

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 official capacity as Attorney General of California, WARREN
STANLEY, in his official capacity as the Commissioner of the California Highway
Patrol; SONIA Y. ANGELL, in her official capacity as the State Public Health
Officer
Defendants and Appellees.

On Appeal from the Order of the United States
District Court for the Eastern District of California
The Honorable John A. Mendez
District Court Case Number: 2:20-cv-00852-JAM-CKD

APPELLANTS' OPENING BRIEF

HARMEET K. DHILLON
MARK P. MEUSER
GREGORY R. MICHAEL
KARIN SWEIGART
DHILLON LAW GROUP INC.
177 Post Street – Suite 700
San Francisco, CA 94108
Phone: 415.433.1700

D. GILL SPERLEIN
LAW OFFICE OF D. GILL SPERLEIN
345 Grove Street
San Francisco, CA 94102
Phone: (415) 404-6615

Attorneys for Plaintiffs and Appellants Ron Givens and Christine Bish.

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“[C]onsistent[] with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime.” Justice Charles Even Hughes, *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

INTRODUCTION

There is no pandemic exception to the Constitution. Yet, for months, the Appellees (“state officials” or the “government”) have prohibited Appellants Ron Givens and Christine Bish from obtaining permits to lawfully protest the unprecedented actions of their elected officials. State officials have criminalized public demonstrations, rallies, and protests across California, but only for those holding one point of view. State officials, including the governor, have encouraged protests that present a viewpoint they support,¹ while criminalizing protests that

¹ California Governor Gavin Newsom, *Governor Newsom Update on Statewide Demonstrations & COVID-19*, YouTube (June 1, 2020), <https://www.youtube.com/watch?v=1z4HTQ49jWI&feature=youtu.be> (see timestamp 17:38–19:22); Hannah Wiley, “*Your rage is real,*” *Gavin Newsom tells California protesters*, THE SACRAMENTO BEE (June 1, 2020, 2:55 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article243173056.html>.

challenge the Government’s Stay-at-Home and Reopening Orders.^{2, 3} Givens and Bish agree the health and safety of the public is critically important during this crisis, which is why their measured and reasoned approach to lawful assembly included precautions following the latest CDC guidance for stopping the spread of COVID-19. They sought to engage with state officials to negotiate a mutually agreeable standard that would both address public health concerns and still allow them to exercise their constitutional rights – in short, to narrowly tailor the Orders. The state officials refused and banned protests, but then did an about face and began *supporting* protests, RJN Ex 6, (following none of the narrow tailoring Givens and Bish had proposed), when state officials agreed with the viewpoint of the speech at issue.

² “Orders” hereinafter refers to the Stay-at-Home Executive Order issued by California Governor Gavin Newsom, ER 193-94, as modified by Governor Newsom’s May 4, 2020, Order detailing California’s Reopening Plan, Executive Order N-60-20, RJN Exs. 1–3.

³ In light of California’s content-based and discriminatory enforcement (or lack thereof) of the Orders after the district court denied their motion for a temporary restraining order, Givens and Bish intend to file a motion to reconsider and request the court issue an indicative ruling per Federal Rule of Civil Procedure 62.1. Appellants have additionally filed a Request for Judicial Notice with this Court (“RJN”) concerning the same recent enforcement changes and decisions by the state.

Throughout the time when the Orders have been in effect, state officials, while restricting constitutionally protected activity, have allowed businesses deemed “essential,” as determined by state officials on an *ad hoc* basis, to continue operations provided that certain social distancing guidelines are followed. For example, the government has permitted marijuana dispensaries, take-out restaurants, hardware stores, and laundromats to continue operations, subject to these restrictions. Statewide, the news media have been permitted to continue operations unconstrained, due to the perceived importance of *their* First Amendment role in our society.

Gatherings to engage in core First Amendment protected activities such as demonstrations, rallies, and protests, however, did not make state officials’ cut, even if participants followed the exact same guidelines required of “essential” businesses. Instead, state officials banned these activities in their entirety until it was no longer politically expedient. The United States and California Constitutions simply do not tolerate such total and arbitrary restrictions thrust upon fundamental rights while less restrictive measures are available and are being allowed for entities the Government deems “essential.” And the viewpoint-discriminatory enforcement of the Orders by state officials strikes at the very heart of the First Amendment.

The state officials' actions violate the First and Fourteenth Amendments of the U.S. Constitution and the corresponding articles of the California Constitution. This Court should immediately enjoin the Governor and other Appellees from further violating the Appellants' First Amendment protected core liberties and award Appellants all requested relief.

ISSUES PRESENTED

1. Did the District Court err in failing to follow the Supreme Court's traditional tiered scrutiny review standards and instead applying a never before recognized tier of scrutiny below rational basis review to the violations of Appellants' fundamental rights? Excerpt to Record ("ER"), p. 7.⁴
2. Are Appellants likely to succeed on the merits of their claims that the Government's complete prohibition of peaceful assembly violates the United States and California Constitutions?
3. Are Appellants likely to succeed on the merits of their claims that the Government's viewpoint discriminatory enforcement of the Orders violates the United States and California Constitutions?

⁴ All further citations to the Excerpts of Record will be in the form "ER [page number(s)]."

4. Are Appellants likely to suffer irreparable harm absent an injunction prohibiting the Government from its continued restrictions of lawful assembly?
5. Do the public consequences of a preliminary injunction weigh in favor of temporarily enjoining the Government from further prohibiting peaceful assembly?

STATEMENT OF JURISDICTION

The district court had federal question subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a) and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

This Court may hear appeals from interlocutory orders of the District Court, which grant, continue, modify, refuse, or dissolve injunctions. *See* 28 U.S.C. § 1292(a)(1). An order denying a temporary restraining order may be appealable if it 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 Environmental Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)). This is so where the denial followed a “full adversary hearing” and if, “in the absence of review, the appellant would be effectively foreclosed from pursuing further interlocutory relief.” *Andrus*, 625 F.2d at 862.

This Court has jurisdiction over this appeal because the order below denied Appellants request for preliminary injunction. Appellants had moved for (1) a temporary restraining order and (2) an order to show cause why a preliminary injunction should not issue. ER 160. The District Court denied their requests following a full briefing on the merits and a hearing via Zoom video conference at which all parties were represented by counsel. ER 25.

At the conclusion of the hearing, the Honorable John A. Mendez expressed his intent to deny Givens and Bish a TRO and stated he would not set a hearing for a preliminary injunction motion. Judge Mendez offered that Givens and Bish were free to pursue “their right to appeal any decision by this Court to the Ninth Circuit.” ER 78, lines 12–15.

By denying Appellants’ motion, the District Court effectively decided the merits of the case and foreclosed the possibility of any further interlocutory relief. In the order, the District Court erroneously held, for example, that “the court would usurp the function of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case,” and “Plaintiffs [were] not likely to succeed on their challenge to the State’s stay at home order as an impermissible exercise of emergency police powers.” ER 8, 11. The court

further held that the Orders were narrowly tailored because “The 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.” ER 14.

