

No. 20-15949

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

RON GIVENS AND CHRISTINE BISH,  
*Plaintiffs and Appellants,*

v.

GAVIN NEWSOM, IN HIS CAPACITY AS GOVERNOR OF CALIFORNIA; XAVIER  
BECERRA, IN HIS CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; WARREN  
STANLEY, IN HIS CAPACITY AS COMMISSIONER OF THE CALIFORNIA HIGHWAY  
PATROL; SONIA ANGELL, IN HER CAPACITY AS STATE PUBLIC HEALTH OFFICER,  
*Defendants and Appellees.*

**On Appeal from an Order of the U.S. District Court  
for the Eastern District of California**  
No. 2:20-cv-852-JAM-CKD  
Hon. John A. Mendez, District Judge

**ANSWERING BRIEF ON THE MERITS**

Xavier Becerra  
*Attorney General of California*  
Michael J. Mongan  
*Solicitor General*  
Thomas S. Patterson  
*Senior Assistant Attorney General*

Joshua A. Klein  
*Deputy Solicitor General*  
Mark R. Beckington  
*Supervising Deputy Attorney General*  
James Walter  
Amie L. Medley  
*Deputy Attorneys General*  
CALIFORNIA DEPARTMENT OF JUSTICE  
1515 Clay Street, 20th Floor  
Oakland, CA 94612-0550  
(510) 879-0756  
joshua.klein@doj.ca.gov  
*Attorneys for Defendants and Appellees*

July 7, 2020

---

## TABLE OF CONTENTS

	<b>Page</b>
Jurisdictional statement.....	1
Issues presented .....	1
Pertinent statutes and regulations .....	2
Introduction.....	3
Statement of the case .....	5
A.    The COVID-19 pandemic and California’s response.....	5
B.    This case.....	8
1.    Plaintiffs’ complaint .....	8
2.    The TRO motion and supporting evidence .....	10
3.    The district court’s denial of the TRO and statements about further proceedings .....	13
4.    Later district court proceedings and state directives.....	18
Summary of argument .....	19
Argument .....	21
I.    The appeal should be dismissed.....	21
A.    The TRO denial is not an appealable order .....	21
B.    This appeal is moot .....	25
1.    No injury or potential remedy remains .....	26
2.    No exception to mootness applies .....	27
3.    No advisory opinion or vacatur is needed.....	30
C.    The district court lacked jurisdiction to restrain these defendants based on state-law claims.....	32
II.   If this Court reaches the merits, it should affirm .....	33
A.    Standard of review .....	33

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
B. Plaintiffs did not establish a likelihood of success on the merits.....	34
1. Speech claims .....	34
2. Other federal claims .....	43
3. State law claims .....	45
C. Events after the district court’s decision provide no basis to reverse.....	46
D. Other <i>Winter</i> requirements support affirmance .....	50
Conclusion .....	53
Statement of related cases.....	54

## TABLE OF AUTHORITIES

	<b>Page</b>
<b>CASES</b>	
<i>Allen v. Minnstar, Inc.</i> 8 F.3d 1470 (10th Cir. 1993) .....	48
<i>Alliance for the Wild Rockies v. Cottrell</i> 632 F.3d 1127 (9th Cir. 2011) .....	34
<i>Already, LLC v. Nike, Inc.</i> 568 U.S. 85 (2013).....	28, 29
<i>Ashwander v. Tenn. Valley Auth.</i> 297 U.S. 288 (1936).....	25
<i>Bd. of Trustees of Glazing Health &amp; Welfare Trust v. Chambers</i> 941 F.3d 1195 (9th Cir. 2019) .....	29
<i>Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.</i> 868 F.2d 1085 (9th Cir. 1989) .....	49, 50
<i>BNSF Ry. Co. v. California Dep’t of Tax &amp; Fee Admin.</i> 904 F.3d 755 (9th Cir. 2018) .....	34
<i>Clark v. Community for Creative Nonviolence</i> 468 U.S. 288 (1984).....	40
<i>County Mun. Empl. Supervisors’ and Foremen’s Union Local 1001 v. Laborers’ Int’l Union of N. Am.</i> 365 F.3d 576 (7th Cir. 2004) .....	25
<i>Doe v. Regents of the Univ. of Cal.</i> 891 F.3d 1147 (9th Cir. 2018) .....	32
<i>Elim Romanian Pentecostal Church v. Pritzker</i> --- F.3d ---, 2020 WL 3249062 (7th Cir. 2020).....	36
<i>Env’t Defense Fund, Inc. v. Andrus</i> 625 F.2d 861 (9th Cir. 1980) .....	22

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Friends of the Earth, Inc. v. Laidlaw Envt’l Serv., TOC, Inc.</i> 528 U.S. 167 (2000).....	28
<i>Gill v. Whitford</i> 138 S. Ct. 1916 (2018).....	27
<i>Haskell v. Harris</i> 745 F.3d 1269 (9th Cir. 2014) .....	48
<i>Holder v. Humanitarian Law Project</i> 561 U.S. 1 (2010).....	43
<i>In re Arata</i> 52 Cal. App. 380 (Cal. Ct. App. 1921).....	46
<i>In re Martin</i> 83 Cal. App. 2d 164 (Cal. Ct. App. 1948).....	46
<i>Int’l Union of Bricklayers &amp; Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.</i> 752 F.2d 1401 (9th Cir. 1985) .....	48
<i>Jacobson v. Massachusetts</i> 197 U.S. 11 (1905).....	14, 15, 35, 36, 37
<i>Jew Ho v. Williamson</i> 103 F. 10 (C.C.N.D. Cal. 1900).....	46
<i>Kingdomware Techs., Inc. v. United States</i> 136 S. Ct. 1969 (2016).....	30
<i>Lincoln Club of Orange County v. City of Irvine</i> 292 F.3d 934 (9th Cir. 2002) .....	44
<i>Lofton v. Verizon Wireless (VAW) LLC</i> 586 F. App’x 420 (9th Cir. 2014).....	51
<i>Mallard v. U.S. Dist. Court for S. Dist. of Iowa</i> 490 U.S. 296 (1989).....	45

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Pom Wonderful LLC v. Hubbard</i> 775 F.3d 1118 (9th Cir. 2014) .....	34
<i>Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp.</i> 711 F.2d 902 (9th Cir. 1983) .....	47
<i>Religious Tech. Ctr., Church of Scientology Int’l, Inc. v. Scott</i> 869 F.2d 1306 (9th Cir. 1989) .....	21, 22
<i>Roberts v. United States Jaycees</i> 468 U.S. 609 (1984).....	43, 44
<i>Rosebrock v. Mathis</i> 745 F.3d 963 (9th Cir. 2014) .....	29
<i>S. Bay United Pentecostal Church v. Newsom</i> 140 S. Ct. 1613 (2020).....	<i>passim</i>
<i>S. Bay United Pentecostal Church v. Newsom</i> 959 F.3d 938 (9th Cir. 2020) .....	25
<i>S. Bay United Pentecostal Church v. Newsom</i> 2020 WL 2814636 (S.D. Cal. May 15, 2020) .....	25
<i>Singleton v. Wulff</i> 428 U.S. 106 (1976).....	48
<i>Spencer v. Kemna</i> 523 U.S. 1 (1998).....	26, 27, 30
<i>Steel Co. v. Citizens for a Better Environment</i> 523 U.S. 83 (1998).....	31
<i>Stuhlbarg Int’l Sales Co. v. John D. Brush &amp; Co.</i> 240 F.3d 832 (9th Cir. 2001) .....	33
<i>Summers v. Earth Island Institute</i> 555 U.S. 488 (2009).....	27

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Super Tire Eng'g Co. v. McCorkle</i> 416 U.S. 115 (1974).....	28
<i>TRW, Inc. v. FTC</i> 647 F.2d 942 (9th Cir. 1981) .....	52
<i>Turner Broad. Sys., Inc. v. FCC</i> 520 U.S. 180 (1997).....	39
<i>U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship</i> 513 U.S. 18 (1994).....	30, 31
<i>United States v. Dixon</i> 509 U.S. 688 (1993).....	45
<i>United States v. Munsingwear</i> 340 U.S. 36 (1950).....	31
<i>United States v. Sanchez-Gomez</i> 138 S. Ct. 1532 (2018).....	26
<i>United States v. Stevens</i> 559 U.S. 460 (2010).....	41
<i>United States v. Williams</i> 553 U.S. 285 (2008).....	45
<i>Ward v. Rock Against Racism</i> 491 U.S. 781 (1989).....	17, 37, 38, 39
<i>Washington v. Trump</i> 847 F.3d 1151 (9th Cir. 2017) .....	24
<i>Wayte v. United States</i> 470 U.S. 598 (1985).....	44
<i>Weinstein v. Bradford</i> 423 U.S. 147 (1975).....	29, 30

**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
<i>Wildwest Inst. v. Bull</i> 472 F.3d 587 .....	34, 37, 40
<i>Wilson v. Shaw</i> 204 U.S. 24 (1907).....	48
<i>Winter v. Nat. Res. Defense Council, Inc.</i> 555 U.S. 7 (2008).....	33, 50, 51
<i>Wong Wai v. Williamson</i> 103 F. 1 (C.C.N.D. Cal. 1900).....	46
<i>Woratzek v. Ariz. Bd. of Executive Clemency</i> 117 F.3d 400 (9th Cir. 1997) .....	24
<i>Ex parte Young</i> 209 U.S. 123 (1908).....	32
 <b>STATUTES AND REGULATIONS</b>	
28 U.S.C. § 1292.....	<i>passim</i>
§ 1331.....	1
§ 1343.....	1
42 U.S.C. § 1983 .....	1, 9
Cal. Gov. Code § 8567 .....	29
Cal. Labor Code § 6409.1 .....	42
Cal. Code Regs., tit. 8, § 340 .....	42
Cal. Code Regs., tit. 8, § 342 .....	42



