

1 **MICHAEL N. FEUER**, City Attorney – SBN 111529  
 2 **JAMES P. CLARK**, Chief Deputy City Attorney – SBN 64780  
 3 **KATHLEEN A. KENEALY**, Chief Assistant City Attorney – SBN 212289  
 4 **SCOTT MARCUS**, Civil Litigation Branch Chief – SBN 184980  
 5 **BLITHE S. BOCK**, Assistant City Attorney – SBN 163567  
 6 **BENJAMIN F. CHAPMAN**, Deputy City Attorney – SBN 234436  
 7 **JONATHAN H. EISENMAN**, Deputy City Attorney – SBN 279291  
 200 North Main Street, 7th Floor, City Hall East  
 Los Angeles, CA 90012  
 Phone No.: (213) 978-2212 Fax No.: (213) 978-0763  
 Email: jonathan.eisenman@lacity.org

*Attorneys for Defendants, ERIC GARCETTI and the CITY OF LOS ANGELES*

8 **UNITED STATES DISTRICT COURT**  
 9 **CENTRAL DISTRICT OF CALIFORNIA**

11 ADAM BRANDY, et al.,

13 Plaintiffs,

14 v.

15 ALEX VILLANUEVA, et al.,

17 Defendants.

CASE NO: CV20-02874-AB (SK)  
 Hon. André Birotte Jr., Ctrm. 7B, 7<sup>th</sup> Fl., 1<sup>st</sup> Street  
 Hon. Steve Kim, Ctrm. 540, 5<sup>th</sup> Fl., Roybal

**CITY DEFENDANTS’ OPPOSITION  
 TO PLAINTIFFS’ APPLICATION  
 FOR A TEMPORARY  
 RESTRAINING ORDER AND  
 ORDER TO SHOW CAUSE WHY A  
 PRELIMINARY INJUNCTION  
 SHOULD NOT ISSUE**

**TABLE OF CONTENTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

INTRODUCTION .....5

RELEVANT FACTS .....6

LEGAL STANDARD .....7

ARGUMENT .....8

I. The memorandum supporting the TRO application contains no argument whatsoever why a TRO should be granted against Mayor Garcetti or the City of Los Angeles, and most Plaintiffs haven’t even shown standing to sue the Mayor or City over the Order. ....8

    A. Plaintiffs’ memorandum of points and authorities contains no argument whatsoever about the Mayor’s Order. ....8

    B. There has been no attempt at all to demonstrate most Plaintiffs’ standing to sue the City or the Mayor, though that is Plaintiffs’ burden.....8

II. Even assuming the arguments made against other Defendants apply to the Mayor and City, those Plaintiffs who have adequately alleged standing haven’t demonstrated that they are entitled to a TRO.....9

    A. The law and facts do not favor the Plaintiffs’ position.....9

        1. The Constitution recognizes the extraordinary powers local governments possess in times of public health emergency, including over commerce. ....9

        2. A broad emergency restriction on commerce that incidentally affects the sale of firearms doesn’t offend the Second Amendment.....11

        3. Even if the Mayor’s Order is subject to Second Amendment scrutiny, the Order passes muster. ....13

        4. Plaintiffs’ tacked-on void-for-vagueness challenge is likewise unavailing.....15

    B. Assuming, for argument’s sake, that the Mayor’s Order “irreparably harms” a Plaintiff, the balance of equities does not tip in Plaintiffs’ favor—and the public interest would not be served by granting a TRO.....16

CONCLUSION.....17

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*Bauer v. Becerra*,  
858 F.3d 1216 (9th Cir. 2017)..... 14

*Compagnie Francaise De Navigation A Vapeur v. La. State Bd. of Health*,  
186 U.S. 380 (1902) ..... 10

*Crowder v. Kitagawa*,  
81 F.3d 1480 (9th Cir. 1996)..... 10

*District of Columbia v. Brooke*,  
214 U.S. 138 (1909) ..... 10

*District of Columbia v. Heller*,  
554 U.S. 570 (2008) ..... 11, 12

*Duncan v. Becerra*,  
742 F. App’x 218 (9th Cir. 2018)..... 14

*Frontline Med. Assocs. v. Coventry Healthcare Workers Comp., Inc.*,  
620 F. Supp. 2d. 1109 (C.D. Cal. 2009)..... 7

