

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 OFFICIAL 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; and SONIA ANGELL, IN HER CAPACITY AS STATE PUBLIC
HEALTH OFFICER,
Defendants and Appellees.

On Appeal from an Order of the United States District Court
for the Eastern District of California
District Court Case Number: 2:20-cv-852-JAM-CKD
The Honorable John A. Mendez, District Judge

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INTRODUCTION

This appeal is not moot. The Government has repeatedly warned the public that its recent lifting of restrictions may be dialed-back at any time, and, in recent weeks, the Government has indeed reverted to its earlier severe restrictions in several counties with respect to religious worship and schools. Even if this were not the case, the exceptional likelihood that the Government may discriminatorily reinstate its orders criminalizing outdoor protests, impermissibly chills Appellants' speech and renders injunctive relief both timely and necessary. The rising number of COVID-19 cases in California coupled with the reduction in protest activities relating to the Government's preferred viewpoints, makes this risk particularly acute. For this same reason, Appellants will suffer irreparable harm absent injunctive relief. Under these circumstances, the Court should not hesitate to reverse the district court's order to prevent a further suppression of Appellants' fundamental rights.

RECENT DEVELOPMENTS

On May 25, the State issued updated restrictions allowing limited in-person protests. RJN Ex. 17; FRE 111.¹ Under these restrictions, all protests were limited in size to 100 people or 25% of the relevant capacity, whichever results in fewer

¹ Appellants' Excerpts of the Record are cited as "ER;" Appellees' Supplemental Excerpts of the Record are cited as "SER;" and Appellants' Further Excerpts of the Record are cited as "FER."

persons attending the protest, among other restrictions. *Id.* That same day, George Floyd was killed by police in Minneapolis, Minnesota, igniting dozens of large demonstrations against police brutality, several of which were held on and near State Capitol grounds and elsewhere in California. RJN Exs. 6-10, 14-16; FER 190-206. These demonstrations involved, at times, tens of thousands of protesters, clearly exceeding the State’s 100-person limit. RJN Ex. 16; FER 190-206.

Defendants publicly encouraged the George Floyd protests, despite their apparent illegality under the Government’s orders. FER 190-93, 223, 227. On June 3, 2020, Governor Newsom announced publicly via livestream video the following: “For those of you that are out there protesting, I want you to know you matter, and I want you to know I care, we care....and those who want to express themselves and have: thank you; God bless you; keep doing it; your rage is real, express it so that we can hear it.” RJN Exs. 2, 6; *see also id.*, Ex. 7 (statement by Governor Newsom in support of peaceful protests); FER 190-93. On June 5, Governor Newsom published the following statement on Twitter: “Protestors have the right to protest peacefully – not be harassed. Not be shot at by rubber bullets or tear gas....” FER 225. On June 6, 2020, California Attorney General published the following statement on Twitter: “Many Californians are headed out this weekend to make their voices heard in the fight for racial justice. The CA Department of

Justice supports people’s rights to peaceful protest. Protesters should be treated with dignity and respect.” *Id.* at 227.

On June 9, 2020, Plaintiffs-Appellants filed with the district court their application for reconsideration of the court’s order denying a temporary restraining order and requested that the district court issue an injunction pending this appeal. *Id.* at 283. In their motion, Appellants asserted that the Government’s *de facto* selective enforcement of its orders amounts to content-based discrimination in violation of Appellants’ First Amendment rights. *Id.*

On June 12, 2020, shortly after Appellants’ filed their motion with the district court, the Government issued updated protest restrictions for a second time. *Id.* at 110-13. Under these new restrictions, there are no capacity limitations for outdoor protests, but indoor protests remain subject to the earlier limits. *Id.* The Government asserts that these most recent revisions were made possible because of certain “encouraging results in California’s ongoing fight to contain the COVID-19 threat.” *Id.* at 146. It informed this Court of the same in its Answering Brief, filed July 7, 2020. ABM 18.²

On June 16, 2020, the Government filed with the district court a motion to dismiss Appellants’ claims under Federal Rule of Civil Procedure 12(b)(1). FER

² “ABM” refers to the Government’s Answering Brief on the Merits. Doc. 24.