**TABLE OF AUTHORITIES**  
**(continued)**

	<b>Page</b>
 <b>COURT RULES</b>	
Federal Rules of Appellate Procedure	
Rule 4 .....	1
Rule 10 .....	48
Federal Rules of Civil Procedure	
Rule 62.1 .....	19
Rule 65 .....	24
Federal Rules of Evidence	
Rule 106 .....	49
Rule 201 .....	48, 49
 <b>OTHER AUTHORITIES</b>	
California Department of Public Health, Guidance for the Prevention of COVID-19 Transmission for Gatherings .....	
	7
Executive Order N-33-20 .....	
	6
<a href="https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf">https://covid19.ca.gov/img/EssentialCritical InfrastructureWorkers.pdf</a> .....	
	7
<i>In re Extending Temporary Restrictions on Courthouse Access and In Court Hearings</i> , General Order 617 (E.D. Cal. Apr. 17, 2020) .....	
	13
National Park Service, Temporary Facilities Closure Advisory, June 26, 2020 .....	
	42
Rutter Group, Federal Civil Procedure Before Trial (Apr. 2020 update) .....	
	24
U.S. Dep’t of Homeland Security, Cybersecurity and Infrastructure Security Agency, Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During Covid-19 .....	
	41
Wright & Miller, Federal Practice & Procedure (3d ed. & 2020 Supp) .....	
	31

## JURISDICTIONAL STATEMENT

Plaintiffs brought this action under 42 U.S.C. § 1983 and state law. ER 181-189.<sup>1</sup> The district court had subject matter jurisdiction over plaintiffs' application for a temporary restraining order with respect to the federal claims under 28 U.S.C. §§ 1331, 1343(a), but had no jurisdiction with respect to the state-law claims because of the Eleventh Amendment, *see infra* p. 32.

The district court denied plaintiffs' request for a temporary restraining order on May 8, 2020, and plaintiffs filed a timely notice of appeal on May 17, 2020. *See* ER 1, 81; Fed. R. App. P. 4(a)(1)(A). This Court lacks jurisdiction for two reasons. First, as explained below at pages 21-25, jurisdiction is improper under 28 U.S.C. § 1292(a). Second, as explained at pages 25-31, the appeal is moot.

## ISSUES PRESENTED

1. Whether this Court lacks jurisdiction over plaintiffs' appeal:
  - (a) under 28 U.S.C. § 1292, because the district court's denial of a temporary restraining order was not tantamount to the denial of a preliminary injunction;

---

<sup>1</sup> Plaintiffs-appellants' Excerpts of Record are cited as ER; defendants-appellees' Supplemental Excerpts of Record are cited as SER. District Court documents are cited by docket number as D.C. Doc. OBM refers to plaintiffs-appellants' Opening Brief on the Merits, and U.S. Br. refers to the United States' Brief as Amicus Curiae. RJN refers to plaintiffs-appellants' motion requesting judicial notice.

(b) under the doctrine of mootness, because state policies no longer pose any impediment to plaintiffs' conducting the activities for which they filed the TRO motion giving rise to this appeal; and

(c) with respect to plaintiffs' state-law claims, under the Eleventh Amendment.

2. Whether, if jurisdiction exists, the district court committed reversible error when it denied plaintiffs' request to forbid application of the State's then-existing emergency restrictions in May 2020 on the limited record of plaintiffs' temporary restraining order proceeding.

## **PERTINENT STATUTES AND REGULATIONS**

### **U.S. Const., Amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### **28 U.S. Code § 1292. Interlocutory decisions**

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.]

## INTRODUCTION

This appeal is an unnecessary and jurisdictionally improper distraction from the district court proceedings that should be the focus of plaintiffs' efforts. Plaintiffs wished to gather 500 to 1,000 people for in-person outdoor political demonstrations on the grounds of the California State Capitol over the weekend of May 2 and 3, 2020. They were denied permits because of temporary emergency orders then in effect. The orders required Californians to stay at home, and forbade large gatherings, to help stem the advance of the COVID epidemic that had recently overwhelmed the healthcare system in other parts of the country and threatened to do the same in California. Plaintiffs sued in federal court and requested a temporary restraining order to permit the demonstrations. As with many TRO proceedings, the record was necessarily limited in light of the timing. And when the district court denied the request, it invited plaintiffs to contact chambers if they wished to seek a preliminary injunction on a more fully developed record. Plaintiffs chose not to do so, and filed this appeal instead. In the meantime, the evolving pandemic has required a dynamic response from the State. California has been able to relax some of its restrictions in stages, and plaintiffs could now apply for a permit and hold the kind of outdoor political protest they asked for in their TRO motion.

Congress deliberately chose to allow appeals from only a limited set of interlocutory orders—including injunctive orders but not TROs. If plaintiffs had chosen to follow-up with a preliminary injunction proceeding, the district court, with a fuller record and less extreme time-pressure, could have made the type of interim decision that Congress considered fit for appellate review. Such a proceeding would also have allowed plaintiffs to explain how—if at all—they continue to be injured despite the considerable scope for outdoor political gatherings provided in the newer state directives. If there were no such injury, then plaintiffs’ requests for injunctive relief might not have been successful. But lack of injury makes the appeal here moot as well: The mandate that plaintiffs seek from this Court would change nothing about plaintiffs’ current ability to gather and to protest, and no exception to mootness applies. Because the TRO denial presents no case or controversy to review, the appeal should be dismissed.

The appeal is misguided in another sense as well. Plaintiffs’ main contention is that the district court erred by denying their request under a special test for emergency measures instead of applying the standards of review that generally govern First Amendment claims. But the district court in fact applied both kinds of review, finding plaintiffs’ claims lacking under each. Indeed, any standard of review would recognize the State’s extraordinarily compelling need to prevent COVID’s spread, and would defer to the expert medical judgment that California’s

public health officials exercised and which plaintiffs' sparse evidence did not controvert. Plaintiffs present to this Court new documents that postdate the district court's decision, arguing that later events show California's past policies to have been viewpoint discriminatory or raise concerns about future unequal enforcement. In addition to being without merit, that argument contradicts fundamental principles relating to the record on appellate review; the need to judge only actual, ripe controversies instead of hypothetical ones; and the limits of judicial notice. And while plaintiffs continue to argue about purported state-law violations, the Eleventh Amendment barred their request for a TRO on such grounds.

## STATEMENT OF THE CASE

### A. The COVID-19 Pandemic and California's Response

COVID-19 is "a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide." *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of injunctive relief). "At this time, there is no known cure, no effective treatment, and no vaccine." *Id.* By April 30, California had had almost 50,000 confirmed COVID cases, 3,500 hospitalized patients, and 2,000 deaths. SER 85. And those figures involved only confirmed cases; they understated the risk that a particular Californian could unknowingly carry the virus and transmit the disease. *See S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring

in denial of injunctive relief) (“Because people may be infected but asymptomatic, they may unwittingly infect others.”).

As early as December 2019, California began working closely with the national Centers for Disease Control and Prevention, the United States Health and Human Services Agency, and local health departments to monitor and plan for the disease. ER 9. The Governor proclaimed a State of Emergency on March 4, 2020. *Id.* at 193. The State’s efforts have been coordinated with and responsive to federal efforts. President Trump proclaimed a State of Emergency on March 13. *Id.* at 176. And California has learned from the actions and reports of federal authorities, *id.* at 9, incorporating federal guidance into its own guidance and operative requirements as appropriate, *see e.g., id.* at 193-194.

On March 19, the Governor issued Executive Order N-33-20. ER 193. Its purpose was to “preserve the public health and safety, and to ensure the healthcare delivery system is capable of serving all, and prioritizing those at highest risk and vulnerability.” *Id.* It ordered California residents to “immediately heed the current State public health directives.” *Id.* And it reprinted relevant directives as part of the Governor’s order. *Id.* In the reprinted “Order of the State Public Health Officer” dated March 19, the State Public Health Officer and Director of the California Department of Public Health “order[ed] all individuals living in the State of California to stay home ... except as needed to maintain continuity of

operations of [federally specified] critical infrastructure sectors.” *Id.*

(capitalization altered). Critical infrastructure workers were authorized to leave home to accomplish their critical labor. *See id.* at 193-194.<sup>2</sup> Those not designated “Essential Critical Infrastructure Workers” were allowed to leave home to “access such necessities as food, prescriptions, and health care” or to “facilitate authorized necessary activities.” *Id.* at 194. The purpose of these commands was “to protect the public health of Californians” and “establish consistency across the state in order to ensure that we mitigate the impact of COVID-19.” *Id.* “Our goal is simple, we want to bend the curve, and disrupt the spread of the virus.” *Id.*

Other directives specifically addressed public gatherings. On March 16, the California Department of Public Health had determined that “‘all gatherings’” of any size—in any “‘indoor or outdoor space’”—“‘should be postponed or canceled’” to combat the spread of COVID-19. ER 3 (quoting Cal. Dep’t of Pub. Health, Guidance for the Prevention of COVID-19 Transmission for Gatherings, March 16, 2020).<sup>3</sup> Consistent with this public health determination, the California

---

<sup>2</sup> The State’s April 28 list of critical infrastructure workers can be found at <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>. *See* ER 176 n.7.

<sup>3</sup> The March 16 guidance is available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CDPHGuidanceforthePreventionofCOVID19TransmissionforGatherings.aspx>. It explained that “aggressive strategies ... that reduce close contact of people not regularly together, including limiting gatherings,



Highway Patrol (CHP)—which issues permits for events on the grounds of the State Capitol—decided not to issue permits for such gatherings. *See* SER 70.

## **B. This Case**

### **1. Plaintiffs' Complaint**

On April 27, plaintiffs Ron Givens and Christine Bish filed a complaint in the U.S. District Court for the Eastern District of California, naming Governor Gavin Newsom, Attorney General Xavier Becerra, Public Health Officer Sonia Angell, and CHP Commissioner Warren Stanley as defendants. ER 172.

