has issued a series of temporary, specific and emergency “Stay Well at  
5 Home” orders, on March 17, 20, and 31, 2020, and April 9, 18 and 20, 2020  
6 (collectively, “Stay Well at Home Order” or “Order”) to slow the spread of a  
7 highly contagious and potentially fatal virus, for which there is no known cure.<sup>1/</sup>  
8 Since the outbreak of the global coronavirus (“COVID-19”) pandemic, the Health  
9 Officer has closely monitored the evolving pandemic and the outbreak of COVID-  
10 19 in Ventura County. In response to the outbreak, the Health Officer declared a  
11 local health emergency in Ventura County on March 12 and has since issued, and  
12 continues to modify, the Stay Well at Home Order narrowly tailored slow the  
13 spread of COVID-19 while providing minimal disruption to Ventura County  
14 residents. The Order bears a “real or substantial relation” to both slow the spread  
15 of COVID-19 and provide for the physical, social, economic and emotional well-  
16 being of Ventura County residents, without imposing, “beyond all question, a  
17 plain, palpable invasion of rights secured by the fundamental law. (*Jacobson v.*  
18 *Commonwealth of Massachusetts* (1905) 197 U.S. 11 [25 S.Ct. 358] (“*Jacobson*”).)

19 Contrary to the arguments of plaintiffs,<sup>2/</sup> the temporary pause imposed by the  
20 Stay Well at Home Order on a person’s ability to purchase or sell a firearm does  
21 not implicate the Second Amendment of the Constitution, as this Court previously  
22 ruled, nor does the Stay Well at Home Order implicate a person’s right to travel  
23 into or out of Ventura County in a way that violates the Privileges and Immunities  
24 Clause or the Fifth and Fourteenth Amendments of the Constitution. And even if  
25 the Order has curtailed some rights in any of these respects, the Health Officer’s

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26  
27 <sup>1/</sup> All further dates are in 2020, unless otherwise indicated.

28 <sup>2/</sup> Plaintiffs are Donald McDougall, Juliana Garcia, Second Amendment Foundation, California Gun Rights Foundation and Firearms Policy Coalition, Inc.



1 overriding and compelling need to protect public health through the temporary and  
2 emergency measures justifies the intrusion, whether under the applicable *Jacobson*  
3 framework or traditional constitutional scrutiny. Accordingly, plaintiffs’ request  
4 for a temporary restraining order must be denied.

5 **II**

6 **RELEVANT BACKGROUND**

7 **A. The Emergency and Temporary Orders Are to Designed to Prevent the**  
8 **Spread of a Virulent, Highly Contagious Disease with No Known Cure**

9 According to the Centers for Disease Control and Prevention, COVID-19 is  
10 highly contagious and potentially deadly, especially for older persons and persons  
11 with serious chronic health conditions. The incubation period for COVID-19 is  
12 anywhere from 1 day to 14 days, during which time a person may not experience  
13 any symptoms but will be contagious to others. The virus spreads easily and  
14 sustainably through respiratory droplets produced when an infected person coughs  
15 or sneezes, person-to-person contact, and surfaces that can remain infectious for  
16 several days. (Request for Judicial Notice (“RJN”), Exh. 1, 2,<sup>3/</sup> & 3.) Since  
17 December 2019, COVID-19 has “swept the globe, infecting millions and killing  
18 nearly two-hundred thousand people.” (RJN, Exhs. 2 & 3.) From early March  
19 through April 26, there have been 42,164 confirmed cases and 1,710 deaths in  
20 California attributable to COVID-19, with 509 cases and 17 deaths occurring  
21 within Ventura County. (RJN, Exh. 21.) There are no known treatments or  
22 immunizations available for COVID-19. (RJN, Exh. 1.) “Without a vaccine,  
23 measures limiting physical contact between citizens . . . are widely recognized as  
24 the only way to effectively slow the spread of the virus.” (RJN, Exhs. 2, 3 & 4.)

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28 <sup>3/</sup> *Gish v. Newsom* (C.D.Cal. April 23, 2020) Case No. 5:20-cv-00755-JGB-KK, ECF 51, pg. ID 1021 (“*Gish*”).

1 On March 4, citing an increasing number of confirmed COVID-19 cases in  
2 the United States and worldwide, Governor Gavin Newsom declared that a state of  
3 emergency existed in the State of California. (RJN, Exh. 5.) On March 11, the  
4 World Health Organization declared COVID-19 to be a global pandemic. (RJN,  
5 Exh. 5.) On March 12, based on the confirmation of COVID-19 cases in Ventura  
6 County, and the likelihood that the number of cases would increase, the County’s  
7 Health Officer declared that a local health emergency existed in Ventura County.  
8 (RJN, Exh. 6.)

9 On March 17, following a marked increase of COVID-19 cases in the  
10 County, the Health Officer issued an order requiring persons living, working and  
11 doing business in Ventura County to take a number of precautions to prevent or  
12 slow the spread of the disease (“March 17 Order”). Among other provisions, the  
13 March 17 Order required the immediate closure of a number of businesses,  
14 including bars and nightclubs, movie theaters, live-performance venues, bowling  
15 alleys and gyms. Restaurants were ordered to close except for take-out and  
16 delivery and to practice social distancing. (RJN, Exh. 7.)

17 On March 19, Governor Newsom issued Executive Order N-33-20, which  
18 required all persons living in California to stay at their places of residence except  
19 as needed to maintain continuity of operations in “critical infrastructure sectors”  
20 specified by the state health officer. Supplementary guidance from the state health  
21 officer identified “critical infrastructure workers” in sectors such as health care,  
22 emergency services, food and agriculture, water, energy, transportation,  
23 government services, and financial services. (RJN, Exh. 8.)<sup>4/</sup>

24 \_\_\_\_\_  
25 <sup>4/</sup> Executive Order N-33-20 defines “critical infrastructure sectors”  
26 consistent with the “March 19, 2020, Memorandum on Identification of Critical  
27 Infrastructure Workers During COVID-19 Response” published by the United  
28 States Department of Homeland Security’s Cybersecurity and Infrastructure  
Security Agency (“CISA”). (RJN, Exh. 9 (“March 19 CISA Memo”).) The March  
19 CISA Memo does not identify retail gun stores as a component of critical  
infrastructure. On March 22, the state health officer issued a list of “Essential

(continued...)