141. The Government argued that the case had become moot as a result of the Government's decision to allow outdoor protesting. *Id.*

On July 14, the district court held a Zoom hearing on the Government's motion to dismiss and Appellants' motions for reconsideration and for injunction pending appeal. FER 1-20. The district court disagreed with the Government's position on mootness and largely denied the requested relief.³ *Id.* Judge John A. Mendez summarized his reasoning on the record as follows:

“[Governor Newsom] can reinstate [the ban on outdoor protests] at any time. And given the direction that this pandemic is taking, I'm actually surprised that he didn't reinstitute the permit ban as well. But he can. Everybody knows he can do that simply by holding a press conference and saying, guess what, the order is back in effect. And that's what prevents this court from making a finding as a matter of law that this case is now moot. It's not.”

Id. at 15-16. Nevertheless, the district court denied Appellants' motions, stating that its earlier analysis “remains sound.” *Id.* at 12. Judge Mendez also repeatedly stated on the record that “we're all going to get some guidance from the Ninth Circuit” in relation to this appeal and words to similar effect. *Id.* at 19-20. The district court did not issue a written order on the motions. *Id.* at 20.

³ Appellants did not contest the Government's motion to dismiss the state law claims for reason of sovereign immunity, save on jurisdictional grounds. FER 12. Accordingly, the district court granted the Government's motion to dismiss the state law claims. *Id.* Similarly, here, Appellants do not contest the Government's assertion of sovereign immunity as to Appellants' state law claims.

In recent weeks, the Government issued stern warnings to the public that it may reimplement its severe restrictions on liberty as a result of the spread of COVID-19. *Id.* at 69 (June 29, 2020—“[w]e don’t like the trendline, that’s why again this mandatory mask requirement is in effect, that’s why we’re using this dimmer switch to start to pull back”), 73 (June 29, 2020—“Newsom said there was a 45 percent increase in positive tests, and a 43 percent increase in hospitalizations in the last two weeks. Over the last three days, Newsom said that new positive test numbers remained high, with 5,932 new cases on Friday, 4,810 new cases on Saturday and 5,307 new cases on Sunday.”), 78 (June 28, 2020—“COVID-19 is still circulating in California, and in some parts of the state, growing stronger.”), 81 (June 22, 2020—“[t]hose that suggest we’re out of the woods, those that suggest this somehow is going to disappear, these numbers tell a very, very different and sobering story”). The Government recently carried out its threats with respect to in-person worship services and public and private schooling in most counties across California. Supp. RJN Exs. 18-19.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS APPEAL.

For the purposes of 28 U.S.C. § 1292(a), a district court’s order denying an application for a temporary restraining order is immediately reviewable on appeal where the order is tantamount to the denial of a preliminary injunction. *Religious*

Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1308 (9th Cir. 1989) (citing *Env'tl. Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)); see also *Hunt v. National Broadcasting. Co.*, 872 F.2d 289, 292 (9th Cir. 1989) (denial of a temporary restraining order is also appealable where it “effectively decides the merits of the case.”).

Here, the Government argues that this Court lacks jurisdiction because Appellants were not “effectively foreclosed” from “pursuing further interlocutory relief” at the district court. AMB pp. 21-24 (citing the district court’s remarks that it “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....”). The Government’s effort to dismiss this appeal falls flat.

The district court’s remarks at the hearing, coupled with its order denying the TRO—which Appellants wholly ignore in their analysis of this issue—explicitly foreclosed the possibility of Appellants obtaining injunctive relief. ER 8, 11 (“Plaintiffs are not likely to succeed on their challenge to the State’s stay at home order as an impermissible exercise of emergency police powers”), 14 (“[t]he State’s stay at home order advances the only fool-proof way to prevent the virus from spreading at in-person gatherings: prohibiting in-person gatherings”), 78 (refusing to set a hearing for a preliminary injunction motion).