*Garcia v. Google, Inc.*,  
786 F.3d 733 (9th Cir. 2015) (en banc)..... 7, 15

*Gibbons v. Ogden*,  
22 U.S. (9 Wheat.) 1 (1824) ..... 10

*Jacobson v. Massachusetts*,  
197 U.S. 11 (1905) ..... 9, 10

*Johnson v. United States*,  
135 S. Ct. 2551 (2015)..... 16

*Lujan v. Defenders of Wildlife*,  
504 U.S. 555 (1992) ..... 8, 9

*Mazurek v. Armstrong*,  
520 U.S. 968 (1997) ..... 7

1 *McDougall v. Cnty. of Ventura*,  
 2 No. 2:20-cv-02927-CBM-AS (C.D. Cal. Apr. 1, 2020)..... 15, 17  
 3 *Missouri v. McNeely*,  
 4 569 U.S. 141 (2013) ..... 10  
 5 *Morgan S.S. Co. v. La. Bd. of Health*,  
 6 118 U.S. 455 (1886) ..... 10  
 7 *Pena v. Lindley*,  
 8 898 F.3d 969 (9th Cir. 2018)..... 11, 13, 14  
 9 *Peruta v. Cnty. of San Diego*,  
 10 824 F.3d 919 (9th Cir. 2016) (en banc)..... 12  
 11 *Silvester v. Harris*,  
 12 843 F.3d 816 (9th Cir. 2016)..... 11, 14  
 13 *Stormans, Inc. v. Selecky*,  
 14 586 F.3d 1109 (9th Cir. 2009)..... 16  
 15 *Teixeira v. Cnty. of Alameda*,  
 16 873 F.3d 670 (9th Cir. 2017) (en banc)..... 11, 12, 13  
 17 *United States v. Chovan*,  
 18 735 F.3d 1127 (9th Cir. 2013)..... 14  
 19 *Weinberger v. Romero-Barcelo*,  
 20 456 U.S. 305 (1982) ..... 16  
 21 *Winter v. Natural Res. Def. Council, Inc.*,  
 22 555 U.S. 7 (2008) ..... 7

**Other Authorities**

22 U.S. Const. amend. II..... *passim*  
 23 C.D. Cal. R. 7-4 ..... 8  
 24 C.D. Cal. R. 7-5 ..... 8  
 25 Cal. Const. art. XI, § 7 ..... 10  
 26 U.S. Const. amend. X ..... 10  
 27  
 28

## INTRODUCTION

1  
2 Plaintiffs' TRO application obscures two points that are fatal both to their  
3 application and to their entire case. First, while enumerating the Second Amendment  
4 injuries that Mayor Garcetti's Safer At Home Order supposedly inflicts on them,  
5 Plaintiffs appear to have fabricated one: Nothing in the Mayor's Order prohibits them  
6 from "lawfully possess[ing]" firearms or ammunition. The Mayor's Order instead  
7 deems commerce in innumerable kinds of goods and services, including commerce in  
8 firearms, to be a non-essential activity during the COVID-19 pandemic. The actual  
9 scope of the Mayor's Order is important because of the second thing that Plaintiffs  
10 obscure: While the litany of authorities Plaintiffs cite do protect a core (qualified) right  
11 to possess a firearm, from the Supreme Court on down, they also hold that conditions a  
12 government imposes on commerce in firearms are *presumed to be constitutional*.