According to the complaint, Givens sought to convene a large outdoor “protest” at the State Capitol on May 3 to protest delays in processing background checks for firearms purchasers. ER 178-179; *see id.* at 167. On April 22, he had submitted a permit application to the CHP, forecasting that the event would draw 1,000 attendees and requesting permission to use the Capitol Building’s “entire grounds.” *Id.* at 179; *see id.* at 168. The application was denied on April 24. *Id.* The complaint asserted that “Givens intend[ed] to instruct his fellow attendees to

---

has proven effective in prior pandemics at delaying rates of transmission and reducing illness and death.” *Id.* It defines a “‘gathering’” as “any event or convening that brings together people in a single room or single space at the same time, such as an auditorium, stadium, arena, large conference room, meeting hall, cafeteria, or any other indoor or outdoor space.” *Id.*; *see id.* (“[t]his includes gatherings such as concerts, conferences, and ... sporting events,” and “applies regardless of [the] sponsor”). And it stated that “authorities will revisit this guidance on a regular basis to evaluate the continued public health need” and “evaluate if any elements need to be changed.” *Id.*

follow social distancing and wear masks,” and that Givens had not personally contracted coronavirus. *Id.* at 179.

The complaint alleged that on April 23, Bish had submitted an application for a permit to hold a May 2 “rally” in front of the State Capitol Building. ER 180. The purpose was to “encourage the state to lift its coronavirus-related restrictions, and to raise voter awareness about civil rights issues pertaining to the stay-at-home orders.” *Id.* Bish was told on April 24 that the CHP had denied her application. *Id.* The complaint states that Bish personally does not have coronavirus, and that “Bish and her fellow protestors intend to practice social distancing and wear masks.” *Id.* at 180-181.

Givens and Bish raised four federal claims under 42 U.S.C. § 1983, alleging that the order violated the First Amendment’s Free Speech Clause, Freedom of Assembly Clause, and Right to Petition Clause, and the Fourteenth Amendment’s Due Process Clause. ER 181-185. The complaint also raises four claims under the California Constitution, alleging violations of the state constitutional Right to Liberty Clause, Freedom of Speech Clause, Freedom of Assembly Clause, and Right to Petition Clause. *Id.* at 186-189; *see* Cal. Const., art. I, §§ 1, 2, 3. The complaint seeks “an order and judgment declaring that the State Order, facially and as-applied to plaintiffs, violates” each relevant provision of the state and federal constitutions; an order “enjoining ... defendants from enforcing the State Order or

otherwise interfering with Plaintiffs['] ability to exercise constitutionally protected rights”; and attorneys’ fees and costs. ER 190. The complaint does not seek damages.

## 2. The TRO Motion and Supporting Evidence

Together with the complaint, plaintiffs moved on April 27 for a temporary restraining order and an order to show cause why a preliminary injunction should not issue. ER 160-162. Plaintiffs requested that defendants be required to “issue permits to Plaintiffs so that they may proceed with their requested use of the State Capitol grounds.” *Id.* at 161. They also requested that defendants be prohibited “from enforcing, ... or otherwise requiring compliance with any prohibition on Plaintiffs’ engagement in First Amendment protected activities including gathering for the purpose of political demonstrations, ... religious services, practices, or activities at which the Center for Disease Control’s social distancing guidelines are followed.” *Id.* Plaintiffs’ application was accompanied by brief declarations from Givens and Bish stating their plans for the gatherings on May 2 and 3 and reiterating some of the allegations from their complaint. ER 166-171.<sup>4</sup> Plaintiffs

---

<sup>4</sup> With their May 5 reply brief, two days before the hearing, plaintiffs submitted additional materials. *See* ER 110-157. Most were newspaper and Internet articles. *Id.* at 113-124, 138-158. The submission also included a CDC report covering the week of April 19-25. ER 126-137. That report noted, among other things, that the percentage of death certificates attributing death to pneumonia, influenza or COVID-19 had decreased to 14.6% but remained

did not submit evidence from any physician or public health expert on the relative risks of large gatherings as compared to other activities, or the ability to mitigate that risk while still gathering in large numbers.

The State's opposition, filed four days later, relied partly on declarations from a public health expert and a CHP captain. SER 68-90. The declaration of James Watt, M.D., M.P.H., provided California's then-current statistics for known COVID diagnoses (almost 50,000), hospitalizations (almost 3,500) and deaths (almost 2,000). *Id.* at 85. Dr. Watt explained that a "large number of people with COVID-19 have no symptoms," but could nonetheless spread the disease. *Id.* The exponential nature of COVID transmission meant that, at average infection rates, a single carrier could be responsible for over 1,000 transmissions over 10 cycles. *Id.* at 84. Dr. Watt explained that the purpose of the State's health and safety rules was to "reduc[e] community spread," thereby "protect[ing] vulnerable people" and "prevent[ing] ... health care facilities[] from being overwhelmed." *Id.* at 85.

Dr. Watt stated that any interaction by "a large group of people" carried "increased risk that COVID-19 may be transmitted," and that avoidance of large gatherings was an important supplement to—rather than substitute for—measures such as masks and social distancing. SER 85-86; *see id.* at 86 ("This is why the

---

"significantly above baseline" and could change as more death certificates were processed. *Id.* at 128.

CDC recommends that large gatherings be cancelled.”). He recounted his education and experience, including postgraduate degrees in both medicine and public health, and over two decades as a professional dealing with epidemiology and communicable diseases. *Id.* at 83. “Based on my experience with infectious disease prevention measures that depend on individual behavior,” he stated, “it will be very difficult for organizers to conduct safely [the] rallies with hundreds of people that [are] the subject of this litigation.” *Id.* at 85.

Moreover, a gathering at the capitol of people from other parts of the State presented a geographic risk: those who caught COVID at the event and returned to their home communities “will likely spread COVID-19” to others; the “spread could fan out into different parts of the state jeopardizing the hard work to contain COVID-19 that is going on in many communities.” ER 86. And such rallies would be especially risky because “chanting and yelling could generate respiratory droplets and spread them more widely than in normal circumstances.” *Id.*

CHP Captain Douglas Lyons’s declaration noted CHP’s “longstanding requirement that permitted events be consistent with public health and safety.” ER 70. In light of the state orders, CHP had determined not to issue permits for any gatherings “for a temporary period,” because gatherings would not currently be consistent with that requirement. *Id.* at 69-70. Captain Lyons explained that “CHP applies this temporary policy to all permit applications for gatherings regardless of

the sponsor of the gathering, that sponsor's viewpoint, or anything else connected to the content of the gathering. *Id.* at 70.

Captain Lyons further noted a recent experience shedding light on that judgment. An April 20 gathering at the State Capitol had featured “hundreds of demonstrators ... from all over California.” ER 69. During the permit application process, CHP had been told “that most of the participants would demonstrate from their cars, and ... that those who chose to congregate in person would self-police” to “wear[] protective masks, and practice physical distancing by maintaining a minimum of six feet between each other.” *Id.* “[M]ost of these protesters,” however, ended up “not maintaining physical distanc[e].” *Id.* Instead, “they stood shoulder to shoulder” while cheering. *Id.* “[M]any were not wearing protective masks and gloves.” *Id.* The organizers “made no apparent effort to correct these failures.” *Id.*

### **3. The District Court's Denial of the TRO and Statements About Further Proceedings**

The district court conducted oral argument by video conference on May 7, applying its own measures to prevent in-person gatherings. ER 25-78.<sup>5</sup> There was

---

<sup>5</sup> See *In re Extending Temporary Restrictions on Courthouse Access and In Court Hearings*, General Order 617 (E.D. Cal. Apr. 17, 2020) (“[I]f the assigned Judge believes a hearing is necessary, the hearing will be by telephone or videoconference.”), available at <http://www.caed.uscourts.gov/caednew/assets/File/GO%20617.pdf>.

no testimony. At the end, the court stated that, “[u]nder the facts and circumstances of this specific case, what they’re asking for, and the evidence before this Court on a limited record I don’t believe ... that a temporary restraining order at this time is appropriate.” ER 77. “So where we go from here is really up to all of you,” the court continued. *Id.* at 78. “If you want to continue or initiate discussions that may change the Court’s view or impact this case, please notify me right away.” *Id.* “Given that I’m likely to deny the temporary restraining order, I will not set this for a hearing on a preliminary injunction motion, but that doesn’t obviously, preclude the plaintiffs from filing that motion as well, or [from] pursuing, if there is a means of doing so, their right to appeal any decision by this Court to the Ninth Circuit.” *Id.*

The court issued its order and opinion the next day. ER 1-24. As previewed at the hearing, the court denied the requested TRO because plaintiffs had failed to demonstrate a likelihood of success or serious question on the merits of their claims. *Id.* at 7. The court noted that its conclusion would be the same under either of two analyses: a special test for emergency health measures, or the traditional test applicable to time, place, and manner restrictions on speech. *Id.*

The first mode of analysis focused on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). ER 7-11. Under that precedent, the court explained, when a State “enact[s] an emergency public health measure, courts will uphold it unless

(1) there is no real or substantial relation to public health,” or (2) the measure is “‘beyond all question’ a ‘plain, palpable invasion of rights secured by [] fundamental law.’” *Id.* at 8 (quoting *Jacobson*, 197 U.S. at 30).