This Court’s sound jurisprudence does not require that the parties bog down the district court with ritualistic and redundant proceedings, where the outcome is a foregone conclusion. *See Religious Tech. Cr.*, 869 F.2d at fn. 6 (noting that pursuing an evidentiary hearing would have been “pointless”); *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020) (denying motion to dismiss appeal from order denying a temporary restraining order in a religious-liberty case). Indeed, the important public policy issues involved in this appeal counsel against requiring such procedural box-checking. *See Andrus*, 625 F.2d at 862 (“Because important public policy issues are involved and time is of the essence we exercise our option under Fed. R. App. 2 to suspend the normal requirements of appellate procedure and reach the merits of this appeal.”).

Even if the district court’s initial ruling was ambiguous as to whether preliminary injunctive relief remained a possibility—it was not—subsequent events prove that any such request for relief would be futile. On July 14, 2020, the district issued a ruling from the bench denying Appellants’ motion for reconsideration of the TRO Order and denying Appellants’ motion for an injunction pending appeal. FER 1-20. In doing so, the district court stated that it “sees no reason at this point to revisit its May 8th, 2020 denial of the application for the temporary restraining order....because the analysis remains sound.” FER 11-12. For this same reason, the court “[saw] no legal basis or reason to grant an

injunction pending appeal.” *Id.* As if to remove all doubt, the court continued on to state that “again, all these issues are before the Ninth Circuit and will be taken up by the Ninth Circuit,” indicating its understanding that “we’re all going to get some guidance from the Ninth Circuit...” *Id.* at. 19.

The district court has no intention of granting injunctive relief in this action. As such, this Court has jurisdiction to review the district court’s TRO Order in this appeal.

II. THE GOVERNMENT’S RECENT DECISION TO SUSPEND ITS PROHIBITION OF OUTDOOR PROTESTS DOES NOT MOOT THIS APPEAL.

An appeal becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000) (internal quotes omitted). Where mootness is raised with respect to the pursuit of injunctive relief, the relevant issue becomes “whether relief against the [challenged actions] could meaningfully improve [the plaintiff’s] position.” See *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1000 (9th Cir. 2004) (citing *In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001)); *United States v. Arkison*, 34 F.3d 756, 759 (9th Cir. 1994); *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). A case is not moot if the court can fashion some relief for the claimant, even where there is no possibility of returning the parties to the “*status quo ante*.” *Church of Scientology of Calif.*, 506 U.S. at 12-13;

Chafin v. Chafin, 568 U.S. 165, 172-177 (2013); *see also U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 400 (1980) (describing the mootness doctrine’s “flexible character” that distinguishes it from other justiciability doctrines).

The Government’s claim that this appeal is moot fails on several grounds, including because: (1) Governor Newsom’s Executive Order N-33-20—the order challenged by Appellants in this action—remains in effect and the Government warns that it may reimplement its ban on outdoor protests at any time; (2) even if this were not the case, long-established exceptions to the mootness doctrine apply, as discussed below.

A. The Challenged Executive Order Remains in Effect.

The Government argues that “no injury or potential remedy remains.” AMB p. 26. It is wrong on both counts. Appellants seek injunctive relief prohibiting the Government from enforcing Governor Newsom’s Executive Order N-33-20, which directs all persons in California to “heed” all State public health directives. ER 173.⁴ While the Government has changed the relevant public health directives to permit outdoor protests, the underlying order remains in effect. FER 15-16 (district court Judge John Mendez: “[Governor Newsom] can reinstate [the ban on outdoor protests] at any time . . . Everybody knows he can do that simply by holding a

⁴ On May 4, 2020, the Governor issued a supplementary order, EO N-60-20, requiring Californian’s to “continue to obey” all public health directives. FER 166. The order did not withdraw, supersede, or even amend the order challenged here.

press conference and saying, guess what, the order is back in effect.”). As a result, the Government may reinstate its ban on outdoor protests at any time.

