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JOSIE GONZALES

15 **UNITED STATES DISTRICT COURT**

16 **CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION**

17 WENDY GISH, an individual;
18 PATRICK SCALES, an individual;
JAMES DEAN MOFFATT, an
19 individual; and BRENDA WOOD, an
individual,

20 Plaintiffs,

21 v.

22 GAVIN NEWSOM, in his official
23 capacity as to Governor of California;
24 XAVIER BECERRA, in his official
capacity as the Attorney General of
25 California; ERIN GUSTAFSON, in her
official capacity as the San Bernardino
26 County Acting Public Health Officer;
JOHN MCMAHON, in his official

27 [CONTINUED ON NEXT PAGE]
28

Case No. 5:20-cv-00755

**SAN BERNARDINO COUNTY
DEFENDANTS' OPPOSITION TO
PLAINTIFFS' APPLICATION FOR
TEMPORARY RESTRAINING
ORDER**

Trial Date: None Set

1 capacity as the San Bernardino County
2 Sheriff; ROBERT A. LOVINGGOOD,
3 in his official capacity as a San
4 Bernardino County Supervisor;
5 JANICE RUTHERFORD, in her official
6 capacity as a San Bernardino County
7 Supervisor; DAWN ROWE, in her
8 official capacity as a San Bernardino
9 County Supervisor; CURT HAGMAN
10 in his official capacity as a San
11 Bernardino County Supervisor; JOSIE
12 GONZALES, in his official capacity as
13 a San Bernardino County Supervisor;
14 CAMERON KAISER, in his official
15 capacity as the Riverside County Public
16 Health Officer; GEORGE JOHNSON in
17 his official capacity as the Riverside
18 County Executive Officer and Director
19 of Emergency Services; CHAD
20 BIANCO, in his official capacity as the
21 Riverside County Sheriff; KEVIN
22 JEFFRIES, in his official capacity as a
23 Riverside County Supervisor; KAREN
24 SPIEGEL, in her official capacity as a
25 Riverside County Supervisor; CHUCK
26 WASHINGTON, in his official capacity
27 as a Riverside County Supervisor; V.
28 MANUAL PEREZ, in his official
capacity as a Riverside County
Supervisor;

Defendants.

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1 **I. INTRODUCTION**

2 These are not normal times. The highly contagious COVID-19 virus is
3 circulating with deadly ease through local communities, states, nations and indeed the
4 world. With no current vaccine or cure, the only effective means of fighting the
5 unprecedented pandemic is to limit social interactions so as to stem the spread of the
6 disease. Thus people are called upon to stay at home and forgo all gatherings—to
7 stand together for a common purpose in solitude. The challenges and sacrifices this
8 poses are shared by all. People are required to give up the very gatherings that bring
9 joy and meaning to their lives. This is what communities must temporarily do if they
10 want to protect the most vulnerable among them, prevent the collapse of the
11 healthcare system, and avoid unnecessary deaths and suffering. And these sacrifices,
12 these limitations on the gatherings that people hold dear, will only be effective through
13 collective action. Ignoring the restrictions puts everyone at risk. Birthday parties,
14 funerals, church, temple and synagogue services, bar mitzvahs, and the like have all
15 been the unwitting source of the mass spreading of the virus as indeed anyone
16 attending such a gathering has the potential to end up being the next super spreader
17 devastating the community at large.

18 To address and have a fighting chance of reducing this public health issue of
19 epic proportions, the County of San Bernardino, the County of Riverside and the
20 State, have issued public health stay at home/shelter in place orders to prohibit public
21 gatherings. These stay at home orders are laws of general applicability; they apply to
22 all residents and visitors in the State, the County of San Bernardino and the County
23 of Riverside. While certain businesses and services deemed essential to health and
24 safety by the State (such as grocery stores and pharmacies) are permitted to continue
25 offering in-person services under strict public-health requirements, all other in-person
26 businesses and gatherings away from one's own home have been temporarily
27 prohibited in order to combat the spread of COVID-19. Schools have been shuttered,
28 sporting events canceled, performances postponed, group therapy sessions put on

1 hold, exercise/yoga and meditation sessions suspended. Neither Plaintiffs' church
2 services, nor religious gatherings in general, are singled out or otherwise treated
3 unfavorably under these public health orders. Indeed, Plaintiffs may participate in
4 and hold their religious services by live-streaming, praying or reciting scripture within
5 the confines of their own home.