The district court’s decision conclusively denies interlocutory injunctive relief. Given the evolving nature of the government’s response to the coronavirus outbreak, interlocutory relief may very well be the only relief the Appellants may expect to achieve in this action. As such, the district court’s order is tantamount to an order denying injunctive relief altogether and effectively deciding the merits of the case, providing this Court jurisdiction over the matter.

STATEMENT OF THE CASE

On March 13, 2020, President Donald J. Trump proclaimed a national state of emergency following an outbreak of a novel coronavirus, COVID-19. ER 176, ¶ 14. In the weeks and months following, the federal government’s projections of the anticipated national death toll from the virus decreased substantially.⁵ ER 176, ¶15.

⁵ According to data released by the Center for Disease Control, the percentage of hospital visits for influenza-like illnesses (“ILI”) has fallen sharply in recent weeks and is currently lower than ILI rates at the end of 2019, before any known outbreak of COVID-19 in the United States. <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html>.

On March 4, 2020, California Governor Gavin Newsom proclaimed a state of emergency as a result of the threat of COVID-19. ER 176, ¶16. On March 19, 2020, Newsom issued Executive Order N-33-20 requiring that “all residents . . . heed the current State public health directives.” ER 176, ¶17. The state public health directive required “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors . . .” *Id.* The directive stated that it “shall stay in effect until further notice.” *Id.*

On March 22, 2020, the California Public Health Officer designated a list of “Essential Critical Infrastructure Workers.” ER 114-17, 176, 193. Listed as a part of the “essential workforce” were quick serve food workers, grocery store workers, laundromats employees, workers supporting the entertainment industry, and workers supporting ecommerce. ER 177. The directive did not designate protestors, demonstrators, or individuals engaged in other First Amendment protected activities as “Essential Critical Infrastructure Workers.” ER 177, ¶20.

California’s emergency Orders amounted to a total ban on public gatherings for the purpose of engaging in protected First Amendment speech by means of demonstrations, rallies, or protests, regardless of measures taken to reduce or eliminate the risk of spreading the virus, such as designating larger spaces for

gatherings so that a minimum six-foot distance could be maintained between participants, directing participants to wear masks, encouraging participants to bring personal supplies of sanitizer, and/or designating volunteers to help maintain distancing. Meanwhile, state officials deemed the continuity of services provided by coffee baristas, restaurant workers, and laundromat technicians to be so necessary for society that these activities were permitted to continue under the Orders, despite the existence of the very same – or even greater – risk state officials imposed on to inhibit the exercise of fundamental First Amendment rights. ER 177, ¶ 20. Givens and Bish are permitted to peruse the aisles of their local grocery store alongside their neighbors for an unlimited amount of time, yet, under the Orders, it is criminal for them to engage in speech activity outside, because they seek to lawfully protest the actions of their government.

On May 4, 2020, Governor Newsom issued Executive Order N-60-20, also called California's Reopening Plan. RJN Exs. 1, 2. The plan allows schools, restaurants, factories, offices, shopping malls, swap meets, and others to operate with social distancing in Stage 2 of California's four-stage reopening process, but makes no mention of lessening restrictions on Californians' right to protest the actions of their government.

The grounds of the State Capitol Building are the most important and widely-used public forum in California. It is where legislators meet, and therefore, the closest that protestors may physically get to having their grievances actually heard by high-level government officials. One California court described the west plaza as “the frequent site of civic and ceremonial occasions, of concerts, receptions for visiting dignitaries, public meetings and demonstrations. Pickets urging a wide variety of viewpoints often stand or walk outside the west entrance and, less frequently, at the building’s other entrances. Distribution of handbills and solicitation of petition signatures are customary activities outside the Capitol entrances, particularly at the west plaza.” *Simpson v. Mun. Court*, 14 Cal. App. 3d 591, 597 (1971). Countless watershed protests have been held here, including the 2011-12 Occupy Wall Street protests in Sacramento,⁶ the 2018 protests against the police shooting of Stephon Clark,⁷ the 1991 protests in reaction to Governor Pete

⁶ *Mass arrests at Occupy Education protest at California State Capitol*, RT (Mar. 6, 2012, 4:52 PM), <https://www.rt.com/usa/occupy-protest-california-sacramento-979/>.

⁷ Eric Thomas, *Protests move to capitol building after Sacramento officer-involved shooting*, ABC 7 NEWS (Mar. 23, 2018), <https://abc7news.com/stephon-clark-shooting-sacramento-officer-involved/3252401/>.

Wilson's veto of gay rights,⁸ and the famous May 2, 1967 Black Panther Open Carry March protesting the anti-gun Mulford Bill.⁹

Appellant Ron Givens is Chief Firearms Instructor and Director of Training Operations at the Sacramento Gun Club. ER 174-75, ¶ 8. Givens has exercised his rights to free speech and peaceful assembly under the First Amendment numerous times in the past decades through public protests in front of the California State Capitol Building and has participated in and/or organized at least five permitted protests from 2010 to 2015. Givens sought to hold a protest on the State Capitol Building grounds, decrying the California DOJ's delays of background checks for gun purchasers under the guise of a public health emergency. Seeking to hold a protest on this matter on May 3, 2020, Givens submitted a permit application to the State Capitol Permit Office of the California Highway Patrol on April 22, 2020. ER 177-79, ¶¶ 22–31.

⁸ Scott Harris & Dan Morain, *Thousands of Gay Activists Converge on State Capitol: Demonstration: Five are arrested in protest of bias bill veto. Colorful spectacle shocks many onlookers.*, LOS ANGELES TIMES (Oct. 12, 1991, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1991-10-12-mn-153-story.html>.

⁹ *State Capitol March*, PBS, https://www.pbs.org/hueypnewton/actions/actions_capitolmarch.html.

On April 24, 2020, a CHP officer reached out to Givens inquiring as to why Givens required the entirety of the State Capitol Building grounds for his protest. Givens explained that he required sufficient space for all of his fellow protestors to maintain social distancing. The officer agreed with Givens that, upon that basis, the request was a good idea. ER 168, ¶11. However, the officer reached out again later in the afternoon to inform Givens that his permit request was denied. ER 168, ¶13. The CHP officer informed Givens the Governor instructed the CHP to deny all permits in light of the Orders. ER 168, ¶13. Givens received a confirmation email stating the same after the call. ER 168, Givens Decl. ¶13.

The State Capitol Building grounds have sufficient space for Givens' planned protest, even with social distancing and a large number of attendees. Assuming a 12 feet by 12 feet square of space centered around each person, this would mean that each protestor would at most, require 144 sq. ft. of space for themselves. Givens estimated that around one thousand protestors had planned to attend the event, which would require 144,000 sq. ft. of land. ER 179, ¶ 36. The State Capitol Grounds is at least forty (40) acres of land, or 1,742,400 sq. ft. Accordingly, more than ten thousand protestors – far more than the thousand planned by Givens - would be able to meet while safely following social distancing guidelines within the State Capitol grounds. Givens not only planned to instruct his

fellow attendees to follow social distancing and wear masks, but also to have volunteers ensure mask-wear and social distancing by acting as guides and marking places with tape. ER 167, Givens Decl. ¶¶ 8-9.