The likelihood that the Government reinstates its ban on outdoor protests—particularly in the absence of a threatened injunction—is high. FER 15-16 (Judge John Mendez: “I’m actually surprised that [the Governor] didn’t reinstitute the permit ban as well.”). The Government has repeatedly warned the public that it may “pull back” on its recent loosening of restrictions. FER 69 (“[w]e don’t like the trendline, that’s why we’re using this dimmer switch to start to pull back”). It has already reinstated its ban on in-person religious services in several counties, and it did so mere days after securing dismissal of a separate lawsuit on religious liberty grounds based on the same mootness arguments it makes here. *Id.* at 22-31; Supp. RJN Exs. 18-19. Most recently, the Government has prohibited all in-person instruction and public and private schools across dozens of counties, affecting over 80% of California’s population. Supp. RJN Exs. 18-19.

Further, even if the protest ban were not reinstated, the mere *threat* that the Government may do so is worthy of injunctive relief in and of itself. “The very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992); *see also 4805 Convoy, Inc. v. City of San Diego*, 183

F.3d 1108, 1111 (9th Cir. 1999); *Bordell v. General Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991)); *Bigelow v. Virginia*, 421 U.S. 809, 816–17 (1975).

Here, the Government wields abundant, court-sanctioned discretionary authority to adopt, alter, and eliminate policies suppressing Appellants’ free speech. ER 1-24 (TRO Order). It has exercised that broad power to ban Appellants’ organized protests with social distancing and mask-wearing against the Government, only to turn around days later to actively *encourage* large scale protests on matters which the Government supports. FER 187-227. The mere fact that the Government retains such discretionary authority, and that it wields it discriminatorily, acts to chill Appellants’ speech—and the speech of forty million other Californians.⁵

If Appellants attempt to protest against the Government again, will the Government’s “encouraging results” in California’s fight against COVID-19 suddenly evaporate, such that Defendants once again criminalize all outdoor protests (or at least, those with which they disagree)? The mere fact that this question may be asked renders injunctive relief both appropriate and necessary.

⁵ In fact, in recent district court filings, the Government suggests that chilling speech is not merely a by-product of its orders, but the Government’s primary objective. D.C. Doc. 35, p. 8 (“CHP frequently declines . . . to take aggressive enforcement action against unpermitted protests even on the State Capitol grounds.”); *id.* at p. 9 (“there are good health and safety reasons for the State to have shown restraint in the face of recent protests.”); *see also* FER 83-113.

B. Even If the Government Rescinds Its Order, Established Mootness Exceptions Apply.

1. Voluntary cessation: the doctrine of mootness does not apply where the Government merely pauses its engagement in the challenged conduct.

Courts do not allow parties to artificially create mootness to insulate a favorable decision from appellate review. *City of Erie*, 529 U.S. at 288-289. A defendant’s voluntary cessation of challenged conduct moots a case only if it is “absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91-92 (2013) (internal quotes omitted); *ASW v. State of Oregon*, 424 F.3d 970, 974 (9th Cir. 2005). If it is not “absolutely clear,” courts may grant appropriate relief to prevent the defendant from returning to his old ways. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *E.E.O.C. v. Federal Express Corp.*, 558 F.3d 842, 847-848 (9th Cir. 2009).

The Government asks that this Court simply presume that its ban on outdoor protesting will not be reinstated, without any factual support for the truth of that presumption. AMB 28-29. Established Ninth Circuit case law counsels otherwise: “when the Government asserts mootness based on such a [policy] change it still must bear the heavy burden of showing that the challenged conduct cannot

reasonably be expected to start up again.”*Rosebrock v. Mathis*, 745 F.3d 963, 971-972 (9th Cir. 2014). The Government has failed to carry that “heavy burden” here.

Unlike statutory changes made through a legislative process, such as those discussed in cases cited by the Government, a policy change made through executive action is not necessarily entitled to a presumption that agency will not revert back to the challenged action.⁶ *Id.* at 971. This is particularly true where, as here, the policy change is “not reflected in statutory changes or even in changes in ordinances or regulations,” because “the new policy ... could be easily abandoned or altered in the future.” *Id.* (citing *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013)).

Here, it is far from “absolutely clear” that the Government will not reinstate its ban on outdoor protesting. FER 187-227 (warning that the Government’s COVID-19 restrictions may be reimplemented at any time); Supp. RJN Exs. 18-19 (re-criminalizing in-person religious services and schooling in most of California).