1 On March 20, March 31, and April 9, the Health Officer issued supplemental  
 2 and restated Stay Well at Home orders to impose further restrictions. (RJN, Exhs.  
 3 12, 13 & 14 (“Further Orders”).) The Further Orders sought to slow the spread of  
 4 COVID-19 by ensuring, among other things, that all persons living in Ventura  
 5 County stay at their places of residence, except for the purpose of engaging in  
 6 essential activities and working at essential businesses. The Further Orders  
 7 prohibited public or private gatherings, prohibited non-essential travel, required the  
 8 closure of “non-essential” businesses, and mandated social distancing protocols for  
 9 the operation of essential businesses and for persons engaging in essential  
 10 activities. (RJN, Exhs. 12-14.) Under the Further Orders, “essential businesses”  
 11 were those business activities the Health Officer determined to be necessary to stop  
 12 the spread of COVID-19 or to enable persons to shelter at home. Essential  
 13 businesses included health care providers, grocery stores, gas stations, newspapers  
 14 and radio stations, gas stations, banks, hardware stores, certain tradesmen, mailing  
 15 and shipping services, educational institutions (for purposes of facilitating distance  
 16 learning), restaurants (for service of takeout food only), airlines, taxis and other  
 17 transportation services, childcare facilities, hotels and motels, and commercial  
 18 construction. Gun stores were not an essential business

19  
 20  
 21 <sup>4/</sup>(...continued)

22 Critical Infrastructure Workers.” (RJN, Exh. 10.) On March 25, in response to  
 23 inconsistent local views as to whether gun stores must remain open as an “essential  
 24 business” under his order, Governor Newsom expressly deferred to local  
 25 jurisdictions to make the determination. (RJN, Exh. 11.) On March 28, CISA  
 26 issued an additional “Advisory Memorandum on Identification of Essential Critical  
 27 Infrastructure Workers During COVID-19 Response” (“Revised CISA Memo”),  
 28 which included “the operation of firearm or ammunition product manufacturers,  
 retailers, importers, distributors, and shooting ranges” as a component of critical  
 infrastructure. The Revised CISA Memo expressly declared that it is “*not, nor  
 should it be considered, a federal directive or standard. . . . Individual  
 jurisdictions should add or subtract essential workforce categories based on their  
 own requirements and discretion.*” (RJN, Exh. 22, Revised CISA Memo (March  
 28, 2020), italics added.) Governor Newsom has not revised Executive Order N-  
 33-20 or issued a new executive order to incorporate the Revised CISA Memo and  
 its inclusion of gun retailers.

1 under the Further Orders. The Further Orders were set to expire on April 19.  
2 (RJN, Exhs. 12-14.)

3 Based on a determination that COVID-19 continued to present an imminent  
4 and continuing threat to the residents of Ventura County, the Health Officer issued  
5 a new Stay Well at Home Order, effective April 20, that superseded all prior orders  
6 (“April 20 Order”). (RJN, Exh. 15.) All provisions of the April 20 Order “shall be  
7 interpreted to effectuate” the intent and purpose of the Order: “to cause persons to  
8 stay at their places of residence to the maximum extent feasible with the minimum  
9 disruption to their social, emotional and economic well-being consistent with the  
10 overarching goal of eliminating the COVID-19 pandemic.” (RJN, Exh. 15, p. 2, ¶  
11 1.)

12 As with the prior orders, the April 20 Order stated that the Health Officer  
13 “will continue to assess the quickly evolving situation [and] may issue additional  
14 orders related to COVID-19. . . .” (RJN, Exh. 15, p. 20, ¶ 23.) The April 20 Order  
15 is set to expire on May 15, 2020. (RJN, Exh. 15, p. 1.)

16 The April 20 Order is, in some respects, less restrictive than the prior orders  
17 consistent with the intent and purpose of the Order. For example, while “non-  
18 essential businesses” are still ordered to close, certain businesses that fall outside  
19 of the Stay Well at Home Order’s definition of essential businesses but within the  
20 state health officer’s list of essential critical infrastructure (as incorporated into the  
21 Governor’s Executive Order N-33-20) may now operate to the extent they can  
22 minimize the risk of spreading COVID-19, i.e., the non-essential businesses must  
23 be closed to the public, operate with a limited number of employees who follow  
24 strict social distancing guidelines, and deliver to the purchaser any goods to be  
25 sold. (RJN, Exh. 15, pp. 3-4, ¶ 7.) The April 20 Order also makes a “[s]pecial  
26 allowance for completion of firearm sales”:

27 “Under California law persons wishing to purchase a  
28 firearm must complete a background check and waiting

1 period, and all sales must be completed in-person. It is  
2 not feasible, therefore, for the Health Officer to require  
3 that firearm sales be conducted on-line only. To  
4 accommodate persons who initiated the purchase of a  
5 firearm at a store located within the County before March  
6 20 . . . , firearm purchasers may engage in the actions  
7 necessary to complete firearm purchases initiated before  
8 March 20, 2020, provided that: [¶] a. All activities,  
9 including the transfer of possession of any firearm, occur  
10 by appointment only, and only the purchaser and one  
11 person of behalf of the store shall be present; [¶] b. The  
12 firearm store shall remain closed to the general public;  
13 and [¶] c. Social Distancing Requirements shall be  
14 followed to the greatest extent feasible.” (RJN, Exh. 15,  
15 p. 7, ¶ 11.)

16 The April 20 Order prohibits “Non-Essential Travel” within the County but  
17 *expressly* provides that the Order “allows travel into or out of the County.” (RJN,  
18 Exh. 15, p. 3, ¶ 6.) It also expressly provides that “Essential Travel” includes  
19 “[t]ravel engaged in interstate commerce and otherwise subject to the provisions of  
20 the Commerce Clause of the United States Constitution.” (RJN, Exh. 15, p. 18,  
21 ¶ g(7).)

## 22 **B. Procedural History**

23 Plaintiff Donald McDougall filed the original complaint in this action on  
24 March 28, alleging that the then-operative Stay Well at Home Order prevented him  
25 from taking possession of his previously purchased firearm in violation of the  
26 Second Amendment. (ECF 1, pg. ID 5, ¶¶ 31-33.) McDougall sought a temporary  
27 restraining order (“TRO”) to enjoin the County from “ordering gun stores closed”  
28 under the then-operative Stay Well at Home Order. (ECF 9, pg. ID 31.) This

1 Court denied the TRO, finding that McDougall would be unlikely to succeed on  
2 the merits of his Second Amendment claim. (ECF 12.) In particular, the Court  
3 found that the Stay Well at Home Order survived intermediate scrutiny given that  
4 the Order was temporary, did not target handgun ownership, did not prohibit the  
5 ownership of a handgun outright, and because of the Health Officer’s “compelling”  
6 government interest in preventing the spread of COVID-19. (ECF Doc. No. 12,  
7 pg. ID 51.)

8 On April 14, McDougall filed a first amended complaint (“FAC”), adding  
9 four co-plaintiffs: a would-be gun purchaser, Juliana Garcia, and three  
10 associations that promote Second Amendment rights, Second Amendment  
11 Foundation, California Gun Rights Foundation, and Firearms Policy Coalition, Inc.  
12 The FAC reasserts McDougall’s Second Amendment claim and adds a claim that  
13 the then-operative Stay Well at Home Order violated the right to travel under the  
14 Privileges and Immunities clause at article IV, section 2 of the Constitution and the  
15 due process clauses of the Fifth and Fourteenth Amendments. (ECF 19.)

