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14 **UNITED STATES DISTRICT COURT**  
 15 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

16 DONALD MCDOUGALL, *et al.*,

17 Plaintiffs,

18 vs.

19 COUNTY OF VENTURA,  
 20 CALIFORNIA, *et al.*,

21 Defendants.

Case No. 2:20-cv-02927-CBM

**PLAINTIFFS' OPPOSITION TO**  
**DEFENDANTS' MOTION TO DISMISS**  
**FIRST AMENDED COMPLAINT**

Date: June 30, 2020

Time: 10:00 a.m.

Ctrm: 8b

Judge: Hon. Consuelo B. Marshall

Trial: Not Set

Complaint Filed: March 28, 2020

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1 **ARGUMENT**

2 Defendants move to dismiss the First Amended Complaint (FAC) under Rule  
3 12(b)(6) of the Federal Rules of Civil Procedure, on the basis that it “fails to allege  
4 sufficient facts to state any cognizable legal claim.” Notice of Motion to Dismiss  
5 (MTD). Defendants push this motion with two arguments: (1) the case is “moot”  
6 under a new set of orders issued after the FAC was filed which, for now they say,  
7 “no longer prohibit[] firearm stores from opening, and no longer restrict[] intra-  
8 country firearms transactions,” MTD at 1, 10; and (2) all orders they have issued,  
9 including those that defendants readily admit forced firearms and ammunition  
10 retailers to shutter for 48 days – March 20th through May 7th – “pass[] constitutional  
11 muster” as “lawful” actions, which in fact did not even “implicate,” much less  
12 violate, the fundamental constitutional right to keep and bear arms, *id.* at 1.  
13

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16  
17 Nothing is moot, and plaintiffs strongly state redressable claims for relief.<sup>1</sup>

18  
19 **I. Defendants Fail to Recognize and Apply the Applicable Standards**

20 At the outset, defendants cite only Rule 12(b)(6) and draw no distinction  
21 between the standards applicable to the two different dimensions of their motion –  
22 one attacking the jurisdiction of this Court and the other the substance of the claims.  
23

24 In a motion to dismiss for failure to state a claim under Rule 12(b)(6), “we  
25

26  
27 <sup>1</sup> In the interest of economy and efficiency, plaintiffs are focusing on their  
28 claims for relief specifically concerning the violation of the Second Amendment and,  
to that end, are dismissing Count Two of the FAC concerning the right to travel.

1 accept all factual allegations in the complaint as true and construe the pleadings in  
2 the light most favorable to the nonmoving party.” *Association for Los Angeles*  
3 *Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 990 (9th Cir. 2011)  
4 (citations omitted). “The court draws all reasonable inferences in favor of the  
5 plaintiff.” *Id.* “Although ‘conclusory allegations of law and unwarranted inferences  
6 are insufficient’ to avoid a Rule 12(b)(6) dismissal ... a complaint need not contain  
7 detailed factual allegations; rather, it must plead ‘enough facts to state a claim to  
8 relief that is plausible on its face.’” *Cousins v. Lockyer*, 568 F.3d 1063, 1067-68 (9th  
9 Cir. 2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (internal  
10 quotations omitted). “A claim has facial plausibility when the plaintiff pleads factual  
11 content that allows the court to draw the reasonable inference that the defendant is  
12 liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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18 The vehicle for challenging subject matter jurisdiction on mootness grounds,  
19 under Rule 12(b)(1), is quite different. “A defendant’s Rule 12(b)(1) jurisdictional  
20 attack can be either facial or factual.” *Phom Lamb v. United States*, 389 F.Supp.3d  
21 669, 679 (N.D. Cal. 2019). “A ‘facial’ attack asserts that a complaint’s allegations  
22 are themselves insufficient to invoke jurisdiction, while a ‘factual’ attack asserts that  
23 the complaint’s allegations, though adequate on their face to invoke jurisdiction, are  
24 untrue.” *Id.* (quoting *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n.3 (9th  
25 Cir. 2014). “Under a facial attack, the court ‘accept[s] all allegations of fact in the  
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1 complaint as true and construe[s] them in the light most favorable to the plaintiffs.”  
2 *Id.* (quoting *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.  
3 2003)). In a factual attack, the defendant relies on extrinsic evidence. *Id.* In that case,  
4 “the court ‘need not presume the truthfulness of the plaintiff’s allegations’ and ‘may  
5 review evidence beyond the complaint without converting the motion to dismiss into  
6 a motion for summary judgment.’” *Id.* (quoting *Safe Air for Everyone v. Meyer*, 373  
7 F.3d 1035, 1039 (9th Cir. 2004)); *Pratt v. Hawaii Dept. of Public Safety*, 308  
8 F.Supp.3d 1131, 1138 (D. Hawaii 2018) (“On a Rule 12(b)(1) motion to dismiss, the  
9 district court is ordinarily free to hear evidence regarding jurisdiction...”).  
10  
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12