6 Plaintiffs, however, argue they are entitled to special treatment and move for
7 an emergency ex parte application to suspend these public health orders from
8 operating to limit in-person gatherings outside their home. Plaintiffs, however, have
9 not met the high burden for the ex parte relief they seek and indeed if the relief they
10 seek is granted, it will substantially harm the County of San Bernardino's ability to
11 protect the community's health during this unprecedented public-health crisis. This
12 is because without widespread testing, which is not currently available, it is
13 impossible to know who might be a silent carrier of the disease or to properly limit
14 those who are infected from interacting with others. Thus, in-person gatherings
15 imperil not just the health of Plaintiffs' church going congregation but also the health
16 of the wider community as congregants circulate through grocery stores, visit the
17 doctor, go to the pharmacy or walk around the block (all activities still allowed under
18 the stay at home orders). The 2.1 million residents of the County of San Bernardino
19 are dependent on each other to protect the community by staying at home. This shared
20 sacrifice by the whole community will save lives by avoiding the pandemic's worst
21 case scenarios.

22 Plaintiffs show neither any emergency need for such an ex parte order which
23 does not provide an opportunity for a hearing or for defendants to properly brief these
24 critical issues, nor have Plaintiffs met the requirements of this Court's Standing Order
25 regarding ex parte applications. For this reason alone, Plaintiffs' ex parte request for
26 a temporary restraining order should be denied. Moreover, Plaintiffs have not met
27 any of the substantive elements for a temporary restraining order as they have not
28 shown any likelihood of prevailing on the merits or any immediate irreparable harm.

1 Nor do the balance of hardships or the public interest tip in Plaintiffs’ favor. Rather,
2 they tip in favor of the County of San Bernardino as it takes the action needed to stem
3 the spread of a highly contagious virus. For these reasons as well, Plaintiffs’ request
4 for a temporary restraining order should be denied.

5 **II. THE COVID-19 PANDEMIC AND PUBLIC HEALTH RESPONSES**

6 **A. State Of California Declares Emergency And Mandates Shelter In**
7 **Place Except For Essential Critical Workers**

8 On March 4, 2020, Governor Gavin Newsom declared a State of Emergency in
9 California as a result of the threat of COVID-19 with the singular goal of protecting
10 the public health and safety for all Californians. *See* County of San Bernardino’s
11 Request for Judicial Notice (“County of San Bernardino RFJN”), Exhibit A. Then,
12 on March 16, 2020, the State of California –California Department of Public Health
13 issued guidance for the prevention of COVID-19 Transmission for Gathering. The
14 State declared that all gatherings should be postponed or cancelled. Gathering is
15 defined in a neutral manner and applies to:

16 [A]ny event or convening that brings together people in single
17 room or single space at the same time, such as an auditorium,
18 stadium, arena, large conference room, meeting hall, cafeteria or
19 any other indoor or outdoor space.

20 *See* County of San Bernardino RFJN, Exh. B.

21 This was followed on March 19, 2020 with the issuance by Governor Newsom,
22 in his various capacities as Governor, the State Public Health Officer, and the Director
23 of the California Department of Public Health, of Executive Order N-33-20, which
24 directs all residents to shelter in place except as needed to maintain a continuity of
25 operations of defined critical infrastructure sectors. County of San Bernardino RFJN,
26 Exh. C. Governor Newsom, acting in his role as the State Health Officer, ordered:
27 [A]ll individuals living in the State of California to stay at home or at their place of
28 residence except as needed to maintain continuity of operations of the federal critical

1 infrastructure sectors. *See* County of San Bernardino RFJN, Exh. C, p. 2, numbered
2 par. 1.

3 The State Public Health Officer has called out a list which designates the
4 “Essential Critical Infrastructure Workers” who are exempt from the shelter in place
5 restrictions and designated to help state, local and industry partners as they work to
6 protect communities while ensuring the continuity of functions critical to public
7 health and safety, as well as economic and national security. These defined terms are
8 found at the following state website, and were last updated on March 28, 2020:

9 [www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Cr](http://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf)
10 [itical_Infrastructure_Workforce_Version_2.0_Updated.pdf](http://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf). The federal critical
11 infrastructure designation includes "Clergy for essential support." *Id.* at 12.

12 The Governor’s Executive Order N-33-20 specifically calls out the ability of
13 the Governor to “designate additional sectors as critical in order to protect the health
14 and well-being of all Californians." County of San Bernardino RFJN, Exh. C at 1.
15 Governor Newsom did so, by expanding the list of California's designated "critical
16 infrastructure sectors" to include "Faith based services that are provided through
17 streaming or other technology." County of San Bernardino RFJN, Exh. E which is
18 published at: <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>

19 Government Code § § 8567, 8627, and 8665 provides the legal authority for
20 the Governor's Executive Order. And, the Governor’s Executive Order is enforceable
21 pursuant to Government Code § 8665. While, California Health and Safety Code § §
22 120125, 120140, 131080, 120130(c), 120135, 120145, 120175 and 120150 provide
23 the legal authority for the State Health Officer found in Executive Order N-33-20.