16 On April 21, plaintiffs served the FAC on defendants County of Ventura  
17 (“County”), the Health Officer, William Ayub, the County Sheriff, and William T.  
18 Foley, the director of the County Health Care Agency, which houses the Public  
19 Health Department, together with an improperly noticed motion for a preliminary  
20 injunction set for hearing on May 12. (Declaration of C. Buehner (“Buehner  
21 Decl.”), ¶ 2, Exh. 1, pp. 3-7.) The parties jointly stipulated for a later hearing date  
22 of May 19 or as soon thereafter as could be heard by the Court. (ECF 24.) In  
23 response, this Court set the hearing for July 28. (ECF 25.)

24 On the afternoon of April 24, plaintiffs inquired whether defendants would  
25 oppose a second ex parte TRO application by plaintiffs. Defendants indicated that  
26 they would oppose any such request, providing in writing the bases for such  
27 opposition, including that plaintiffs’ claims were mooted by the issuance of the  
28 April 20 Order, that plaintiffs would be unlikely to prevail on the merits of their

1 claims and that this Court’s prior orders impliedly denied plaintiffs’ request for  
2 expedited and preliminary relief. (Buehner Decl., ¶ 3, Exh. 1, pp. 1-2.) Without  
3 responding to the County’s correspondence, Plaintiffs filed their second TRO  
4 application late in the evening of Friday, April 24. (ECF 27.) This time, plaintiffs  
5 seek to enjoin defendants from “closing or compelling the closure of retail firearm  
6 and ammunition businesses on the grounds that they are ‘non-essential businesses’  
7 and preventing individuals from traveling to obtain firearms and ammunition  
8 under” the Stay Well at Home Order. (ECF 27, Pg. ID 203.)

### 9 III

### 10 ARGUMENT

#### 11 A. Legal Standard for Pre-Trial Injunctive Relief

12 The purpose of a TRO is to preserve the status quo and prevent irreparable  
13 harm until a hearing may be held on the propriety of a preliminary injunction.  
14 (*Reno Air Racing Ass’n v. McCord* (9th Cir. 2006) 452 F.3d 1126, 1131.) Except  
15 for a heightened focus on the alleged irreparable injury in the context of a TRO, the  
16 standard for issuance of a TRO and preliminary injunction are the same.  
17 (*Lockheed Missile & Space Co. v. Hughes Aircraft Co.* (N.D.Cal. 1995) 887  
18 F.Supp. 1320, 1323 [identical standard]; *Hunt v. Nat’l Broad Co., Inc.* (9th Cir.  
19 1989) 872 F.2d 289, 292 [heightened focus for TRO].) Injunctive relief is an  
20 “extraordinary remedy” that requires the moving party to make a clear showing of  
21 irreparable injury. (*Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305, 312;  
22 *Stanley v. University of Southern Calif.* (9th Cir. 1994) 13 F.3d 1313, 1320;  
23 *Mazurek v. Armstrong* (1997) 520 U.S. 968, 972 [“clear” showing requirement  
24 particularly strong when TRO is sought].)

25 The court must “balance the competing claims of injury and must consider  
26 the effect on each party of the granting or withholding of the requested relief.  
27 Although particular regard should be given to the public interest . . . ‘a federal  
28 judge sitting as chancellor is not mechanically obligated to grant an injunction for

1 every violation of law.”” (*Amoco Production Co. v. Village of Gambell, Alaska*  
2 (1987) 480 U.S. 531, 542; *Dogloo, Inc. v. Doskocil Mfg. Co., Inc.* (C.D.Cal. 1995)  
3 893 F.Supp. 911, 917.) A plaintiff must establish: (1) a likelihood of success on  
4 the merits; (2) that the plaintiff will suffer irreparable harm in the absence of  
5 preliminary relief; (3) the balance of equities tips in the plaintiff’s favor; and (4)  
6 that an injunction is in the public interest. (*Winter v. National Resources Defense*  
7 *Council, Inc.* (2008) 555 U.S. 7, 20 [vacating preliminary injunction] (“*Winter*”);  
8 *Fyock v. City of Sunnyvale* (N.D.Cal. 2014) 25 F.Supp.3d 1267 (“*Fyock*”) [denying  
9 preliminary injunction].) Plaintiffs cannot make such a showing in this case.

10 **B. Plaintiffs Are Not Entitled to Emergency Relief**

11 Plaintiffs’ second TRO application requests relief similar to the first TRO  
12 application. Neither application presents an emergency justifying relief. The  
13 Court denied the first TRO application without waiting for service on or a response  
14 by defendants. Courts in the Central District have long held that ex parte  
15 applications are “nearly always improper,” unless the moving party first establishes  
16 “some genuine urgency such that ‘immediate and irreparable injury, loss, or  
17 damage will result to the applicant before the adverse party or his attorney can be  
18 heard in opposition’” according to a regular noticed motion. (*In re Intermagnetics*  
19 *America, Inc.* (C.D.Cal. 1989) 101 B.R. 191, 192-94, citing Fed. Rules Civ.Proc.,  
20 rule 65(b) (“*Intermagnetics*”); see also *Mission Power Engineering Co. v.*  
21 *Continental Cas. Co.* (C.D.Cal. 1995) 883 F.Supp. 488, 492 (“*Mission Power*”)  
22 [applicant must show “why the moving party should be allowed to go to the head  
23 of the line in front of all other litigants and received [*sic*] special treatment”]; see  
24 also *Hunt v. Nat’l Broad Co, Inc.* (9th Cir. 1989) 872 F.2d 289, 292 [TRO  
25 applicants must show entitlement to immediate relief in addition to standard for  
26 preliminary injunctive relief].)

27  
28 ///



1 Entitlement to emergency relief hinges on whether the party seeking relief  
2 will suffer irreparable prejudice, decided with reference to the relief requested by  
3 the underlying proposed motion. (*Ibid.*) Here, plaintiffs have not identified any  
4 “irreparable” harm because this Court *has already determined* that they are  
5 unlikely to succeed on the merits of their Second Amendment claim. (ECF 12.)

6 Neither plaintiffs’ second TRO application nor the FAC alleges any new  
7 facts or adds new plaintiffs that would change the result of the outcome of the  
8 Court’s decision on the first TRO application. To the contrary, as explained below,  
9 the judicial deference that should be afforded to the Stay Well at Home Order  
10 under *Jacobson, supra*, 197 U.S. at 27, as recognized in *Gish, supra*, Case No.  
11 5:20-cv-00755-JGB-KK, RJN, Exh. 2 (ECF 51, pg. ID 1021), makes it even less  
12 likely that plaintiffs will succeed on the merits of their claims. In addition, the  
13 modifications to the Stay Well at Home Order since this Court denied the first  
14 TRO application further support denial of plaintiffs’ second TRO application.<sup>5/</sup>  
15 These modifications evidence the Health Officer’s continual assessment of the Stay  
16 Well at Home Order, both to prevent the spread of COVID-19 and to provide  
17 minimum disruption of the social, emotional and economic well-being of Ventura  
18 County residents. To this end, the Stay Well at Home Order now contains  
19 provisions *solicitous* of plaintiffs’ claimed Second Amendment rights so long as  
20 strict protocols are followed. (See, e.g., *Legacy Church, Inc. v. Kunkel* (D.N.M.  
21 April 17, 2020) 2020 WL 1905586 [upholding orders based, in part, on fact that  
22