The court viewed the *Jacobson* standard as unlikely to support plaintiffs’ requested relief. The restrictions’ relation to public health was “uncontroverted.” ER 9; *see id.* at 2-3 (noting that COVID had infected millions of people and killed over 250,000 worldwide); *id.* at 9 (COVID had already infected over 58,000 Californians and killed almost 2,500). California had “‘work[ed] closely with the national Centers for Disease Control and Prevention, the United States Health and Human Services Agency, and local health departments’” to plan its response. *Id.* at 9. The virus “is known to quickly spread from person to person,” and if “[u]nchecked, it can spread exponentially.” *Id.* “Many who are infected show no symptoms but still contribute to COVID-19’s spread.” *Id.* Under *Jacobson*, the court would not “question expert determinations on the efficacy of reducing gatherings in lowering the number of new infections.” *Id.* (citing *Jacobson*, 197 U.S. at 30); *see supra* pp. 11-12 (discussing declaration of James Watt, M.D., M.P.H.). For these reasons, the court found that the emergency restrictions bore a “‘real and substantial relationship’ to preventing widespread transmission of COVID-19”; moreover, based on the constitutional analysis discussed below, plaintiffs did not show a “‘plain, palpable invasion’” of their rights. ER 10-11.



The court next determined that plaintiffs would be unlikely to succeed “under traditional constitutional analysis.” ER 7; *see id.* at 11-16. Analyzing plaintiffs’ free speech claims under traditional standards, the court treated the State Capitol grounds as a traditional public forum, and asked whether the state’s restrictions passed the Supreme Court’s time, place, and manner test. *Id.* at 11. Because the State’s order was “‘applicable to all speakers’” and CHP was applying its temporary moratorium on permits to all applicants, the State was acting in a content-neutral way. *Id.* at 12. Given the record, the court also concluded, the ban on in-person gatherings met the narrow-tailoring requirement for time, place, and manner restrictions. *Id.* at 13. Although plaintiffs maintained that they should be allowed to gather in the hundreds and rely on other methods of preventing transmission, the court found, the parties’ evidence “clearly demonstrates that in-person gatherings increase the spread of COVID-19 ... even when people attempt to comply with the CDC’s recommendations.” *Id.* The “only fool-proof way to prevent the virus from spreading at in-person gatherings” was to “prohibit[] in-person gatherings,” as the State had done. *Id.* at 14. Nor did the State’s allowance for people to come together in other, limited contexts undercut that conclusion. “[T]he record demonstrates that [plaintiffs’ proposed] gatherings put Plaintiffs and others at significantly *higher* risk than many other prohibited activities.” *Id.*; *see*

*also id.* (referring to the court’s “close examination of the evidence before this Court, including Plaintiffs’ permit applications”).

In examining whether the State’s orders left adequate alternative means for plaintiffs’ speech, the court noted a variety of protests methods that remained open. *See, e.g.*, ER 14 (“Defendants have conceded that Plaintiffs may plan in-car protests, ‘filling streets and honking horns as other groups have done ....’”); *id.* at 16 (plaintiffs could stage rallies and protests via electronic media). The court found that such options might be more effective than in-person protests, given the stay-at-home order. *Id.* at 16. In any event, the court reasoned, narrow tailoring “does not require the ‘least restrictive means’ possible,” and “[p]laintiffs have not proposed a more tailored option that would ensure comparable levels of safety.” *Id.* at 15 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

Applying a traditional analysis with respect to plaintiffs’ other claims, the court determined that those claims were also unlikely to succeed. The right-to-assemble claims were unlikely to succeed, because the challenged policy did not appear to “prohibit substantially more expressive association” than was necessary to advance the “compelling” interest in “protecting California’s residents from ‘[a] global pandemic and its local outbreak.’” ER 17. The right-to-petition claims were unlikely to succeed for essentially the same reasons as the speech and assembly claims. *Id.* at 18-19. Plaintiffs’ due-process claim was unlikely to

succeed because the Governor’s order was sufficiently clear. *Id.* at 20-22. And plaintiffs’ remaining state constitutional claim was unlikely to succeed because the alternative—requiring public health officials to “‘identify specific individuals who carry the virus and order only them to stay home’”—“would not be feasible.” *Id.* at 22.

Plaintiffs filed a notice of appeal on May 17. ER 81.

#### **4. Later District Court Proceedings and State Directives**

Shortly after plaintiffs appealed, events overtook their claims. On May 25, in light of the State’s progress in slowing the spread of COVID-19, California issued a directive allowing for in-person protests and rallies, subject to an attendance cap. *See* OBM 14. On June 12, the State removed that cap for outdoor protests. *See* <https://covid19.ca.gov/stay-home-except-for-essential-needs/>; *see also infra* pp. 48-49 nn. 21 & 22. In short, there is not presently any statewide prohibition against outdoor rallies and protests in California.<sup>6</sup>

Litigation at the district court has also continued. Plaintiffs filed a motion for reconsideration on June 9. D.C. Doc. 28. The motion alleges newly discovered evidence that defendants are “selectively enforcing” the stay-at-home requirements based on speakers’ viewpoints. *Id.* at 1. In support, plaintiffs cited statements of

---

<sup>6</sup> The May 25 numerical limits continue to govern indoor protests. In addition, the state guidelines do not prohibit county health officials from imposing numerical limitations on outdoor gatherings, should local conditions warrant.

state officials during May 30 through June 6, concerning protests regarding police misconduct. *Id.* at 3. Plaintiffs requested that the court grant “an indicative ruling granting the application for reconsideration.” *Id.* at 1; *see* Fed. R. Civ. P. 62.1. Defendants, in the meantime, have filed a motion to dismiss plaintiffs’ complaint. D.C. Doc. 33. Plaintiffs’ response argues that district court proceedings must be delayed pending this appeal. D.C. Doc. 36, at 5-6. A hearing on both motions is scheduled for July 14. D.C. Doc. 34.

### **SUMMARY OF ARGUMENT**

The Court should dismiss this appeal for lack of jurisdiction. As a statutory matter, this Court has no jurisdiction to review the denial of plaintiffs’ requested temporary restraining order. The district court’s decision was not tantamount to the denial of a preliminary injunction, because the court made clear its willingness to consider preliminary injunctive relief if asked. By attempting to pursue this appeal instead, plaintiffs have created the sort of needless, piecemeal multiplication of proceedings that Congress intended 28 U.S.C. § 1292(a) to prevent. As a constitutional matter, moreover, this Court has no jurisdiction because the order plaintiffs challenge has been superseded, and the dispute is now moot. Current health orders allow gatherings of the type plaintiffs sought to organize, and no exception to mootness applies that would allow the litigation of this appeal to continue. Finally, plaintiffs’ attempt to secure a restraining order

against state officials based on purported violations of state law is barred by the Eleventh Amendment. This appeal should be dismissed; plaintiffs should pursue any viable claims in the district court, amending their complaint if necessary.

On the merits, should they be reached, the operative issues substantially differ from what plaintiffs describe. This case does not feature some grand dispute between traditional First Amendment analysis and a special, extraordinarily deferential standard applicable to health regulations. As the district court concluded, plaintiffs' assertions of constitutional violations at this stage of the case failed under any standard of review. That conclusion was virtually compelled by plaintiffs' failure to adduce competent evidence casting doubt on the State's evidence about the measures needed at the time to prevent catastrophic risks to large numbers of the State's inhabitants.

Plaintiffs attempt to make up for this failure by introducing to this Court new evidence that purportedly shows later governmental favoritism towards certain protesters. In addition to being unpersuasive—the State has in fact remained content- and viewpoint-neutral from the beginning of this crisis through the present—plaintiffs' assertion is beside the point. Fundamental principles of appellate procedure do not permit the introduction on appeal of purported evidence that was not part of the record on which the district court ruled. Nor do the rules of evidence permit plaintiffs to belatedly “prove,” without adversarial testing,

contested and contestable facts and inferences. The district court’s ruling was correct on the record before it, and any new allegations or evidence should be brought to that court for adversarial testing and initial resolution.

## **ARGUMENT**

### **I. THE APPEAL SHOULD BE DISMISSED**

This Court lacks jurisdiction over this appeal for two reasons: The denial of the TRO was not an appealable order under 28 U.S.C. § 1292; and intervening events have rendered the appeal from that order moot. Moreover, the Eleventh Amendment does not permit plaintiffs’ attempt to restrain state officials based on purported violations of state law. The appeal should be dismissed.

#### **A. The TRO Denial Is Not an Appealable Order**

Jurisdiction over interlocutory appeals is governed by 28 U.S.C. § 1292. Appeal ordinarily “does not lie from the denial of an application for a temporary restraining order.” *Religious Tech. Ctr., Church of Scientology Int’l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989). Such appeals “are considered premature.” *Id.* They are “disallowed ‘[i]n the interests of avoiding uneconomical piecemeal appellate review.’” *Id.* Instead, for an interlocutory decision to be appealable, it must “grant[,], continu[e], modify[,], refus[e], or dissolv[e]” an “injunction[.]” 28 U.S.C. § 1292(a)(1). The TRO denial here did none of those things.

Plaintiffs assert, however, that the TRO denial here is appealable because it was “tantamount to the denial of a preliminary injunction.” OBM 5 (citing

*Religious Tech. Ctr.*, 869 F.2d at 1308). It met that requirement, they contend, because the denial “followed a ‘full adversary hearing’” and “‘in the absence of review, the appellant would effectively be foreclosed from pursuing further interlocutory relief.’” *Id.* (quoting *Env’tl Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)). That is incorrect.

A district court’s TRO denial “effectively foreclose[s]” a party from “pursuing further interlocutory relief” and permits appeal when it makes clear that any request for injunctive relief would be rejected. *See, e.g., Religious Tech.*, 869 F.2d at 1308-1309 (appeal allowed where district court “emphatic[ally]” stated that precedent “foreclosed any interlocutory relief,” and that “‘I don’t believe that the appellate court feels that in this case an injunction is appropriate .... I would say that we don’t have anything much to talk about.’”). In such a case, the court has effectively “refus[ed]” to grant an “injunction” as Section 1292(a)(1) requires.