24 In sum, these State Orders preclude public gatherings of all types without
25 regard to the content or subject of the gathering while, allowing limited exceptions so
26 that faith based services may stream services to their homes during this shelter in place
27 environment at play throughout California.

28

1 **B. The County Of San Bernardino’s Declared Emergency And Public**
2 **Health Orders**

3 The County of San Bernardino Board of Supervisors declared a Local Health
4 Emergency on March 10, 2020 based on the imminent and proximate threat to public
5 health based on the introduction of the novel and incurable COVID-19 virus. *See*
6 County of San Bernardino RFJN, Exhs. F and G. The County’s Proclamation of the
7 Existence of the Local Emergency calls out that with a population of over 2.1 million
8 residents and home to a high volume airport, there are significant risks to the
9 substantial spreading of this infectious disease. *See* County of San Bernardino RFJN,
10 Exh. H. Indeed, the Board specifically recognized this critical public health and safety
11 issues and declared that COVID-19 is:

12 [C]reating a condition of extreme peril to the safety of persons and
13 property within the territorial limits of the County of San Bernardino
14 which conditions are or are likely to be beyond the control of the
15 services, personnel, equipment, and facilities of the County of San
16 Bernardino. . .

17 See County of San Bernardino RFJN, Exh. H.

18 Then on March 17, 2020, following the directive of the Governor, the County
19 of San Bernardino issued an Order of the Health Officer of the County of San
20 Bernardino Cancelling all Gatherings. *See* County of San Bernardino RFJN, Exh I.
21 The County of San Bernardino's Order provides that:

22 [P]ublic or private Gatherings, as defined in this Order, are hereby
23 prohibited in the County. A “gathering” is defined as “any event or
24 convening that brings together more than one person in a single room
25 or single space at the same time, such as an auditorium, stadium,
26 arena, large conference room, meeting hall, cafeteria, or any other
27 indoor or outdoor space. Nothing in this Order prohibits the gathering
28 of members of a household or living unit.

1 *See* County of San Bernardino RFJN, Exh. I.

2 This limitation precluding gatherings mirrors the State's definition of
3 gatherings, and just like the State, applies across the board to all gatherings,
4 irrespective of the subject matter or nature of the gathering. In other words, the
5 limitation is content neutral and of general application as to all gatherings in the
6 County of San Bernardino.

7 Similarly, the County of San Bernardino Order of April 7, 2020 also imposed
8 a shelter in place restriction mirroring the State Order and as well, adopts the State's
9 designation of "Faith based services that are provided through streaming or other
10 technology" as essential critical infrastructure services that are permitted to occur. *See*
11 County of San Bernardino RFJN, Exh. J [noting that Governor Newsom's Executive
12 Order No. N-33-20 does allow faith based services that are provided through
13 streaming or other technology, while individuals remain in their homes]. The
14 following day, April 8, 2020, the County clarified that through April 12, 2020 drive-
15 in religious services would be allowed. *See* County of San Bernardino's RFJN, Exh.
16 K. The County also clarified that as to enforcement:

17 [T]he public is advised that although violation of a health order is a
18 violation of the California Health and Safety Code, the County does
19 not expect law enforcement to broadly impose citations on
20 violators. The expectation is that law enforcement will rely upon
21 community members to use good judgment, common sense, and act
22 in the best interest of their own health and the health of their loved
23 ones and the community at large.

24 *See* County of San Bernardino's RFJN, Exh. K.

25 In sum, the County of San Bernardino Local Orders mirror the State Orders,
26 preclude public gatherings of all types without regard to the content or subject of the
27 gathering while, allowing limited exceptions for critical infrastructure sectors which
28 includes allowing faith based services to stream services to their congregants homes

1 while California shelters in place. Plaintiffs’ ex parte request to be exempted from
2 these Orders precluding all public in person gatherings should be summarily rejected.
3 The health and safety of the County residents depends on it.

4 **III. PLAINTIFFS HAVE NOT MET THE HIGH BAR REQUIRED TO**
5 **SATISFY THE NEED FOR EMERGENCY EX PARTE RELIEF**

6 Plaintiffs’ ex parte request for a temporary restraining order must be denied as
7 Plaintiffs do not qualify, nor have they made a sufficient showing to support the need
8 for, emergency expedited ex parte relief. This is especially true in this case where
9 granting the ex parte relief sought by Plaintiffs will undermine the critical and
10 fundamental work of the County and the State needed to mitigate the spread of the
11 highly contagious COVID-19 virus.