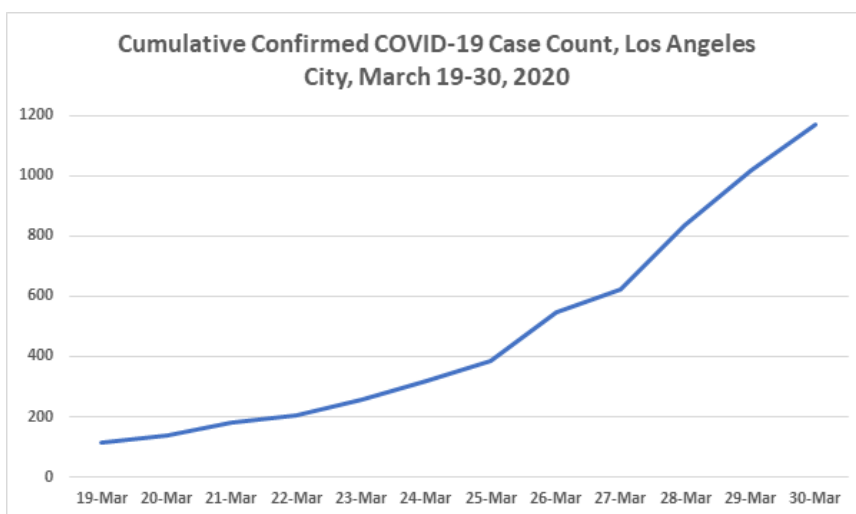
13 This is precisely the kind of situation in which one would expect that presumption  
14 to have bite. The City is experiencing an emergency in which all kinds of businesses  
15 have been temporarily shuttered to address a dire public health need. Under those  
16 circumstances, Plaintiffs—especially the gun stores and their owners—are not asking the  
17 Court to protect a person's core constitutional right to possess a firearm for self-defense.  
18 Instead, in the face of a public health crisis, they're demanding that the Court privilege  
19 their trade in firearms against a broad rule that affects all sorts of commerce. And in  
20 demanding that the Court extend gun stores that privilege via temporary restraining  
21 order, Plaintiffs are contending that the Second Amendment likely entitles them to it.  
22 Likely? No, not even if the Court subjects the Mayor's Order to a heightened level of  
23 scrutiny. Indeed, another judge of this Court recently upheld a similar closure order in  
24 the face of a Second Amendment challenge.

25 At bottom, Plaintiffs are asking this Court hurriedly to second-guess the Mayor's  
26 considered effort to address a public health emergency through a temporary measure that  
27 treats all non-essential commerce equally, neither specifically targeting guns nor  
28 prohibiting gun ownership or possession. The Court should decline, and deny the TRO.

## RELEVANT FACTS

To meet “a global emergency that is unprecedented in modern history,” Mayor Garcetti sought to slow the spread of the novel coronavirus in the City of Los Angeles. (Eisenman Decl. Ex. A at 2.) He therefore ordered Angelenos “to isolate themselves in their residences.” (*Id.* at 2.) The Mayor’s Safer At Home Order then identifies limited exceptions to this stay-at-home rule for “certain essential activities,” such as obtaining healthcare and food, and, correspondingly, for providing healthcare and selling food. (*Id.* at 3–7.) Unless extended, the Mayor’s Order expires on April 19—a month after it was issued, and a scant 16 days from today. (*Id.* at 7.)

There was, and remains, good reason for the Mayor to impose emergency measures. Between March 19 (when the Mayor issued the Order) and March 30, there was a 10-fold increase in the number of known COVID-19 cases (the disease caused by the novel coronavirus) in the City—from 112 cases to 1,386 cases. (Simon Decl. ¶¶ 3–4.) That looks like this:



(Simon Decl. ¶ 4.)

That number has since increased, and at last tally, there were 2,047 *identified* cases—an underestimate of *actual* cases—in the City. (*Id.* ¶¶ 4–5.) Of the cases identified, 22 percent required hospitalization, and 16 percent of those required intensive care and ventilator support. (*Id.* ¶ 6.) As of March 29, there were a total of 2,549 hospital beds in *the entire County*, of which 294 are ICU beds. (*Id.* ¶ 7.) There are 865

1 ventilators. (*Id.*) Any measure that averts unnecessary person-to-person contact slows  
2 the spread of infection, and so buys the County’s healthcare system time to address the  
3 COVID-19 crisis before the number of sick patients overwhelms its capacity to care for  
4 them. (*Id.* ¶¶ 2, 9.)

5 Accordingly, the Mayor took temporary emergency steps to keep people away  
6 from each other, shutting down vast swaths of commercial activity throughout the City.  
7 (Eisenman Decl. Ex. A at 3.) That includes the 18 stores within City limits that sell  
8 either guns or ammunition or both. (Meda Decl. ¶ 4.) The Mayor has since expanded  
9 the range of venues shuttered to address additional crowding where it has subsequently  
10 occurred—even where the crowded venues provide essentials, such as food. (Eisenman  
11 Decl. Ex. B at 3, 4 [subsequently shutting down farmers markets that lack an approved  
12 crowd-control plan, and shutting down “City beaches, park trails, trail heads, and park  
13 facilities”].)

