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14 **UNITED STATES DISTRICT COURT FOR**
15 **NORTHERN DISTRICT OF CALIFORNIA**

16 **RITESH TANDON**, an individual; **KAREN**
17 **BUSCH**, an individual; **TERRY GANNON**,
an individual; **CAROLYN GANNON**, an
18 individual; **JEREMY WONG**, an individual;
JULIE EVARKIOU, an individual; **DHRUV**
19 **KHANNA**, an individual; **CONNIE**
20 **RICHARDS**, an individual; **FRANCES**
BEAUDET, an individual; and **MAYA**
21 **MANSOUR**, an individual,

22 Plaintiffs,
23 v.

24 **GAVIN NEWSOM**, in his official capacity as
the Governor of California; **XAVIER**
25 **BECERRA**, in his official capacity as the
Attorney General of California; **SANDRA**
26 **SHEWRY**, in her official capacity as the
Acting State Director of the California
27 Department of Public Health; **ERICA S.**
28 **PAN**, in her official capacity as the Acting

Case No. _____

**COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF AND
NOMINAL DAMAGES**

1 State Public Health Officer of the California
2 Department of Public Health; **JEFFREY V.**
3 **SMITH**, in his official capacity as County
4 Executive of Santa Clara County; and **SARA**
5 **H. CODY**, in her official capacity as the
6 Health Officer and Public Health Director of
7 Santa Clara County,
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Defendants.

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INTRODUCTION

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2 1. California has now been in a state of emergency for seven months, with no end in sight.
3 During this time, the basic religious, political, and economic freedoms guaranteed by the United States
4 Constitution have been effectively abrogated for nearly 40 million people. In the name of stopping the
5 spread of COVID-19, state and local officials have closed churches and businesses; banned political
6 events; and even prohibited individuals from hosting small gatherings in their homes. In normal times,
7 federal courts would not hesitate to strike down such blatantly unconstitutional restrictions on civil
8 liberties. Until recently, however, courts have largely suspended judicial review of pandemic-related
9 executive actions, incorrectly citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), for the
10 proposition that executives enjoy unfettered discretion to respond to public health emergencies. This
11 judicial passivity in the face of executive overreach is reminiscent of the Supreme Court’s disastrous
12 decision in *Korematsu*, in which the Supreme Court erroneously sustained a gross violation of civil
13 rights because it was unwilling to look behind the government’s purported claims of exigency. As
14 Justice Jackson correctly observed in his dissent, there was no justification for what was “one of the
15 most sweeping and complete deprivations of constitutional rights in the history of this nation in the
16 absence of martial law.” *Id.* at 235 (Jackson, J., dissenting). The same is true here. COVID-19 is a
17 serious disease—just as the threat of sabotage was a serious threat during World War II—but
18 Defendants’ unprecedented infringement on civil liberties bears no rational relationship to the realities
19 of the public health situation in California. It is far past time to end the *Korematsu*-like deference that
20 state and local officials have enjoyed since early March. *See* Lindsay F. Wiley and Stephen I. Vladeck,
21 *Coronavirus, Civil Liberties, and the Courts: the Case Against “Suspending” Judicial Review*, 133
22 *HARV. L. REV. F.* 179 (2020). Defendants must be required to defend their executive actions under
23 normal constitutional standards. Because those actions cannot survive heightened scrutiny, they should
24 be enjoined.

25 2. Plaintiffs in this case are individuals who seek to exercise their First and Fourteenth
26 Amendment rights to exercise their religion, engage in political speech, and earn a living. Yet because
27 of the emergency orders issued by the Governor, the California Department of Public Health, and
28 Santa Clara County officials, they cannot do so. This is because the State’s so-called “Blueprint for a

1 Safer Economy”—along with various guidance documents and Q&As—entirely prohibit most
2 gatherings, put onerous restrictions on other types of gatherings, and prohibit Plaintiffs from operating
3 their businesses or providing certain services. Santa Clara County has imposed additional restrictions
4 that prevent any gatherings from occurring indoors at all, even where they would otherwise be allowed
5 under the State’s orders, and limit permissible outdoor gatherings to 60 people, even if the venue could
6 safely accommodate many more.

7 3. None of these restrictions on Plaintiffs’ liberties can survive review under the
8 appropriate legal standard. The limitations on religious and political gatherings infringe on core First
9 Amendment-protected activities. They are also content based because Defendants explicitly exempt
10 protests, cultural gatherings, and religious ceremonies from their restrictions, and thus disfavor the
11 religious and political gatherings Plaintiffs seek to hold. Defendants’ Orders are thus subject to
12 heightened scrutiny. But whether the Orders are reviewed under strict or intermediate scrutiny, they
13 are unconstitutional because Defendants have not even attempted to narrowly tailor their restrictions to
14 their asserted interest. Given the current understanding of the virus, Defendants could target their
15 mitigation efforts at vulnerable populations to ensure that individuals in nursing homes and long-term
16 care facilities are not put at risk. Defendants have instead implemented a blunderbuss approach that
17 imposes across-the-board restrictions on all citizens.