13 “However, ‘[t]he relatively expansive standards of a 12(b)(1) motion are not  
14 appropriate for determining jurisdiction ... where issues of jurisdiction and substance  
15 are intertwined.’ *Nampa Classical Academy v. Goesling*, 714 F.Supp.2d 1079, 1087  
16 (D. Idaho 2010) (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th  
17 Cir.1987)). “A court may not resolve genuinely disputed facts where ‘the question  
18 of jurisdiction is dependent on the resolution of factual issues going to the merits.’”  
19 *Id.* “In such a case, ‘the jurisdictional determination should await a determination of  
20 the relevant facts on either a motion going to the merits or at trial.’” *Id.* (quoting  
21 *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983)); accord *Winebarger*  
22 *v. Pennsylvania Higher Education Assistance Agency*, 411 F.Supp.3d 1070, 1081  
23 (C.D. Cal. 2019). Indeed, “discovery should ordinarily be granted where pertinent  
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1 facts bearing on the question of jurisdiction are controverted or where a more  
2 satisfactory showing of the facts is necessary.” *Laub v. U.S. Dept. of Interior*, 342  
3 F.3d 1080, 1093 (9th Cir. 2003); *accord Brophy v. Almanzar*, 359 F.Supp.3d 917,  
4 925 (C.D. Cal. 2018). Because defendants rely on extrinsic evidence to support their  
5 claim of mootness, the attack is factual in nature. Def. Req. for Jud. Notice (RJN).  
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7

## 8 **II. A Live Justiciable Case Remains with Fully Redressable Claims**

9 Defendants attempt to make short shrift of the mootness question itself –  
10 devoting a single paragraph based on a single quote from a single case to declare this  
11 whole case “entirely moot,” MTD at 10-11 – when any proper mootness  
12 determination requires an intricate analysis recognizing the well-settled exceptions  
13 to the very general rule defendants cite that “when interim relief or events have  
14 deprived the court of the ability to redress the party’s injuries,” *id.* at 10.  
15  
16

### 17 **A. Controlling Mootness Principles**

18 The “case and controversy” requirement of federal court jurisdiction requires  
19 “an actual controversy ... be extant at all stages of review, not merely at the time the  
20 complaint is filed.” *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 669 (2016)  
21 (citation omitted). A case becomes moot, so as to “deprive[] the plaintiff of a  
22 personal stake in the outcome of the lawsuit,” “only when it is impossible for a court  
23 to grant any effectual relief whatever to the prevailing party.” *Gomez* at 669 (citation  
24 omitted); *accord Native Village of Nuiqsut v. Bureau of Land Management*, \_\_  
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1 F.Supp.3d \_\_ 2020 WL 113495, \*9 (D. Alaska 2020). ““As long as the parties have  
2 a concrete interest, *however small*, in the outcome of the litigation, the case is not  
3 moot.”” *Gomez* at 669 (quoting *Chafin v. Chafin*, 568 U.S. 165, 171 (2013)).  
4  
5 Generally, the party challenging the court’s jurisdiction on such grounds bears the  
6 burden of demonstrating mootness, and it is “a heavy one.” *Native Village* at \*9, n.  
7  
8 103 (quoting *Feldman v. Bomar*, 518 F.3d 637, 642 (9th Cir. 2008)).

9  
10 Multiple well-recognized exceptions to “mootness” exist. Under one  
11 exception, ““voluntary cessation of allegedly illegal conduct does not deprive the  
12 tribunal of power to hear and determine the case, i.e., does not make the case moot,””  
13 except “where the Court determines that (1) the alleged violation will not recur and  
14 (2) ‘interim relief or events have completely and irrevocably eradicated the effects  
15 of the alleged violation.’” *Durst v. Oregon Education Association*, \_\_ F.Supp.3d \_\_,  
16  
17 2020 WL 1545484, \*3 (D. Oregon 2020) (quoting *Los Angeles Cty. v. Davis*, 440  
18 U.S. 625, 631 (1979)). If not, “a dismissal for mootness would permit a resumption  
19 of the challenged conduct as soon as the case is dismissed.” *American Diabetes*  
20  
21 *Association v. U.S Dept. of the Army*, 938 F.3d 1147 (9th Cir. 2019). The burden  
22 ordinarily rests on the party claiming mootness. *Friends of the Earth, Inc. v. Laidlaw*  
23  
24 *Environmental Services (TOC)*, 528 U.S. 167, 189 (2000) (citations omitted) (“The  
25 ‘heavy burden of persua[ding]’ the court that the challenged conduct cannot  
26 reasonably be expected to start up again lies with the party asserting mootness.”).  
27  
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1 In this context, the Ninth Circuit has held that “a *legislative act* creates a  
2 presumption that the action is moot, unless there is a reasonable expectation that the  
3 legislative body is likely to enact the same or substantially similar legislation in the  
4 future.” *Board of Trustees of Glazing Health and Welfare Trust v. Chambers*, 941  
5 F.3d 1195, 1197 (9th Cir. 2019) (italics added). Thus, when the defendant’s cessation  
6 of the challenged action is the product of such an act, the typical burdens are  
7 reversed, as “we should presume that the repeal, amendment, or expiration of  
8 legislation will render an action challenging the legislation moot, unless there is a  
9 reasonable expectation that the legislative body will reenact the challenged provision  
10 or one similar to it.” *Id.* at 1199. That said, “[t]he party challenging the presumption  
11 of mootness need not show that the enactment of the same or similar legislation is a  
12 ‘virtual certainty,’ only that there is a reasonable expectation of reenactment.” *Id.*  
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18 Another “justiciability-saving exception is for challenges to injuries that are  
19 ‘capable of repetition, yet evading review.’” *Planned Parenthood of Greater*  
20 *Washington and North Idaho v. U.S. Department of Health & Human Services*, 946  
21 F.3d 1100 (9th Cir. 2020). This exception to the mootness doctrine  
22 “requires (1) the complaining party to reasonably expect to be subject to the same  
23 injury again and (2) the injury to be of a type inherently shorter than the duration of  
24 litigation.” *Id.* at 1109. A party has a reasonable expectation of being “subject to the  
25 same injury again” when it reasonably believes “will again be subjected to the  
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1 alleged illegality’ or will be or ‘subject to the threat of prosecution’ under the  
2 challenged law.” *Koller v. Harris*, 312 F.Supp.3d 814, 823 (N.D. Cal. 2018) (quoting  
3 *FEC v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 463 (2007)). A canvass of the  
4 case law indicates that the Ninth Circuit has not applied a presumption of mootness  
5 in the context of challenges to injuries “capable of repetition, yet evading review.”  
6  
7