#### 14 **LEGAL STANDARD**

15 Temporary restraining orders and preliminary injunctions are drastic remedies,  
16 and may only be granted if the party seeking them carries its burden of persuasion “by a  
17 clear showing.” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (cleaned up); *see*  
18 *Frontline Med. Assocs. v. Coventry Healthcare Workers Comp., Inc.*, 620 F. Supp.  
19 2d. 1109, 1110 (C.D. Cal. 2009) (TRO and preliminary injunction standards are the  
20 same). That showing must be made as to each of four elements: (1) the moving party  
21 must be likely to succeed on the merits of its claim; (2) it must be likely to suffer  
22 irreparable harm in the absence of preliminary relief; (3) the balance of equities must tip  
23 in its favor; and (4) an injunction must be in the public interest. *Winter v. Natural Res.*  
24 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

25 If a movant seeking injunctive relief fails at even the first element, the analysis is  
26 over and the district court must deny the application. *Garcia v. Google, Inc.*, 786 F.3d  
27 733, 740 (9th Cir. 2015) (en banc).

**ARGUMENT**

**I. The memorandum supporting the TRO application contains no argument whatsoever why a TRO should be granted against Mayor Garcetti or the City of Los Angeles, and most Plaintiffs haven't even shown standing to sue the Mayor or City over the Order.**

**A. Plaintiffs' memorandum of points and authorities contains no argument whatsoever about the Mayor's Order.**

An application for a temporary restraining order must be supported by a “complete memorandum in support thereof and the points and authorities upon which the moving party will rely” and “[t]he evidence upon which the moving party will rely in support of the motion.” C.D. Cal. R. 7-5 (emphasis added). The application by which the Plaintiffs seek injunctive relief against the Mayor and the City is supported by a memorandum that doesn't so much as mention the Mayor or the City—never mind the Mayor's Order, which is supposedly the subject of Plaintiffs' challenge. (*See* Mem. of P. & A. in Supp. of TRO [Doc. No. 14-1].) It is reason enough to deny Plaintiffs' application that they asked for a temporary restraining order against the Mayor and City without making a single argument why a temporary restraining order should be granted against the Mayor and City. C.D. Cal. R. 7-4.

**B. There has been no attempt at all to demonstrate most Plaintiffs' standing to sue the City or the Mayor, though that is Plaintiffs' burden.**

It isn't hard to see why Plaintiffs failed to say a thing about either the Mayor or the City in their memorandum: Both were added as an afterthought to litigation the Plaintiffs had already undertaken against Los Angeles County and the State of California, and various County and State officials. This also explains why Plaintiffs largely failed to demonstrate that they have standing to sue either the Mayor or the City in the first place. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (a party invoking a federal court's jurisdiction bears the burden of demonstrating standing



1 to sue). There are 14 Plaintiffs in this case, but between the allegations in the First  
 2 Amended Complaint and the declarations accompanying their TRO application, the only  
 3 ones who have *possibly* demonstrated standing are (1) Plaintiff Alan Kushner (the owner  
 4 of a gun store in Van Nuys), (2) Plaintiff The Target Range (Kushner’s store in Van  
 5 Nuys), (3) Plaintiff California Gun Rights Foundation (which claims “members and  
 6 supporters” in various places, including the City), and (4) Plaintiff Firearms Policy  
 7 Coalition, Inc. (“members” in the City). (First Am. Compl. [Doc. No. 9] ¶¶ 10, 14;  
 8 Hoffman Decl. [Doc. No. 14-6] ¶ 5; Combs Decl. [Doc. No. 14-7] ¶ 5.) None of the  
 9 other Plaintiffs have alleged any connection with the City whatsoever, leaving one to  
 10 wonder how the Mayor’s Order could have injured them at all. *See Lujan*, 504 U.S. at  
 11 560 (to have standing, a plaintiff must have suffered an actual injury).

12 **II. Even assuming the arguments made against other Defendants apply to the**  
 13 **Mayor and City, those Plaintiffs who have adequately alleged standing**  
 14 **haven’t demonstrated that they are entitled to a TRO.**

15 But assume the Court is inclined to make Plaintiffs’ arguments for them, applying  
 16 to the City and Mayor the arguments that Plaintiffs made against other jurisdictions and  
 17 their governing officials. (The Court should not be so inclined.) Even then, Plaintiffs—  
 18 those of them who have standing—have failed to demonstrate their entitlement to an  
 19 emergency order requiring the Mayor to privilege one type of business over many  
 20 others.