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23 <sup>5/</sup> Plaintiffs have argued that the global pandemic presents a unique and  
24 heightened need for them to purchase firearms because of a perceived increased  
25 need for self-defense from violent crime during this time. (ECF 27-1, Pg. ID 212.)  
26 The widely reported facts, however, are that while certain types of property crime  
27 have increased, violent crime throughout the country has *dramatically* decreased  
28 concurrent with the issuance of shelter-in-place orders, including in Ventura  
County. (RJN, Exh. 16 [violent crime down 11 percent in Los Angeles]; RJN,  
Exh. 17 [crime rate dropped 16.6 percent in New York City]; RJN, Exh. 18  
[Chicago homicides decreased by 29 percent, shootings by 19 percent and sexual  
assault by 5 percent]; RJN, Exh. 19 [zero homicides recorded in Miami for six-  
week period for first time since 1964]; RJN, Exh. 20 [violent crime dropped in  
Ventura County].)

1 emergency COVID-19 orders were solicitous of plaintiff’s First Amendment  
 2 rights].) Plaintiff McDougall is now expressly authorized to take possession of the  
 3 weapon he alleges he previously purchased, mooted his Second Amendment claim  
 4 entirely. (RJN Exh. 15, p. 7.)

5 Plaintiffs’ newly asserted right-to-travel claim will fare no better. Plaintiffs  
 6 complain that the Stay Well at Home Order prevents them (or their members) from  
 7 leaving Ventura County to purchase a gun elsewhere. (ECF 19, pg. ID 94, ¶ 87;  
 8 ECF 27, pg. ID 203, ln. 6-8.) This claim is contrary to the express language of the  
 9 Stay Well at Home Order, which *allows* persons to travel into and out of the  
 10 County. (RJN, Exh. 15, p. 3 [“This Order allows travel into or out of the  
 11 County”].) Moreover, the Stay Well at Home Order has, since March 20, included  
 12 in its definition of “Essential Travel” “[t]ravel engaged in interstate commerce and  
 13 otherwise subject to the provisions of the Commerce Clause of the United States  
 14 Constitution.” (See, e.g., RJN, Exh. 15, p. 18, ¶ g(7).) Accordingly, because the  
 15 Orders do not restrict interstate travel, the Stay Well at Home Order does not  
 16 implicate the constitutional right to travel at all. (See *Saenz v. Roe* (1999) 526 U.S.  
 17 489, 490 [119 S.Ct. 1518] (“*Saenz*”) [detailing three components of right to travel,  
 18 all stemming from *interstate* travel]; see also *Memorial Hospital v. Maricopa*  
 19 *County* (1974) 415 U.S. 250, 256 [94 S.Ct. 1076]; *Nunez v. City of San Diego* (9th  
 20 Cir. 1997) 114 F.3d 935, 944 [declining to opine whether right to travel extends to  
 21 intrastate travel].) The Court should deny plaintiffs’ second ex parte TRO  
 22 application.

23 **C. Plaintiffs Cannot Establish a Likelihood of Success on the Merits**

24 **1. The Stay Well at Home Order Is a Valid Exercise of the Health**  
 25 **Officer’s Power Entitled to Minimal Scrutiny and Judicial Deference.**

26 The Supreme Court has long recognized that “a community has the right to  
 27 protect itself against an epidemic of disease which threatens the safety of its

28 ///

1 members.” (*Jacobson, supra*, 197 U.S. at p. 27.)<sup>6/</sup> During such public  
 2 emergencies, states and local governments may take action to curb the disease that  
 3 would otherwise impermissibly burden constitutionally protected liberties. (*Id.* at  
 4 p. 19; see also *Prince v. Massachusetts* (1944) 321 U.S. 158, 166-167 [64 S.Ct.  
 5 438] [finding that First Amendment “right to practice religion freely does not  
 6 include liberty to expose the community . . . to communicable disease”].)<sup>7/</sup> The  
 7 Health Officer’s measures will be lawful so long as they bear “real or substantial  
 8 relation” to the public health crisis and are not, “beyond all question, a plain,  
 9 palpable invasion of rights secured by the fundamental law.” (*Gish, supra*, Case  
 10 No. 5:20-cv-00755-JGB-KK, ECF 51 at p. 1022, citing *In re Abbott, supra*, 2020 WL  
 11 1685929 at \* 7, and *Jacobson, supra*, 197 U.S. at p. 31; see also *Robinson v.*  
 12 *Attorney General* (11th Cir. April 23, 2020) 2020 WL 1952370, \*5, and *Mega*  
 13 *Vape, LLC v. City of San Antonio* (W.D.Tex. April 22, 2020) 2020 WL 1933938,  
 14 \*6, and *In re Rutelidge, supra*, 2020 WL 1933122.) In other words, under  
 15 *Jacobson*, the Stay Well at Home Order is subject to “judicial deference and not  
 16 subject to traditional constitutional scrutiny.” (*Gish, supra*, Case No. 5:20-cv-

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19 <sup>6/</sup>*Jacobson*’s restriction of civil liberties in the face of overriding circumstances has  
 20 been recognized as precedent by the Supreme Court as recently as 1997, and more widely  
 21 by federal courts throughout the country in the context of the current pandemic as the  
 22 framework by which constitutional claims should be analyzed. (See *Kansas v. Hendricks*  
 23 (1997) 521 U.S. 346, 356 [recognizing that individual’s constitutionally protected interest  
 in avoiding physical restraint may be overridden in civil context], citing *Jacobson, supra*,  
 197 U.S. at p. 26; *In re Abbott* (5th Cir. April 7, 2020) 2020 WL 1685929 at \* 7; *In re*  
*Rutelidge* (8th Cir. April 22, 2010) 2020 WL 1933122; see also *Gish, supra*, Case No.  
 5:20-cv-00755-JGB-KK, ECF 51, pg. ID 1022.)

24 <sup>7/</sup> See also *Camara v. Municipal Court of City and County of San Francisco*  
 25 (1967) 387 U.S. 523, 539 [87 S.Ct. 1727] [noting that warrantless searches  
 26 permitted under Fourth Amendment when conducted to protect public health in  
 27 emergency situations], citing *North American Cold Storage Co. v. City of Chicago*  
 28 (1908) 211 U.S. 306 [29 S.Ct. 101] [seizure of unwholesome food]; *Jacobson,*  
*supra*, 197 U.S. 11 [compulsory smallpox vaccination]; *Compagnie Francaise de*  
*Navigation a Vapeur v. Louisiana State Board of Health* (1902) 186 U.S. 380 [22  
 S.Ct. 811] [health quarantine prohibiting disembarkation of healthy passengers and  
 cargo into infected area]; *Kroplin v. Truax* (1929) 119 Ohio St. 610 [165 N.E. 498]  
 [summary destruction of tubercular cattle].)