8 Yet another exception exists for claims seeking nominal damages based on  
9 the injury already inflicted during the enforcement of the challenged action. “Unlike  
10 most private tort litigants, a civil rights plaintiff seeks to vindicate important civil  
11 and constitutional rights that cannot be valued solely in monetary terms.” *Bernhardt*  
12 *v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) (quoting *City of*  
13 *Riverside v. Rivera*, 477 U.S. 561, 574 (1986)). “It is well-established that ‘the basic  
14 purpose’ of § 1983 damages is ‘to compensate persons for injuries that are caused  
15 by the deprivation of constitutional rights.’” *Epona LLC v. County of Ventura*, 2019  
16 WL 7940582, \*5 (C.D. Cal. 2019) (quoting *Memphis Cmty. Sch. Dist. v. Stachura*,  
17 477 U.S. 299, 307 (1986)). “By making the deprivation of such rights actionable for  
18 nominal damages without proof of actual injury, the law recognizes the importance  
19 to organized society that those rights be scrupulously observed.” *Bernhardt* at 872.  
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25 Thus, “[a]s a general rule, amending or repealing an ordinance will not moot  
26 a damages claim because such relief is sought for ‘a past violation of [the plaintiff’s]  
27 rights,’” *Epona* 2019 WL 7940582 at \*5 (quoting *Outdoor Media Grp. v. City of*  
28

1 *Beaumont*, 506 F.3d 895, 902 (9th Cir. 2007)), and “[a] live claim for nominal  
2 damages will prevent dismissal for mootness,” *Bernhardt*, 279 F.3d at 871.  
3

4 **B. The History of Defendants’ Orders Violating Second Amendment**  
5 **Rights as Supposedly Necessary to Combat COVID-19**  
6

7 All these exceptions apply here to vest in this Court continuing jurisdiction  
8 over the case despite the later orders beginning May 7th, which no longer prohibit  
9 firearms and ammunition transactions within the county but which the County  
10 Health Officer retains the power to unilaterally “rescind[], supersede[] or amend[]”  
11 at any time. RJN, Ex. 23, p. 9, § 16 (May 7th “Stay Well VC” Order)); *id.* at Ex. 25  
12 (May 20th Order, p. 9, § 16 (containing same proviso)); *id.* at Ex. 26 (May 22nd  
13 Order, p. 9, § 16 (same)); *id.* at Ex. 27 (May 29th Order, p. 6, § 11 (same)).  
14  
15

16 Nothing about these later orders consists of “a legislative act.” Like the first  
17 round of orders which plaintiffs challenged as unconstitutional, these orders were  
18 issued by mere proclamation of the County Health Officer with no voice from or  
19 accountability to any of the numerous residents they directly impacted. *See Reynolds*  
20 *v. Sims*, 377 U.S. 533, 565 (1964) (legislatures “should be bodies which are  
21 collectively responsive to the popular will”). Rather, the County is imposing its will  
22 upon all residents through an exercise of otherwise unchecked executive power, and  
23 the same will be true with any and all later orders rescinding, superseding, or  
24 amending the orders currently in place when and however the County deems fit. *See*  
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1 *Chadha v. Immigration and Naturalization Service*, 634 F.2d 408, 431, n. 32 (9th  
2 Cir. 1980) (“This emphasizes one danger inherent in departures from the rule of  
3 separation of powers: when a governmental power is exercised by a branch other  
4 than that ordinarily responsible, the specific guarantees of governmental regularity  
5 applicable to the ordinarily responsible branch are in effect short-circuited.”).

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7  
8 The installation of the County’s new orders by such executive edict cannot  
9 give rise a presumption of mootness concerning its previous orders issued in the  
10 same way, so as to remove the new orders from the “voluntary cessation” exception.  
11 Even so, unquestionably, there exists a “reasonable expectation of reenactment”  
12 *Board of Trustees*, 941 F.3d at 1197, and, similarly a reasonable belief that plaintiffs  
13 “will again be subjected to the alleged illegality’ or will be or ‘subject to the threat  
14 of prosecution’ under the challenged law,” *Koller v. Harris*, 312 F.Supp.3d at 823,  
15 within the meaning of the “capable of repetition, yet evading review” exception.  
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19 Throughout the history of defendants’ orders and this ensuing litigation, they  
20 have made abundantly clear that they believe sales and transfers of firearms and  
21 ammunition – which they know can only be lawfully conducted through a firearms  
22 dealer – to be “non-essential” business activity during times of public health crisis.  
23 *See* MTD at 1 (stating that the prior orders required closure of all gun stores effective  
24 March 20th “because such businesses did not support the ability of people to remain  
25 sheltered in their homes to the maximum extent possible”); *id.* at 22 (arguing that  
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1 allowing any “non-essential” businesses like gun stores “to remain open would have  
2 diminished the effectiveness of the Stay Well at Home Order”).