⁶ The Government’s reliance on *Already, LLC v. Nike*, 568 U.S. 85, 91 (2013) is misguided. AB 28. In *Already*, the defendant, Nike, expressly promised to refrain from enforcing the disputed trademark by issuing a covenant not to sue the plaintiff. As a result, the plaintiff’s effort to invalidate Nike’s mark was rendered moot because enforcement of the mark against the plaintiff was not reasonably expected to recur. *Already*, 568 U.S. at 95. Here, however, not only does the Government refuse to promise that it will not reinstate its ban on outdoor protests, but it *expressly reserves* the right to do so at any time. See AMB 30 (conceding that changing circumstances may require the Government to adopt a “dynamic” approach to combating the spread of the virus).

Tellingly, the Government's Answering Brief fails to offer even a simple statement to that effect. Instead, the Government relies on inapposite case law to argue that the Court should simply presume the appeal is moot because the Government has temporarily suspended its restrictions. No such presumption is, or should be, afforded here. This appeal is not moot.

2. The circumstances giving rise to this appeal are capable of repetition, yet evading review.

This Court has jurisdiction over an otherwise mooted appeal where (a) the challenged order is of such short duration that it would be virtually impossible to litigate its validity before its expiration, and (b) the court reasonably expects the same complaining party will be subjected to the same kind of order in the future. *Turner v. Rogers*, 564 U.S. 431, 439-440 (2011); *Sosna v. State of Iowa*, 419 U.S. 393, 399-402 (1975); *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 786 (9th Cir. 2012); *Farris v. Seabrook*, 677 F.3d 858, 863 (9th Cir. 2012). This exception is most often invoked in cases like this one, where individuals have brought suit against a governmental entity where it is anticipated that the challenged action will be repeated. Because the governmental party is "constant," it can often be inferred that the same controversy will recur. *See United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1080-1081 (9th Cir. 2004), *amended* 400 F.3d 1177 (9th Cir. 2005); *A.D. ex rel. L.D. v. State of Hawaii Dept. of Ed.*, 727 F.3d 911, 914 (9th Cir. 2013). As such, even if the Court were to interpret

Appellants' claims as challenging merely the public health directives, and not the executive order giving effect to such directives, the appeal would not be moot because those directives are likely to revert to its earlier form.

By their very nature, public health directives may be, and are, changed frequently, often on a time frame in which full judicial review is impossible. *Alcoa, Inc.*, 698 F.3d at 787 (the duration component of this exception is satisfied where the underlying action will run its course before the Ninth Circuit or Supreme Court can give the case full consideration). Indeed, the health directives at issue in this case have changed twice during the pendency of this appeal, which has yet to be heard by this Court. FER 110-13 (the public health directives were changed on May 25 to allow limited outdoor protests, and again on June 12 to their current form).

Further, there is a substantial "likelihood of similar injury in the future." *Moore v. Urquhart*, 899 F.3d 1094, 1100 (9th Cir. 2018) (second prong satisfied where there exists a "credible threat" the plaintiff will be subjected to the particular injury again). Nowhere does the Government say that it will refrain from restricting the right to protest in the future. To the contrary, the Government admits that its future response will be "dynamic." AB 30. The Government has, and by all appearances will continue, to reimplement its restrictions as a result of an increase in the spread of the coronavirus. Any such renewed directives are, as was the case

with the first set of directives, likely to last for an indeterminate period and be subject to ongoing review and modifications by the Government. The Court need not grant the Government *carte blanche* to trammel Appellants' fundamental rights provided the Government temporarily suspends the challenged restrictions on the eve of every appeal.

C. If This Court Nevertheless Dismisses this Appeal as Moot, It Should Also Vacate the District Court's Order.

While Appellants strongly disagree with the Government's mootness assertion, if this Court does dismiss this appeal on mootness grounds, then the appropriate action would be to vacate the district court's TRO Order and allow litigation to proceed on the revised directives through amended pleadings or otherwise. *See United States v. Munsingwear*, 340 U.S. 36 (1950). The legal issues ruled on by the district court are a matter of first impression, yet the circumstances giving rise to this dispute afflict the entire nation. As a result, district courts across the country look to decisions issued by their sister courts for guidance and consistency in application of the law. *See, e.g., Legacy Church, Inc. v. Kunkel*, No. CV 20-0327 JB\SCY, 2020 WL 3963764, at *107 (D.N.M. July 13, 2020) (citing the district court's TRO Order).