To his knowledge, Givens has never had nor contracted COVID-19, and has never exhibited the related symptoms. ER 168, ¶ 14. As a result of not being able to protest, Givens has been deprived of the opportunity for airing his grievances against the government, including speech activities pertaining to the coronavirus outbreak and the government's response, especially as to Second Amendment rights.

Appellant Chris Bish, a resident of Sacramento County, is a firm believer and practitioner of her First Amendment rights to free speech and peaceful assembly. She often participates in public demonstrations against governmental overreach. On April 20, 2020, Bish attended a rally, which advocated the lifting of the Orders and restarting the economy. During the rally, Bish observed CHP officers not wearing masks. ER 170, ¶ 3.

On or around April 20, 2020, Bish applied to the CHP for a permit to hold a rally in front of the State Capitol Building. The purpose of the rally was to encourage the state to lift its coronavirus-related restrictions. ER 170, ¶ 4. The CHP denied this application "due to the State and County Health Order and our

inability to ensure proper social distancing to keep demonstrators safe.” ER 170, ¶ 6. The CHP then inquired whether she would still hold the protest despite the denial. ER 170, ¶ 7. Surprised by the question, Bish replied that she did not plan to, as CHP had denied her permit. ER 170, ¶ 8. The CHP then informed her that many groups planned to hold their demonstrations despite the blanket denials of permits. ER 170, Bish Decl. ¶ 9.

Between the time that Givens and Gish made their requests for lawful permits to protest and now, numerous other groups have illegally protested at the Capitol, RJN Exs 10–11, and elsewhere. RJN Ex 8. Many protesters have refused to wear masks or practice social distancing. RJN Ex 12. Law enforcement officials have arrested individuals for protesting in violation of the Orders when those protests are protesting the Orders themselves, RJN Ex 13, but have not arrested protestors for violations of the Orders, and have in fact encouraged protests against police brutality. RJN Exs 6, 9.

On May 25, 2020, the Governor issued new guidance allowing in person protests if “(1) attendance is limited to 25% of the relevant area’s maximum occupancy, as defined by the relevant local permitting authority or other relevant authority, or a maximum of 100 attendees, whichever is lower, and (2) physical distancing of six feet between persons or groups of persons from different

households is maintained at all times.” RJN Ex 17. The guidance stated failure to adhere to these rules could result in “enforcement action.” Soon thereafter, the Governor made an appearance at Sacramento police brutality protests on June 3, 2020, where he encouraged those who “want to express themselves” to “keep doing it,” even though the protests violated the Governor’s latest Order issued just one week prior. RJN Exs 6–7. At a news conference on June 5, the Governor was reported as saying, “Protestors have the right not to be harassed,” and “protestors have the right to protest peacefully.” RJN Ex 14. On June 7, 2020, the California Highway Patrol estimate 15,000 people attended a Saturday protest that ended at the Capitol grounds. RJN Exs 15–16. Video of the events shows protestors not wearing masks and violating the Orders by failing to maintain 6 feet of physical distancing. *Id.* Additionally, the Order included a caveat that public health officials would be reviewing limitations on attendance “at least every 21 days” to assess “the impacts of these imposed limits on public health and provide further directions.” RJN Ex 17.

PROCEDURAL HISTORY

On April 27, 2020, Givens and Bish filed their Complaint and an application for a temporary restraining order and for an order to show cause why a preliminary injunction should not issue. ER 172, 160. The next day, the court issued a minute

order setting the briefing schedule. ER 159. Appellees filed oppositions to the motion on May 1, 2020. ER 199; Doc. No. 10. Appellants filed their reply regarding application for temporary restraining order on May 5, 2020. ER 199; Doc. No. 15. On May 7, 2020, the District Court held a hearing via video conference on Appellants' motion, and later issued the order denying the motion on May 8, 2020. ER 1.

Givens and Bish filed their timely notice of appeal on May 17, 2020. ER 81.

STANDARD OF REVIEW

This Court reviews a district court's "denial of a preliminary injunction for abuse of discretion." *All for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "An abuse of discretion will be found if the district court based its decision 'on an erroneous legal standard or clearly erroneous finding of fact.'" *Id.* This Court reviews conclusions of law de novo and findings of fact for clear error. *Id.*

SUMMARY OF THE ARGUMENT

In rejecting Appellants' constitutional claims, the district court erroneously applied a tier of scrutiny below rational basis which has never been recognized, applied, or discussed by the Supreme Court. ER 1-2. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), which has been misinterpreted by several

lower courts in recent months, did not create a level of scrutiny below rational basis for emergency situations. The district court's flawed standard gives unbridled police powers to state and local governments allowing nearly unfettered constitutional violations to occur with impunity. The Supreme Court has never suggested that constitutional rights give way to plenary state power wholesale in an emergency, and *Jacobson*, a case examining liberty interests in the context of the Fourteenth Amendment, does not suggest or require that courts ignore the Constitution in the shadow of an emergency. *Jacobson*, 197 U.S. at 27.

The district court further erred in finding the Orders were a permissible prior restraint on speech and did not violate the freedom of assembly or the right to petition the government. The restrictions should have failed an appropriate constitutional test, because they place significant burdens on speech and are not narrowly tailored.

The district court also erred because Appellants were not afforded sufficient due process, given that the Orders are impermissibly vague.

Finally, the district court erred in failing to apply binding precedent interpreting the liberty clause of California's constitution because the court found the standard impractical. It is not the court's prerogative to disregard binding precedent from the California Supreme Court because it disagrees with the

precedent. For these reasons and more, this Court should grant Appellants their requested relief.

ARGUMENT

This Court has established two sets of criteria for evaluating a request for injunctive relief. *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir. 2003). Under the “traditional” criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) a likelihood of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Alternatively, injunctive relief may be appropriate when a movant raises “serious questions going to the merits” and the “balance of hardships tips sharply in the plaintiff’s favor,” provided that the plaintiff is able to show there is a likelihood of irreparable injury and that the injunction is in the public interest. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

For the reasons addressed below, Appellants meet all the criteria for injunctive relief. They have proven a clear violation of their constitutional rights; they will continue to be injured if relief is not granted; the balance of hardships tips

in favor of protecting their constitutional rights; and it is in the public interest to protect constitutional rights from government overreach.

I. THE SUPREME COURT HAS NEVER HELD THAT CONSTITUTIONAL RIGHTS GIVE WAY TO PLENARY POLICE POWER IN AN EMERGENCY.

A. *Jacobson* Did Not Establish a Tier of Scrutiny Below Rational Basis for Analyzing the Constitutionality of Government Action During an Emergency.

