

EXHIBIT 1

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13 **UNITED STATES DISTRICT COURT**
 14 **CENTRAL DISTRICT OF CALIFORNIA**
 15 **EASTERN DIVISION**

16 **WENDY GISH**, an individual, *et al.*,
 17 Plaintiffs,
 18 v.
 19 **GAVIN NEWSOM**, in his official
 20 capacity as Governor of California, *et al.*,
 21 Defendants.

Case Number: 5:20-cv-00755-JGB-KK

**REPLY IN SUPPORT OF
 PLAINTIFFS' APPLICATION
 FOR TEMPORARY
 RESTRAINING ORDER AND
 FOR ORDER TO SHOW CAUSE
 WHY PRELIMINARY
 INJUNCTION SHOULD NOT
 ISSUE**

Date: April 22, 2020
 Time: 2:00 p.m.
 Judge: Hon. Jesus G. Bernal



1 **INTRODUCTION**

2 Defendants argue for what is perhaps the most extreme curtailment of
3 constitutional rights ever to be considered by this Court—namely, that federal, state,
4 and local authorities may do *anything* that is “rationally related” to slowing the spread
5 of the coronavirus, without legal challenge. Selective quarantines, discriminatory
6 suppression of religion, even more extreme measures—all of these, Defendants argue,
7 should be subjected to rational basis review for the duration of the COVID19
8 outbreak, which may last for months, or even years. In other countries, governments
9 have used extreme measures to curtail the spread of disease, which might pass a
10 rational basis test, even if it condemned the infected to death, because it rationally
11 helps stop the spread of the disease.

12 Defendants argue further that it is their victims’ burden to prove that
13 Defendants’ actions are *not* rationally related to this or any other legitimate purpose,
14 and that failure to prove as much renders Defendants’ actions constitutional. Dkt. 13,
15 pp. 24-25. Not only does the government urge error on this Court by insisting on the
16 wrong test, but it also tries to flip the burden of proof. While the health crisis is a
17 serious, even grave concern, there is no precedent in our nation’s history for simply
18 ignoring the Constitution or centuries of jurisprudence, and this case requires no such
19 extreme abandonment.

20 Plaintiffs respectfully submit this reply brief to address the narrow issue of the
21 level of judicial scrutiny applicable to Plaintiffs’ claims: strict scrutiny. Given the
22 multiple, lengthy opposition briefs filed by Defendants, and the short period in which
23 Plaintiffs have had to draft and file this reply, Plaintiffs cannot adequately address all
24 arguments raised by Defendants in this filing alone. Plaintiffs’ counsel will be
25 available to address Defendants’ remaining arguments at the telephonic hearing
26 scheduled for April 22, 2020.

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1 **ARGUMENT**

2 **I. Strict Scrutiny Applies to Plaintiffs’ Claims.**

3 The rights afforded by the U.S. and California Constitutions are not up for
4 debate; hard-fought as they are, these rights belong to the People. *See Kennedy v.*
5 *Mendoza—Martinez*, 372 U.S. 144, 164–165 (1963) (“The imperative necessity for
6 safeguarding these rights to procedural due process under the gravest of emergencies
7 has existed throughout our constitutional history, for it is then, under the pressing
8 exigencies of crisis, that there is the greatest temptation to dispense with fundamental
9 constitutional guarantees which, it is feared, will inhibit governmental action”); *see*
10 *also United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if,
11 in the name of national defense, we would sanction the subversion of one of those
12 liberties ... which makes the defense of the Nation worthwhile”).

13 **A. A State of Emergency Does Not Grant Defendants *Carte Blanche***
14 **Authority to Violate Plaintiffs’ Fundamental Rights.**

15 Plaintiffs’ rights do not vanish simply because Defendants have declared an
16 emergency. *See On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020
17 WL 1820249 (W.D. Ky. Apr. 11, 2020) (granting a temporary restraining order so that
18 the plaintiff could hold drive-up religious services, despite COVID19 outbreak).
19 Defendants rely principally on *Jacobson v. Commonwealth of Massachusetts*, 197
20 U.S. 11 (1905), arguing that during a state of emergency “constitutional rights may be
21 reasonably restricted ‘as the safety of the general public may demand.’ ” *See, e.g.,*
22 *Def. Newsom and Becerra’s Opp.* p. 14.

23 The historical context in which the *Jacobson* case was decided is extremely
24 important the Court’s analysis here, yet it is altogether ignored by Defendants. In
25 *Jacobson*, the Supreme Court upheld a conviction under a Massachusetts statute that
26 criminalized the defendant’s failure to vaccinate himself from smallpox. *Jacobson*,
27 197 U.S. at 12. *Jacobson* was decided *decades* before the First Amendment’s
28 Establishment and Free Exercise Clauses were held to apply to the States by

1 incorporation. *Everson v. Board of Edu.*, 330 U.S. 1 (1947) (Establishment Clause);
2 *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause). As such,
3 *Jacobson* does not, and could not, control this Court’s analysis of Plaintiffs’ claims.