Here, the district court has expressed more than once that it awaits further guidance from this Court on the applicable legal standards. FER 19. If this Court does not provide that guidance in connection with this appeal, Appellants

respectfully request that the TRO Order be vacated to avoid the unintended consequences stemming from other's reliance on the district court's unreviewed reasoning.

III. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER DENYING INTERLOCUTORY RELIEF.

A. Standard of Review.

The Government cites *Wildwest Institute v. Bull*, 472 F.3d 587 (9th Cir. 2006) for the proposition that the Court should adopt a "limited and deferential" standard when reviewing the district court's TRO Order. *Id.* at 589. Such deferential review, however, is premised on the district court applying the law correctly. *Id.* at 590; *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (holding that the Court reviews conclusions of law *de novo* and findings of fact for clear error on appeal from a preliminary injunction ruling). For reasons set forth in Appellants' Opening Brief and below, the district court did not do so here.

B. Plaintiffs Are Likely to Succeed on the Merits.

1. The Government's self-made discretionary authority to prohibit outdoor protests violates the First Amendment's viewpoint-neutrality mandate.

Contrary to the Government's assertions, the district court misapplied established First Amendment law with respect to both its traditional scrutiny analysis and its analysis under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

With respect to traditional tiered scrutiny, the district court (as well as the Government) wholly ignored the threat posed by the Government’s virtually unchecked discretionary authority. “[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints.” *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006); *see also Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012) (adopting the view that “the viewpoint neutrality requirement includes the prohibition on a licensing authority’s unbridled discretion”); *Southerworth v. Bd. Of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) (“[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement”). Thus, the First Amendment’s mandate of viewpoint and content-neutrality is not satisfied where the government maintains unbridled discretion to approve or reject requests to access a forum for free speech activities—regardless of whether the government actually harbors discriminatory intent. *See Kaahumanu*, 682 F.3d at 806.

Here, the Government wields nearly unchecked authority to suppress outdoor protests. It has held that discretionary authority from the outset of the current crisis. ER 1. Unfortunately, as if to illustrate the point, the Government has exercised that authority to engage in *de facto* content-based discrimination by first

disallowing Appellants' protests against the Government, only to temporarily suspend its directives weeks later in order encourage and allow protesters whose messages the Government supports. FER 187-227, 110-14.

While the district court may not have had these more recent facts at the time it issued its TRO Order, the Government's unbridled discretion to suppress speech has nevertheless been consistently present throughout this case. Indeed, the district court's TRO Order endorsed the exercise of such discretionary authority in light of public health concerns. ER 1. The district court has since repeated this endorsement even after reviewing evidence of the Government's content-based discrimination. FER 12 (stating that the district court's prior analysis "remains sound").

The Government's vast discretionary authority to suspend fundamental rights renders its actions, *per se*, in violation of the First Amendment's viewpoint-neutrality requirement. *See Kaahumanu*, 682 F.3d at 806. Yet, the district court applied legal standards regarding content-neutral time, place, and manner restrictions, which this case does not involve. In doing so, the district court gutted the First Amendment, erroneously holding that even where no public health emergency exists, a universal ban on protesting in public fora is somehow permissible under the First Amendment—plainly, it is not. *See, e.g., Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015) ("The vice of content-based legislation .

. . . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.”).

On a strikingly similar set of facts, the Northern District of New York recently concluded that New York’s shifting stance on outdoor protests was inconsistent with fundamental law. *Soos v. Cuomo*, No. 1:20-cv-00651, 2020 WL 3488742 (N.D. N.Y. June 26, 2020). In that case, as here, the government issued statements supporting the peaceful protests that erupted following the death of George Floyd. *Id.* at *4. Noting the contrasting nature of the government’s support of those protests with the government’s restrictions on worship services, the court enjoined the government from restricting all indoor and outdoor gatherings at which participants adhere to social distancing guidelines. *Id.*

The same reasoning applies here. The Government cannot be allowed to pick and choose those who may exercise fundamental rights. This is true regardless of whether the Government does so in a purportedly “neutral” fashion, where that neutrality makes no appearance in the reality of the Government’s selectively exercised discretionary authority. *See Hoye v. City of Oakland*, 653 F.3d 835, 849 (9th Cir. 2011) (finding a constitutional violation where the police only enforced an otherwise content neutral statute against one viewpoint).