The Supreme Court’s decision in *Jacobson* did not establish precedent that traditional constitutional scrutiny be supplanted by the whims of police power in an emergency.¹⁰ The district court’s analysis of *Jacobson* both misinterprets the case itself and fails to consider the last century of Supreme Court precedent applying *Jacobson* and developing an established constitutional framework for analyzing potential violations of constitutional rights, sometimes in very trying circumstances. Prior to the public health crisis triggered by COVID-19, despite

¹⁰ To the contrary, throughout this nation’s history, overzealous use of police power, regardless of the emergency giving rise to its exercise, has been shown to have no place under the Constitution. See *Ex parte Milligan*, 71 U.S. 2, 39 (1866) (holding during the Civil War that civilians cannot be convicted by military tribunals while regular courts remain open); *Korematsu v. U.S.*, 323 U.S. 214 (1944) (condoning internment of Japanese citizens during World Word II); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu v. U.S.*, 323 U.S. 214 (1944), condoning internment of Japanese citizens during World Word II,] was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.”).

numerous discussions of *Jacobson* in the last century, no court had ever interpreted *Jacobson* in the way the district court suggests. *Jacobson*, a case examining liberty interests in the context of the Fourteenth Amendment, did not create a standard below rational basis to analyze potential violations of constitutional rights in emergency situations, and the Supreme Court has never recognized such a standard. *Jacobson*, 197 U.S. at 27.

In *Jacobson*, the Supreme Court upheld a conviction under a Massachusetts statute that criminalized the defendant's refusal to vaccinate himself from smallpox. *Id.* The defendant asserted the statute violated his liberty interests under the Fourteenth Amendment. *Id.* at 12. Within the *Jacobson* Court's discussion, the Supreme Court included the following sentence:

If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.

Id. at 32 (emphasis added).

It is from this language the district court purportedly derived its test:

In view of this principle, when a state exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless (1) there is no real or substantial relation to public health, or (2) the measures are “beyond all question” a “plain, palpable invasion of rights secured by [] fundamental law.

ER 8.

There are several glaring problems with the district court’s articulation of the “emergency test” from *Jacobson*. First and foremost, there is no mention of the word “emergency.” *Jacobson*, 197 U.S. at 31. There is no language in the articulated test that could reasonably be construed to limit this standard to only emergencies. Instead, it would apply to any “matter affecting the general welfare” at any time. *Id.*

Nor would this exception be limited to matters related to “public health,” as public health lists as its equal the terms “public morals” and “public safety.” *Id.* The logical extension of the district court’s test would mean that the legislature could violate *any* constitutional right, at *any* time, as long as it bears a “real or substantial relation” to a matter of “public health, public morals, or public safety” and is not a “plain, palpable invasion of rights secured by the fundamental law.” *Id.* Allowing this test to stand would swallow up the entirety of the Court’s last century of constitutional jurisprudence and impose a new standard, below rational basis review, for any matter of government-claimed “public health, public morals,

or public safety.” This remarkable defenestration of a century of Supreme Court precedent cannot be allowed to stand.

The Supreme Court has only cited *Jacobson*’s “plain, palpable invasion of rights” language twice, and not since 1917. *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917); *Lochner v. New York*, 198 U.S. 45, 55, 58 (1905). In *Thomas Cusack*, the Court cited the language in a discussion of the “reasonableness” of a city’s regulation of billboard placement. *Thomas Cusack Co.*, 198 U.S. at 529. In *Lochner*, which has since been overturned, the Court referenced the *Jacobson* language only to say the case did not apply. *Lochner*, 198 U.S. at 55, 58.

Subsequent Supreme Court citations of *Jacobson* focus largely on questions surrounding interpretations of the Fourteenth Amendment. For example, in *Cruzan v. Dir., Missouri Department of Health*, the Supreme Court compared the liberty interest at issue in *Jacobson* with the liberty interest at issue in the decision to withhold life-sustaining treatment before applying traditional constitutional scrutiny to the Missouri policy at issue. *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 278 (1990). Similarly, in *Mills v. Rogers*, the Court cited *Jacobson* in its discussion of how, under the applicable constitutional framework,

individuals' liberty interests should be weighed against competing state interests.

Mills v. Rogers, 457 U.S. 291, 299 (1982).

The Supreme Court has frequently cited *Jacobson* in its discussion of the right to privacy under the Fourteenth Amendment in the reproductive rights context. *See, e.g., Roe v. Wade*, 410 U.S. 113, 154 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992). When cited outside the Fourteenth Amendment context, the Court has generally used it as an example of potentially permissible restrictions on rights if neutrally applied. *See, e.g., Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990); *Everson v. Board of Ed. Ewing Tp.*, 330 U.S. 1, 32 (1947). In the Court's seventy-nine citations to *Jacobson* over the last 115 years, the Supreme Court has never once recognized the separate lower scrutiny test applied by the district court.

Jacobson was decided decades before the First Amendment was incorporated to the states. *See Gitlow v. New York*, 268 U.S. 652 (1925) (free speech clause); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (free assembly clause); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (right to petition).

Jacobson did not involve the First Amendment, and therefore does not, and could not, control this Court's analysis of Appellants' claims. *Jacobson*, 197 U.S. at 27.

Additionally, over the last 115 years since *Jacobson* was decided, the Supreme Court has developed a substantial and durable body of case law establishing, unequivocally, that a state’s infringement of fundamental rights enshrined by the First Amendment to the U.S. Constitution is subject to heightened judicial scrutiny: *See, e.g., Brown v. Entertainment Merchants Ass’n*, 564 U.S. 786, 799 (2011)(strict scrutiny applied where the government regulation is not content neutral); *United States v. O’Brien*, 391 U.S. 367, 376 (1968)(a form of intermediate scrutiny when a law restricts conduct that combines “speech” and “nonspeech” elements); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (restrictions on the time, place, and manner of speech must be justified without reference to the content of the regulated speech, must be narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information).

The Supreme Court cases citing *Jacobson* show the Court intends *Jacobson*’s analysis be incorporated within the Court’s traditional tiered scrutiny framework for constitutional rights. *See e.g., Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990) (discussing *Jacobson* in the context of rational basis review); *Bates v. City of Little Rock*, 361 U.S. 516, 524–525 (1960) (citing *Jacobson* as an example of a compelling government interest that can

subordinate “a significant encroachment upon personal liberty”). Emergency use of the police power is to be considered evidence of the government’s rational or compelling purpose in the context of the court’s traditional tiered scrutiny, *see S. Bay United Pentecostal Church*, No. 205465, 2020 WL 2316679, at *3, not afforded a separate emergency scrutiny standard even lower than that of rational basis review. None of the Supreme Court’s citations to *Jacobson* in the last century suggest *Jacobson* established a separate, lower tier of scrutiny that courts should apply in government-defined emergencies. The district court abused its discretion by failing to apply the Supreme Court’s traditional tiered scrutiny analysis and instead applying a never before identified standard, from language that has not been cited by the Supreme Court in over a century, and both adding and subtracting words from that language to buttress the district court’s desired result.