3  
4 It is also abundantly clear that the asserted basis for these prior orders  
5 precluding sales and transfers of firearms and ammunition throughout the county has  
6 been that doing so is necessary to combat “the spread of COVID-19 to the maximum  
7 extent possible” and “the risk of serious health complications, including death,” by  
8 limiting the nature and extent of residents’ activity outside the home. Def. RJN (filed  
9  
10 5/5/20), Ex. 7, p. 1 (March 17th Order); *id.* at Ex. 12 (March 20th Order), p. 1, § 1  
11 (same); *id.* at Ex. 13 (March 31st Order), p. 1, § 1 (same); *id.* at Ex. 14 (April 9th  
12 Order), p. 1, § 1 (same); *id.* at 15, Ex. 15 (April 20th Order), p. 2, § 1 (same).  
13  
14

15 **C. New Orders of the Same Effect are Likely, and at Any Time**

16 The same health risks that served as defendants’ justification for the prior  
17 orders not only still exist, but they are increasing all the time. The statistical data  
18 show cases of COVID-19 in Ventura County have steadily been on the rise since the  
19 end of March, and that they are now at the highest point ever with over 1,200 cases  
20 in the county. Ex. 1<sup>2</sup> (L.A. Times article). In just three days, between May 29th and  
21 June 2nd, 74 new cases were reported in the County. Ex. 2 (VC Reporter article).  
22  
23

24 Cases are also steadily on the rise throughout the State of California, with the  
25  
26  
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28 <sup>2</sup> Plaintiffs have filed a request for judicial notice of the exhibits cited herein.

1 number new daily cases spiking right at 15,000 by the end of May. Ex. 3 (L.A. Times  
2 article); Ex. 4 (John Hopkins University). Indeed, Ventura County’s next-door  
3 neighbor, Los Angeles County, reported 10,000 new cases alone last week. Ex. 4.  
4 The total number of cases in the State was almost 123,000 as of June 4, 2020, Ex. 5  
5 (CA Dept. of Public Health,), and the Center for Disease Control’s projection models  
6 show a continuation of this upward trend, Ex. 6 (CDC). The picture is the same  
7 nationally, with the total cases just shy of 2,000,000 as of June 5th, Ex. 7 (CDC),  
8 and with the number of infections expected to continue a steady climb, Ex. 8 (CDC).

9  
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11  
12 The CDC has already been warning about a “second wave” of the contagion  
13 during this year’s upcoming flu season – one likely to be “far more dire because it is  
14 likely to coincide with the start of flu season.” Ex. 8 (Washington Post). And now,  
15 with the nationwide protests, the risk of further spread has exponentially increased  
16 just over the last couple weeks. Ex. 10 (UCLA Health, General Internal Medicine &  
17 Health Services (“Epidemiological studies show that large, crowded, and loudly  
18 expressive events that involve shouting or singing increase the spread of SARS-  
19 COV-2, causing COVID-19 outbreaks.”)); Ex. 11 (California Heathline (“Newsom  
20 Warns California Residents To Brace For Surge Of Cases Following Protests”).  
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25 Defendants continue to speak of the same concerns themselves: “Ventura  
26 County continues to experience a local health emergency that is part of a global  
27 pandemic. COVID-19 is highly contagious and potentially deadly.” MTD at 22.  
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1 “COVID-19 presents an imminent and proximate threat to the residents of Ventura  
2 County, and it is essential to control the spread of COVID-19 as much as possible...”

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4 *Id.* Having clearly demonstrated that they believe all sales and transfers of firearms  
5 and ammunition within the county can be precluded in the name of combatting these  
6 risks, and having acted on that belief by shutting down all such activity for several  
7 weeks already, it is eminently reasonable to expect they will do so again. This is  
8 particularly true when defendants have expressly reserved the power to unilaterally  
9 “repeal,” “supersede,” or “amend” their orders at will, and when the COVID-19  
10 statistics on which they previously relied are now substantially *worse*.  
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13 Under these circumstances, plaintiffs retain a *substantial* concrete interest in  
14 the outcome more than sufficient to preserve this Court’s jurisdiction. *Gomez*, 136  
15 S.Ct. at 669 (“As long as the parties have a concrete interest, *however small*, in the  
16 outcome of the litigation, the case is not moot.”). And, in addition to declaratory  
17 relief, plaintiffs have properly pled for nominal damages, FAC at p. 29, in seeking  
18 redress of the constitutional injuries already inflicted, something defendants simply  
19 cannot avoid by claiming “mootness.” *Outdoor Media Grp.*, 506 F.3d at 902.  
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22 Moreover, to the extent any question may remain here, it stems from  
23 defendants’ arguments on the merits contesting factual matters about the actual  
24 meaning and effects of the prior orders. *See e.g.*, MTD at 23 (arguing, without any  
25 evidence, that allowing gun stores to remain open “would have diminished the  
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1 effectiveness of the Stay Well at Home Order”), *id.* at 19 (arguing, again with no  
2 evidence, these orders did not “limit the ability of persons to keep or bear arms”).  
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4 Thus, defendants’ jurisdictional attack “is dependent on the resolution of factual  
5 issues going to the merits,” meaning the question of jurisdiction cannot be resolved  
6 without development of further evidence on the factual issues raised by defendants’  
7 mootness claim. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir.1987)).