4 During the 115 years since *Jacobson* was decided, the Supreme Court has
5 developed a substantial and durable body of case law establishing, unequivocally, that
6 a state’s infringement of fundamental rights enshrined by the First Amendment to the
7 U.S. Constitution are subject to the most rigorous form of judicial scrutiny: strict
8 scrutiny. *See, e.g., New York Times Co. v. United States*, 403 U.S. 713, 717 (1971)
9 (“The word ‘security’ is a broad, vague generality whose contours should not be
10 invoked to abrogate the fundamental law embodied in the First Amendment.”).¹ Since
11 the Supreme Court’s adoption of its modern analytical framework, it has never set it
12 aside due to an emergency, let alone crafted a rule in which a government defendant
13 could preemptively alter the applicable standard by declaring that an emergency
14 exists. The Court should not craft such an exception here.²

15 Defendants also cite the Supreme Court’s decision *Prince v. Massachusetts*,
16 321 U.S. 158 (1944), which stated, in *dicta*, “[t]he right to practice religion freely does

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18 ¹ The Supreme Court’s more recent citations to *Jacobson* cast further doubt as to its
19 continued applicability to modern constitutional analysis. For example, in *Kansas v.*
20 *Hendricks*, 521 U.S. 346 (1997), cited by Defendants, the Court upheld the civil
21 commitment of a convicted sexual predator. In its decision, the Court cited *Jacobson*
22 for the limited purpose of establishing that there is no “absolute” right to liberty—a
23 concept Plaintiffs do not challenge here. The Court did not hold that those rights are
24 diminished during an emergency. *Id.* at 353 (emphasis added).

25 ² The Fifth Circuit’s decision in *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *1
26 (5th Cir. Apr. 7, 2020) (holding that the plaintiff’s immediate access to abortion
27 services did not warrant issuance of a temporary restraining order)— is not binding on
28 this Court. There, the court relied on *Jacobson* without considering the historical
context in which the *Jacobson* decision arose, as discussed above. *See Robinson v.*
Marshall, No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020)
(granting temporary restraining order to abortion providers) (appeal pending).

1 not include liberty to expose the community or the child to communicable disease or
2 the latter to ill health or death.” *Id.* at 166-67 (citing *People v. Pierson*, 176 N.Y. 201
3 (1903) (upholding the conviction of man who willfully refused to seek medical care
4 for child in his custody who later died of catarrhal pneumonia)). Read in proper
5 context, it is abundantly clear that Supreme Court simply acknowledged that limits
6 exist as to the exercise of constitutional rights; a concept Plaintiffs do not challenge
7 here.

8 Nothing in *Prince* supports Defendants’ outlandish proposition that the same
9 religious liberties so carefully considered by the Supreme Court in that case, are
10 subject to virtually *no* judicial scrutiny when there is an emergency declared by the
11 government. Indeed, the Court in *Prince* openly acknowledged the child labor law at
12 issue in that case would itself have been invalid if it were applied more broadly to all
13 persons and not just children. *Id.* at 167.

14 Even if the Court adopts Defendants’ proposed analytical framework, the
15 Orders still fail to pass constitutional muster and should be enjoined. The *Jacobson*
16 Court expressly acknowledges that:

17 “if a statute purporting to have been enacted to protect the
18 public health, the public morals, or the public safety, has no
19 real or substantial relation to those objects, or is, beyond all
20 question, *a plain, palpable invasion of rights secured by the*
21 *fundamental law*, it is the duty of the courts to so adjudge,
22 and thereby give effect to the Constitution.”

23 *Jacobson*, 197 U.S. at 31.

24 Here, Defendants’ Orders constitute a “plain, palpable invasion” of Plaintiffs’
25 fundamental rights, as set forth in Plaintiffs’ moving papers. The Orders have not
26 passed Legislative scrutiny, as is the case for duly enacted statutes, but rather are
27 decrees unilaterally issued by executive officers. As such, this Court is all that stands
28 between Defendants and their newly-claimed, nearly-absolute exercise of control over

1 Plaintiffs’ lives and liberties. *Jacobson* directs this Court to protect Plaintiffs’ rights,
2 even in times of an emergency.

3 **B. Defendants’ Orders Are Neither Neutral, Nor Generally Applied.**

4 Contrary to Defendants’ contentions otherwise, their Orders expressly
5 encumber religious practices, and do so in an arbitrary, discriminatory fashion.
6 Indeed, Governor Newsom and Attorney General Becerra now argue that the
7 Executive Order permits drive-in worship services because such conduct constitutes
8 “faith based services that are provided through . . . other technology.”³ Setting aside
9 this strained re-interpretation of their own Order, the mere fact such an interpretation,
10 strained or otherwise, is necessary proves the point: religious worship is not permitted
11 on the same terms and conditions as other activities deemed “essential” by
12 Defendants.⁴ Instead, Plaintiffs are required to adhere to vaguely worded
13 specifications applicable to the faithful, only. The U.S. and California Constitutions
14 do not tolerate such treatment—nor should this Court.

15 **CONCLUSION**

16 Plaintiffs respectfully request that the Court grant Plaintiffs’ application for a
17 temporary restraining order, and issue an order to show cause why a preliminary
18 injunction should not be issued.

19 Respectfully submitted,

20 Date: April 20, 2020

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24 ³ Following Governor Newsom’s filing of his opposition brief, San Bernardino and
25 Riverside Counties issued clarifications as to their respective Orders, indicating that
26 drive-in worship services would be permitted as a result of the Governor’s revised
27 stance. See, [https://www.pe.com/2020/04/17/riverside-san-bernardino-counties-
change-course-allow-drive-up-worship/](https://www.pe.com/2020/04/17/riverside-san-bernardino-counties-change-course-allow-drive-up-worship/).

28 ⁴ Defendants’ decision to permit drive-in religious services does not affect Plaintiffs’
request for the issuance of a temporary restraining order, because Plaintiffs also seek
to hold in-person services while adhering to social-distancing protocols.

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