12 Temporary restraining orders are for real emergencies only. The Federal Rules
13 of Civil Procedure provide that a temporary restraining order may only be granted if
14 specific facts are stated in an affidavit or a verified complaint that clearly show an
15 immediate and irreparable injury that will result to the movant before the adverse
16 party can be heard in opposition. Fed. R. Civ. Proc. § 65(b)(1)(A). Thus a plaintiff
17 must clear a high bar to obtain ex parte relief. This “reflect[s] the fact that our entire
18 jurisprudence runs counter to the notion of court action taken before reasonable notice
19 and an opportunity to be heard has been granted both sides of a dispute.” *Granny*
20 *Goose Foods, Inc. v. Bhd. of Teamsters*, 415 U.S. 423, 438 (1974). Courts recognize
21 very few circumstances justifying the issuance of an ex parte temporary restraining
22 order. *See Reno Air Racing Ass’n., Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir.
23 2006).

24 While the standard for granting a temporary restraining order is “identical” to
25 that for granting a preliminary injunction, where ex parte relief is sought, there is the
26 additional requirement that the applicant show that immediate relief is necessary. *See,*
27 *e.g., Hunt v. Nat’l Broad. Co., Inc.*, 872 F.2d 289, 292 (9th Cir.1989); *see also*
28 *Stanchart Sec. Int’l, Inc. v. Galvador*, 2012 WL 5286952, at *1 (S.D. Cal. 2012);

1 *Brown Jordan Intern. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D.
2 Haw. 2002). Thus, ex parte temporary restraining orders are “restricted to serving
3 their underlying purpose of preserving the status quo and preventing irreparable harm
4 just so long as is necessary to hold a hearing, and no longer.” *Granny Goose Foods,*
5 *Inc.*, 415 U.S. at 438–39. Moreover, this Court’s Standing Order also provides that
6 ex parte applications “will be DENIED” if the moving party fails to make the
7 appropriate showing under Rule 65(b) of the Federal Rules of Civil Procedure or fails
8 to include a statement of opposing counsel’s position. *See* Standing Order, No. 13, p.
9 10. Here, Plaintiffs have both failed to meet the emergency requirement under Rule
10 65(b) and failed to advise the Court of the County of San Bernardino’s intent to
11 oppose its application for a temporary restraining order as required by this Court’s
12 Standing Order and despite the specific request made by the County to Plaintiffs to so
13 advise the Court.

14 First and foremost, Plaintiffs' application for a temporary restraining order is
15 fatally flawed as there is no risk of immediate irreparable injury justifying ex parte
16 issuance of such relief. *See Stanchart Sec. Int'l, Inc. v. Galvadon*, 2012 WL 5286952
17 at *3 (S.D. Cal. 2012) [finding that, because the movants failed to show irreparable
18 harm, the court need not analyze other factors for a temporary restraining order]; *see*
19 *also Yi Tai Shao v. Tsan-Kuen Wang*, 2014 WL 12796401, at *1 (N.D. Cal. 2014)
20 [because the court found that no “immediate and irreparable” harm will result the
21 court did not address the merits of plaintiff’s motion further]. Indeed, a modest single
22 page, of a twenty-five page brief, with generalized propositions about alleged injury
23 is presented as a basis for the emergency relief sought by Plaintiffs. Plaintiffs appear
24 to rest on the mistaken proposition that because they “allege” a violation of
25 constitutionally protected rights, no further showing of a basis for emergency relief
26 or irreparable injury is required. Not so. Plaintiffs do not get a "free pass" simply
27 because they are making claims of constitutional violations and Plaintiffs otherwise
28 offer no argument supporting their claim of immediate irreparable injury.

1 Specifically, as Plaintiffs’ own evidence shows, there is no threat of
2 enforcement by the County of San Bernardino as against any of the Plaintiffs nor have
3 any of the Plaintiffs been cited or otherwise punished by the County of San
4 Bernardino. Rather, the April 8, 2020 Clarification by the County of San Bernardino
5 regarding religious services specifically calls out that the County “does not expect
6 law enforcement to broadly impose citations on violators” and that “the expectation
7 is that law enforcement will rely upon community members to use good judgment,
8 common sense, and act in the best interest of their own health and the health of their
9 loved ones and the community at large.” County of San Bernardino RFJN, Exh. K.
10 Here, there has not been any individual congregant, nor any religious facility, that is
11 under any threat of enforcement by the County of San Bernardino.

12 Moreover, Plaintiffs are not precluded from engaging in their constitutionally
13 protected activity. Rather, they can utilize numerous means for engaging in religious
14 services and activities such as attending religious services through streaming or other
15 technologies as well as practicing other faith based activities within their own homes
16 while the Court considers their claims under the normal preliminary injunction
17 briefing and hearing schedule.