### 9 **III. Plaintiffs’ Case Easily Passes the Lenient Test of Legal Sufficiency**

10 “A Rule 12(b)(6) motion is disfavored and rarely granted.” *U.S v. Hempfling*,  
11 431 F.Supp.2d 1069, 1075 (E.D. Cal. 2006). Therefore, “[a] complaint should not be  
12 dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff  
13 can prove no set of facts in support of his claim which would entitle him to relief,”  
14 *Geraci v. Homestreet Bank*, 347 F.3d 749, 751 (9th Cir. 2003) (quoting *Conley v.*  
15 *Gibson*, 355 U.S. 41, 45-46 (1957)), and “[t]he court draws all reasonable inferences  
16 in favor of the plaintiff,” *Association for Los Angeles Deputy Sheriffs v. County of*  
17 *Los Angeles*, 648 F.3d at 990. Defendants plow right past these fundamentals and  
18 stage their case for dismissal with arguments that rest on the ultimate legal  
19 conclusions they hope to draw from a view of the facts favorable to them. Again, the  
20 claims need only survive the lenient test of “legal sufficiency.” *See California*  
21 *Trucking Association v. Becerra*, \_\_\_ F.Supp.3d \_\_\_, 2020 WL 620287 \* 3 (S.D. Cal.  
22 2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“At the  
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1 pleading stage, general factual allegations of injury resulting from the defendant’s  
2 conduct may suffice, for on a motion to dismiss we ‘presum[e] that general  
3 allegations embrace those specific facts that are necessary to support the claim.’”).  
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6 **A. The FAC Clearly Alleges the Essential Facts**

7 The proper standards for determining defendants’ motion are essential to bear  
8 in mind because the FAC repeatedly alleges essential facts which, taken as true,  
9 establish plaintiffs’ claim under the Second Amendment as more than legally  
10 sufficient. Specifically, they assert “[i]n California, individuals are required to  
11 purchase and transfer firearms and ammunition through state and federally licensed  
12 dealers in face-to-face transactions or face serious criminal penalties.” FAC ¶ 3.  
13 “Shuttering access to arms, the ammunition required to use those arms, and the  
14 ranges and education facilities that individuals need to learn how to safely and  
15 competently use arms, necessarily closes off the [Second Amendment]  
16 Constitutional right to learn about, practice with, and keep and bear those arms.” *Id.*  
17 Therefore, “[f]irearm and ammunition product manufacturers, retailers, importers,  
18 distributors, and shooting ranges are essential businesses that provide essential  
19 access to constitutionally protected fundamental, individual rights.” *Id.* at ¶ 2. As a  
20 result, “[b]y forcing duly licensed, essential businesses to close or eliminate key  
21 services for the general public,” defendants’ prior orders were “foreclosing the only  
22 lawful means to buy, sell, and transfer firearms and ammunition available to typical,  
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1 law-abiding individuals in California.” *Id.* at ¶ 3; *id.* at ¶¶ 58, 65, 72-76, 81 (same).  
2  
3 Ultimately then, the FAC expressly alleges that defendants’ orders “prevent[ed] the  
4 Plaintiffs, Plaintiffs’ members, and similarly situated members of the public from  
5 exercising their rights, including the purchase, sale, transfer of, and training with  
6 constitutionally protected arms, ammunition, magazines, and appurtenances, ... thus  
7 causing injury and damage that is actionable under 42 U.S.C. § 1983.” *Id.* ¶ 81.

9         While defendants contest the “essential” nature of such businesses, MTD at 1,  
10 all such “factual disputes are construed in the plaintiff’s favor,” *Freestream Aircraft*  
11 *(Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 602 (9th Cir. 2018), and defendants  
12 do *not* dispute the fundamental fact that their orders mandated these closures, thereby  
13 cutting off access to all sales of firearms and ammunition within the county  
14 throughout the entire period of March 17th through May 7th – save for the small  
15 window opened on April 20th, *a full month* after the county-wide closure mandate,  
16 for completing a sliver of *firearms* transactions initiated before March 20th.

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20         All defendants really do is make conclusory assertions about the actual effects  
21 of the prior orders, declaring that they “did nothing to regulate or limit the ability of  
22 persons to keep or bear arms” and thus imposed no burden or at most a “very small”  
23 burden on those rights. MTD at 19, 21. They filter these assertions through overly-  
24 favorable legal standards – with the *Jacobson* framework at the forefront and a  
25 skewed version of intermediate scrutiny as a fallback, *id.* at 11-23 – in advancing  
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1 arguments that come up way short of defeating the FAC under the lenient test that it  
2 need merely state *plausible* case for relief. *Cousins*, 568 F.3d at 1067-68.