The Government, like the district court, also errs in its analysis of *Jacobson*. *Jacobson* does not, as the Government argues, supplant traditional tiered scrutiny

analysis. See AMB p. 36 (citing *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613). Indeed, the Supreme Court, when reviewing an emergency request for injunctive relief in *S. Bay United Pentecostal Church*, cited *Jacobson* for the general purpose of counseling deference to the political branches in times of crises—it did not hold that traditional scrutiny was altogether inapplicable. 140 S. Ct. at 1613 (“[the challenged] restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings....”); see also *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *6 (D. Kan. Apr. 18, 2020) (applying traditional scrutiny when analyzing whether the government’s actions violated fundamental law under *Jacobson*); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128, at *10 (M.D. Ala. Apr. 12, 2020) (holding that the *Jacobson* standard was not dispositive because abortions concern fundamental rights).

Furthermore, in *S. Bay United Pentecostal Church*, Justice Kavanaugh, joined by Justices Thomas and Gorsuch, wrote in dissent in *S. Bay Pentecostal Church* expressly applying traditional scrutiny to the church’s request. The dissent concluded that the Government’s restrictions on houses of worship violate the Free Exercise Clause under those standards. 140 S. Ct. at 1614-15. At a minimum, the Supreme Court’s analysis confirms that serious questions arise as to the merits of Appellants’ claims here, such that the issuance of immediate injunctive relief is

proper to prevent the imposition of additional speech restrictions that cannot be timely reviewed by this Court before Appellants suffer irreparable harm. *See, e.g., Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968) (A delay “of even a day or two” may be intolerable when applied to “political speech in which the element of timeliness may be important.”).

2. Other federal claims.

The Government fails to raise any arguments unique to Appellants’ claims of associational freedom and the right to petition the government under the First Amendment. Instead, the Government argues generally that the claims fail because such rights are coextensive with the rights secured under the Free Speech Clause. AB 43-44. Even if true in this instance, because strict scrutiny applies to each of Appellants’ claims, the claims nevertheless serve as additional grounds by which injunctive relief is proper. Appellants’ desired speech was to be directed toward the Government itself and was to be delivered alongside hundreds of others sharing similar views. Accordingly, ample grounds exist on which this Court may reverse the district court’s decision to deny injunctive relief.

With respect to Appellants’ due process claim, the Government argues that its order directing Californians to “heed” all public health directives is sufficiently clear to order actual compliance with those directives. The Government makes no effort to distinguish the dictionary definition of “heed,” which does not equate the

word with an “order,” but rather a request for acknowledgement. In any event, the Government has since issued a supplemental order, EO N-60-20, clarifying that the public must “continue to obey” all State public health directives. FER 166.

C. The Risk of the Government Exercising Its Unfettered Discretion to Ban Protests Selectively Existed at All Times.

The Government argues, incorrectly, that this Court should ignore recent developments referenced by Appellants in their Opening Brief, which events the district court had not considered before issuing its TRO Order. AMB 46-49. The Government’s logic is flawed in multiple respects.

First, Appellants filed their Opening Brief mere days after significant changes in the Government’s treatment of outdoor protests. This Court is always obligated to address jurisdiction issues, including mootness, and Appellants’ counsel are similarly obligated to inform the Court of developments potentially affecting the Court’s jurisdiction. *In re Cellular 101, Inc.*, 539 F.3d 1150, 1154-1155 (9th Cir. 2007) (acknowledging counsel’s duty to inform the Court of events that may moot the appeal, even in part). Appellants appropriately—and correctly—anticipated that the Government would contend that this appeal was mooted by intervening events. Their submission of materials implicating whether the Court maintains jurisdiction over this appeal is therefore not only permissible but required.