1 00755-JGB-KK, RJN, Exh. 2, pg. ID 1021, citing *Jacobson, supra*, 197 U.S. at  
2 p. 27.)

3 The Stay Well at Home Order in this case easily meets the *Jacobson* test.<sup>8/</sup>  
4 The Stay Well at Home Order bears a substantial relation to the public health  
5 crisis. The Order is temporary, specific and tailored to prevent the spread of a  
6 highly contagious and potentially deadly disease through a combination of targeted  
7 requirements, all of which are aimed at minimizing human-to-human contact by  
8 directing Ventura County residents to stay at their places of residence to the  
9 maximum extent feasible. (RJN, Exh. 15.) The Health Officer is continually  
10 monitoring the pandemic's impact on Ventura County residents and has updated  
11 the Order as necessary to meet its goals. (RJN, Exh. 15.) The public's compliance  
12 with, and the County's enforcement of, the Stay Well at Home Order has slowed  
13 the spread of the disease, saved lives and prevented Ventura County's health care  
14 systems from being overwhelmed, unlike the situation elsewhere around the  
15 globe.<sup>9/</sup> The Health Officer's determination of what businesses are deemed  
16 "essential" is entitled to "great deference," notwithstanding any federal advisory  
17 documents or differing decisions by other jurisdictions. (See *Winter, supra*, 555  
18 U.S. at p. 24; see also *Gish, supra*, Case No. 5:20-cv-00755-JGB-KK, RJN, Exh. 2  
19 at p. 1022.)

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21 \_\_\_\_\_  
22 <sup>8/</sup> Nor can the authority of the Health Officer be reasonably questioned: The  
23 Health Officer has broad, long-standing and well-established powers to make  
24 orders necessary to preserve and protect public health. For example, the California  
25 Health and Safety Code provides that "[t]he local health officer may take any  
26 preventive measure that may be necessary to protect and preserve the public health  
27 from any public health hazard during any 'state of war emergency,' 'state of  
28 emergency,' or 'local emergency,' as defined by section 8558 of the [California]  
Government Code, within his or her jurisdiction." (Cal. Health & Saf. Code, §  
101040; see also Cal. Health & Saf. Code, §§ 101080, 101085, 120175 & Cal. Code  
Regs., tit. 7, § 2500 et seq.)

<sup>9/</sup> See, e.g., L.A. Times, Social Distancing May Have Helped California  
Slow the Virus and Avoid New York's Fate (March 31, 2020) (available at  
<https://news.yahoo.com/social-distancing-may-helped-california-120003221.html>  
(visited April 27, 2020)).

1 Plaintiffs, on the other hand, cannot demonstrate that the Order’s imposition  
2 of a temporary and emergency pause on their ability to purchase or sell a firearm  
3 for the next few weeks will be, “beyond all question, a plain, palpable invasion of  
4 rights secured by the fundamental law.” (*Jacobson, supra*, 197 U.S. at p. 31.)  
5 Unlike the right to use, possess, or otherwise keep and bear arms in the name of  
6 self-defense, the law is well-established that any right to purchase or sell firearms  
7 is subject to regulation without violating the Second Amendment, as explained  
8 below. Similarly, plaintiffs’ right-to-travel claim will fail.

9 **2. Even Under Traditional Scrutiny, the Stay Well at Home Order Does**  
10 **Not Violate the Second Amendment**

11 The Second Amendment protects the right of law-abiding, responsible  
12 citizens to use arms in defense of hearth and home. (*District of Columbia v. Heller*  
13 (2008) 554 U.S. 570, 635 [128 S.Ct. 2783] (“*Heller*”).) That right, however, is not  
14 unlimited. (*Id.* at p. 626.) The government may place certain limits on where the  
15 right is exercised, how the right is exercised and who may exercise the right. (*Id.*  
16 at pp. 626-627; *U.S. v. Carpio-Leon* (4th Cir. 2012) 701 F.3d 974, 977 [“the Second  
17 Amendment does not guarantee the right to possess for *every purpose*, to possess  
18 *every type of weapon*, to possess at *every place*, or to possess by *every person*”]);  
19 *U.S. v. Huitron-Guizar* (10th Cir. 2012) 678 F.3d 1164, 1166 [“The right to bear  
20 arms, however venerable, is qualified by what one might call the ‘who,’ ‘what,’  
21 ‘where,’ ‘when,’ and ‘why’”].)

22 In *U.S. v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1136 (“*Chovan*”), the court  
23 adopted a two-step inquiry to analyze claims that a law violates the Second  
24 Amendment. This test “(1) asks whether the challenged law burdens conduct  
25 protected by the Second Amendment; and (2) if so, directs courts to apply an  
26 appropriate level of scrutiny.” (*Ibid.*)

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1                   **a. The Stay Well at Home Order Does Not Impinge on the Second**  
2 **Amendment as It Was Historically Understood**

3                   Under the first *Chovan* step, a court cannot “apply the Second Amendment  
4 to protect a right that does not exist under the Amendment.” (*Peruta v. County of*  
5 *San Diego* (9th Cir. 2016) 824 F.3d 919, 942 (en banc) (“*Peruta*”), *cert. denied sub*  
6 *nom.*; *Peruta v. California* (1995) \_\_\_ U.S. \_\_\_ [137 S.Ct. 1995 (Mem), 198  
7 L.Ed.2d 746].) Therefore, the first step of the analysis requires the court to explore  
8 the amendment’s reach “based on a ‘historical understanding of the scope of the  
9 [Second Amendment] right.’” (*Jackson v. City & County of San*  
10 *Francisco* (9th Cir. 2014) 746 F.3d 953, 960 (“*Jackson*”), quoting *Heller, supra*,  
11 554 U.S. at p. 625.)

12                  Whether the challenged law falls outside the scope of the Second  
13 Amendment involves examining whether there is persuasive historical evidence  
14 showing that the regulation does not impinge on the Second Amendment right as it  
15 was historically understood. (*Jackson, supra*, 554 U.S. at p. 625.) Laws restricting  
16 conduct that can be traced to the founding era and are historically understood to  
17 fall outside of the Second Amendment’s scope may be upheld without further  
18 analysis. (See *Peruta, supra*, 824 F.3d at p. 919.)

19                  The Stay Well at Home Order requires the closure of non-essential  
20 businesses, including gun stores. Plaintiffs argue that the temporary closure  
21 hinders the ability of certain persons to finalize gun purchases during the pendency  
22 of the Stay Well at Home Order or prevents would-be gun purchasers from buying  
23 a firearm. As an initial matter, the Stay Well at Home Order now allows the  
24 completion of gun purchases initiated before March 20. To the extent would-be  
25 gun purchasers are unable to temporarily buy guns within Ventura County,  
26 however, California has a long history of delaying possession of firearms without  
27 impinging on the Second Amendment. California has had some kind of waiting  
28 period statute for firearm purchases continuously since 1923. (*Silvester v. Harris*

1 (9th Cir. 2016) 843 F.3d 816, 823 (“*Silvester*”).) The waiting periods  
2 encompassed both time for the California Department of Justice (“Cal DOJ”) to  
3 conduct a background check and time for a cooling-off period (so that guns were  
4 not purchased in the heat of a conflict). (*Id.* at pp. 823-824.) The Cal DOJ has up  
5 to 30 days to complete a background check, and the cooling-off period extends 10  
6 days beyond that. As such, the Second Amendment has never protected immediate  
7 or convenient purchase and sale of guns.