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4 **B. *Jacobson* is Not the Controlling Framework**

5 The framework of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11  
6 (1905), simply doesn't fit here. "The fundamental law" of concern there was far  
7 removed from the constitutional principles at stake here. The *Jacobson* court  
8 considered only an inchoate, non-enumerated liberty interest—"the inherent right of  
9 every freeman to care for his own body and health in such way as to him seems best,"  
10 197 U.S. at 25—long before the evolution of modern constitutional scrutiny. It  
11 effectively applied a rational-basis-like test for *legislatively-enacted* restraints on  
12 *general* liberty interests not specifically protected by enumerated fundamental  
13 rights. "Supreme Court jurisprudence has progressed markedly from the deferential  
14 tone of *Jacobson* and its progressive-era embrace of the social compact." Note,  
15 *Toward a Twenty-First Century Jacobson v. Massachusetts*, 121 Harv. L. Rev. 1820  
16 (2008); Goston, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil*  
17 *Liberties in Tension*, 95 Am. J. Pub. Health 576, 580 (2005).

18  
19 *Jacobson* must be read with its historical limitations in mind. Its approach to  
20 evaluating a democratically enacted, acutely focused public health rule affecting a  
21 general interest is not a replacement for modern constitutional analysis. When a  
22 specific constitutional right is at stake, that right's mode of scrutiny applies. The  
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1 Sixth Circuit just recognized this in *Adams & Boyle, P.C. v. Slatery*, \_\_\_ F.3d \_\_\_,  
2 2020 WL 1982210 (6th Cir. Apr. 24, 2020). There, the district court issued a  
3 preliminary injunction against a governor’s COVID-19 order temporarily banning  
4 certain types of abortions as “elective” surgeries. Upholding the injunction, the Sixth  
5 Circuit cautioned that “[a]ffording flexibility [] is not the same as abdicating  
6 responsibility, especially when well-established constitutional rights are at stake...”  
7 2020 WL 1982210 at \*1. It was the nature of the specific constitutional right at stake  
8 that drove the analysis. The court held that, “bottom line ... even accepting *Jacobson*  
9 at face value, it does not substantially alter our reasoning here” because “[a]s of  
10 today, a woman’s right to a pre-viability abortion is a part of ‘the fundamental law.’”  
11 *Id.* at \*9. It would “not countenance ...the notion that COVID-19 has somehow  
12 demoted *Roe* and *Casey* to second-class rights, enforceable against only the most  
13 extreme and outlandish violations.” *Id.* at \*10. “Such a notion is incompatible not  
14 only with *Jacobson*, but also with American constitutional law writ large.” *Id.*

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20 Similarly, in *Robinson v. Attorney General*, \_\_\_ F.3d \_\_\_, 2020 WL 1952370  
21 (11th Cir. Apr. 23, 2020), Alabama’s attempt to wield the *Jacobson* case as somehow  
22 dispositive in support of its COVID-19 driven restriction on abortions was rejected.  
23 The Eleventh Circuit held that *Jacobson* could not be used to supplant other cases  
24 applying the specific constitutional rights at stake and the framework for protecting  
25 that right as defined throughout the decades of jurisprudence since *Jacobson*. *Id.* at  
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1 \*8. Notably, the Court specifically employed the modern *Roe-Casey* framework to  
2 conclude that Alabama’s COVID-19 order “impinge[d] the right to an abortion” in  
3 a “plain, palpable” fashion as contemplated by *Jacobson. Id.*  
4

5 To further illustrate, in *Maryville Baptist Church, Inc. v. Beshear*, \_\_\_ F.3d  
6 \_\_\_, 2020 WL 2111310 (6th Cir. May 2, 2020), the Sixth Circuit reversed the denial  
7 of a TRO enjoining a governor’s orders and enforcement actions shutting down  
8 worship services, regardless whether they met or exceeded social distancing and  
9 hygiene guidelines for permitted non-religious activities during the COVID-19  
10 pandemic. The Sixth Circuit found that the government’s orders and actions likely  
11 prohibited the free exercise of religion in violation of the First and Fourteenth  
12 Amendments, especially with respect to drive-in services. 2020 WL 211310 at \*2.  
13 Again, what drove the analysis was the nature of the specific constitutional right at  
14 stake scrutinized in the manner required under Supreme Court precedents since the  
15 time of *Jacobson. Id.* at \*3 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of*  
16 *Hialeh*, 508 U.S. 520, 553 (1993) (applying the rule that “a law that discriminates  
17 against religious practices will usually be invalidated unless the law ‘is justified by  
18 a compelling interest and is narrowly tailored to advance that interest’”). The Sixth  
19 Circuit cited *Jacobson* merely as a historical reference for purposes of recognizing  
20 the governor was well-intentioned in doing his best to lessen the spread of the virus,  
21 *id.* at \* 4, but the orders were ultimately adjudged under strict scrutiny according to  
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1 the nature of the right at stake—not any lesser form akin to rational basis.