18 4. Indeed, the Orders’ restrictions on Plaintiffs’ economic activities are not even rationally
19 related to the government’s asserted interest because they are based on metrics that have little
20 correlation with public health. Public health officials in California and elsewhere have historically
21 looked at the rates of hospitalizations and deaths to determine whether an infectious disease constitutes
22 a public health emergency. These metrics are important because they allow public officials to act if it
23 appears that a disease may overwhelm a community’s healthcare infrastructure. As the Governor noted
24 in his declaration of a state of emergency on March 4, 2020, if COVID-19 continued to spread at “a
25 rate comparable to the rate of spread in other countries, the number of persons requiring medical care
26 may exceed locally available resources,” and it would “likely [] require the combined forces of a
27 mutual aid region or regions to appropriately respond” to COVID-19.¹ As it turned out, however,

28 ¹ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

1 COVID-19 has not spread at anything approaching the feared rate, and the disease is far less deadly
2 than initially estimated. As a result, hospitalizations in the state resulting from COVID-19 have never
3 exceeded 10% of total capacity, and no mutual aid region has ever been established. Moreover,
4 hospitalization rates have plummeted to roughly one third of their peak in late July.² According to the
5 metrics historically used to measure the severity of an epidemic, there is no ongoing state of
6 emergency in California.

7 5. Defendants justify their continuing restrictions by focusing myopically on the number
8 of “cases” in the state—i.e., the number of people who test positive using the PCR test. But there is no
9 rational basis for using case counts as a basis for infringing on constitutionally protected liberties.
10 Because a majority of individuals who test positive experience no symptoms, case counts are not a
11 useful proxy for hospitalizations or deaths. Nor are case counts a useful proxy for infectiousness
12 because, as recent studies have confirmed, the PCR test can yield a positive result *weeks* after an
13 infected person has ceased to be infectious. This is because although infected individuals are typically
14 contagious from days 3 to 14 days after infection, the PCR test can detect traces of the virus up to 80
15 days after the initial infection. Some studies have estimated that up to 90% of positive results involve
16 people who are no longer infectious. Whatever the precise number, it is now clear that a large number
17 of the “cases” used to justify Defendants’ Orders have absolutely no relevance to the public health
18 situation. It is irrational to make public policy based on this data, yet that is precisely what Defendants
19 are currently doing under the State’s “Blueprint.”

20 6. Worse, Defendants have indicated that they have no intention of *ever* relinquishing
21 their extraordinary emergency powers. According to the State’s Blueprint, even if a county has
22 reported *zero* positive cases for over three weeks—and thus is in the “yellow” tier—churches, gyms,
23 and movie theaters are limited to 50% capacity, and nearly every activity is subjected to
24 “modifications.”³ There is no “green” tier in which all restrictions are eliminated. In other words,
25 Defendants’ regulations will extend indefinitely even after COVID-19 has disappeared from a county.

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27 ² <https://public.tableau.com/views/COVID-19HospitalsDashboard/Hospitals?:embed=y&:showVizHome=no>.

28 ³ https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf.

1 7. Defendants will no doubt contend here, as they have elsewhere, that the Court should
2 defer to their judgment because the Orders are designed to address a public health emergency. Any
3 such pleas should be rejected. Although federal courts may decide to defer to a state or local
4 executive’s emergency actions during the initial days and weeks of a public health crisis—when the
5 severity of the disease, the rate of spread, and the ability of the public healthcare system to address it
6 are uncertain—such deference must end as soon as there is publicly available data courts can use to
7 judge the reasonableness of the State’s response. Otherwise courts run the risk of repeating the error
8 in *Korematsu*, which the Supreme Court has squarely renounced. *See Trump v. Hawaii*, 138 S. Ct.
9 2392, 2423 (2018) (“*Korematsu* was gravely wrong the day it was decided, has been overruled in the
10 court of history, and—to be clear—‘has no place in law under the Constitution.’”) (quoting
11 *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)). In *Korematsu*, the majority followed the
12 precedent it had established one year earlier in *Hirabayashi v. United States*, 320 U.S. 81 (1943),
13 which upheld an executive order that imposed a curfew on people of Japanese ancestry in certain
14 areas. The *Korematsu* court recognized that confinement in an internment camp was a “far greater
15 deprivation” than a curfew, but nevertheless held that the “principles” announced in *Hirabayashi*
16 compelled the Court to uphold the internment order. 323 U.S. at 218. As Justice Jackson recognized in
17 dissent:

18 [O]nce a judicial opinion rationalizes such an order to show that it conforms to the
19 Constitution, or rather rationalizes the Constitution to show that the Constitution
20 sanctions such an order, the Court for all time has validated the principle of racial
21 discrimination in criminal procedure and of transplanting American citizens. The
22 principle then lies about like a loaded weapon ready for the hand of any authority
23 that can bring forward a plausible claim of an urgent need. Every repetition imbeds
24 that principle more deeply in our law and thinking and expands it to new purposes.”
25 *Id.* at 246 (Jackson, J., dissenting)

26 8. Federal courts should not recapitulate the error in *Korematsu* by blindly following—
27 and thereby expanding—the supposed “principle” in *Jacobson* that actions taken to address threats to
28 public health are effectively unreviewable. As the supposed principle in that case has taken root,
courts have become increasingly paralyzed in the face of proclaimed public health emergencies. Taken
to the extreme, state officials could declare a public health emergency every winter during peak

1 influenza season and justify substantial infringements on civil liberties without any judicial
2 interference.⁴ *Jacobson* does not endorse such deference, and the Constitution forbids it.