18 *Elrod* does not compel a different result as that case involved highly protected,
19 time-sensitive, political speech. *Elrod v. Burns* 427 U.S. 347, 373 (1976). Political
20 speech is axiomatically the type of core expressive freedom that is most highly
21 protected. Here, Plaintiffs are not being prevented from “speaking”, rather, Plaintiffs
22 dispute whether the County and State can place limitations on their in-person
23 gatherings when weighed against the governmental interest in combating the spread
24 of a highly contagious disease that is part of a worldwide pandemic of epic
25 proportions. Plaintiffs have not identified any time sensitive aspects to their
26 gatherings other than their desire to resume such. And even if for some reason
27 Plaintiffs were to ultimately prevail on their underlying claims, a temporary restriction
28 on one type of religious service (namely in-person gatherings) when there are ample

1 alternatives available, does not rise to the level of a wholesale infringement on time-
2 sensitive expressive activity that the Supreme Court was faced with in *Elrod*. There
3 are simply no time sensitive issues at play warranting the issuance of an emergency
4 temporary restraining order.

5 Plaintiffs ask this Court to jump to the merits of the case—to wit: whether these
6 Counties and the State may limit in-person gatherings (including religious services)
7 to combat the spread of COVID-19—all without an opportunity for full briefing or a
8 hearing on these highly critical and hotly disputed issues. This Court should decline
9 that request and deny this temporary restraining order application.

10 **IV. PLAINTIFFS HAVE FAILED TO MEET THE SUBSTANTIVE**
11 **REQUIREMENTS FOR THE ISSUANCE OF A TRO**

12 The real emergency at play is for the State of California, the County of San
13 Bernardino, and the County of Riverside (along with sister governmental agencies) to
14 marshal all their respective powers and resources to combat the spread of a highly
15 contagious disease and flatten the curve of this pandemic. Plaintiffs’ demands to be
16 exempted from these Orders governing restrictions on in-person gatherings directly
17 undermines this fight and should be rejected outright.

18 The Supreme Court has deemed a preliminary injunction to be “an
19 extraordinary remedy never awarded as of right.” *Winter v. Nat’l Res. Def. Council,*
20 *Inc.*, 555 U.S. 7, 24 (2008). To obtain such extraordinary relief mandates that the
21 moving party show:

- 22 (1) likelihood of success on the merits;
- 23 (2) likelihood of irreparable harm absent a preliminary injunction;
- 24 (3) that the balance of equities tips in favor of issuing an injunction;
- 25 (4) that an injunction is in the public interest.

26 *Winter*, 555 U.S. at 24; Fed. R. Civ. P. Rule 65(b)(1). In the alternative, the
27 “sliding scale” approach can be used. Under this approach, a party seeking a
28 preliminary injunction must show a combination of serious questions going to the

1 merits, and must also show that the balance of hardships tips sharply in the movant's
2 favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–32 (9th
3 Cir.2011) [holding that the sliding scale test remained valid]. A weaker showing on
4 either of the two points can be outweighed by a stronger showing on the other. *Id.*
5 Plaintiffs fall well short of satisfying either of the standards for granting extraordinary
6 relief.

7 **A. Plaintiffs Have Not Established A Likelihood Of Success On The**
8 **Merits And Accordingly The TRO Must Be Denied.**

9 A temporary restraining order is an "extraordinary remedy that may only be
10 awarded upon a clear showing that the plaintiff is entitled to such relief" which
11 showing Plaintiffs have abjectly failed to make. *See Winter*, 555 U.S. at 22.

12 **1. The County of San Bernardino's Public Health Order Does**
13 **Not Violate The Free Exercise Clause Or The Freedom Of**
14 **Assembly Clause**

15 Plaintiffs' claim that the County's April 7, 2020 Public Health Order ("the
16 Public Health Order"), and in particular the Order's shelter in place requirements,
17 violates Plaintiffs' free exercise of religion and/or freedom of assembly must be
18 rejected. Rather, the County's emergency Public Health Order is a valid and neutral
19 law of general applicability that does not target Plaintiffs' exercise of religion or
20 unconstitutionally restrict their right of assembly. And, even assuming arguendo, that
21 the Public Health Order is not neutral or generally applicable (which it is), the Public
22 Health Order meets the heightened strict scrutiny standard as it is narrowly tailored to
23 meet a compelling government interest in addressing a public health crisis of
24 unprecedented proportions.