2           And in *First Baptist Church v. Kelly*, \_\_\_ F.3d.Supp \_\_\_, 2020 WL 1910021  
3  
4 (D. Kan. Apr. 18, 2020), the district court ruled that *Jacobson* “d[id] not provide the  
5 best framework in which to evaluate the governor’s executive orders” restricting  
6 First Amendment free exercise rights in response to COVID-19. Instead, the court  
7 applied the modern-day jurisprudence on free exercise rights as the proper  
8 framework for reviewing the orders’ constitutionality. 2020 WL 1910021 at \*6.  
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11           While defendants make much of Justice Roberts’s concurring opinion in the  
12 denial of an application for injunctive relief in *South Bay United Pentecostal v.*  
13 *Newsom* 590 U.S. \_\_\_, 2020 WL 2813056, that case is distinguishable. First, it  
14 concerned merely a *capacity limit* on the number of attendees for religious services  
15 otherwise generally *permitted*. *Id.* at \*1. Had the orders at issue just reduced the  
16 capacity or number of daily transactions within retailers of firearms and ammunition,  
17 we might have a comparison. But the orders *completely denied* access to, and any  
18 lawful transactions involving, firearms and ammunition throughout the county.  
19  
20 Second, while a *capacity limitation* on an otherwise *permissible* activity may be  
21 entitled to judicial deference because one could conceivably conclude that the state  
22 officials did not exceed the bounds of their state statutory powers, *id.* at \*2, a  
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1 complete preclusion of constitutionally protected activity is a very different story.<sup>3</sup>  
2 Further, having imposed this complete preclusion without any showing of, or  
3 apparently any effort to investigate, less restrictive alternatives, defendants' actions  
4 simply cannot be fairly attributed the sort of presumed "competence" and "expertise"  
5 in "assess[ing] public health" for which *Jacobson-like* deference is reserved. *Id.* at  
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7 \*1 (granting such deference to the church capacity limitation). Indeed, defendants  
8 have supplied no evidence at all for their claim that their prior orders were intended  
9 to be, or truly were, "specific" and "tailored" to minimize the extent of unnecessary  
10 or unreasonable impact upon the fundamental rights at stake. MTD at 13-14.

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14 Lastly, one cannot ignore the scathing dissent of Justice Kavanaugh, joined  
15 by three other justices, who took California to task even over this limited capacity  
16 restriction on religious gatherings, holding the state to strict scrutiny and concluding  
17 the action was unsupported by any compelling justification for the restriction. *South*  
18 *Bay*, 2020 WL 2813056 at \*2-3 (Kavanaugh, J., dissenting). If four of the five  
19 justices of the Supreme Court would strike down this much more limited restriction  
20 *partially* impinging upon First Amendment rights, it is quite conceivable, if not  
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26 <sup>3</sup> While defendants seek to enhance the degree of substantial deference to which  
27 they are supposedly entitled by citing state statutory provisions permitting county  
28 officials to institute preventative measures "necessary" to protect public health,  
MTD at 13, n. 10, this is obviously a federal action in which the propriety of their  
actions must be adjudged and resolved under the United States Constitution.

1 likely, that at least a simple majority would strike down the orders at issue here given  
2 their effect of having completely denied access to the exercise of fundamental rights  
3 protected under the Second Amendment. And, again, the case is distinguishable and  
4 thus not controlling. *McDowell and Craig v. City of Santa Fe Springs*, 54 Cal. 2d 33,  
5 38, 4 Cal. Rptr. 176, 351 P.2d 344 (1960) (“It is elementary that the language used  
6 in any opinion is to be understood in the light of the facts and the issue then before  
7 the court. Further, cases are not authority for propositions not considered.”).

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11 Defendants cannot escape true constitutional scrutiny. Just as we cannot  
12 “countenance ...the notion that COVID-19 has somehow demoted *Roe* and *Casey* to  
13 second-class rights, enforceable against only the most extreme and outlandish  
14 violations,” *Adams & Boyle*, 2020 WL 1982210 at \*10, we cannot countenance a  
15 rule granting defendants the power to demote the rights at stake here by suspending  
16 over a century of Supreme Court jurisprudence to facilitate their policy preferences  
17 in blocking the exercise of fundamental rights under the Second Amendment.

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21 **C. The Constitutional Violation is Clear Under a Proper Analysis**

22 So the question is not, as Defendants say, whether their policies and practices  
23 are “beyond all question, a plain, palpable invasion of rights secured by” inchoate  
24 notions of “fundamental law” untethered from the individual rights at stake. MTD at  
25 12. The Supreme Court has made clear the Framers and ratifiers of the Fourteenth  
26 Amendment counted the right to keep and bear arms as among those fundamental  
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1 rights *necessary* (i.e., essential) to our system of ordered liberty, *McDonald v. City*  
2 *of Chicago*, 561 U.S. 742, 778, 791 (2010), and as a privilege and immunity of  
3 citizenship, *id.* at 805 (Thomas, J., concurring). Even under the Ninth Circuit’s two-  
4 step test, when a regulation burdens Second Amendment rights, *Heller* requires it  
5 must reject rational basis review “and conclude that some sort of heightened scrutiny  
6 must apply.” *United States v. Chovan*, 735 F.3d 1127, 1136-37 (9th Cir. 2013) (citing  
7 *District of Columbia v. Heller*, 554 U.S. 570, 628, n. 27 (2008)). The notion that the  
8 prior orders did not “implicate” these rights, or did no more than impose a miniscule  
9 burden, is just plain absurd. Again, defendants readily concede the fundamental fact  
10 repeatedly asserted in the FAC that they forced the complete closure of firearms  
11 retailers, and with that imposed a complete preclusion against all sales and transfers  
12 of firearms throughout the entire county for almost *seven weeks* (48 days).<sup>4</sup>

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18 Defendants’ orders struck at the heart of every right enshrined in the Second  
19 Amendment – the right to “keep,” “bear,” “use,” “possess,” and “carry” for self-

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23 <sup>4</sup> That residents were allowed to complete firearms transactions initiated before  
24 March 20th does not change the matrix. This narrow exception applied only for that  
25 small segment of transactions and made no exception for any ammunition. Plus, the  
26 exception certainly did not negate the claims of Plaintiff McDougall, as defendants  
27 spin it. MTD at 14. He was still barred from obtaining any ammunition throughout,  
28 and he was also barred throughout from retrieving his firearm in the possession of a  
gunsmith, since there was no exception for accessing gunsmiths. And Plaintiff  
Garcia was barred from obtaining any firearms or ammunition throughout the whole  
period because she had not initiated a firearms purchase before March 20th.