3 9. Because Defendants' Orders infringe on Plaintiffs' constitutional rights to free exercise
4 of religion, freedom of speech, equal protection, and the right to earn a living, and are not narrowly
5 tailored or rationally related to the government's asserted interest, the Orders violate the First and
6 Fourteenth Amendments. Plaintiffs thus request declaratory and injunctive relief to end these
7 unconstitutional infringements on their liberties.

8 **JURISDICTION AND VENUE**

9 10. This action arises under the Constitution and laws of the United States. Plaintiffs assert
10 that Defendants' Orders violate the U.S. Constitution's First and Fourteenth Amendments' guarantees
11 of speech, association, and free exercise. Plaintiffs further assert that the Orders violate the Fourteenth
12 Amendment's guarantees of due process and equal protection. This Court therefore has jurisdiction
13 under Article III of the U.S. Constitution, 28 U.S.C. § 1331, and 42 U.S.C. § 1983. This Court also has
14 authority to award attorneys' fees and costs under 42 U.S.C. § 1988 and other applicable law.

15 11. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C.
16 §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, by *Ex Parte Young*,
17 209 U.S. 123 (1908), and by the general and equitable powers of this Court.

18 12. The Northern District of California is the appropriate venue for this action pursuant to
19 28 U.S.C. § 1391(b)(1)–(2) because Defendants maintain offices, exercise their authority in their
20 official capacities, and will enforce the State and County Orders in this District; and because it is the
21 District in which substantially all of the events giving rise to the claims occurred.

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26 ⁴ Indeed, the Governor has already explained that the CDPH's current orders are, in part, a response to
27 the upcoming flu season. *See Gov. Newsom Outlines California's New Simplified, 4-Tier COVID-19*
28 *Reopening Guidelines*, CBS SF BayArea (August 28, 2020), available at
<https://sanfrancisco.cbslocal.com/2020/08/28/gov-newsom-californias-new-simplified-color-coded-covid-reopening-guidelines/>.

PARTIES

Plaintiffs

13. Plaintiff Ritesh Tandon (“Tandon”) is a resident of Santa Clara County and a candidate for the U.S. Congress in California’s 17th Congressional District, which covers portions of Santa Clara and Alameda Counties. Tandon is campaigning for elected office against an incumbent officeholder. Defendants’ Orders prevent him from gathering in person with constituents and donors to discuss public issues and raise funds.

14. Plaintiff Pastor Jeremy Wong (“Wong”) is a resident of Santa Clara County. Before the Orders, Pastor Wong would meet with members of his congregation about once a week for communal worship, including Biblical studies, theological discussions, collective prayer, and musical praise. Since the Orders, Pastor Wong has been unable to host these sessions.

15. Plaintiff Karen Busch (“Busch”) is a resident of Santa Clara County. Busch is a member of a Bible study group that, before the Orders, held bi-weekly Bible study sessions in their homes on a rotating basis. Busch regularly hosted these Bible studies, but because of Defendants’ Orders she has been unable to host any sessions since March.

16. Plaintiffs Terry Gannon and Carolyn Gannon (“Gannons”) are residents of San Mateo County. Before Defendants issued their shutdown Orders, the Gannons regularly hosted in-person gatherings in their home to debate state and national policies. These forums provided a medium for the Gannons to share their beliefs and convictions with others and raise awareness for their causes. Because of Defendants’ Orders, the Gannons have not been able to host any such gatherings for nearly seven months.

17. Plaintiff Connie Richards (“Richards”) owns and operates Better Life Fitness Academy (“BLFA”) located in Nevada County. The Orders have made it impossible to continue operations because Richards can no longer provide the services included in clients’ memberships or offer group classes.

18. Plaintiff Julie Evarkiou (“Evarkiou”) is the co-owner of Wavelength salon located in Santa Clara County. Wavelength leases space to stylists and hosts events that attract clients.

1 Defendants' Orders have prohibited Wavelength from hosting wine tastings, botox parties, and other
2 gatherings that are an important part of its business.

3 19. Plaintiff Dhruv Khanna ("Khanna") owns Miranda Wines, LLC (doing business as
4 Kirigin Cellars) in Santa Clara County. Kirigin Cellars produces small batch wines made with grapes
5 from its vineyards, but a large component of its business is hosting events. Because of the limitations
6 imposed by the state and county on gatherings, Kirigin Cellars' events business has been devastated.

7 20. Plaintiff Frances Beaudet ("Beaudet") is the co-owner of Old City Hall Restaurant in
8 Santa Clara County. Under the County's Order, Old City Hall Restaurant may not utilize any of its
9 indoor dining space and has therefore suffered a significant decrease in revenue. Even under the
10 State's less stringent Order, Old City Hall Restaurant would be allowed to utilize only 25% of its
11 indoor dining space.

12 21. Plaintiff Maya Mansour ("Mansour") is the owner of a salon, The Original Facial Bar,
13 in Santa Clara County. Before the Orders forced her business to close, her salon offered facials and
14 other skincare treatments to a devoted client base. Santa Clara County's Orders have prevented her
15 from reopening her business.