B. Appellants Should Prevail Even Under the District Court’s Inappropriate Scrutiny Standard

Even under the district court’s erroneous interpretation of *Jacobson*, government action is still rendered unconstitutional if it “has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson*, 197 U.S. at 31; *see also Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020) (granting a temporary restraining order to abortion providers) (appeal

pending); *First Baptist Church*, No. 20-1102-JWB, 2020 WL 1910021, at *3 (applying strict scrutiny to the plaintiff's claims of constitutional violations arising from Kansas' prohibition on public gatherings).

For reasons discussed in greater detail in Section II below, the Government cannot meet even this standard; its indefinite and total ban on the exercise of First Amendment rights is beyond all question, a plain, palpable invasion of fundamental rights. Allowing the entertainment industry and frontline news reporters to gather in order to engage in speech and expressive activities under CDC guidelines, but restricting protestors challenging governmental actions from expressing their rights under the identical guidelines clearly singles out a certain viewpoint for disfavored treatment. The State allows restaurants, shopping malls, and swap meets to open, but continues to refuse to extend permits to Givens and Bish to engage in lawful protest compliant with social distancing guidelines. The arbitrary Orders are a plain and palpable invasion of Appellants' rights and do not satisfy even the district court's new, erroneous test.

The district court erred in interpreting *Jacobson* to provide a free-standing tier of constitutional scrutiny below rational basis review to be applied in government-defined emergency situations. *Jacobson* does not supplant the

Supreme Court’s long standing and well-established traditional scrutiny tests for analyzing violations of constitutional rights.

II. APPELLANTS HAVE PROVEN MULTIPLE, FLAGRANT VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS.

The Orders, both facially and as applied, violate several sacred constitutional rights of Givens and Bish. The First Amendment of the U.S. Constitution forbids laws “abridging the freedom of speech” and protects “the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I. The California Constitution similarly forbids laws that “abridge liberty of speech,” or restrict peoples’ “right to restrict their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.” Cal. CONST. art. I § 2–3. “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978) (“Violations of first amendment rights constitute per se irreparable injury.”).

A. The Orders Impermissibly Restrict Appellants’ Right to Engage in Protected Political Speech.

“Political speech is core First Amendment speech, critical to the functioning of our democratic system” and “rest[s] on the highest rung of the hierarchy of First

Amendment values.” *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009); *see also Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”). The Supreme Court has recognized that “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)).

The First Amendment “applie[s] with particular force to a march and other protest activities.” *Long Beach Area Peace Network*, 574 F.3d at 1021 (internal quotations and citations omitted). “[T]iming is of the essence in politics [W]hen an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.” *N.A.A.C.P., W. Region v. City of Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984) (citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969)). 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.” *Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968) (internal quotation omitted).

Givens and Bish seek to engage in core political speech occupying the highest rung of First Amendment protection. Each Appellant wants to gather with like-minded individuals so that their communal voices may be heard by their elected officials. The Orders criminalize Appellants' efforts to gather to engage in protected political dissent, boldly and impermissibly intruding on their constitutional rights.

1. *The Orders are facially unconstitutional as they are not content neutral or narrowly tailored to restrict only such speech as necessary to accomplish the government's goal.*

“[T]raditional public fora are areas that have historically been open to the public for speech activities.” *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). The Government's ability to restrict speech in a traditional public forum is “very limited.” *Id.* Prior restraints on speech, those that forbid certain communications in advance, “bear a heavy presumption of unconstitutionality because they ‘are the most serious and the least tolerable infringements on First Amendment rights.’”¹¹ *U.S. v. Baugh*, 187 F.3d 1037, 1042 (9th Cir. 1999) (citing *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994)).

¹¹ The protection afforded by California's liberty of speech clause, Cal. CONST. art. 1 § 2, in this circumstance is coterminous with the protections provided under the First Amendment. *Los Angeles All. For Survival v. City of Los Angeles*, 993 P.2d 334, 367 (Cal. 2000).

In a traditional public forum, the government “may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” *McCullen*, 573 U.S. at 476 (2014) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Here, the Orders violate the First Amendment on their face because they are not content neutral or narrowly tailored.

2. *The Order’s speech restrictions are not content neutral because they allow members of the entertainment industry and the press to continue to gather for speech purposes, but restrict those who wish to gather to protest.*

“The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.” *Ward*, 491 U.S. at 791. “Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’” *Id.* (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)). However, a law can also be content based if it distinguishes between speakers or types of events. In *Reed v. Town of Gilbert*, the Supreme Court found that a law that placed restrictions on temporary

directional signs was subject to strict scrutiny because it treated political directional signs different than it treated other temporary directional signs. *Reed v. Town of Gilbert*, 576 U.S. 155, 170-71 (2015).

The Orders are not content neutral because they allow members of the entertainment industry and the press to continue to gather to propagate their speech, but not protesters. Givens and Bish sought to engage in political dissent, which “rest[s] on the highest rung of the hierarchy of First Amendment values” and should be afforded the greatest constitutional protection. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009). The Orders with a broad-brush stroke, deem “essential” “[w]orkers supporting the entertainment industries, studios, and other related establishments,” regardless of the type of speech these workers support. These “essential workers” are allowed to gather to engage in speech if they follow social distancing, but Appellants were not allowed to gather under those same standards. Similarly, the Orders deemed “news reporters” and other workers supporting “newsgathering, reporting, and publishing news” as essential. Freedom of the press is specifically protected under the First Amendment alongside freedom of speech, the right to peaceably assemble, and the right to petition the government. U.S. CONST. amend. I. Yet, in the Orders, only members of the press were deemed sufficiently “essential” to be permitted to

continue their First Amendment activities unconstrained. The Orders are not content neutral because they allow entertainment speech and press speech to proceed if individuals follow social distancing, but restrict political dissenters from gathering to speak following the exact same standards.

3. *The Orders are not narrowly tailored because they burden substantially more speech than necessary to protect Californians from spreading COVID-19.*

To be narrowly tailored, a restriction must not “burden substantially more speech than is necessary to further the government’s legitimate interests,” and “may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Id.* at 799. “[T]he existence of obvious, less burdensome alternatives is a relevant consideration in determining whether the fit between ends and means is reasonable.” *Berger v. City of Seattle*, 569 F.3d 1029, 1035–36 (9th Cir. 2009).

Here, the Orders are facially unconstitutional because they are not narrowly tailored and burden substantially more speech than necessary to slow the spread of COVID-19. They eliminate *all* public protests, rallies, and demonstrations, ER 177-81, ¶ 22–48, the quintessential form of First Amendment protected speech. The state officials have alternatives that would allow protected speech to continue while still accomplishing their goals. The alternatives would permit protected

political speech in accordance with CDC guidelines with no more risk than other “essential” activities, including activities that enjoy no constitutional protection. The Orders cut protected speech with a sword when what is needed to protect Californians is a scalpel.

The grounds of the State Capitol building are the most important and widely-used public forum in California. The Legislature continues to gather following CDC guidelines during this crisis, yet Appellants cannot gather to collectively make their opinions known to their Legislators under the same guidelines. The Orders carry the threat of criminal prosecution for any Californian who desires to protest or petition the government during this time of critical government engagement. They are not narrowly tailored and therefore violate Appellants free speech rights.