25 The First Amendment's Free Exercise Clause and Freedom of Assembly
26 Clause, apply to the states via the Fourteenth Amendment. U.S. Const. Amend. I;
27 *see Cantwell v. Connecticut*, 310 U.S. 296 (1940). The right to exercise one's religion
28 freely, however, "does not relieve an individual of the obligation to comply with a

1 valid and neutral law of general applicability on the ground that the law proscribes (or
2 prescribes) conduct that his religion prescribes (or proscribes).” *Stormans, Inc. v.*
3 *Wiesman*, 794 F.3d 1064, 1075–76 (9th Cir. 2015) quoting *Employment Div. v. Smith*,
4 494 U.S. 872, 879 (1990). A neutral law of general application need not be supported
5 by a compelling government interest even when the law has the incidental effect of
6 burdening a particular religious practice. *Id.* Laws of general application like those
7 at play here, need only survive rational basis review. *Miller v. Reed*, 176 F.3d 1202,
8 1206 (9th Cir. 1999). In contrast, laws that are not neutral or not generally applicable,
9 mandate a strict scrutiny application. *See Lukumi*, 508 U.S. at 531–32 [“A law failing
10 to satisfy these requirements must be justified by a compelling governmental interest
11 and must be narrowly tailored to advance that interest”].

12 The County of San Bernardino’s April 7, 2020 Public Health Order on its face
13 is both neutral and generally applicable. Specifically, the Public Health Order follows
14 the Governor’s Order by requiring all California residents to stay at home or shelter
15 in place except for certain critical infrastructure sectors as designated by the
16 Governor. These stay at home orders are clearly laws of general applicability, as they
17 apply to all residents and visitors to the State and the County of San Bernardino alike.
18 In light of this global COVID-19 pandemic, the Public Health Order was designed to
19 mimic the Governor’s Order so as to address the public-health emergency threatening
20 the entire state. Plaintiffs do not dispute the reason for the County’s Public Health
21 Order, but instead complain that the burden placed on their ability to meet for in-
22 person religious services by the Public Health Order unconstitutionally violates their
23 free exercise of religion. Not so. Neither Plaintiffs’ church services, nor religious
24 gatherings in general, are singled out or otherwise treated unfavorably. Rather, the
25 Orders are facially and operationally neutral as they are not directed at gatherings
26 because of their religious motivations. *See Stormans*, 794 F.3d at 1075–76. Indeed
27 faith-based services are recognized as essential businesses to the extent they offer
28 services “through streaming or other technology.” *See County of San Bernardino’s*

1 RFJN, Exh. E. Thus, unlike for other gatherings such as concerts or theater
2 performances, individuals can leave their homes to organize the technology needed
3 to stream a religious service from a place of worship.

4 Plaintiffs also futilely argue that the State and County of San Bernardino orders
5 are not laws of general application because they are substantially under inclusive
6 based on exemptions for designated critical infrastructure sectors whereby employees
7 are permitted to leave their homes to do their jobs while Plaintiffs are not allowed to
8 leave their homes and gather for in-person religious services. These critical
9 infrastructure employees, as designated by the State, of course include healthcare
10 workers, police officers, and emergency personnel but Plaintiffs focus on what they
11 dismissively refer to as “baristas” and “burger flippers.” These employees, however,
12 are part of the food sector and thus are permitted to provide take-away food services.
13 “Baristas” and “burger flippers” are not gathering in groups but providing services
14 with minimal social contact. Plaintiffs also take issue with marijuana dispensaries
15 being allowed to operate but as these have medical purposes, they too are exempted
16 as long as they provide take-away services only. The County is not violating
17 Plaintiffs’ constitutional rights by abiding by the State’s designations of these critical
18 infrastructure sectors. The County does not dispute that the Public Health Order is
19 restrictive but such limitations are needed to combat this unprecedented public health
20 crisis. Schools have closed, sporting events have been cancelled, and people can no
21 longer gather for performances, dinner parties, book clubs or group therapy sessions.
22 In short, comparable secular and religious gatherings have been similarly restricted as
23 the County fights to contain the spread of COVID-19 and these public health orders
24 are valid laws of neutral and general application. *See Stormans*, 794 F.3d at 1079,
25 1082.

26 Indeed, the County’s interest in issuing its April 7, 2020 Public Health Order is
27 compelling as it is directed at battling a highly contagious and deadly virus circulating
28 throughout the County, the State and the world at large. The scientific evidence and

1 data show that given the absence of a vaccine or a cure, currently the most effective
 2 method for battling this disease is through limiting social gatherings and practicing
 3 social distancing. Thus, even if strict scrutiny were to apply here (which it does not)
 4 the County's Public Health Order would pass muster. Plaintiffs futilely argue
 5 otherwise, claiming the Public Health Order is not narrowly tailored because of the
 6 exemptions for designated critical infrastructure sectors. But as discussed above,
 7 these exemptions are not for similarly situated secular gatherings but for the provision
 8 of such items as food, and healthcare. In short, even under the strict scrutiny standard,
 9 the disputed Public Health Order passes constitutional examination.