16 **Defendants**

17 22. Defendant Gavin Newsom ("Newsom") is made a party to this Action in his official
18 capacity as the Governor of California. The California Constitution vests the "supreme executive
19 power of the State" in the Governor, who "shall see that the law is faithfully executed." Cal. Const.
20 Art. V, § 1.

21 23. Defendant Xavier Becerra ("Becerra") is made a party to this Action in his official
22 capacity as the Attorney General of California. Under California law, Becerra is the chief law
23 enforcement officer in the State. Cal. Const. Art. V, § 13.

24 24. Defendant Sandra Shewry, MPH, MSW ("Shewry") is made a party to this Action in
25 her official capacity as the Acting Director of the California Department of Public Health ("CDPH").
26 Shewry was selected to replace Sonia Angell, the former State Public Health Officer and Department
27 of Public Health Director, after Angell's abrupt resignation in August 2020.

1 25. Defendant Erica S. Pan, MD, MPH (“Dr. Pan”) is made a party to this Action in her
2 official capacity as the Acting State Public Health Officer of the California Department of Public
3 Health. Pan was selected to replace Sonia Angell, the former State Public Health Officer and
4 Department of Public Health Director, after Angell’s abrupt resignation in August 2020.

5 26. Defendant Jeffrey V. Smith, MD, JD (“Dr. Smith”) is made a party to this Action in his
6 official capacity as the County Executive Officer of Santa Clara County.

7 27. Defendant Sara H. Cody, MD (“Dr. Cody”) is made a party to this Action in her official
8 capacity as the Health Officer and Public Health Director of Santa Clara County.

9 **FACTUAL ALLEGATIONS**

10 **I. DEFENDANTS ISSUE EMERGENCY ORDERS LIMITING PLAINTIFFS’**
11 **ABILITY TO GATHER FOR RELIGIOUS AND POLITICAL ACTIVITIES OR**
12 **RUN THEIR BUSINESSES**

13 28. On March 4, 2020, Governor Newsom proclaimed a state of emergency to exist in
14 California attributable to an outbreak of COVID-19.⁵

15 29. Among other mandates, Governor Newsom’s proclamation waived California
16 Government Code § 8630 indefinitely, conferring perpetual powers on local governments to address
17 the COVID-19 outbreak: “The 60-day time period in Government Code section 8630, within which
18 local government authorities must renew a local emergency, is hereby waived for the duration of this
19 statewide emergency. Any local emergency proclaimed will remain in effect until each local
20 governing authority terminates its respective local emergency.”

21 **A. The State Defendants Issue Restrictions on Gatherings**

22 30. On March 16, 2020, CDPH issued a “guidance” memorandum prohibiting all indoor
23 and outdoor gatherings “across the state of California.”⁶ The guidance defines a gathering as “any
24 event or convening that brings together people in a single room or single space at the same time, such
25 as an auditorium, stadium, arena, large conference room, meeting hall, cafeteria, or any other indoor or
26

27 ⁵ <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

28 ⁶ <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/cdph-guidance-gatherings-covid19-transmission-prevention-03-16-2020.pdf>.

1 outdoor space.” The guidance further states that the prohibition on indoor and outdoor gatherings “will
2 remain in place until further guidance is released by the [CDPH].”

3 31. On March 19, 2020, Governor Newsom issued Executive Order N-33-20 (“EO N-33-
4 20”), which imposed two pertinent mandates. First, it directed all California residents “to immediately
5 heed the State public health directives from the Department of Public Health.” Second, it “order[ed]
6 all individuals living in the State of California to stay home or at their place of residence except as
7 needed” to maintain continuity of operations of “Essential Critical Infrastructure” sectors and
8 additional sectors as the State Public Health Officer may designate. The order also clarified its
9 purported aim: “Our goal is simple, we want to bend the curve, and disrupt the spread of the virus.”
10 EO-N-33-20 has no end date and invokes California Government Code § 8665, which provides: “Any
11 person who ... who refuses or willfully neglects to obey any lawful order or regulation promulgated or
12 issued as provided in this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, shall
13 be punishable by a fine of not to exceed one thousand dollars (\$1,000) or by imprisonment for not to
14 exceed six months or by both such fine and imprisonment.”

15 32. On May 4, 2020, Governor Newsom issued Executive Order N-60-20 (“EO N-60-20”),
16 directing all California residents “to continue to obey State public health directives, as made available
17 [online] and elsewhere as the State Public Health Officer may provide.”⁷ EO-N-60-20 also directs the
18 State Public Health Officer “to establish criteria and procedures ... to determine whether and how
19 [local health officers] may implement public health measures” less restrictive than those of the State.

20 33. The online resource referenced in EO N-60-20 is titled “Stay home Q&A” and
21 addresses CDHP’s health directives, including restrictions placed upon political and religious
22 gatherings.⁸ This webpage claims that its contents “have the same force and effect as other State
23 Public Health Officer directives.”

24 34. While State agencies like CDPH ordinarily must follow rulemaking procedures under
25 California’s Administrative Procedure Act when issuing guidance, including comprehensive notice
26 and comment requirements, Governor Newsom suspended these requirements because he concluded

27 _____
28 ⁷ <https://www.gov.ca.gov/wp-content/uploads/2020/05/5.4.20-EO-N-60-20.pdf>.