B. The Orders Are Unconstitutional As Applied Because Government Officials Are Enforcing The Orders in a Content-Discriminatory Manner, Criminalizing Only Protests Against the Orders While Actively Encouraging Protests Supporting a Favored Viewpoint.

It is unconstitutional to enforce a speech restriction in a content-discriminatory manner.¹² *Hoye v. City of Oakland*, 653 F.3d 835, 849 (9th Cir.

¹² Givens and Bish, concurrent with this brief’s filing, have filed a Request for Judicial Notice with this Court concerning recent enforcement changes and

2011) (finding a constitutional violation where the police only enforced an otherwise content neutral statute against one viewpoint). “The government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). The government may not use otherwise neutral laws to “favor speakers on one side of a public debate.” *Hoye*, 653 F.3d at 849. The government violates the constitution when it only enforces speech restrictions against disfavored speakers. *See Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002).

Appellants applied for permits to protest on State Capitol grounds, and the CHP denied their applications. ER 170, ¶ 8; ER 168, ¶13. Neither Givens nor Bish expected so large a number of attendees that it would have prevented the protest from following CDC social distancing guidelines. Additionally, Appellants actively attempted to negotiate with state officials for a solution that would have satisfied the government’s public health concerns. When Bish was denied a permit,

decisions by the state. While the general rule is appellate courts may not consider evidence and argument outside the district court record on appeal, it is within this Court’s discretion to do so. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). This is one such “extraordinary case” where this Court should consider the facts included in Appellants’ RJN and related argument to prevent injustice. *Int’l Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

the CHP informed her that many groups planned to hold demonstrations despite being denied permits. ER 170, ¶ 9. Indeed, many groups have held unauthorized protests in violation of the Orders, RJN Exs 6–16, but whereas the government has arrested individuals protesting the Orders for gathering in violation of the Orders, RJN Ex 13,¹³ the government has not arrested individuals similarly gathered to protest police brutality.¹⁴ RJN Exs 8–9, 16.

Even after state officials loosened restrictions, RJN Ex 17, they continue to threaten enforcement, but yet, allow protests well outside the operative state guidelines for certain speakers. RJN Ex 16 (stating the Capitol police brutality protest on June 6, 2020, was estimated to include 15,000 people when the guidelines limit attendance to 100). The Orders also create the possibility, even likelihood that should police brutality protests result in an increase in coronavirus cases, the state officials will once impermissibly restrict disfavored speech once

¹³ Sam Stanton et al., *32 arrested in California Capitol protest demanding end to stay-at-home order, CHP says*, THE SACRAMENTO BEE (May. 1, 2020, 11:01 AM), <https://www.sacbee.com/news/local/article242421321.html>.

¹⁴ Kristi Gross, *Protest of solidarity surround State Capitol in wake of George Floyd killing*, FOX 40 (May. 30, 2020, 10:53 AM), <https://fox40.com/news/local-news/protests-of-solidarity-surround-state-capitol-in-wake-of-george-floyd-killing/>.

the present unrest has subsided.¹⁵ This selective enforcement regime, which singles out favored speech for exemptions yet enforces restrictions on disfavored speech, is anathema to the First Amendment. The government violates the free speech clause of the First Amendment by enforcing the Orders' restrictions on political speech in a content-discriminatory manner.

C. The Orders Impermissibly Restrict Appellants' Rights to Peaceably Assemble.

“The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental’ [because] [a]ssembly, like speech, is indeed essential in order to maintain the opportunity for free political discussion.”

Gibson v. Florida Legislative Investigation Committee, 371 U.S. 539, 563 (1963)

¹⁵ Because state officials continue to threaten further restrictions on speech should the coronavirus infection rate increase, even if Appellants may no longer receive injunctive relief, the Appellants' claims fall within several established exceptions to mootness. Declaratory relief would be justified because “the challenged government activity ... is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.” *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 122 (1974). Further, there is a reasonable likelihood that the Appellants will be subject to the injury again. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Finally, a defendant's voluntary cessation of a challenged practice does not deprive federal courts of their power to determine the legality of a practice when the defendant would be, as here, “free to return to his old ways.” *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000).

(internal quotations omitted).¹⁶ The right to assemble is a fundamental right which “cannot be denied without violating those fundamental principles which lie at the base of all civil and political institutions.” *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (internal citation omitted).¹⁷ “[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of wide variety of political, social, economic, education, religious and cultural ends.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

Because the right to assemble is so fundamental, the Supreme Court has stated, “laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.” *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967). A statute that denies individuals the right to assemble or associate for the purposes of exercising First Amendment rights of free speech is subject to strict scrutiny – asking whether

¹⁶ The California Constitution also protects the right to freely assemble. *See, e.g.*, Cal. CONST. art. I, § 3; *People v. Chambers*, 72 P.2d 746 (1937) (“laws should not infringe upon our guaranteed freedom of speech and lawful assembly.”).

¹⁷ *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) incorporated the freedom of assembly clause to the states.

a restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. *See Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984); *Lincoln Club of Orange County v. City of Irvine, CA*, 292 F.3d 934, 938 (9th Cir. 2002). As discussed by the Supreme Court in *Roberts*, infringements on rights of expressive association, which the court discusses in tandem with the right of free assembly, must: a) serve compelling state interests, b) be unrelated to the suppression of ideas, and c) cannot be achieved through less restrictive means. *Roberts*, 468 U.S. at 623.

The Orders and the Government's enforcement thereof violate the First Amendment, both facially and as-applied, to Givens and Bish. While Appellants recognize the State's compelling interest unrelated to the suppression of ideas, the State's goals could be achieved through less restrictive means. By denying Givens and Bish the ability to organize and attend political demonstrations, rallies, and protests that comply with the CDC guidelines for social distancing, Appellees violate the freedom of assembly clause. An outright ban on public gatherings for the purposes of political demonstration, rally, or protest, while at the same time allowing a myriad of activities deemed critical by the State Health Officer, but which do not possess the special constitutional protections conferred by the First

Amendment, by definition cannot be deemed the least restrictive means of achieving the government's public health goals.

The ban on public protests includes all public demonstrations, rallies, and protests, leaving no alternative avenues for engaging in these core First Amendment protected activities. Requiring Appellants to abstain from political demonstrations, rallies, and protests, despite substantial modifications to satisfy the public health interests at stake (modifications that have been deemed acceptable in the cases of operations deemed "essential" by government decree, with no due process), violates their constitutional right to peaceably assemble.

D. The Orders Prevent Appellants from Petitioning Their Government in Violation of the First Amendment to the U.S. Constitution and the California Constitution.