21 **A. The law and facts do not favor the Plaintiffs’ position.**

22 **1. The Constitution recognizes the extraordinary powers local**  
 23 **governments possess in times of public health emergency, including**  
 24 **over commerce.**

25 “Upon the principle of self-defense, of paramount necessity, a community has the  
 26 right to protect itself against an epidemic of disease which threatens the safety of its  
 27 members.” *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). That is why the power  
 28 to impose quarantines and other public health measures is perhaps *the* archetypal police

1 power that state and local governments possess, as the Constitution recognizes. *Id.*  
2 at 25; *Compagnie Francaise De Navigation A Vapeur v. La. State Bd. of Health*, 186  
3 U.S. 380, 387 (1902); *Morgan S.S. Co. v. La. Bd. of Health*, 118 U.S. 455, 460 (1886);  
4 *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824) (“quarantine laws” and “health  
5 laws of every description” are within the states’ power to enact); *see generally* U.S.  
6 Const. amend. X (powers not delegated to the federal government are reserved to the  
7 states); Cal. Const. art. XI, § 7 (delegation of police powers to cities and counties). Such  
8 police power is “the most essential of powers, at times the most insistent, and always  
9 one of the least limitable powers of government.” *District of Columbia v. Brooke*, 214  
10 U.S. 138, 149 (1909). It follows that when exercised for “public health and safety,” it is  
11 a “general principle that courts will not second-guess” the use of “traditional police  
12 powers.” *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996). In the face of  
13 “prevalent and increasing” disease, a court “would usurp the functions of another branch  
14 of government if it adjudged, as a matter of law, that the mode adopted under the  
15 sanction of the State, to protect the people at large, was arbitrary and not justified by the  
16 necessities of the case.” *Jacobson*, 197 U.S. at 28.

17 Which is to say: Of *course* the imposition of a quarantine or similar public health  
18 measure affects the rights of the people subject to it and burdens the commercial  
19 interactions in which they’re engaged. *See Morgan S.S. Co.*, 118 U.S. at 465–66  
20 (recognizing as much); *Gibbons*, 22 U.S. (9 Wheat.) at 203 (same). But courts recognize  
21 that the nature of a public health emergency can require people to yield to measures far  
22 more intrusive than a temporary cessation of business, including measures that might  
23 otherwise be deemed an impermissible invasion of their bodily integrity. *See, e.g.*,  
24 *Jacobson*, 197 U.S. at 26, 31 (state may compel vaccination against smallpox on pain of  
25 criminal prosecution); *see generally Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (“an  
26 invasion of bodily integrity implicates an individual’s ‘most personal and deeply-rooted  
27 expectations of privacy’”).

28

1           The Mayor’s Order that people stay home, and—correspondingly, that most  
2 businesses close—reaches nowhere near that far. And as far as it does reach, it is  
3 supported by evidence that SARS-CoV-2, the novel coronavirus that causes COVID-19,  
4 spreads like the common cold. (Simon Decl. ¶ 2.) Without intervention, each infected  
5 person on average infects two to three others, and the virus can be spread even by people  
6 who don’t exhibit symptoms of COVID-19. (*Id.*) That means that any measure that  
7 discourages interpersonal contact helps to slow the disease’s spread (*id.* ¶ 9), and so  
8 justifies the Mayor taking measures to do just that: To discourage interpersonal contact  
9 by keeping people at home and, as much as possible, restricting their interactions with  
10 others.

11                           **2. A broad emergency restriction on commerce that incidentally**  
12                           **affects the sale of firearms doesn’t offend the Second Amendment.**

13           Plaintiffs would have the Court pit the Mayor’s broad public-health authority, in  
14 the middle of a global pandemic, against the “core right to possess a firearm for self-  
15 defense” protected by the Second Amendment. *Teixeira v. Cnty. of Alameda*, 873 F.3d  
16 670, 677 (9th Cir. 2017) (en banc); see *District of Columbia v. Heller*, 554 U.S. 570, 630  
17 (2008) (recognizing the Second Amendment’s protection of the “core lawful purpose of  
18 self-defense”). Engaging in that exercise requires a two-step analysis: The Court must  
19 first decide whether the Mayor’s Order actually burdens conduct that the Second  
20 Amendment protects. *Pena v. Lindley*, 898 F.3d 969, 975 (9th Cir. 2018). If the Order  
21 does burden protected conduct, then the Court must the apply a level of scrutiny that  
22 appropriately accounts both for “‘how close the [Order] comes to the core of the Second  
23 Amendment right’ and ‘the severity of the [Order’s] burden on the right.’” *Id.* at 975,  
24 977 (quoting *Silvester v. Harris*, 843 F.3d 816, 821 (9th Cir. 2016)).