⁸ <https://covid19.ca.gov/stay-home-except-for-essential-needs/>.

1 that they would “prevent, hinder, or delay” CDPH actions and the enforcement of EO-N-60-20. As a
 2 result, Plaintiffs lack any recourse to challenge CDPH’s orders, guidance, or directives under
 3 California’s Administrative Procedure Act (Government Code § 11340 *et seq.*).

4 35. EO N-60-20 therefore purports to vest unchecked executive power in the State Public
 5 Health Officer to regulate all public, private, and commercial affairs in California: “Nothing ... shall
 6 limit the authority of the State Public Health Officer to take any action she deems necessary to protect
 7 public health in the face of the threat posed by COVID-19.” Like EO-N-33-20, EO-N-60-20 also
 8 invokes California Government Code § 8665, which subjects any person “who refuses or willfully
 9 neglects to obey any lawful order or regulation promulgated or issued,” to a crime punishable by a
 10 fine, six-month imprisonment, or both.

11 **Pandemic Resilience Roadmap**

12 36. In late April 2020, the State Public Health Officer issued a “Pandemic Resilience
 13 Roadmap” that outlined a four-stage framework to reopening the State:

- 14 • Stage 1: Safety and preparation;
- 15 • Stage 2: Reopening of lower-risk workplaces and other spaces;
- 16 • Stage 3: Reopening of higher-risk workplaces and other spaces;
- 17 • Stage 4: Easing of final restrictions leading to the end of stay-at-home order.

18 37. Several weeks later, CDPH issued another public health order stating that “the
 19 statewide data now supports the gradual movement of the entire state from Stage 1 to Stage 2 of
 20 California’s Pandemic Resilience Roadmap.”⁹ The order does not specify the precise “data”
 21 supporting this transition, but states that the State Public Health Officer “will progressively designate
 22 ... activities that may reopen with certain modifications, based on public health and safety needs.” The
 23 order also authorized “local health jurisdiction[s]” to “implement or continue more restrictive public
 24 health measures if the jurisdiction’s Local Health Officer believes conditions in that jurisdiction
 25 warrant it.”

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 28 ⁹ <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%205-7-2020.pdf>.

1 38. On July 13, 2020, the CDPH reversed course and issued another public health order
2 providing that the “statewide data [have] since demonstrated a significant increase in the spread of
3 COVID-19, resulting in public health conditions that demand measures responsive to those conditions
4 be put into place with haste.”¹⁰

5 39. Among those measures, the July 13 order commands counties that appear on CDPH’s
6 “County Monitoring List” for three consecutive days to “close all indoor operations” of several venues
7 and events, including “Places of Worship” and “Protests.” The order allows “[o]utdoor operations ...
8 under a tent, canopy, or other sun shelter but only as long as no more than one side is closed,” and it
9 states that the March 16, 2020 “guidance prohibiting gatherings continue to apply statewide, except as
10 specifically permitted in other orders or guidance documents.”

11 **Blueprint for a Safer Economy**

12 40. On August 28, 2020, Defendant Erica Pan issued a third CDPH order replacing the
13 “County Monitoring List” with a four-tiered, color-coded system called “California’s Plan for
14 Reducing COVID-19 and Adjusting Permitted Sector Activities to Keep Californians Healthy and
15 Safe.”¹¹ Under this tiered system, more commonly known as the “Blueprint for a Safer Economy”
16 (“Blueprint”), “all local health jurisdictions in the state may reopen specified sectors according to their
17 respective county’s Tier.”

18 41. The Blueprint places strict reopening requirements on counties and emphasizes a
19 slower reopening timeline. As Governor Newsom stated, the Blueprint is “statewide, stringent and
20 slow.”¹² It specifically relies on two health metrics (both of which utilize a seven-day average):

- 21 (1) the average amount of “cases” per 100,000 residents, and
22 (2) the average amount of COVID-19 tests that come back “positive.”

23
24 ¹⁰ <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%20Dimming%20Entire%20State%207-13-2020.pdf>.

25 ¹¹ https://rivcoph.org/Portals/0/Documents/CoronaVirus/August/GovernorOrders/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf?ver=2020-08-31-102913-927×tamp=1598894957501.

26 ¹² Press Release, Office of Governor Gavin Newsom, Governor Newsom Unveils Blueprint for a Safer
27 Economy, a Statewide, Stringent and Slow Plan for Living with COVID-19 (Aug. 28, 2020),
28 <https://tinyurl.com/y5al8vo5>.

1 CDPH publishes its metrics calculations on its website.¹³

2 42. Under the Blueprint, a county must remain in a tier for a minimum of three weeks
3 before it can advance to a less restrictive tier. Also, before a county can advance, it must meet the
4 criteria for both metrics (rate of “cases” and rate of “positive” tests) of the next less-restrictive tier for
5 two consecutive weeks immediately prior to advancement. Conversely, a county that fails to meet the
6 metrics for their current tier for two consecutive weeks must be sent back to the more restrictive tier.

7 43. On September 30, 2020, CDPH added an additional requirement for counties to
8 advance to the next tier: the health equity metric. Under this metric, counties with a population over
9 106,000 are divided by census tract. These counties must identify their “most disadvantaged
10 neighborhoods,” determined as “the lowest quartile of the Healthy Places Index census tracts.”¹⁴ In
11 order to advance to the next tier, a county’s lowest quartile must meet certain thresholds for case and
12 positivity rate, in addition to the thresholds that must be met on a county-wide basis.