Like other First Amendment rights, the right to petition is "a fundamental right of critical importance."¹⁸ *Leonard v. Clark*, 12 F.3d 885, 891 (9th Cir. 1993). The right is implicit in "[the] very idea of government, republican in form." *United States v. Cruikshank*, 92 U.S. 542 (1876). "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a

¹⁸ The petition clause was incorporated against the states in *Edwards v. South Carolina*, 372 U.S. 229 (1963).

particular freedom of expression.” *McDonald v. Smith*, 472 U.S. 479, 482 (1985). In fact, “[t]he right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign.” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397 (2011). “The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs.” *Id.* at 388. While both advance personal expression, “the right to petition is generally concerned with expression directed to the government seeking redress of a grievance.” *Id.* Where the government burdens the fundamental right, the law must be narrowly tailored to achieve a compelling government interest. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“classifications affecting fundamental rights are given the most exacting scrutiny.”); *Hoffman v. U.S.*, 767 F.2d 1431 (9th Cir. 1985).

The grounds of the State Capitol building are “chief among traditional public fora.” ER 11. The Capitol grounds are “especially important locales for communication among the citizenry” and a place for the citizenry to convey important messages to its lawmakers. *Berger v. City of Seattle*, 569 F.3d 1029,

1036 (9th Cir. 2009). When legislators are gathered at the Capitol and voting, protests provide a direct and visible way for individuals to make their collective opinions known to elected officials. Prohibiting Givens and Bish from gathering with others to petition the state government on the state capitol grounds, despite substantial modifications to satisfy the public health interests at stake (modifications that have been deemed acceptable in the cases of operations deemed “essential” by government decree), violates Appellants’ constitutional right to petition the government. The Orders additionally violate Appellants’ rights to petition as applied because, the government denied their applications for permits despite their willingness to take measures to ensure CDC social distancing guidelines.

E. The Orders are Void Because They are Vague and State Officials are Subjectively Enforcing Them in Arbitrary and Discriminatory Ways.

A regulation is constitutionally void on its face when, as a matter of due process, it is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1115 (1997). Vague laws “trap the innocent by not providing fair warning.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972).

The vagueness doctrine implicates two related requirements. “First, laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly,” and “fair notice of the conduct a statute proscribes.” *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2019) (internal quotation marks and citation omitted). But when First Amendment freedoms are in the balance, “an even greater degree of specificity and clarity of laws is required.” *Key, Inc. v. Kitspa Cty.*, 793 F.2d 1053, 1057 (9th Cir. 1986) (internal citation omitted). Courts must instead ask “whether language is sufficiently murky that speakers will be compelled to steer too far clear of any forbidden areas.” *Edge*, 929 F.3d at 664 (internal quotation marks and citation omitted).

The second requirement “aims to avoid arbitrary and discriminatory enforcement and demands that laws provide explicit standards for those who apply them.” *Id.* at 665 (internal quotation marks and citation omitted). The problem with a vague regulation is that it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108–109 (1972); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

The Orders are so vague as to their scope and application as to run afoul of the due process clause of the Fourteenth Amendment. Embedded within the Orders are public health directives to shelter in place. The Orders themselves merely request the public “heed” the public health directive; they do not appear to order compliance therewith. Webster’s Dictionary defines the word “heed” to mean “to give consideration or attention to”—not to “adhere” or comply. Despite this, state and local officials and the media have widely reported the Orders to require compliance with the public health directive by sheltering in place.¹⁹

The CHP has interpreted the Orders to require it to deny applications to peacefully assemble for the purpose of political demonstrations, rallies, and protests on the grounds of the State Capitol. While Givens and Bish did consider holding their gatherings on locations not requiring a permit, it is unclear from the Orders whether they would face criminal prosecution for doing so. Additionally, as shown above, policy decisions on who may still gather and protest have been delegated to law enforcement, who, on an ad hoc and subjective basis, are

¹⁹ Tim Arango & Jill Cowan, *Gov. Gavin Newsom of California Orders Californians to Stay at Home*, *The New York Times* (March 19, 2020), <https://www.nytimes.com/2020/03/19/us/California-stay-at-home-order-virus.html> (reporting that “Gov. Gavin Newsom of California on Thursday ordered Californians—all 40 million of them—to stay in their houses...”).

arbitrarily and discriminatorily enforcing the Orders only against disfavored speakers – including those speaking out against the Orders themselves.

Accordingly, the Orders are void for vagueness.

F. The District Court Was Not Free to Disregard Binding California Supreme Court Precedent Interpreting the California Constitution’s Right to Liberty as Requiring Health Officials Have Probable Cause to Believe a Person has an Infectious Disease Before Imposing a Quarantine.

All Californians “are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.” Cal. CONST. art. I, § 1. The California Supreme Court has held that California’s right to liberty limits public health officials’ authority to quarantine.²⁰ *Ex parte Martin*, 83 Cal. App. 2d 164 (1948). Before ordering a quarantine which the Court described as “complete authority over one of the most fundamental of our constitutional rights – the right of personal liberty,” public health officials must have “probable cause” and “reasonable grounds [] to support the belief that the

²⁰ *Quarantine*, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/quarantine?src=search-dict-box> (last visited June 5, 2020) (“3a: a restraint upon the activities or communication of persons or the transport of goods designed to prevent the spread of disease or pests 4: a state of forced isolation”)

person so held is infected” with an infectious disease. *Id.* at 167. Probable cause can be shown by an individual’s exposure to or transmission of an infectious disease. *Id.* “[A] mere suspicion [of a contagious disease], unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.” *Ex parte Arta*, 52 Cal. App. 380, 383 (1921) (emphasis added).

In a case somewhat analogous to what Californians are facing with COVID-19, California courts found that public health officials could not quarantine twelve blocks of San Francisco Chinatown because of nine reported deaths due to bubonic plague. *See Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900); *Wong Wai v. Williamson*, 103 F. 1 (C.C. Cal. 1900). These courts found it “purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference with the personal liberty of complainant” who had “never had or contracted said bubonic plague, that he has never been at any time exposed to the danger of contracting it, and has never been in any locality where said bubonic plague, or any germs of bacteria thereof, has or have existed.” *Jew Ho*, 103 F. at 10.

When construing a state constitutional provision, “the most recent Supreme Court decisions of that state, construing the constitution and statutes of that state

... are binding upon the federal courts.” *Sires v. Cole*, 314 F.2d 340, 341 (9th Cir. 1963). District courts are required to follow related “statements of law” made by the California Supreme Court when interpreting California’s constitution. *Hubbard v. Superior Court*, 78 Cal. Rptr. 2d 819, 822 (Cal. App. 4th 1997). Despite this, the district court refused to apply precedent regarding how liberty interests are to be weighed when combatting infectious disease because the court found the proposition “not [] feasible.” ER 23. It was not the role of the district court to weigh the wisdom of the California Supreme Court’s interpretation of its own constitution. *Ex parte Martin*, *Jew Ho*, *Ex Parte Arte*, are all controlling precedent. In each of these cases, the courts examined the appropriate constitutional constraints on public health officials’ ability to quarantine citizens. A vague threat of infection was not enough to justify a quarantine. Only “probable cause” of infection could justify the government taking the drastic action of restricting citizens’ liberty. *Ex parte Martin*, 83 Cal. App. 2d 167 (1948). This precedent is directly on point.