25           The Mayor’s Order does not come close to infringing the right of any person in  
26 the City to possess a gun for self-defense. The Order says nothing at all about guns, or  
27 ammunition, or who can possess either, or when or where they can be possessed. To  
28 protect public health, the Order instead closes *all* non-essential businesses in the City, a

1 sweep that includes thousands more businesses than the 18 stores within City limits that  
2 sell guns or ammunition or both. It is a broad commercial regulation made for the  
3 benefit of public health; it is not a firearms regulation. At most, the Order is incidentally  
4 a “law[] imposing conditions and qualifications on the commercial sale of firearms”—  
5 that is, the type of “presumptively lawful regulatory measure[]” that falls outside the  
6 Second Amendment’s reach. *Heller*, 554 U.S. at 626–27 & n.26; *cf.*, *e.g.*, *Peruta v.*  
7 *Cnty. of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (en banc) (as a matter of its  
8 historic scope, “the Second Amendment right to keep and bear arms does not include, in  
9 any degree, the right of a member of the general public to carry concealed firearms in  
10 public.”)

11 To be sure, something like an outright and explicit ban on all firearm or  
12 ammunition sales would have spillover effects on the rights of people to possess firearms  
13 for self-defense, and so would invite a Second Amendment challenge by someone  
14 seeking to purchase a gun or ammunition. *Teixeira*, 873 F.3d at 677–78. But the City’s  
15 response to a public health emergency—a response that restricts all types of businesses,  
16 and incidentally burdens a handful of stores selling guns and ammo, isn’t at all like that  
17 sort of a ban. If anything, it’s more like a zoning rule that prohibits a multitude of  
18 commercial uses, and which happens to include within its ambit the operation of a gun  
19 store. *See id.* at 690 (Owens, J., concurring) (claim that a zoning law happened to  
20 preclude the operation of a gun store shouldn’t be viewed as a Second Amendment  
21 issue: “all ‘we’re dealing with here is a mundane zoning dispute dressed up as a Second  
22 Amendment challenge.”)

23 Moreover, any burden the Order imposes *on gun stores* isn’t a Second  
24 Amendment problem, because the Second Amendment protects only the rights of  
25 would-be gun owners—it doesn’t confer a right to sell guns. *Id.* at 690 (majority opn.).  
26 Of the four relevant Plaintiffs, one is a gun store and the other is that store’s owner.  
27 (First Am. Compl. ¶¶ 10, 12.) As a matter of law, neither can assert a Second  
28 Amendment claim premised on their temporary inability to sell guns. *Teixeira*, 873 F.3d

1 at 690. Either might *try* to assert a claim on their customers’ behalf, *id.* at 678, but  
2 neither the store nor its owner has anything to say about customers’ core right *to possess*  
3 a firearm: Both say only that they are “concerned about [their] safety and the safety of  
4 [their] customers and the public.” (First Am. Compl. ¶¶ 10, 12.) Particularly given the  
5 temporary and emergency nature of the Order at issue here, that is a far cry from “a  
6 plausible claim on behalf of [their] potential customers that the [Order] meaningfully  
7 inhibits residents from acquiring firearms within their jurisdiction.” *Teixeira*, 873 F.3d  
8 at 680.

9 And as for the other two relevant Plaintiffs, both are organizations that offer only  
10 boilerplate statements about having members in the City, and of the diversion of  
11 amorphous organizational resources because of unspecified Defendants’ “laws, policies,  
12 orders, practices, customs, and enforcement actions.” (Hoffman Decl. ¶¶ 5, 7–9; Combs  
13 Decl. ¶¶ 5, 7–9.) What is “conspicuously missing from this lawsuit is any honest-to-God  
14 resident of [the City of Los Angeles] complaining that he or she cannot lawfully buy a  
15 gun . . . .” *Teixeira*, 873 F.3d at 680 (cleaned up). Given that fact, the actual scope of  
16 the Mayor’s Order, and the emergency context in which it was issued, there’s simply no  
17 cognizable Second Amendment claim here—let alone a basis for issuing a temporary  
18 restraining order.