13 44. The California Healthy Places Index was “developed by the Public Health Alliance of
14 Southern California in partnership with the Virginia Commonwealth University’s Center on Society
15 and Health.”¹⁵ The Index “combines 25 community characteristics into a single indexed HPI Score.”
16 Many of these characteristics—such as the percentage of registered voters who voted in the 2012
17 election—are entirely unrelated to the likelihood of COVID-19 transmission and severity.

18 45. The Blueprint’s tiers are designated by four colors: purple (widespread), red
19 (substantial), orange (moderate) and yellow (minimal with the lowest restrictions):

- 20 • Tier 1 (Purple): Widespread. More than 7 new daily cases per 100,000 residents or a
21 positive test rate of more than 8%. Most nonessential indoor business operations must
22 close.

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24
25 ¹³ Available at <https://tinyurl.com/y4bjr3np>. The case rate is adjusted based on testing volume per
100,000 population. *Id.*

26 ¹⁴ CDPH, *Blueprint for a Safer Economy: Equity Focus* (September 30, 2020), available at
27 [https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-
19/CaliforniaHealthEquityMetric.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CaliforniaHealthEquityMetric.aspx).

28 ¹⁵ About, The California Healthy Places Index, <https://healthyplacesindex.org/about/> (last visited
October 5, 2020).

- 1 • Tier 2 (Red): Substantial. Between 4 and 7 new daily cases per 100,000 residents or a
2 positive test rate between 5% and 8%. Some nonessential indoor business operations must
3 close.
- 4 • Tier 3 (Orange): Moderate. Between 1 and 3.9 new daily cases per 100,000 residents or a
5 positive test rate between 2% and 4.9%. Some business operations are open with
6 modifications.
- 7 • Tier 4 (Yellow): Minimal. Less than 1 new case daily per 100,000 residents or less than 2%
8 positive tests. Most business operations are open with modifications.

9 46. There is no “Green” tier in which a county may return to pre-pandemic operations. Nor
10 is there any expiration date to the tier system. Californians must endure the Blueprint’s restrictions
11 indefinitely. Governor Newsom recently confirmed the open-ended nature of Blueprint when he stated
12 at a press conference: “We don’t believe that there is a green light, which says go back to the way
13 things were or back to the pre-pandemic mindset. Quite the contrary.”¹⁶

14 **State Restrictions on Places of Worship and Other Gatherings**

15 47. CDPH has also promulgated industry guidance documents that supplement the
16 Blueprint and provide specific restrictions for various industries and activities.¹⁷ The restrictions
17 specifically placed on “places of worship and cultural ceremonies” include

- 18 • Tier 1 (Purple): Widespread. Indoor activities are prohibited.
- 19 • Tier 2 (Red): Substantial. Indoor activities must be limited to 25% of capacity or 100 people,
20 whichever is less.
- 21 • Tier 3 (Orange): Moderate. Indoor activities must be limited to 50% of capacity or 200 people,
22 whichever is less.
- 23 • Tier 4 (Yellow): Minimal. Indoor activities must be limited to 50% of capacity.¹⁸

24 _____
25 ¹⁶ Available at <https://tinyurl.com/y3xnf7ae>.

26 ¹⁷ Available at <https://covid19.ca.gov/industry-guidance>.

27 ¹⁸ The limitations applicable to counties in tiers 3 and 4 conflict with a separate guidance document
28 CDPH issued on July 29, 2020, which limits indoor attendance to 25% of building capacity or a
maximum of 100 attendees. <https://files.covid19.ca.gov/pdf/guidance-places-of-worship--en.pdf>.
Although this guidance document is still in force, these statewide attendance limitations presumably
have been superseded by the Blueprint.

1 48. In other words, even if a county has had an average of *zero* cases for more than three
2 weeks, churches and other places of worship are not allowed to meet indoors with more than 50% of
3 capacity. Under EO-N-60-20, the failure to comply with the Blueprint subjects an offender to a fine,
4 six-month imprisonment, or both.

5 49. Under the “Stay home Q&A” webpage, faith-based services and may be held outdoor
6 as long as “coverings are worn and people are physically distanced.”¹⁹ “Places of worship may only
7 open indoor operations when permitted by relevant local restrictions and must comply with all
8 applicable attendance limitations and guidance requirements.” It is unclear, however, where religious
9 services may be held because CDPH does not define “place of worship.” Nor is it clear what qualifies
10 as a “religious ceremony.” Someone wishing to host a Bible Study in their backyard, for example,
11 cannot determine from the text of the Orders whether such a gathering is permissible.

12 50. The “Stay home Q&A” guidance allows outdoor “protests” so long as participants are
13 socially distanced or wearing masks, but prohibits indoor “protests” in counties assigned to “Tier 1,”
14 the widespread (purple) tier.²⁰ For all other counties, CDPH directives “do not prohibit in-person
15 indoor protests as long as (1) attendance is limited as required by the relevant restrictions on places of
16 worship, (2) physical distancing of 6 feet between persons or groups of persons from different
17 households is maintained at all times, and (3) singing and chanting activities are discontinued.”