That was not the case here. The district judge did not state that plaintiffs could not gain preliminary relief. Instead, he stressed that he did not “believe[] that a *temporary restraining order at this time* is appropriate,” given “*the evidence before this court on a limited record.*” ER 77 (emphasis added). He refused to interfere with defendants’ enforcement of the state order “unless something changes and more facts are presented to the Court that convinces this Court that perhaps this order is unconstitutional.” *Id.* at 78. Those words reflected the limits

of the expedited TRO context: Plaintiffs' evidence consisted mainly of their own, insertions that the restrictions at issue were unnecessary, *see* pp. 10-11, *infra*, and the parties' briefing and the court's consideration were necessarily abbreviated. *See* ER 75 ("we're at a very, very early stage of this lawsuit"). But the judge declared himself open to more developed arguments and a fuller record in subsequent preliminary injunction proceedings: "If you want to continue or initiate discussions that may change the Court's view or impact this case, please notify me right away." *Id.* at 78.

Plaintiffs argue that their effort to gain a preliminary injunction was effectively denied, because the judge "stated he would not set a hearing for a preliminary injunction motion" and "offered that Givens and Bish were free to pursue 'their right to appeal any decision by this Court to the Ninth Circuit.'"

OBM 6. That paraphrase and partial quotation, however, is highly selective. The full statement was:

Given that I'm likely to deny the temporary restraining order, I will not set this for a hearing on a preliminary injunction motion, but that doesn't, obviously, preclude the plaintiffs from filing that motion as well, or again pursuing, if there is a means of doing so, their right to appeal any decision by this Court to the Ninth Circuit.

ER 78.

The introductory phrase ("[g]iven that I'm likely to deny the temporary injunction order") makes clear why the court indicated that a preliminary



injunction hearing would be scheduled only at the plaintiff's request rather than automatically. "Where a TRO issues, the court normally also issues an order to show cause setting a hearing date on the application for a preliminary injunction." Rutter Group, Federal Civil Procedure Before Trial § 13:146 (Apr. 2020 update); *see also* Fed. R. Civ. P. 65(b)(2) (requiring TROs to expire after 14 days). Because the TRO here was denied, those requirements were not in play.<sup>7</sup> The court also made clear that it would decide a preliminary injunction motion if asked—the judge's decision not to schedule the hearing *sua sponte* did not "foreclose the plaintiffs" from requesting such an injunction and hearing. Plaintiffs could have submitted additional argument or evidence in support of a preliminary injunction motion. They simply chose not to. Finally, the court did not say that its decision gave plaintiffs a "right to appeal." OBM 6. Instead, the court said plaintiffs could pursue such an appeal "*if there is a means of doing so.*" ER 78 (emphasis added).

---

<sup>7</sup> Because of Rule 65(b)(2), the *grant* of a purported TRO that exceeds 14 days is treated as tantamount to a grant of a preliminary injunction. *See, e.g., Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017). But such reasoning does not apply to TRO denials. Plaintiffs also do not argue that their appeal is justified because of deadlines that would allow appellate review of the TRO but not of a later preliminary injunction motion. *Cf., e.g., Woratzeck v. Ariz. Bd. of Executive Clemency*, 117 F.3d 400, 401 (9th Cir. 1997) (per curiam) (allowing appeal from TRO denial regarding execution set for the next day).

Plaintiffs may have preferred an immediate appeal, but they cannot circumvent Section 1292's requirements. *See County Mun. Empl. Supervisors' & Foremen's Union Local 1001 v. Laborers' Int'l Union of N. Am.*, 365 F.3d 576, 578 (7th Cir. 2004) (Easterbrook, J.) (“[R]ather than asking for a preliminary injunction, [plaintiffs] immediately appealed. That maneuver cannot be allowed to work.”). The purpose of Section 1292(a)(1) is to foreclose appeals based on the limited record and rushed consideration of TROs, in favor of the fuller record and more complete consideration of preliminary injunctions. Adherence to that limit is especially appropriate here: Plaintiffs suffer no present injury, *see supra* p. 18; *infra* pp. 26-27, and courts should not “anticipate a question of constitutional law in advance of the necessity of deciding it,” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).<sup>8</sup>

### **B. This Appeal Is Moot**

Appellate jurisdiction is lacking for another reason: The health directives plaintiffs wanted relief from are no longer in effect, and the present directives

---

<sup>8</sup> This Court recently held that a TRO denial was tantamount to the denial of a preliminary injunction in *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020). But the *South Bay* district court allowed no possibility of a later, more extensive preliminary injunction proceeding. *Compare S. Bay United Pentecostal Church v. Newsom*, 2020 WL 2814636 (S.D. Cal. May 15, 2020) (denying both TRO and order to show cause regarding preliminary injunction), *with* ER 199 (minute order here, denying only “Motion for TRO”), *and* ER 2 (written order here, denying the “Application for a Temporary Restraining Order”).

leave plaintiffs free to convene the kind of gathering they want. That makes any dispute over the decision below moot.

For a federal court to act, an “actual and concrete dispute[.]” must be “‘extant at all stages of review, not merely at the time the complaint is filed.’” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). “[T]hroughout the litigation, the plaintiff ‘must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.’” *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). “A case that becomes moot at any point during the proceedings is no longer a Case or Controversy for purposes of Article III,” and must be dismissed. *Sanchez-Gomez*, 138 S. Ct. at 1537 (internal quotation marks omitted). That is true here.

### **1. No Injury or Potential Remedy Remains**

Plaintiffs’ original motion alleged an injury that could be redressed by the district court: Plaintiffs sought an order forbidding the application of operative state directives, to allow plaintiffs to convene outdoor political protests. But the directives that plaintiffs challenged have been superseded and, as of today, plaintiffs can convene such protests regardless of any judicial decision. *See supra* p. 18. This Court is without a case or controversy to judge.

Plaintiffs cannot create a justiciable controversy through passing references to COVID-related restrictions that continue to affect other kinds of activities. *See ER*

161 (requesting order barring enforcement of prohibitions on “religious services, practices, or activities at which the Center for Disease Control’s social distancing guidelines are followed”). Plaintiffs’ only “specific and concrete plan[s]” concerned outdoor political demonstrations. *Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (“a plaintiff’s remedy must be ‘limited to the inadequacy that produced [his] injury in fact.’”). With such demonstrations now allowed, plaintiff is neither “suffer[ing], [n]or threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision” from this Court or the court below. *Spencer*, 523 U.S. at 7. The appeal is moot.

## **2. No Exception to Mootness Applies**

Plaintiffs acknowledge the May 25 executive order, which became effective before they filed their opening brief. OBM 14. But they address mootness only in a cursory footnote (OBM 36 n.15), which cites various mootness exceptions but says little about how each applies to this appeal. Plaintiffs’ overall contention—that this appeal is not moot “even if Appellants may no longer receive injunctive relief” (OBM 36 n.15)—severely misunderstands what is before this Court. This appeal concerns only plaintiffs’ TRO motion, and the only relief that could be granted is to require the district court to issue an order prohibiting defendants from enforcing the directives against plaintiffs’ planned protests. If intervening facts

mean that the district court could not provide such an order on remand, then there is no remedy for this Court to provide either and the appeal is moot regardless of other relief that could be contained in a final judgment in the underlying case.

Each of plaintiffs' individual defenses to mootness fail as well. Plaintiffs' first defense is that "declaratory relief would still be justified." OBM 36 n.15; *see Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121 (1974). That claim lacks any plausible relevance here, since declaratory relief was not and could not have been at issue in the TRO proceeding that is the subject of this appeal.

Plaintiffs also assert that their appeal fits within the mootness exception for cases where defendants voluntarily cease the challenged conduct. OBM 36 n.15. That exception does not obviate the constitutional requirement of an actual case or controversy. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). It addresses, however, the concern that "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Id.* To prevent such manipulation, courts have said that a party who asserts mootness based on its voluntary cessation of challenged conduct faces a "'heavy burden'" to persuade the court that "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Env't'l Serv., TOC, Inc.*, 528 U.S. 167, 189 (2000).

But changes to governmental requirements that carry the force of law are treated quite differently than a private party's changes in its practice. *See Bd. of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019). Courts “should assume that a legislative body is acting in good faith in repealing or amending a challenged legislative provision, or in allowing it to expire[.]” *Id.* Accordingly, a statutory change renders the case moot “even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.” *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). Here, the Governor's orders and incorporated directives have statewide application and operate with “the force and effect of law.” Cal. Gov. Code § 8567(a). The orders that previously prohibited outdoor protests are no longer in place. They have been replaced by orders that, with the force of law, expressly permit such protests. The Court should assume that the replacement was taken “in good faith,” *Bd. of Trustees*, 941 F.3d at 1199—not as part of the sort of manipulative “cycle” that the voluntary cessation exception addresses, *Already*, 568 U.S. at 91.

Finally, plaintiffs claim an exception under *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), because “there is a reasonable likelihood that [they] will be subject to the injury again.” OBM 36 n.15. But the prerequisites for *Weinstein's* ““capable of repetition, yet evading review”” exception are not satisfied here. *See* 423 U.S. at 149. The exception applies only in “exceptional situations” where

(1) the challenged action cannot be fully litigated before its cessation or expiration; and (2) there is a reasonable expectation that the challenger will again be subject to the same action. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). Plaintiffs offer nothing beyond speculation that the State will again prevent events that plaintiffs might plan. Granted, COVID risk factors are subject to fluctuation, and the State’s response must be similarly “dynamic” and “fact intensive.” *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of injunctive relief). But future changes will respond to future conditions and developments in medical knowledge and treatments. This is not the type of recurring event contemplated by the *Weinstein* exception.<sup>9</sup>

### **3. No Advisory Opinion or Vacatur Is Needed**

The United States, as amicus curiae, agrees that this appeal is “moot.” U.S. Br. 9. Although “the ultimate merits of California’s original policy are not currently suitable for appellate review,” *id.* at 8, however, the United States suggests this Court “may wish” to pronounce upon the underlying constitutional issues, *id.* at 13. But “[i]f a judgment has become moot [while awaiting review], this Court may not consider its merits ....” *U.S. Bancorp Mortg. Co. v. Bonner*

---

<sup>9</sup> Moreover, this exception requires a challenged action that is “in its duration too short to be fully litigated prior to its cessation or expiration.” *Spencer*, 523 U.S. at 17. That requirement cannot be met here without contradicting plaintiffs’ argument on the merits. *See* ER 173 (alleging restrictions in place “for an indefinite period of time, potentially months or years”).