19 **3. Even if the Mayor’s Order is subject to Second Amendment**  
20 **scrutiny, the Order passes muster.**

21 But even if the Court is inclined—for argument’s sake—to find that the Mayor’s  
22 Order reaches Second Amendment protected conduct, Plaintiffs would still need to  
23 satisfy the second prong of the Ninth Circuit’s Second Amendment analysis: They must  
24 demonstrate that the burden the Order imposes on their Second Amendment rights  
25 exceeds that allowed under the applicable level of constitutional scrutiny. *Pena*, 898  
26 F.3d at 975; *see id.* at 976 (in an abundance of caution, the Ninth Circuit often assumes  
27 the first prong of the analysis is satisfied and undertakes the second).

1           Unsurprisingly, Plaintiffs argue for strict scrutiny—which might be appropriate if  
2 the Mayor’s Order came close to infringing the “core” right of firearm possession for  
3 self-defense, and subsequently placed a severe burden on it. *See id.* at 977 (level of  
4 scrutiny is determined by how close a regulation comes to the core rights protected by  
5 the Second Amendment, and how severely it burdens them). What Plaintiffs have not  
6 done is to identify a single case in which the Ninth Circuit applied strict scrutiny to a gun  
7 regulation. In each case they’ve cited, the Circuit has applied—or affirmed the district  
8 court’s application of—no more than intermediate scrutiny. *See Bauer v. Becerra*, 858  
9 F.3d 1216, 1218 (9th Cir. 2017) (upholding, under intermediate scrutiny, the allocation  
10 of a portion of firearm-transfer fee “to fund enforcement efforts against illegal firearm  
11 purchasers”); *Silvester*, 843 F.3d at 819 (upholding 10-day waiting period under  
12 intermediate scrutiny); *United States v. Chovan*, 735 F.3d 1127, 1136 (9th Cir. 2013)  
13 (upholding bar on firearm possession for domestic-violence misdemeanants under  
14 intermediate scrutiny); *Duncan v. Becerra*, 742 F. App’x 218, 221 (9th Cir. 2018)  
15 (affirming the district court’s decision to apply intermediate scrutiny to large-capacity  
16 magazine ban); *see also Pena*, 898 F.3d at 977 (listing cases applying intermediate  
17 scrutiny to firearms regulations). And nothing more than intermediate scrutiny *could* be  
18 appropriate here, because the challenged Order does not speak at all to the core Second  
19 Amendment right to possess a firearm for self-defense. Whatever burden it places on  
20 that right is only incidental, arising because the Order forces the 18 gun stores in the  
21 City, just like innumerable other businesses, to close on a temporary basis because of an  
22 ongoing pandemic.

23           Applying intermediate scrutiny, a court asks whether there is “(1) a significant,  
24 substantial, or important government objective, and (2) a ‘reasonable fit’ between the  
25 challenged law and the asserted objective.” *Pena*, 898 F.3d at 979. That requires a  
26 showing that the Order “promotes a substantial government interest that would be  
27 achieved less effectively absent the [Order], but not necessarily that the [Order] is the  
28 least restrictive means of achieving the [City’s] interest.” *Id.* (cleaned up). Here, the

1 City’s interest is in limiting—as much as is practically possible—close interpersonal  
2 contact between people, thereby curtailing the rate with which the novel coronavirus  
3 spreads. For every in-person transaction that risks close interpersonal contact, that  
4 interest is less effectively achieved. *Especially* given the temporary and emergency  
5 nature of the Mayor’s Order limiting such contact (by limiting ordinary commerce), the  
6 City need not entertain various other schemes that might less restrictively achieve the  
7 same goal. The Order satisfies intermediate scrutiny.

8 Which is precisely what another judge of this Court concluded just two days ago,  
9 when a firearm buyer—someone with a protected Second Amendment interest—  
10 challenged a Ventura County order that called for the emergency closure of businesses,  
11 including gun stores. *McDougall v. Cnty. of Ventura*, No. 2:20-cv-02927-CBM-AS  
12 (C.D. Cal. Apr. 1, 2020).<sup>1</sup> There, as here, intermediate scrutiny applied. *Id.* at 2. There,  
13 as here, the plaintiff did not dispute the severity of the crisis the spread of SARS-CoV-2  
14 presents: COVID-19 is a grave illness. *Id.* at 2. There, as here, there’s no evidence that  
15 efforts to mitigate that spread “would be as effective without closure of non-essential  
16 businesses.” *Id.*

17 And here, as there, the result should be that Plaintiffs have “not demonstrated  
18 [they are] likely to succeed on the merits of [their] claim.” *Id.* That is reason enough to  
19 deny them a temporary restraining order. *Garcia*, 786 F.3d at 740.