18 51. Other than referring to citizens’ “right to engage in political expression,” CDPH has
19 failed to define “protest.” While a prototypical protest is clearly permissible so long as public health
20 measures are followed, it is unclear whether gatherings for other types of political activities—
21 speeches, debates, fundraisers, etc.—are permissible under the exception for “protests.”

22 52. On September 12, 2020, CDPH issued an “updated” Guidance for the Prevention of
23 COVID-19 Transmission for Gatherings. The guidance provides that all “gatherings unless otherwise
24 specified are not permitted across the State of California.”²¹ Because all “materials linked” on the
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26 ¹⁹ <https://covid19.ca.gov/stay-home-except-for-essential-needs/>

27 ²⁰ *Id.*

28 ²¹ Cal. Dep’t of Pub. Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Sept. 12, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings.aspx>.

1 CDPH’s website constitute “directives of the State Public Health Officer,” citizens must scour
2 CDPH’s website to determine which gatherings are permissible.²²

3 53. On October 9, 2020, CDPH “updated” its gatherings guidance yet again.²³ This new
4 guidance directs that “[a]ll gatherings must be held outside” and “[g]atherings that include more than 3
5 households are prohibited.” The guidance also limits outdoor gatherings to a maximum of two hours
6 and provides that the outdoor venue space must allow at least six feet “in all directions—front-to-back
7 and side-to-side” from others “at all times.” The new rule even restricts bathroom use: “Attendees may
8 go inside to use restrooms as long as the restrooms are frequently sanitized.” And to prevent citizens
9 from circumventing this “outdoors only” rule, the guidance prohibits “multiple gatherings of three
10 households” from being “jointly organized or coordinated to occur in the same public park or other
11 outdoor space at the same time.”

12 54. CDPH has directed citizens to comply with both state- and county-level orders, and the
13 most restrictive order applies.

14 **State Restrictions on Businesses**

15 55. Under CDPH’s tier system, different industries are subject to different restrictions in
16 each tier.²⁴ For “Restaurants, wineries, and bars,” the restrictions are:

- 17 • Tier 1 (Purple): Widespread. Restaurants and wineries: Outdoor only with modifications.
- 18 Bars, breweries, and distilleries: Closed.
- 19 • Tier 2 (Red): Substantial. Restaurants: Indoor with modifications, capacity must be limited to
- 20 25% or 100 people, whichever is less. Wineries: Outdoor only with modifications. Bars, breweries,
- 21 and distilleries: Closed.

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24 ²² Cal. Dep’t of Pub. Health, “What is the relationship between the stay at home order and these
25 questions and answers?,” *State Q&A*, <https://covid19.ca.gov/stay-home-except-for-essential-needs/>
(last accessed Sept. 28, 2020).

26 ²³ Cal. Dep’t of Pub. Health, *Guidance for Private Gatherings* (Oct. 9, 2020),
27 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CDPH-Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-10-09.aspx>.

28 ²⁴ See CDPH, *Industry guidance to reduce risk*, available at <https://covid19.ca.gov/industry-guidance/>;
https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf.

1 • Tier 3 (Orange): Moderate. Restaurants: Indoor with modifications, capacity must be limited to
2 50% or 200 people, whichever is less. Wineries: Indoor with modifications, capacity must be limited
3 to 25% or 100 people, whichever is less. Bars, breweries, and distilleries: Outdoor only with
4 modifications.

5 • Tier 4 (Yellow): Minimal. Restaurants: Indoor with modifications, capacity must be limited to
6 50%. Wineries: Indoor with modifications, capacity must be limited to 50% or 200 people, whichever
7 is less. Bars, breweries, and distilleries: Indoor with modifications, capacity must be limited to 50%.

8 56. CDPH also issued several guidance documents requiring restaurants, bars, and wineries
9 to implement various safety and cleaning measures.²⁵

10 57. Hair salons, barbershops, and nail salons are allowed to “[o]pen indoors with
11 modifications” in all Tiers.²⁶ However, personal care services are more limited:²⁷

12 • Tier 1 (Purple): Widespread. “Tattooing, piercing, and non-medical electrolysis must
13 close and cannot be performed outdoors.” However, “[n]ail services and physician-ordered electrolysis
14 may be performed indoors.” All other personal care services are limited to outdoor services only.

15 • Tier 2 (Red): Substantial. All personal care services are allowed indoors with
16 modifications.

17 • Tier 3 (Orange): Moderate. All personal care services are allowed indoors with
18 modifications.

19 • Tier 4 (Yellow): Minimal. All personal care services are allowed indoors with
20 modifications.

21 58. CDPH has also issued guidance for all personal care services, including cleaning and
22 distancing requirements.²⁸

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25 ²⁵ <https://files.covid19.ca.gov/pdf/guidance-restaurants-bars.pdf>;
<https://files.covid19.ca.gov/pdf/guidance-dine-in-restaurants.pdf>;
<https://files.covid19.ca.gov/pdf/guidance-takeout-restaurants.pdf>.

26 ²⁶ [https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-
27 19/Dimmer-Framework-September_2020.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf).

28 ²⁷ <https://covid19.ca.gov/industry-guidance/>.

²⁸ <https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf>.