8 Moreover, in times of emergency such as war, pandemic or natural disaster,  
9 federal, state and local governments have historically issued temporary, general  
10 regulations that overrode the convenience of purchasers of various goods and  
11 services, including firearms. (See, e.g., *Compagnie Francaise de Navigation a*  
12 *Vapeur v. Louisiana State Board of Health, supra*, 186 U.S. 380 [health quarantine  
13 prohibiting disembarkation of healthy passengers and cargo into infected area],  
14 cited with approval in *Camara v. Municipal Court of City and County of San*  
15 *Francisco, supra*, 387 U.S. at p. 539 [recognizing that warrantless search may be  
16 permissible under Fourth Amendment in public health emergency].) As such, the  
17 temporary delay in a person’s ability to purchase a firearm as a result of the Stay  
18 Well at Home Order does not impinge on the Second Amendment right as it was  
19 historically understood.

20 **b. The Stay Well at Home Order Is a Presumptively Lawful**  
21 **Regulation of General Applicability that Does Not Infringe the Ability to**  
22 **Possess or Use, and Only Incidentally Delays the Purchase of, Firearms**

23 A law also does not burden Second Amendment rights if it falls within “one  
24 of the ‘presumptively lawful regulatory measures’ identified” in *Heller, supra*, 554  
25 U.S. 570. (*Jackson, supra*, 746 F.3d at p. 960; see also *Fyock v. Sunnyvale* (9th  
26 Cir. 2015) 779 F.3d 991, 996-997.)

27 *Heller* made explicit that “nothing in [its] opinion should be taken to cast  
28 doubt on the longstanding prohibitions on the possession of firearms by felons and

1 the mentally ill, or laws forbidding the carrying of firearms in sensitive places such  
2 as schools and government buildings, or laws imposing conditions and  
3 qualifications on the commercial sale of arms.” (*Heller, supra*, 554 U.S. 570 at pp.  
4 626-627.) Such measures are “presumptively lawful.” (*Id.* at p. 627, n. 26.) The  
5 Supreme Court reiterated, two years later, that *Heller* does not undermine the  
6 validity of regulations on the commercial sale of firearms. (*McDonald v. City of*  
7 *Chicago, Ill.* (2010) 561 U.S. 742, 786 [130 S.Ct. 3020].)

8 In that regard, the Ninth Circuit has held that the Constitution provides “no  
9 freestanding right on commercial proprietors to sell firearms” and gun buyers have  
10 no right to particular seller locations “so long as their access is not meaningfully  
11 constrained.” (*Teixiera v. County of Alameda* (9th Cir. 2017) 873 F.3d 670, 673,  
12 680.) Here, the Stay Well at Home Order only incidentally regulates the  
13 commercial sale of firearms. The Order does nothing to regulate or limit the ability  
14 of persons to keep or bear arms. Rather, the Order requires, among other things,  
15 the temporary closure of businesses that are non-essential to the purposes of  
16 keeping persons isolated at their places of residence as determined by the Health  
17 Officer. (RJN, Exhs. 12-15.) Gun stores, and all other retail operations that are not  
18 necessary to stop the spread of COVID-19 or otherwise enable persons to shelter in  
19 their places of residence, are required by the Stay Well at Home Order to be closed  
20 to the public. (RJN, Exhs. 12-15.) On its face, the Stay Well at Home Order does  
21 not prohibit persons from possessing firearms and does not regulate what persons  
22 may do with firearms in their own home. To the extent that the Stay Well at Home  
23 Order delays the ability of some persons to purchase a firearm, the immediate and  
24 convenient acquisition of firearms has never been protected under the Second  
25 Amendment. (See § III.3.C.2.a, *supra*; *Silvester, supra*, 843 F.3d at pp. 823-824.)

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1                   **c. The Stay Well at Home Order Does Not Substantially Burden**  
2 **Second Amendment Rights and Is Substantially Related to Mitigating the**  
3 **Public Health Crisis Presented by COVID-19**

4           Even if the Stay Well at Home Order has burdened plaintiffs' Second  
5 Amendment rights, the Order easily survives intermediate scrutiny as this Court  
6 previously determined (ECF 12), in accordance with the other COVID-19-related  
7 Second Amendment decision in the Central District. (*Brandy v. Villanueva*  
8 (C.D.Cal. April 6, 2020) Case No. 2:20-cv-02874-AB-SK, ECF 20.)

9                   **i. Even if Intermediate Scrutiny Is Applied, the Order Should**  
10 **Stand**

11           Courts determine the appropriate level of scrutiny to apply in a Second  
12 Amendment challenge by considering (1) how close the challenged law comes to  
13 the core of the Second Amendment right and (2) the severity of the law's burden  
14 on that right. (*United States v. Torres* (9th Cir. 2019) 911 F.3d 1253, 1262.) The  
15 core of the Second Amendment is the right of law-abiding, responsible citizens to  
16 use arms in defense of hearth and home (i.e., self-defense). (*Ibid.*; *Heller, supra*,  
17 554 U.S. at p. 628.) Only laws that implicate the core of the Second Amendment  
18 right and severely burden that right will be subjected to strict scrutiny. (*Silvester*,  
19 *supra*, 843 F.3d at p. 821.) Intermediate scrutiny is the appropriate level of  
20 scrutiny for all other laws that do not implicate the core Second Amendment right  
21 or do not place a substantial burden on that right. (*Ibid.*) There has been "near  
22 unanimity in the post-*Heller* case law that when considering regulations that fall  
23 within the scope of the Second Amendment, intermediate scrutiny is appropriate."  
24 (*Id.* at p. 823.)

25           In *Silvester*, the Ninth Circuit examined the constitutionality of California's  
26 10-day waiting period between the purchase and delivery of a firearm. In  
27 California, citizens who want to purchase a firearm (and do not fall into one of the  
28 law's 18 exemptions, including law enforcement) must pass a background check to

1 show that they do not fall into one of the prohibited classes. (*Id.* at pp. 824-825.)  
2 The background check is conducted by the Cal DOJ, which has the authority to  
3 delay the delivery of a firearm for up to 30 days in order to complete the  
4 background check. (*Id.* at p. 825, citing Cal. Pen. Code, § 28220, subd. (f).)  
5 Additionally, a person cannot purchase more than one firearm within a 30-day  
6 period. (*Id.*, citing Cal. Pen. Code, § 27535.) After passing the Cal DOJ  
7 background check, a person may purchase a firearm but must wait 10 days before  
8 taking possession of the firearm. (Cal. Pen. Code, §§ 26815, 27540.)