1 defense in the home, in case of confrontation, and for other lawful purposes, and of  
2 course, the corresponding right to obtain the ammunition required to actually use  
3 them for these protected purposes. *See Heller*, 554 U.S. at 592, 635; *McDonald*, 561  
4 U.S. at 767; *Jackson v. City and County of San Francisco*, 746 F.3d 953, 968 (9th  
5 Cir. 2014); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011). Further, by  
6 forcing residents to “shelter in place” and precluding all travel except to engage in  
7 “essential activities” and patronize “essential businesses” – which clearly did *not*  
8 include any travel for purposes of acquiring firearms or ammunition – the prior  
9 orders imposed the additional burdens of restraining residents’ right to travel as  
10 necessary to exercise the panoply of rights enshrined in the Second Amendment.

11 Such infringements “fail constitutional muster” “[u]nder any of the standards  
12 of scrutiny the Court has applied to enumerated constitutional rights.” *Heller* at 571.  
13 And, even assuming traditional scrutiny, a “law that implicates the core of the  
14 Second Amendment right and severely burdens that right”—like defendants’ prior  
15 orders here—“warrants strict scrutiny.” *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th  
16 Cir. 2017) (quoting *United States v. Chovan*, 735 F.3d at 1138)).

17 Even intermediate scrutiny demands that the government bear the burden of  
18 proving less restrictive alternatives do not exist or would be inadequate. *Ashcroft v.*  
19 *ACLU*, 542 U.S. 656, 669 (2004). “It is not enough for the Government to show that  
20 [its chosen action] has some effect.” *Id.* It must prove that any substantially less  
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1 restrictive alternatives would be less effective or ineffective. *Id.* It must show, and  
2 the court must find, “the means chosen are not substantially broader than necessary  
3 to achieve the government’s interest.” *Ward v. Rock Against Racism*, 491 U.S. 781,  
4 800 (1989). Here, defendants have made absolutely no effort to demonstrate they  
5 even *considered* less restrictive alternatives, much less that any such alternatives  
6 would be ineffective or inadequate. Similarly, they fail to claim they even *considered*  
7 less restrictive alternatives, much less that any evidence *exists* that would support  
8 this *total ban* as necessary, or even useful, in promoting the generic public interest  
9 supposedly being pursued. Instead, they entirely bypass the topic, resting their case  
10 chiefly on the notion that their orders are “presumptively lawful regulatory  
11 measures” subject to virtually total deference under *Jacobson*.<sup>5</sup>

12 By closing off all sales of and access to firearms and ammunition—with no  
13 justification for doing so while authorizing the operation of numerous other retailers  
14 whose businesses involve substantially more foot traffic and interaction among  
15 people—Defendants have made an impermissible policy choice. *See Heller*, 554  
16 U.S. at 636 (“the enshrinement of constitutional rights necessarily takes certain  
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25 <sup>5</sup> Defendants’ further attempt to diminish the impact here by claiming it is no more  
26 burdensome than the usual delays people face, MTD at 17-19, is also absurd. The  
27 waiting period only applies to firearm transactions (not ammunition). Further,  
28 *because* a background check and waiting period are *already* imposed by the State,  
defendants’ criminalizing conduct required to even start the process unquestionably  
imposes a significant and severe *additional* burden on the core rights at stake.

1 policy choices off the table”). Plaintiffs have stated a “plausible” case for relief.

2 **IV. This Court Still Has the Power to Grant Meaningful and Effective Relief**

3 In addition to their claim for nominal damages, plaintiffs’ claim for  
4 declaratory remains redressable notwithstanding that the prior orders at issue are no  
5 longer in effect. ““In the context of declaratory relief, a plaintiff demonstrates  
6 redressability if the court’s statement would require the defendant to act in any way  
7 that would redress past injuries or prevent future harm.”” *Microsoft Corporation v.*  
8 *United States Dept. of Justice*, 233 F.Supp.3d 887, 903 (W.D. Wash. 2017) (citations  
9 omitted). “A plaintiff is entitled to a presumption of redressability where he ‘seeks  
10 declaratory relief against the type of government action that indisputably caused him  
11 injury.’” *Id.* (quoting *Mayfield v. United States*, 599 F.3d 964, 971 (9th Cir. 2010)).

12 Here, given the clear existence of past injury and “reasonable expectation” –  
13 indeed true likelihood – that defendants will reimpose similar orders as COVID-19  
14 continues to pose the same risks they claim necessitated such orders, the declaratory  
15 relief plaintiffs seek would both redress past injury and prevent future harm.  
16 Defendants’ motion to dismiss should be denied and this case allowed to proceed.

17 Dated: June 9, 2020

18 /s/ Ronda Baldwin-Kennedy  
19 Ronda Baldwin-Kennedy

20 /s/ Raymond DiGuiseppe  
21 Raymond DiGuiseppe  
22 Attorneys for Plaintiffs