*Mall P'ship*, 513 U.S. 18, 21 (1994); see also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 101 (1998) (when jurisdiction “ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause”); advisory opinions been “disapproved by [the Supreme Court] from the beginning”).

In contrast, this Court does have jurisdiction to vacate a district court ruling that mootness has made it impossible to review. *U.S. Bancorp*, 513 U.S. at 21; see U.S. Br. 11-13 (recommending vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950)). But while vacatur is not objectionable to the State, it is not clear what purpose it would serve here. The procedure is designed to “prevent[]” the “hardship” of a party suffering claim or issue preclusion from a judgment that it was unable to appeal. *Munsingwear*, 340 U.S. at 39. An interlocutory order, however, has no preclusive effect and leaves the parties free to litigate the merits of a dispute to conclusion. “[I]f the case remains alive in the district court, it is sufficient to dismiss the appeal without directing that the injunction order be vacated.” 13A Wright & Miller, Federal Practice & Procedure § 3533.10.3 (3d ed. & 2020 Supp).<sup>10</sup> Plaintiffs may “litigate” any claim they “may have ... with

---

<sup>10</sup> *U.S. Bancorp*, 513 U.S. at 29, denied a request for *Munsingwear* vacatur. The United States’ other cited cases (U.S. Br. 12) all involved final judgments.



respect to the revised provision” (U.S. Br. 12) with or without vacatur, by amending their complaint and filing a new motion for preliminary injunction.

**C. The District Court Lacked Jurisdiction To Restrain These Defendants Based on State-Law Claims**

Finally, the district court was without jurisdiction to grant plaintiffs a restraining order based on the state-law claims, and this Court thus lacks jurisdiction over those claims too. All defendants are state officers, and plaintiffs sued them only in their official capacities. ER 175. The Eleventh Amendment generally bars federal courts from hearing cases brought by private parties against States and their instrumentalities. *See Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1153 (9th Cir. 2018). Under *Ex parte Young*, 209 U.S. 123 (1908), “a party may seek prospective injunctive relief against an individual state officer in her official capacity.” *Doe*, 891 F.3d at 1153. But “the *Young* exception does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state official rather than a state instrumentality as the defendant.” *Id.* Because the district court would not have had jurisdiction to restrain the defendants based on alleged state-law violations, plaintiffs’ discussion of the merits of those claims (*e.g.*, OBM 44-48) is beside the point. The claims were jurisdictionally barred as a basis for the order plaintiffs sought, and are not a proper subject for decision here.

## **II. IF THIS COURT REACHES THE MERITS, IT SHOULD AFFIRM**

If this Court finds that it has jurisdiction and reaches the merits, it should affirm. Plaintiffs erroneously portray this case as a duel between two standards of review, with the district court choosing to rest its decision on an unusually forgiving standard for emergencies instead of the “traditional” standard plaintiffs say should apply. *E.g.*, OBM 4, 19, 22, 24, 25, 27. But the district court did apply the traditional analysis plaintiffs propose. *See* ER 11-16. Plaintiffs did not prevail because under *any* relevant standard of review, analysis of the governmental action must be based on the record evidence. Here, the essentially unrebutted record evidence supported the State’s judgment that restrictions on public gatherings were necessary at that time.

### **A. Standard of Review**

The standard for a district court to grant a temporary restraining order is “substantially identical” to that governing preliminary injunctions. *Stuhlberg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). Such relief is “an extraordinary remedy that may only be awarded upon a clear showing” of entitlement. *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008). The plaintiff must establish “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest.”

*Id.* at 20.<sup>11</sup>

This Court’s review of the district court’s determination is “‘limited and deferential.’” *Wildwest Inst. v. Bull*, 472 F.3d 587, 589 (9th Cir. 2006). Factual findings are reviewed for clear error. *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014). The “‘underlying legal principles’” are reviewed de novo. *BNSF Ry. Co. v. Cal. Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018). But this Court “‘will not second guess whether the court correctly applied the law to the facts of the case, which may be largely undeveloped at the early stages of litigation.’” *Wildwest*, 472 F.3d at 590.

**B. Plaintiffs Did Not Establish a Likelihood of Success on the Merits**

**1. Speech Claims**

Plaintiffs primarily argue that the district court simply “fail[ed] to apply the Supreme Court’s traditional tiered scrutiny analysis.” OBM 25; *see id.* at, 16-17, 19-25 . Instead, plaintiffs argue, the district court viewed the emergency health circumstances of this case as requiring the application of a special “tier of scrutiny”

---

<sup>11</sup> This Court has also stated that injunctive relief may be proper when a plaintiff demonstrates that “‘serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.’” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-1135 (9th Cir. 2011). After *Winter*, however, plaintiffs who establish those factors must also show “a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135.

purportedly “below rational basis” under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). OBM 19 (capitalization altered). In fact, the court followed its *Jacobson* analysis with a lengthy “traditional tiered scrutiny analysis” (OBM 25) of the type plaintiffs propose. *See* ER 11-27. The court determined that California’s restrictions were constitutional under either test. *Id.* at 7. There is no ground to reverse.

a. *Jacobson* upheld a local health board’s order for mandatory vaccinations. The board issued its order under a Massachusetts law requiring vaccination “when, in the opinion of the board of health, that was necessary for the public health or the public safety.” 197 U.S. at 27. The Court reasoned that, “of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.*; *see id.* at 29 (individual liberties “may at times, under the pressure of great dangers, be subjected to such ... reasonable regulations[] as the safety of the general public may demand”). The necessity of particular measures was appropriately referred “in the first instance, to a board of health composed of persons ... appointed, presumably, because of their fitness to determine such questions.” *Id.* at 27. With smallpox “prevalent and increasing” in the vicinity, the court would not “adjudge[], as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case.” *Id.* at 28. The Court allowed that a

health order could “go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere.” *Id.* But such review would be limited: If a statute that purportedly protects the public health has “no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Id.* at 31.

Although plaintiffs portray *Jacobson* as an anachronism that cannot apply to the First Amendment (OBM 23-24), it has in fact been applied to such claims—including by the Chief Justice during this epidemic. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct 1613, 1613 (2020) (Roberts, C.J., concurring in denial of injunctive relief).<sup>12</sup> If the analysis starts and stops with *Jacobson*, then plaintiffs here lacked any likelihood of success, given the limited record they adduced at the TRO stage. COVID is “an epidemic of disease which threatens the safety of” the State’s residents to a degree far graver than that in *Jacobson*. 197 U.S. at 27. California’s restrictions were put in place by the State’s Public Health Officer, whose education, training, and experience rendered her “fit[] to determine” the necessity of particular health measures and the inadequacy of

---

<sup>12</sup> *See also, e.g., Elim Romanian Pentecostal Church v. Pritzker*, --- F.3d ---, 2020 WL 3249062, at \*2, 5 (7th Cir. 2020).

potential alternatives, *id.*—and plaintiffs identified nothing casting doubt on her conclusions. *See supra* pp. 10-11, 16.

b. But the district court did not stop its analysis with *Jacobson*. It went on to analyze whether the temporary moratorium was permissible under the First Amendment test that traditionally applies to time, place, and manner restrictions. ER 11-16. That is the same standard that the United States assumes applies (U.S. Br. 18), and one of two standards plaintiffs urge (OBM 30, 32-33). Plaintiffs and the United States do not maintain that the district court erred in identifying the elements of that test. At most, their objection is about how the court applied that law to its preliminary assessment of facts that were “‘largely undeveloped at the [case’s] early stage[.]’” *Wildwest*, 472 F.3d at 590.

Given the record before it at this “very, very early stage,” ER 75, the district court correctly determined that the facts of this case were likely to satisfy the two traditional requirements for time, place, and manner restrictions. The first requirement is that the restriction must be “narrowly tailored to serve the government’s legitimate content-neutral interests”—that is it must “‘promote[] a substantial government interest that would be achieved less effectively absent the regulation.’” *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989). This requires only that the regulation not “burden *substantially* more speech than is necessary”—not that the government employ “the least-restrictive or least-

intrusive means.” *Id.* Here, the State’s evidence established the necessity of its measures and the inadequacy of alternatives. Dr. Watt observed that large gatherings enlarge the risk of COVID transmission, and that gatherings of individuals from diverse geographic areas create additional risks. *See supra* pp. 11-12. Alternatives such as masks and physical distancing were unlikely to be effective in stopping transmission, and masks should be seen as a supplement to prohibitions on such gatherings in times of high transmission risk, rather than as a substitute. *Id.* Those conclusions were bolstered by a CHP captain’s evidence of recent crowd behavior at events at the capitol, including failures to wear masks and to physically distance notwithstanding organizers’ promises. *See supra* p. 13.

Plaintiffs’ contrary evidence, in contrast, rested mainly on two things: Bish’s and Givens’ statements of intent to personally comply with certain restrictions, and their unsupported (and unsupportable) assertion that the unnamed and unknown attendees would do so as well. The first point could not eliminate the risk posed by the hundreds of attendees besides the plaintiffs; and Dr. Watt’s and Captain Lyon’s evidence showed that the second could not be relied on either.<sup>13</sup> The district court

---

<sup>13</sup> Bish’s permit application described an event with food trucks, chairs and tables, and tents, and made “no reference to physical distancing, protective gear, handwashing, or other public health measures.” SER 70. Givens’s application stated that attendees would “have the *opportunity* to maintain social distancing’ and wear protective gear.” *Id.* (emphasis added). But the application did not

did not clearly err or abuse its discretion in finding plaintiffs' blasé assertions less convincing than the States' expert assessment of the health risks posed by the proposed rallies. *E.g.*, ER 14.<sup>14</sup> The State thus established that the restrictions at issue promoted compelling goals of public safety and did not burden substantially more speech than necessary.