9 The court determined that the law requiring the 10-day waiting period did  
10 not place a substantial burden on the Second Amendment right because it did not  
11 prevent, restrict or place any conditions on how guns were stored or used after a  
12 purchaser took possession, and historically, delivery of weapons took some time;  
13 thus, intermediate scrutiny applied. (*Silvester, supra*, 843 F.3d at p. 827.) The  
14 court in *Silvester* noted that the burden of waiting 10 days before taking possession  
15 of a firearm is less than the burden imposed by other challenged regulations in  
16 other Ninth Circuit cases applying intermediate scrutiny and that the burden of  
17 having to wait to take possession is actually “very small.” (*Ibid.*)

18 The court further noted: “There is, moreover, nothing new in having to wait  
19 for the delivery of a weapon. Before the age of superstores and superhighways,  
20 most folks could not expect to take possession of a firearm immediately upon  
21 deciding to purchase one. As a purely practical matter, delivery took time. Our  
22 18th and 19th century forebears knew nothing about electronic transmissions.  
23 Delays of a week or more were not the product of governmental regulations, but  
24 such delays had to be routinely accepted as part of doing business.” (*Silvester*,  
25 *supra*, 843 F.3d at p. 827.)

26 The Stay Well at Home Order in the instant case presents a similarly “very  
27 small” burden on the Second Amendment right. It does not limit or regulate the  
28 ability of persons to possess firearms or what they may do with those firearms in

1 their homes. The Order closes non-essential businesses, which may incidentally  
 2 delay the ability of a person to purchase a firearm. The Order is in effect for a  
 3 finite period of time – first until April 19 and now through May 15. As such, the  
 4 delay is comparable to the constitutionally accepted delays resulting from the Cal  
 5 DOJ background check and the 10-day cooling-off period. As the court noted in  
 6 *Silvester*, much more serious limitations on the ability to bear arms have been  
 7 subjected to intermediate scrutiny. As such, the application of intermediate  
 8 scrutiny is appropriate.<sup>10/</sup>

9 **ii. Preventing the Spread of COVID-19 Is a Compelling**  
 10 **Government Interest and the Closure of Non-Essential Businesses, Including**  
 11 **Gun Stores, Is Reasonably Suited to Achieve that Objective**

12 Under intermediate scrutiny, courts first look to the government’s objectives  
 13 in enacting the regulation and second to whether it is reasonably suited to achieve  
 14 those objectives. (*Jackson, supra*, 746 F.3d at p. 965.)

15 Ventura County is experiencing a local health emergency that is part of a  
 16 global pandemic. COVID-19 is highly contagious and potentially deadly,  
 17 especially for older persons and persons with serious chronic health conditions.  
 18 There is no known anti-viral treatment or immunization available for COVID-19.  
 19 (RJN, Exhs. 1, 2, 3, & 21.) The Stay Well at Home Order is intended to slow the  
 20 spread of COVID-19 by isolating persons in their places of residences as much as  
 21 possible. (RJN, Exhs. 12-15.) COVID-19 presents an imminent and proximate  
 22 threat to the residents of Ventura County, and it is essential to control the spread of  
 23 COVID-19 as much as possible to protect the community’s most vulnerable  
 24 persons and prevent the health care system from being overwhelmed. (RJN, Exhs.  
 25 2-6 & 15.) The compelling government interest in this case is obvious.

26 \_\_\_\_\_  
 27 <sup>10/</sup> Plaintiffs’ reliance on a North Carolina District Court case for the  
 28 proposition that strict scrutiny should apply is misplaced. (See *Bateman v. Perdue*  
 (E.D.N.C. 2012) 881 F.Supp.2d 709.) The statute at issue in that case allowed the  
 complete prohibition on carrying, possessing and selling guns during the state of  
 emergency. (*Id.*) The Stay Well at Home Order does no such thing.

1 The test for whether the Stay Well at Home Order reasonably fits with the  
2 stated objectives “is not a strict one.” (*Silvester, supra*, 843 F.3d at p. 827.)  
3 Intermediate scrutiny does not require the least restrictive means of furthering a  
4 given end. (*Ibid.*) Instead, it requires only that the law be “substantially related to  
5 the important government interest.” (*Ibid.*) Here, the Health Officer is required to  
6 show only that the regulation “promotes a substantial government interest that  
7 would be achieved less effectively absent the regulation.” (*Id.* at p. 829.) The  
8 Health Officer easily meets that burden.

9 The stated goal of the Stay Well at Home Order is to keep as many people in  
10 their homes as possible. Even social distancing is not as effective in controlling  
11 the spread of the disease as isolating at home. The essential nature of essential  
12 businesses, such as grocery stores, justifies their continued operation subject to  
13 social distancing practices. But a gun store is not an essential business and  
14 allowing any non-essential businesses to remain open diminishes the effectiveness  
15 of the Stay Well at Home Order. Keeping gun stores and other non-essential  
16 businesses closed to the public for a limited time easily passes intermediate  
17 scrutiny.

### 18 **3. Plaintiffs Are Unlikely to Prevail on Their Right-to-Travel Claim**

19 Plaintiffs complain they and their members have suffered a violation of their  
20 fundamental right to travel because the Stay Well at Home Order prevents them  
21 from traveling outside Ventura County to purchase a firearm elsewhere. (ECF 27,  
22 pg. ID 203, ECF 27-1, pg. ID 230-231.) The Stay Well at Home Order, however,  
23 expressly allows intercounty travel and interstate travel. (RJN, Exh. 15, p. 3, ¶ 6, &  
24 p. 18, ¶ g(7).) And, while it is true that the right to travel has long been recognized  
25 as a fundamental right, that right arises out of an individual’s *interstate* travel.  
26 (*Saenz, supra*, 526 U.S. at pp. 489-490 [detailing three components of right to  
27 travel, all stemming from *interstate* travel]; see also *Hospital v. Maricopa County*  
28 (1974) 415 U.S. 250, 256 and *Nunez v. City of San Diego* (9th Cir. 1997) 114 F.3d

1 935, 944 [declining to opine whether right to travel extends to intrastate travel].)  
2 In short, the Stay Well at Home Order does not implicate the fundamental right to  
3 travel as claimed by plaintiffs; the Order does not restrain plaintiffs from leaving  
4 Ventura County.

5 Even if the Stay Well at Home Order implicates the right to travel, plaintiffs  
6 are unlikely to succeed on the merits of their claim. (See *Shows v. Swain County*  
7 *Sheriff* (W.D.N.C. April 23, 2020) 2020 WL 1953621 [denying TRO to restrain  
8 public emergency order’s imposition of curfew imposed to curb pandemic, finding  
9 plaintiffs unlikely to prevail on merits of claims under Privileges and Immunities  
10 Clause and First, Fourth, Fifth and Fourteenth Amendments].) This is because  
11 plaintiffs will be unable to show that the Stay Well at Home Order, which is a law  
12 of general application, is not narrowly tailored to achieve the compelling  
13 government interest to prevent the spread of COVID-19, even assuming that strict  
14 scrutiny applies. (See, e.g., *Mohamed v. Holder* (E.D. Va. 2017) 266 F.Supp.3d  
15 868, 879-883 [upholding “no-fly” list register despite its substantial burden on  
16 plaintiff’s right to interstate travel after strict scrutiny review and declining to  
17 recognize that right to travel extends to international travel]; *Lutz v. City of York,*  
18 *PA* (3d Cir. 1990) 899 F.2d 255, 259-70 [dismissing claim that anti-cruise statute  
19 violated due process clause of the Fifth Amendment after determining statute  
20 survived intermediate scrutiny as a valid time, place manner restriction]); *U.S.A. v.*  
21 *Sears* (C.D. Cal. April 6, 2015) 2015 WL 13359437, \*2 [finding law of general  
22 applicability that has incidental effect on an individual’s ability to travel does not  
23 violate the fundamental right to travel].)