10 Finally, while the County of San Bernardino provided a four day exception
 11 for religious services from the new Public Health Order (issued April 7) over the April
 12 11 weekend during which Passover and Easter were celebrated, this neither shows
 13 selective enforcement nor does it mean that the Public Health Order must be enjoined.
 14 Rather, the County finds itself in unprecedented territory and as it works to implement
 15 the new directives from the State in a coordinated fashion, it determined that a one-
 16 time limited accommodation was warranted to ease in the drastic changes
 17 implemented by the State and County's safer at home directives

18 **2. The County's Public Health Order Does Not Violate The** 19 **Establishment Clause**

20 Plaintiffs' claim that the April 7, 2020 Public Health Order violates the
 21 Establishment Clause of the First Amendment also lacks merit. To comply with the
 22 Establishment Clause, the government action at issue must: (1) have a secular
 23 purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3)
 24 not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*,
 25 403 U.S. 602, 612-13 (1972). Here, the Public Health Order clearly comports with
 26 all these requirements.

27 The first prong of the *Lemon* test requires analysis that the government action
 28 being considered has a secular purpose or whether the purpose of the action is to

1 endorse religion. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 862 (2005). Where there
2 is both a secular and religious purpose motivating the action, the existence of a secular
3 purpose will generally satisfy this prong of the *Lemon* test. *See Cammack v. Waihee*,
4 932 F.2d 765, 773 (9th Cir. 1991); *see also Catholic League for Religious & Civil*
5 *Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1060–1061 (9th Cir. 2010).
6 Here it is undisputable that the County’s April 7, 2020 Public Health Order has a
7 secular health and safety purpose of combating the spread of a highly contagious
8 virus. Plaintiffs do not, and cannot, claim otherwise. Instead they make arguments
9 about the scope and application of the Public Health Order, pointing to the limited
10 exception for drive-up services allowed over the April 11th weekend. This, however,
11 does not negate the secular purpose of the Public Health Order.

12 Likewise, Plaintiffs cannot meet the second prong of the *Lemon* test, which
13 considers the primary effect of the government’s action. This prong looks at whether
14 the government’s action will be “perceived by adherents of the controlling
15 denominations as an endorsement, and by the nonadherents as a disapproval of their
16 religious choices.” *Sch. Dist. of Grand Rapids v. Phyllis Ball*, 473 U.S. 373, 390
17 (1985) [portions of the opinion overruled on other grounds by *Agostini v. Felton*, 521
18 U.S. 203 (1997)]. Thus, irrespective of the government’s actual objective, the courts
19 consider whether the practice in question conveys a message of endorsement or
20 disapproval of religion. *See id.* In *Cammack*, the Ninth Circuit ruled that a Hawaiian
21 statute which declared Good Friday to be a legal holiday passed the primary purpose
22 prong, even though some people consider Good Friday to be a religious observance
23 because the placement of Good Friday on the roll of public holidays, along with other
24 important days of secular and (in some cases) religious significance, did not lead to
25 an “endorsing” effect but was instead what “might be best termed a mere
26 ‘acknowledgement’ of religion.” *Id.* at 780.

27 Here, the County’s April 7, 2020 Public Health Order follows the Governor’s
28 Order in limiting gatherings but allowing religious services that are provided through

1 streaming or other technologies while individuals remain in their homes which has
2 neither an effect of endorsing or disapproving of religion. Likewise, the County’s
3 actions in allowing a one-time exception over the April 11th weekend for drive-up
4 religious services that coincided with both Easter and Passover, is not (nor do
5 Plaintiffs claim otherwise) an endorsement or disapproval of religion. Instead it was
6 a limited accommodation made to help ease in the acceptance of the restrictive but
7 necessary limitations required to help contain the spread of a destructive
8 virus.

9 Finally, Plaintiffs’ argument of excessive government entanglement is equally
10 specious. The entanglement prong seeks to minimize the interference of religious
11 authorities in secular affairs and secular authorities in religious affairs. *Cammack*,
12 932 F.2d at 780. Cases in which the Supreme Court has found excessive entanglement
13 include state aid to organizations affiliated with religious sects (such as parochial
14 schools) and situations where religious and public employees must work closely
15 together. *Id.* at 781. The April 7, 2020 Public Health Order involves no such
16 entanglement. Plaintiffs seem to wrongly assume that any enforcement or
17 interpretation of the Public Health Order leads to entanglement issues. They are
18 simply wrong. Indeed, Plaintiffs’ real claim appears to be that the County should be
19 more entangled with and accommodating of religious affairs by agreeing to Plaintiffs’
20 demands for in-person religious services.