Second, Appellants' request for judicial notice of the relevant materials is appropriate under Rule 201 of the Federal Rules of Evidence. Under Rule 201(b), courts may judicially notice a fact that is not subject to reasonable dispute because it is generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Such notice may be taken at any stage of the proceedings, including on appeal. Fed. R. Evid. 201(f).

Here, the materials for which Appellants seek judicial notice are easily verifiable, and they contain relevant factual admissions and other official government actions not reasonably subject to any dispute by the parties. *See e.g., Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999) (taking judicial notice that the market was aware of information contained in certain news articles); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (taking judicial notice of company's news releases and press releases of government official); *Ritter v. Hughes Aircraft Co.*, 58 F. 3d 454, 458-59 (9th Cir. 1995) (judicial notice of layoffs in a newspaper article was "a fact which would be generally known in Southern California and which would be capable of sufficiently accurate and ready determination."); *Cnty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017) (judicial notice of statements made by President and

Attorney General in op-eds and news interviews). Indeed, the Government does not dispute the authenticity of the relevant materials.

As discussed above, the Government has maintained unfettered discretion to impose, retract, or revise its restrictions on fundamental liberties, including the right to protest government action, since the outset of this case. The existence of such discretion does not comport with this Court's viewpoint-neutrality requirements. *See Child Evangelism Fellowship of Md., Inc.*, 457 F.3d at 384; *Kaahumanu v. Hawaii*, 682 F.3d at 806; *Southerworth*, 307 F.3d at 579. Accordingly, it is amply proper that the Court take judicial notice of Government acts indicative of its exercise of that discretion pending this appeal.

Lastly, the district court has had an opportunity to evaluate this evidence in reviewing Appellants' motions for reconsideration of the court's TRO Order and for an injunction pending appeal, as well as in connection with the Government's motion to dismiss the case on mootness grounds. *See generally* FER. Despite reviewing the evidence, which is also submitted to this Court in the form of "Further Excerpts of the Record," the evidence did not persuade the district court to reverse its earlier conclusion. FER 12. Accordingly, the Government's concerns regarding the district court's purported inability to consider this material is unfounded, and the Court should consider all recent events in ruling on this appeal.

D. The Remaining *Winter* Factors Weigh in Favor of Reversal.

The Government fails to raise any credible argument that public policy or a balancing of the equities weighs against injunctive relief; nor could it. *See* AMB 50-52. The Government has, at least for now, suspended its prohibition on outdoor protests, accepting any risk outdoor protests may pose to public health as tolerable in light of the important considerations under the First Amendment. This Court should not come to any different conclusion: outdoor protests should be permitted.

Further, as discussed above, Appellants face ongoing irreparable harm in the form of chilled speech coupled with a clear threat from the Government that it may reinstate its ban on outdoor protests at any time. The Government has ample discretionary emergency power to suppress Appellants' speech, as it did very recently with respect to houses of worship and schools in dozens of counties across the State. Supp. RJN Exs. 18-19. The mere risk that the Government will utilize its effectively unfettered discretion to reinstate its directives acts to chill Appellants' and others' speech. This alone constitutes irreparable harm, and the Court should act swiftly to enjoin the Government from further suppressing outdoor protests without first seeking consent from the Court. *See, e.g., Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004) (affirming injunction to prevent chilling of speech).

CONCLUSION

For the aforementioned reasons, Appellants respectfully request that this Court reverse the district court's order denying injunctive relief and remand to the district court for further proceedings.

July 28, 2020

Respectfully submitted,

/s/ Harmeet K. Dhillon

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellants' Reply Brief complies with the requirements of Ninth Circuit Rule 32-1. The brief was prepared in 14-point font and, other than the portions exempted by Federal Rule of Appellate Procedure 32(f), contains 6,242 words, as counted by Microsoft Word.

July 28, 2020

/s/ Harmeet K. Dhillon

Harmeet K. Dhillon

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2020, I filed the foregoing Appellants' Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

July 28, 2020

/s/ Harmeet K. Dhillon

Harmeet K. Dhillon