24 **D. The Temporary Pause on the Ability to Purchase or Sell Firearms Does**  
25 **Not Amount to Irreparable Harm**

26 While it is true that “[i]rreparable harm is presumed if plaintiffs are likely to  
27 succeed on the merits because a deprivation of constitutional rights always  
28 constitutes irreparable harm.” (*Fyock, supra*, 25 F.Supp.3d at p. 1282, citing *Elrod*

1 *v. Burns* (1976) 427 U.S. 347, 373 [96 S.Ct. 2673]; *Ezell v. Chicago* (7th Cir.  
 2 2011) 651 F.3d 684, 699-700.) In this case, there is no constitutional violation,  
 3 and thus no irreparable harm. In contrast, if defendants are enjoined from  
 4 enforcing the Stay Well at Home Order, the irreparable harm to the public is  
 5 obvious and potentially deadly: increased likelihood of the spread of a highly  
 6 contagious and sometime fatal disease without a known cure and further deaths of  
 7 Ventura County residents caused by the disease.

8 **E. The Balance of Equities of the Hardships to the Parties and Public**  
 9 **Interest Tips Sharply in the County’s Favor**

10 Plaintiffs cannot meet their burden to show that the balance of equities tips  
 11 in their favor. (*Fyock, supra*, 25 F.Supp.3d at pp. 1282-1284 [finding hardships  
 12 balance to be neutral but public interest to weigh in City’s favor], citing *Winters*,  
 13 *supra*, 555 U.S. at p. 20.) In evaluating the equities of whether to issue injunctive  
 14 relief, the court should consider the respective hardships on both parties and the  
 15 public interests advanced by either determination. (*Fyock, supra*, 25 F.Supp.3d at  
 16 p. 1282, citing *United States v. Salerno* (1987) 467 U.S. 739, 748-50 [104 S.Ct.  
 17 2720], and *Schall v. Martin* (1984) 467 U.S. 263, 264 [104 S.Ct. 2403].) In so  
 18 doing, “courts of equity should pay particular regard for the public consequences in  
 19 employing the extraordinary remedy of injunction.” (*Winter, supra*, 555 U.S. at p.  
 20 24, citing *Weinberger v. Romero-Barcelo* (1982) 456 U.S. 305, 312 [102 S.Ct.  
 21 1798], and *Railroad Comm’n of Tex. v. Pullman Co.* (1941) 312 U.S. 496, 500 [61  
 22 S.Ct. 643].) Here, as just noted, the consequences to the public if the relief is  
 23 granted are obvious and dire: increased likelihood that more people will get sick  
 24 and more people will die.

25 In *Winter*, the Supreme Court vacated a preliminary injunction after finding  
 26 the lower courts did not appropriately assess and balance the hardships and  
 27 interests implicated by the injunction on the defendant, the United States Navy.  
 28 (*Winter, supra*, 555 U.S. at pp. 25-33 [analyzing hardships asserted by Navy and

1 public interests implicated by those hardships].) The preliminary injunction at  
2 issue in *Winter* imposed a number of conditions on the Navy’s “ability to conduct  
3 realistic training exercises” at sea involving the use of sonar technology in the  
4 interest of national defense. (*Id.* at p. 24.) The plaintiffs were several groups  
5 dedicated to the protection of marine life and habitats that sought to enjoin the  
6 Navy’s training exercises in the name of those interests. (*Id.* at pp. 14, 25.) The  
7 Navy supported its assertion of specific hardships through declarations of several  
8 high-ranking officers, whose “professional military judgments” about the impact of  
9 the injunction on national security were “complex, subtle, and professional  
10 decisions as to the composition, training, equipping, and control of a military  
11 force” that are to be given “great deference” by the courts. (*Id.* at p. 24.) After  
12 balancing the equities of the plaintiffs’ interests, i.e., “possible harm to the  
13 ecological, scientific, and recreational interests,” with the Navy’s national security  
14 interests, i.e., “forcing the Navy to deploy an inadequately trained antisubmarine  
15 force [that would] jeopardize[] the safety of the fleet,” the court found that the  
16 public interest determination was not a close question. (*Id.* at p. 26.)

17 As explained above, because plaintiffs cannot show a likelihood of success  
18 on the merits, they will be unable to show either that the hardships of a temporary  
19 pause on the sale or purchase of firearms or the public interest warrant relief in  
20 their favor. (*Fyock, supra*, 25 F.Supp.3d at p. 1282.) At worst for plaintiffs, their  
21 ability to buy or sell firearms is subject to delay during the pendency of the Stay  
22 Well at Home Order.

23 In contrast, the Health Officer’s compelling interests are to prevent, slow or  
24 otherwise curtail the spread of COVID-19, to maintain the integrity and continued  
25 operation of the health care system, and to the extent possible, promote the safety  
26 and well-being of thousands of health care workers being called to the front lines  
27 of a global pandemic at the local level. (See, e.g., *Jacobson, supra*, 197 U.S. at  
28 p. 26 [compelling interest of public health allowed forced smallpox vaccinations].)

1 That these interests are, and will be, achieved through the Stay Well at Home  
2 Order is not subject to reasonable dispute. Similar to the opinions of high-ranking  
3 military officers in *Winter*, the Health Officer’s determination of how to best stop  
4 the spread of COVID-19 and the deaths of potentially hundreds of Ventura County  
5 residents, and to prevent the local health care system from being overwhelmed,  
6 involves “complex, subtle, and professional decisions” as to the preservation of  
7 public health, and such “professional judgment” is entitled to “great deference.”  
8 Like in *Winter*, the question of where the public interest lies is not even close: the  
9 balance of equities tips sharply in defendants’ favor. The request for a TRO should  
10 be denied.

11 **IV**  
12 **CONCLUSION**

13 Based on the foregoing, defendants respectfully requests that the Court deny  
14 the request for a TRO.

15 LEROY SMITH  
16 County Counsel, County of Ventura

17 Dated: April 28, 2020

18 By /s/  
CHARMAINE H. BUEHNER  
Assistant County Counsel

19 Attorneys for Defendants County of Ventura  
20 (also erroneously sued as Ventura County Public  
21 Health Care Agency), Sheriff William Ayub  
(erroneously sued as “Bill Ayub”), Robert Levin  
22 and William T. Foley  
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