Second, a time, place, and manner restriction must “leave open ample alternative channels of communication.” *Ward*, 491 U.S. at 802. Here, too, the limited record of the TRO proceeding and the unusual circumstances at the time of plaintiffs' proposed events supported the district court's conclusions. The state orders left plaintiffs free to press their message through mailings, broadcasting, and Internet messages. Such messaging might ordinarily be less effective than in-person demonstrations at reaching the public. However, the district court found, these alternative methods of communication might be as effective or even more

---

explain whether and how participants would actually take those steps, whether they would undertake other steps to protect public health, and whether any such steps could reasonably be expected to be effective in a large-crowd setting. *Id.*

<sup>14</sup> Moreover, intermediate scrutiny under the First Amendment must leave room for appropriate deference to governmental expertise in technical matters. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-196 (1997). Such deference was certainly appropriate here. When public health officials “undertake[] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad,” and “should not be subject to second-guessing” by judges, who “lack[] the background, competence, and expertise to assess public health.” *S. Bay*, 140 S. Ct. at 1613, 1614 (Roberts, C.J., concurring in denial of injunctive relief); *cf. supra* pp. 35-36.



effective than in-person demonstrations during the state-wide shutdown order—because most Californians were staying at home instead of doing things that would take them near a protest. *See* ER 16. That factual finding was not clearly erroneous, and the court’s reliance on it abused no discretion. In addition, plaintiffs had an available way to protest in-person through car assemblies and caravans. *Id.* Plaintiffs pointed to no specific facts undercutting the court’s reasoning on the record of this case’s “early stage[.]” *Wildwest*, 472 F.3d at 590.

3. The remaining arguments against the district court’s conclusion are unconvincing. The United States suggests that alternative avenues for plaintiffs’ message are inadequate because none would carry “the symbolic importance” of gathering at the State Capitol. U.S. Br. 22. In *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), protestors similarly argued that their message about homelessness would be most effectively symbolized by sleeping on park land near the White House. *See* 468 U.S. at 303-304 (Marshall, J., dissenting) (organizers wanted to “re-enact the central reality of homelessness,” and demonstrate the problem “in as dramatic a way as possible”). The Court nevertheless held a complete ban on sleeping in the park consistent with the First Amendment, whether analyzed as a time, place, and manner restriction or as a regulation of expressive conduct. *Id.* at 293-299. Indeed, to require exemptions from generally applicable time, place, and manner restrictions based on the content

of a message would be neither administrable, nor consistent with other demands of the First Amendment.

Plaintiffs—but not the United States— argue that strict scrutiny should apply because the state regulations are not content-neutral. In their view, the stay-at-home order’s exemptions for “‘news reporters’ and other workers supporting ‘newsgathering, reporting, and publishing news,’” meant the State was choosing among speakers and kinds of speech. OBM 30-32.<sup>15</sup>

But the state directives distinguished among *activities* according to their risk, not speech according to its content or speaker. Plaintiffs sought permits for in-person demonstrations of 500 to 1,000 people.<sup>16</sup> That would necessarily involve conduct that the evidence in the record identified as heightening risks of

---

<sup>15</sup> In fact, the State’s judgment reflected federal authorities’ advice to classify as essential those in broadcast, news, and media services. *See* U.S. Dep’t of Homeland Security, Cybersecurity and Infrastructure Security Agency, Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During Covid-19 Response (May 19, 2020), at 16, available at [https://www.cisa.gov/sites/default/files/publications/Version\\_3.1\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_0.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_0.pdf).

<sup>16</sup> Plaintiffs alleged harm only from their inability to hold 500- to 1,000- attendee in-person gatherings with unknown attendees. They do not argue that the orders were overbroad in the sense of having a “‘substantial number’” of unconstitutional applications “‘judged in relation to [the orders’] plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 473 (2010). They therefore could not prevail without showing that the application *to their protests* was itself unconstitutional.

transmission. *See supra* pp. 11-12. Such gatherings cannot be compared to activities “in which people neither congregate in large groups nor remain in close proximity for extended periods.” *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of injunctive relief).<sup>17</sup> The activities which do compare to plaintiffs’ protests—namely, other large in-person gatherings, such as lectures, concerts, sporting events, and movies—were treated the same.<sup>18</sup> There was no error in the district court’s finding that the object of the state’s directives was “‘not to exclude communication of particular content, but to ... prevent uses that are dangerous.’” ER 14. Strict scrutiny was not required.

---

<sup>17</sup> News reporting often involves solitary activity or one-on-one visits, and reporting, broadcasting, and publishing allow communication with large numbers of separate listeners from a distance. Large groups, in contrast, present special risks, as other authorities recognize. *See, e.g.*, U.S. Court of Appeals for the Ninth Circuit, COVID-19 Update (June 29, 2020) (“our courthouses remain closed to the public,” with oral arguments occurring by video and telephone and “live streamed to facilitate public access”); National Park Service, Temporary Facilities Closure Advisory, June 26, 2020 (“[a]ll permits and reservations for events scheduled through May 15 [at the National Mall] have been cancelled[, and n]ew applications will not be accepted for demonstrations ... through June 22”), available at <https://www.nps.gov/nama/planyourvisit/temporary-facilities-closure-advisory.htm>.

<sup>18</sup> *See supra* p. 7 n.3. Plaintiffs also gain little by their attempt (OBM 9) to compare a four-hour 1,000-person protest to brief commercial transactions in smaller settings. Nor are gatherings of hundreds of unknown strangers from across the State similar to workplaces, where employers know those present and regulations make it possible for authorities to quickly follow up with potentially exposed individuals. *See* Cal. Labor Code § 6409.1(b) (requiring employers to “immediately” report cases of serious illness to authorities). *See also* Cal. Code Regs., tit. 8, § 342 (similar); *id.* § 340 (requiring employers to inform employees how they may report dangerous conditions and request state inspection).

Moreover, COVID judgments are ““fraught with medical and scientific uncertainties.”” *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of injunctive relief). Even strict scrutiny requires respect for governmental authorities’ “informed judgment” when they have special expertise, life and death is at stake, and action must precede complete information. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). Under strict scrutiny, review of California’s distinctions as to COVID-related “restrictions on particular social activities” would still take into account the judiciary’s comparative lack of the “background, competence, and expertise to assess public health” needs and health officials’ need for “broad” latitude. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of injunctive relief); *cf. supra* pp. 35-36. Plaintiffs would be unlikely to succeed on their speech claims under any standard of review.

## **2. Other Federal Claims**

Plaintiffs’ arguments with respect to their other federal claims were similarly lacking. Plaintiffs’ right-to-assemble argument presumes that restrictions that impede physical assembly for speech require more stringent scrutiny than restrictions on speech itself. OBM 37-38. That proposition would implausibly grant conduct more protection than speech. It is not supported by plaintiffs’ cited cases. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court addressed the right to “expressive association” through membership in an

organization for purposes of speech. *Id.* at 618. Such association is not implicated by the restrictions here, which do not “impose penalties or withhold benefits from individuals” based on membership in a group, “require disclosure of ... membership in a group seeking anonymity,” or “interfere with the [group’s] internal organization or affairs.” *Id.* at 622-623.<sup>19</sup> The constitutional standards applicable to the restrictions affecting assembly here are the ones applicable to the related speech.

The same is true of plaintiffs’ right to petition claim. “Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.” *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985). The State is not obstructing plaintiffs from urging those in state government to change the policies plaintiffs find objectionable; plaintiffs’ objection is simply that they cannot engage in speech in a particular manner at a particular place.

Plaintiffs’ argument as to vagueness (OBM 43) is that a single word in the Governor’s order—his command to “heed” public health directives—could be interpreted as meaning that Californians must merely ““give consideration or

---

<sup>19</sup> Even further afield is *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002), which involved association through the contribution of speech-supporting campaign donations.

attention’” to a directive before acting against it if they wish. *Id.* The district court rightly rejected that argument. In context, the word “heed” is clear. As the district court noted, what the Governor ordered Californians to “heed” was itself an “order.” ER 21; *id.* (noting additionally that the incorporated order itself “‘*order[ed]*’” all Californians to stay home) (emphasis added). A requirement to heed an *order* means something quite different than an admonition to heed advice, warnings, maxims, and the like. One “heeds an order” by *obeying* it. *See, e.g., United States v. Dixon*, 509 U.S. 688, 698 n.2 (1993) (plurality opinion) (discussing “obligation to ... heed” a “command to ‘Freeze!’”); *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 308 n.8 (1989) (discussing theory about statutory authority to “sanction lawyers for failing to heed the courts’ orders” on a particular subject). Such examples make no sense if one can “heed an order” by merely considering and then acting contrary to the order. “[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *United States v. Williams*, 553 U.S. 285, 304 (2008). The word “heed” was clear in context.

### 3. State Law Claims

Plaintiffs’ state-law claims had no possibility of success because, as explained above (at p. 32), federal courts lack the power to order state officials to act based on state-law claims. Moreover, plaintiffs do not propose any respect in which their

state-law speech, petition, and assembly rights would exceed the federal rights discussed above. *Cf.* OBM 29 n.11.

Plaintiffs’ state-constitutional “right to liberty” claim fails for other reasons. The cases plaintiffs cite are not “Binding California Supreme Court Precedent[s]” as plaintiffs contend. OBM 44; *see also id.* at 17, 46, 48. Instead, they are decisions by intermediate state appellate courts and federal trial courts. *In re Martin*, 83 Cal. App. 2d 164 (Cal. Ct. App. 1948); *In re Arata*, 52 Cal. App. 380 (Cal. Ct. App. 1921); *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900); *Wong Wai v. Williamson*, 103 F. 1 (C.C.N.D. Cal. 1900). And the district court did not err in finding them inapposite. *Jew Ho* and *Wong Wai* involved abuses of quarantine and inoculation requirements to target a racial minority. *See* ER 22. *Martin* and *Arata* involved the abuse of quarantine orders to hold in custody otherwise bailable criminal defendants connected with prostitution. *See id.*; *Martin*, 83 Cal. App. 2d at 165; *Arata*, 52 Cal. App. at 381. Those cases bear little resemblance to the one here. Nor did the court clearly err in finding it infeasible for the State to “‘identify specific individuals who carry the virus and order only them to stay home.’” ER 23.