In *Jew Ho* and *Wong Wai*, government officials quarantined more than 15,000 people living in the twelve blocks of San Francisco Chinatown. The courts found it unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths. This was one death for every 1,666 inhabitants of

Chinatown. As of June 4, 2020, Sacramento County had one thousand four hundred and ninety (1,490) cases and fifty-eight (58) deaths associated with COVID-19.²¹ The United States Census Bureau estimates that as of July 1, 2019, Sacramento County's population was 1,552,058 people.²² Accordingly, less than one tenths of one percent (0.096%) of Sacramento County's population is known to have contracted the virus, and only 0.0037 percent have died from the disease, as of June 4, 2020.

There is no evidence that Givens and Bish – or anyone desiring to attend the proposed demonstrations, for that matter – have either contracted or knowingly been exposed to coronavirus. The government has no probable cause to keep them quarantined. On the contrary, as each day passes, public health officials and noted epidemiologists are undermining the very basis for the sweeping Orders banning fundamental protected speech and other activities in California. The government could not possibly meet its burden of justifying its position, which grows less

²¹ Sacramento County Department of Public Health, (June 5, 2020, 10:56 AM), <https://www.saccounty.net/COVID-19/Pages/default.aspx>.

²² United States Census Bureau, (June 5, 2020, 10:58 AM), <https://www.census.gov/quickfacts/fact/table/sacramentocountycalifornia,CA/PST045218>.

tenable by the hour in light of Appellee Newsom’s recent exhortations in favor of protests of which he approves.²³

Forcing quarantine on Appellants when there is no probable cause to believe they are, or have ever been, infected with COVID-19 violates their liberty interests protected by the California Constitution. The district court erred in failing to apply California Supreme Court precedent interpreting California’s right to liberty as requiring health officials have probable cause to believe a person is infected with an infectious disease before imposing a quarantine.

III. APPELLANTS FACE IMMINENT IRREPARABLE HARM FROM THE CONTINUED ABUSE OF THEIR CONSTITUTIONAL RIGHTS ABSENT IMMEDIATE INJUNCTIVE RELIEF.

“In a case like the one at bar, where the First Amendment is implicated, the Supreme Court has made clear that ‘[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury’ for purposes of the issuance of a preliminary injunction.” *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1011 (N.D. Cal. 2007) (citing *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973–74 (9th Cir. 2002), in turn citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see also *S.O.C., Inc. v.*

²³ See fn 1.

Cnty. of Clark, 152 F.3d 1136, 1148 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated probable success on the merits of its First Amendment overbreadth claim had thereby also demonstrated irreparable harm). “In other words, the requirement that a party who is seeking a preliminary injunction show ‘irreparable injury’ is deemed fully satisfied if the party shows that, without the injunction, First Amendment freedoms would be lost, even for a short period.” *Reed*, 523 F. Supp. 2d at 1011. “Unlike a monetary injury, violations of the First Amendment ‘cannot be adequately remedied through damages.’” *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1058 (C.D. Cal. 2016) (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)).

Without an injunction preventing the State from further enforcing the Orders, Givens and Bish have and will continue to suffer irreparable harm in the form of deprivation of fundamental freedoms secured by the First and Fourteenth Amendment to the U.S. Constitution and the California Constitution. Appellants’ irreparable injuries cannot adequately be compensated by damages or any other remedy available at law. Thus, irreparable injury is clearly shown, necessitating the relief the Appellants seek.

IV. THE BALANCE OF HARDSHIPS TIPS DECIDEDLY IN APPELLANTS' FAVOR.

In cases implicating constitutional rights, “the ‘balancing of the hardships’ factor also tends to turn on whether the challengers can show that the regulations they attack are substantially overbroad.” *Reed*, 523 F. Supp. 2d at 1101.

Given Givens and Bish’ showing of the facially and as-applied invalidity of the vague, overbroad Orders, they necessarily have shown that leaving those Orders in place for even a brief period of time “would substantially chill the exercise of fragile and constitutionally fundamental rights,” and thereby constitute an intolerable hardship to Appellants. *Reed*, 523 F.Supp.2d at 1101. As mentioned above, the State’s ban on all protests, even socially distanced and with masks, deprive Givens, Bish, and innumerable other Californians, of their ability to exercise their rights to speech, petition, and assembly as secured by the First and Fourteenth Amendments and Article 1 of the California Constitution.

By contrast, enjoining the State’s enforcement of the Orders will not result in hardship to the State, who is in a position to adopt, at least on an interim basis, a more narrowly crafted set of equally applied provisions that enable the government to achieve any legitimate ends without unjustifiably invading First and Fourteenth Amendment freedoms. *See id.* In addition, the State will suffer no legitimate harm by accommodating Appellants’ exercise of fundamental rights in the same manner

the State is accommodating thousands—and millions—of others engaged in non-First Amendment protected activities and in the way the state officials are accommodating protests espousing viewpoints with which the state officials agree. The Constitution demands no less.

V. INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST

“As the Ninth Circuit has consistently recognized, there is a significant public interest in upholding First Amendment principles.” *Americans for Prosperity Foundation*, 182 F. Supp. 3d at 1059 (internal citations omitted); *see also Doe v. Harris*, 772 F.3d 563, 683 (9th Cir.2014); *Sammartano*, 303 F.3d at 974. As such, the requirement that issuance of a preliminary injunction be in the “public interest” usually is deemed satisfied when it is clear that core constitutional rights would remain in jeopardy unless the court intervened. *Reed*, 523 F. Supp. 2d at 1101. The public is best served by preserving foundational tenets of this American democracy: free speech, free assembly, and the right to petition government for a redress of grievances. *See Sammartano*, 303 F.3d at 974 (“Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.”).

As discussed above, Appellants’ core constitutional rights to free speech, free assembly, petition, due process, and equal protection, will remain in jeopardy

so long as the State remains free to enforce their Orders. Accordingly, issuance of injunctive relief is proper.

CONCLUSION

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

June 9, 2020

Respectfully submitted,

/s/ Harmeet K. Dhillon_____

Harmeet K. Dhillon

Mark P. Meuser

Gregory R. Michael

Karin Sweigart

DHILLON LAW GROUP INC.

177 Post Street, Suite 700

San Francisco, California 94108

Telephone: (415) 433-1700

D. GILL SPERLEIN

LAW OFFICE OF D. GILL SPERLEIN

345 Grove Street

San Francisco, CA 94102

Telephone: (415) 404-6615

Attorneys for Plaintiffs and Appellants Ron
Givens and Christine Bish

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of FRAP 27(d). The Motion was prepared in Times New Roman 14-point font, and contains 11,177 words, as counted by Microsoft Word 2016.

June 9, 2020

/s/ Harmeet K. Dhillon
Harmeet K. Dhillon

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2020, I filed the foregoing Appellants' Opening 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.

June 9, 2020

/s/ Harmeet K. Dhillon
Harmeet K. Dhillon