21 Schools are closed; sporting events, concerts and theaters shuttered; group
22 therapy sessions (such as AA), book clubs, and meditation classes are not allowed;
23 and the list goes on. Despite Plaintiffs’ protestations to the contrary, in the face of the
24 substantial threats to health and safety, they are not entitled to special dispensation for
25 religious gatherings under the Establishment Clause.

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1 **3. The County’s Public Health Order Does Not Violate The Free**
2 **Speech Clause**

3 Plaintiffs also do not have a likelihood of prevailing on their First Amendment
4 free speech or freedom to assemble claims, as the County’s public health stay-at-home
5 order is a valid time, place and manner restriction under *Ward v. Rock Against Racism*,
6 491 U.S. 781, 791 (1989). The County’s Public Health Order is not targeted at any
7 “speech” and does not trigger either the prior restraint doctrine or the overbreadth
8 doctrine of the First Amendment under the Free Speech Clause. Moreover, as
9 discussed in detail above, even if the County’s Public Health Order was deemed
10 subject to strict scrutiny as content-based (which it is not) the County meets that
11 standard here given the unprecedented public healthcare crisis and the need to restrict
12 gatherings and implement social distancing to save lives, protect the health of
13 residents, and the functioning of the healthcare system.

14 **4. The County’s Public Health Order Is Not Invalid Under The**
15 **Vagueness, Due Process Or Equal Protection Doctrines**

16 Finally, Plaintiffs’ vagueness, due process and equal protection claims are also
17 specious and cannot support the issuance of a temporary restraining order. Plaintiffs
18 are aware that the County’s Public Health Order applies to religious gatherings (just
19 as it applies to secular gatherings) and its due process and vagueness claims are simply
20 recycled arguments that the County’s Public Health Order is unconstitutional because
21 it allows certain essential service activities to continue and because the County
22 allowed for a four day exemption for its new health care order over the April 11th
23 weekend right after the order went into effect. For the reasons discussed above, none
24 of these arguments support enjoining the County’s Public Health Order. Rather, the
25 fundamental right at issue is the right to practice one’s religion, not the right to in-
26 person practice as Plaintiffs wrongly assert, and the right to practice religion is not
27 being prohibited. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) [“Laws
28 that do not infringe a fundamental right survive substantive-due-process scrutiny so

1 long as they are “rationally related to legitimate government interests.”]

2 Moreover, even if the County’s Public Health Order is deemed to infringe a
3 “fundamental right”, it is narrowly tailored to serve a compelling government interest
4 and thus is not unconstitutional. *See Reno v. Flores*, 507 U.S. 292, 302, (1993); *see*
5 *also Stormans, Inc.*, 794 F.3d at 1085–88 [courts formulate the asserted right by
6 carefully consulting both the scope of the challenged regulation and the nature of
7 Plaintiffs' allegations].

8 **B. The Other TRO Factors Also Mandate Denial Of Plaintiffs’ TRO**

9 As Plaintiffs are unlikely to succeed on the merits of any of their claims, their
10 application for a temporary restraining order should be denied for this reason alone.
11 *See Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001) [movant will find it difficult
12 to meet its burden without showing substantial likelihood of success on the merits].
13 Moreover, as discussed in detail in Section III above regarding the lack of any
14 emergency or irreparable harm, Plaintiffs are not entitled to a temporary restraining
15 order merely because they allege constitutional violations. Rather, Plaintiffs must do
16 more than merely allege harm sufficient to establish standing, and instead they must
17 demonstrate immediate threatened injury which they have failed to do here. *See Los*
18 *Angeles Memorial Coliseum Comm'n v. Nat’l Football League*, 634 F.2d 1197, 1201
19 (9th Cir. 1980).

20 With respect to the final two temporary restraining order factors, the balance of
21 equities and the public interest also heavily support denial of the temporary restraining
22 order. The world is experiencing an unprecedented pandemic. Most states and the
23 nation, including California, are under mandatory stay-at-home orders, in an effort to
24 combat the spread of COVID-19 and avoid the needless death and suffering caused
25 by an exponential growth in infections and hospitalizations. The stay-at-home orders
26 will only be effective if residents metaphorically stand together and share in the
27 sacrifice by avoiding group gatherings in an effort to stem the spread of the virus.

28

1 **V. CONCLUSION**

2 Plaintiffs have failed to demonstrate that they are entitled to the extraordinary
3 remedy of an ex parte temporary restraining order to exempt religious gatherings from
4 the County’s April 7, 2020 Public Health Order which directs residents to stay-at-
5 home order to combat the spread of a highly contagious disease with no current
6 vaccine or treatment. Accordingly, the County respectfully requests that this Court
7 deny Plaintiffs’ application for a temporary restraining order.

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DATED: April 17, 2020

MEYERS, NAVE, RIBACK, SILVER &
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