**C. Events After the District Court’s Decision Provide No Basis To Reverse**

Plaintiffs, through their motion for judicial notice, seek reversal of the district court decision that they challenge by raising events that occurred after the district

court made that decision. In particular, plaintiffs direct the Court to reports of state officials making statements in sympathy with people protesting racially directed abuse by police in June 2020, and articles about how authorities have reacted to certain protests. OBM 14-15, 35. Based on those, plaintiffs argue that the prohibitions enforced against plaintiffs were not viewpoint-neutral, and that there is a risk of future discrimination in the enforcement of current restrictions and the promulgation of new ones. The State has demonstrated in recent evidentiary submissions to the district court that its treatment of protests—both through generally applicable directives and in individual enforcement and permitting activities, including the denial of a permit requested by the NAACP—is in fact viewpoint-neutral. *See* D.C. Doc. 35, at 6-10; D.C. Doc. 35-2, at 2-5. But more fundamentally, plaintiffs’ effort to create a factual dispute is inappropriate in this appeal.

This Court’s ““action on appeal can properly be based only upon a record considered by the trial court,”” and ““[i]t would be inappropriate ... to reverse the trial court on the basis of facts not incorporated in the record which the trial court considered at the time of its decision.”” *Rainbow Pioneer No. 44-18-04A v.*



*Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983).<sup>20</sup> That is because “the only proper function of a court of appeals is to review the decision below on the basis of the record that was made before the district court.” *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1474 (10th Cir. 1993) (internal quotation marks omitted). The facts plaintiffs now allege were not before the district court because they did not exist when the district court made its decision. Plaintiffs could have made use of the information had they filed a motion for a preliminary injunction, *see supra* pp. 23-24, and they might do so now by amending their complaint. But evidence to which the district court had no access is irrelevant in this appeal. *See generally Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014) (en banc) (per curiam) (“we are a court of review, not first view”).<sup>21</sup>

---

<sup>20</sup> Courts may add to the appellate record material that was “omitted from or misstated in the record *by error or accident.*” Fed. R. App. P. 10(e) (emphasis added). As the italicized words indicate, evidence post-dating the decision under review would not qualify.

<sup>21</sup> The one clear exception is for new information affecting the appellate court’s obligation to assure itself of jurisdiction. *See, e.g., Wilson v. Shaw*, 204 U.S. 24, 30 (1907). Plaintiffs’ cited cases (OBM 33-34 n.12) do not demonstrate that a broader exception applies here. Those cases discussed when courts of appeal should resolve a legal issue for the first time on appeal—not when they should go beyond the record the district court had. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Int’l Union of Bricklayers & Allied Craftsmen Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

The need to adhere to ordinary processes is especially acute given the inappropriateness of plaintiffs’ submissions under the rules of evidence. Most of the items for which plaintiffs seek judicial notice are newspaper articles and news broadcasts. RJN Exs. 7-16. But judicial notice requires a “high degree of indisputability.” Fed. R. Evid. 201, adv. comm. note. Attempts to establish improper motive through unauthenticated photographs and through news reports based on hearsay are insufficient. *See* Fed. R. Evid. 201(b).<sup>22</sup> Nor could reports conveying parts of various speakers’ statements establish certainty with respect to any particular inference; such statements cannot necessarily be assessed without the context of the whole statement. *Cf.* Fed. R. Evid. 106, adv. comm. note (noting “the misleading impression created by taking matters out of context”). The trial court may receive competing submissions, evaluate potential inferences, and make factual findings; those tasks are not for this Court in the first instance.

In any event, plaintiffs’ new submissions, if considered, support the outcome below. The State’s superseding orders reduced, and then eliminated, restrictions on outdoor protests, confirming the tailored nature of the State’s approach. And as

---

<sup>22</sup> In contrast, the provision of orders issued by public authorities does not violate the rules of evidence. *See* Fed. R. Evid. 201(a) (“This rule governs judicial notice of an adjudicative fact only, not a legislative fact.”).

shown below, the relaxation of restrictions shows that the temporary moratorium caused only limited injury. *See infra* pp. 51-52.

**D. Other *Winter* Requirements Support Affirmance**

The district court found it unnecessary to consider the other *Winter* factors, given its determination that plaintiffs were unlikely to succeed on the merits. ER 23. But those factors provide a basis to affirm as well. *See Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (“Although the district court did not find that Big Country failed to show irreparable injury, we may affirm on any ground supported by the record.”).

Plaintiffs fail even to acknowledge the severe hardship and public harm that could have resulted from allowing dangerous gatherings to proceed. The State—indeed the world—is facing an unprecedented public health emergency. At the time of the district court’s decision, testing rates left it uncertain how far COVID was prevalent in the population. The risk of allowing large gatherings of individuals from potentially different locales was that they could turn into superspreader events: The only expert opinion in the record warned of a risk of causing exponential spread to vulnerable populations across the State. *See supra* pp. 11-12.

In response to these grave public health concerns, plaintiffs offered assertions that they did not believe themselves to be infected (a statement not backed up by

any assertion of actually being tested, and irrelevant to the status of other attendees), that attendees would socially distance and obey safe practices (an assumption without support), and, for Givens's protest (but not Bish's), that the applicant would employ volunteers to seek to promote safe practices. In contrast, defendants could point to then-recent large-crowd experience during the COVID epidemic itself, as well as a public health expert's experience concerning individual compliance with anti-epidemic health measures more broadly. *See supra* pp. 11-13. Given expert evidence of the risk to California's people and healthcare system, the balance of hardships severely tilted in favor of the State's reasonable, temporary restrictions.

Once again, plaintiffs' attempt to go beyond the district court record only strengthens these conclusions. Plaintiffs seeking preliminary relief must demonstrate that "irreparable injury is *likely*," not merely "possible." *Winter*, 555 U.S. at 22. Plaintiffs' concern about being unable to protest for "potentially months or years," ER 173, is of little weight given more recent orders. *See also* ER 72 (plaintiffs' counsel's comment that plaintiffs would be "satisfied with a manner of protest that is less than what they were seeking in their initial application"). The balance of hardships and lack of continuing harm to the plaintiffs would therefore weigh against the district court granting the TRO on remand. *See, e.g., Lofton v. Verizon Wireless (VAW) LLC*, 586 F. App'x 420, 421-

422 (9th Cir. 2014) (mere fact of past practice to which plaintiffs objected did not demonstrate likelihood of future irreparable harm where defendant had changed its written policy); *cf.*, *e.g.*, *TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981) (although there was sufficient possibility of recurrence to survive mootness, there was not sufficient “‘danger’” to justify a cease-and-desist order).<sup>23</sup> They weigh against reversal here as well.

\* \* \*

An unprecedented epidemic is affecting countless spheres of activity throughout the State and nation, leading governments to temporarily restrict activities that, in normal times, occur freely and are even encouraged. Political speech and demonstration have been affected by the State’s past public health orders limiting large gatherings. These are, of course, particularly important activities in our democracy. In recognition of such values, the State moved swiftly to relax restrictions on certain types of public gatherings as circumstances on the ground evolved. This relaxation occurred even as countless other activities that many Californians view as equally important to their lives remain restricted. The

---

<sup>23</sup> There is no dispute that California must adopt and enforce its directives “in a viewpoint-neutral way.” U.S. Br. 23-24. The State agrees with that requirement and has followed it. To the extent plaintiffs wish to contest that, the procedure to do so would be through an amended complaint and related motion for preliminary injunction in the district court.

district court’s denial of plaintiffs’ request for a TRO to lift now-superseded restrictions on public gatherings was proper—judged under any standard of review—given the circumstances and state of knowledge at the time.

### CONCLUSION

The appeal should be dismissed, or the district court’s denial of the temporary restraining order affirmed.

Dated: July 7, 2020

Respectfully submitted,

*s/ Joshua A. Klein*

---

Xavier Becerra  
*Attorney General of California*  
Michael J. Mongan  
*Solicitor General*  
Thomas S. Patterson  
*Senior Assistant Attorney General*  
Joshua A. Klein  
*Deputy Solicitor General*  
Mark R. Beckington  
*Supervising Deputy Attorney General*  
James Walter  
Amie L. Medley  
*Deputy Attorneys General*  
CALIFORNIA DEPARTMENT OF JUSTICE  
1515 Clay Street, 20th Floor  
P.O. Box 70550  
Oakland, CA 94612-0550  
(510) 879-0756  
joshua.klein@doj.ca.gov  
*Attorneys for Defendants and Appellees*

## STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases within the meaning of Ninth Circuit Rule 28-2.6 currently pending before this Court.

We are aware of three pending cases which concern religious organizations' challenges to restrictions affecting religious services, rather than challenges to restrictions on political demonstrations:

*Gish v. Newsom*, No. 20-55445;

*South Bay United Pentecostal Church v. Newsom*, No. 20-55533; and

*Cross Culture Christian Ctr. v. Newsom*, No. 20-15977.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 8. Certificate of Compliance for Briefs**

*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>*

**9th Cir. Case Number(s)**

I am the attorney or self-represented party.

**This brief contains**  **words**, excluding the items exempted

by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
  - it is a joint brief submitted by separately represented parties;
  - a party or parties are filing a single brief in response to multiple briefs; or
  - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature**

**Date**

(use "s/[typed name]" to sign electronically-filed documents)

*Feedback or questions about this form? Email us at [forms@ca9.uscourts.gov](mailto:forms@ca9.uscourts.gov)*