20 **4. Plaintiffs’ tacked-on void-for-vagueness challenge is likewise**  
21 **unavailing.**

22 In addition to their marquee Second Amendment challenge, Plaintiffs also contend  
23 that the State and County have subjected them to unconstitutionally vague orders.  
24 (Mem. of P. & A. in Supp. of TRO at 18–23.) It should be enough to say that, for the  
25 four Plaintiffs who are arguably subject to the Mayor’s Order, the Mayor’s Order isn’t  
26 the State’s or County’s.

27 \_\_\_\_\_  
28 <sup>1</sup> A copy of Judge Marshall’s order is also attached as Exhibit C to the Eisenman  
Declaration.

1 To prevail on a claim that a regulation is void for vagueness, a plaintiff has to  
2 show that a law is “so vague it fails to give ordinary people fair notice of the conduct it  
3 punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United*  
4 *States*, 135 S. Ct. 2551, 2556 (2015). The Mayor’s Order prohibits the operation of non-  
5 essential businesses, and then lists—in detail—the essential businesses that are  
6 excluded from that prohibition. (*E.g.*, Eisenman Decl. Ex. A at 4–7.) There is simply  
7 nothing vague about it.

8 **B. Assuming, for argument’s sake, that the Mayor’s Order “irreparably**  
9 **harms” a Plaintiff, the balance of equities does not tip in Plaintiffs’**  
10 **favor—and the public interest would not be served by granting a TRO.**

11 If Plaintiffs could show that they were likely to succeed on the merits of their  
12 claims—and assuming for argument’s sake that they could show the Mayor’s Order  
13 irreparably harmed them—they would *still* need to show that granting them a temporary  
14 restraining order would be the equitable thing to do.

15 Though it is their burden to make that showing, in the face of a grievous threat to  
16 public health Plaintiffs offer only a single conclusory sentence purporting to satisfy both  
17 the requirements that the balance of equities tips in their favor and that injunctive relief  
18 would be in the public interest. (*See* Mem. of P. & A. in Supp. of TRO at 25.) That is  
19 insufficient to inform the Court in its duty “to balance the interests of all parties and  
20 weigh the damage to each.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir.  
21 2009) (cleaned up). That duty requires the Court to weigh: (1) a temporary delay in the  
22 ability of (2) a hypothetical person (3) to buy a gun or ammunition in the City of Los  
23 Angeles against (4) the public consequences of increasing the risk that our healthcare  
24 system buckles under an onslaught of COVID-19 cases, leading (5) to unnecessary  
25 suffering and death in the City. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312  
26 (1982) (“courts of equity should pay particular regard for the public consequences in  
27 employing the extraordinary remedy of injunction”).

28



1 It would be a broken scale indeed that weighed those considerations in Plaintiffs'  
2 favor. *See McDougall*, slip op. at 2 (similarly finding the equities in favor of the  
3 government).

4 **CONCLUSION**

5 The Court should deny Plaintiffs' application for a TRO. If, however, the Court  
6 grants the application, the City and Mayor request that the Court stay its order pending  
7 an emergency appeal to the United States Court of Appeals to the Ninth Circuit.

8 Respectfully submitted,

9 Dated: April 3, 2020

10 **MICHAEL N. FEUER**, City Atty.  
11 **JAMES P. CLARK**, Chief Deputy City Atty.  
12 **KATHLEEN A. KENEALY**, Chief Asst. City Atty.  
13 **SCOTT MARCUS**, Civil Litigation Branch Chief  
14 **BLITHE S. BOCK**, Asst. City Atty.  
15 **BENJAMIN F. CHAPMAN**, Deputy City Atty.  
16 **JONATHAN H. EISENMAN**, Deputy City Atty.

17 By: /s/ Jonathan H. Eisenman  
18 **JONATHAN H. EISENMAN**, Deputy City Attorney

19 *Attorneys for Defendants, **ERIC GARCETTI and the***  
20 **CITY OF LOS ANGELES**