1 59. Gyms and fitness centers are subject to strict limits:²⁹

2 • Tier 1 (Purple): Widespread. Outdoor only with modifications, saunas and steam rooms
3 must close.

4 • Tier 2 (Red): Substantial. Indoor with modifications, capacity must be limited to 10%.

5 • Tier 3 (Orange): Moderate. Indoor with modifications, capacity must be limited to 25%.

6 Indoor pools can open.

7 • Tier 4 (Yellow): Minimal. Indoor with modifications, capacity must be limited to 50%.

8 Indoor pools, saunas, spas, and steam rooms can open.

9 60. CDPH has also issued guidance for gyms and fitness centers to follow, including yoga
10 and dance studios.³⁰

11 **B. Santa Clara County Imposes Additional Restrictions on Public Gatherings and**
12 **Businesses**

13 61. On July 2, 2020, the Santa Clara County Public Health Officer issued an Order
14 “Establishing Mandatory Risk Reduction Measures Applicable to All Activities and Sectors to
15 Address the COVID-19 Pandemic.”³¹ The Order explains that, where there is conflict between the
16 County and the State Orders, the stricter order controls. This Order, among other things, prohibits
17 opening “[a]ny indoor facility that is used for an activity inherently necessitating the removal of a face
18 covering,” including all indoor dining and indoor bars. The order also requires all businesses to fill
19 out and submit a Social Distancing Protocol to the County. Failure to comply with this directive “is a
20 misdemeanor punishable by fine, imprisonment, or both.”

21 62. On July 14, 2020, the Santa Clara County Health Officer issued a “Mandatory
22 Directive for Outdoor Dining, Wineries, and Outdoor Tasting Rooms,” which the Health Officer
23 updated on October 4, 2020³² This order requires any outdoor seating area to have either 50% or 25%
24 “of its perimeter [] open to the outdoors,” depending on whether the roof is open, and to “[s]eparate
25 all tables to ensure that at least 6 feet of distance . . . can easily be maintained,” which “will generally

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27 ²⁹ <https://covid19.ca.gov/industry-guidance/>.

28 ³⁰ <https://files.covid19.ca.gov/pdf/guidance-fitness--en.pdf>.

³¹ <https://www.sccgov.org/sites/covid19/Documents/07-02-20-Health-Officer-Order.pdf>.

³² <https://www.sccgov.org/sites/covid19/Pages/mandatory-directives-outdoor-dining.aspx>.

1 require that the edge of each table be spaced at least 10 feet apart from the edge of the nearest table,”
2 and to “[a]llow no more than six people per table.”

3 63. On July 14, 2020, the Santa Clara County Health Officer issued a “Mandatory
4 Directive for Personal Care Services Businesses,” which the Health officer updated on September 8,
5 2020 and October 4, 2020.³³ The Order requires, among other things, that anyone performing a
6 service that requires the client to remove their mask wear an N95 mask.

7 64. Also on July 14, 2020, the Santa Clara County Health Officer issued a “Mandatory
8 Directive for Gatherings,” which the Officer revised on September 24, 2020.³⁴ The Order sets out the
9 county’s limitations on in-person gatherings. Under Santa Clara’s Mandatory Directive, a “gathering”
10 is “an event, assembly, meeting, or convening that brings together multiple people from separate
11 households in a single space, indoors or outdoors, at the same time and in a coordinated fashion—like
12 a wedding, banquet, conference, religious service, festival, fair, party, performance, movie theater
13 operation, barbecue, protest, or picnic.”

14 65. Santa Clara’s Mandatory Directive “prohibits any gatherings from occurring indoors.”
15 The directive continues: “[W]orship services, cultural ceremonies, protests, and political events may
16 occur outdoors subject to the requirements of this Directive, but they may not occur indoors.” Relying
17 on CDPH’s prohibitions, Santa Clara’s Mandatory Directive also restricts familial, cultural,
18 traditional, and historic gatherings associated with marriage ceremonies: “[T]he State has clarified that
19 ‘wedding receptions/parties/celebrations are NOT permitted at this time’ under State Public Health
20 Officer’s Orders.”

21 66. Even those outdoor gatherings that are “allowed” in Santa Clara County are severely
22 restricted. Although CDPH’s orders do not limit the number of people who can attend an outdoor
23 religious service, protest, or cultural event, under Santa Clara County’s guidance, “the maximum
24 number of people allowed at an outdoor gathering of any type is 60 people (even if the space is big
25 enough to allow proper social distancing for more than 60 people). This includes everyone present,
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27 _____
28 ³³ <https://www.sccgov.org/sites/covid19/Pages/mandatory-directives-personal-care.aspx>.

³⁴ <https://www.sccgov.org/sites/covid19/Pages/mandatory-directives-gatherings.aspx>.

1 such as hosts, workers, and guests. The space must be large enough so that everyone at a gathering can
2 maintain at least 6-foot social distance from anyone (other than people from their own household).”

3 67. Santa Clara County’s Order requires “[a]ll businesses (including nonprofits,
4 educational entities, and any other business entity, regardless of its corporate structure) that organize
5 or host gatherings,” including “religious institutions,” to submit a “social distance protocol” ensuring
6 compliance with the directive, and to certify that protocol “under penalty of perjury.”

7 68. Like CDPH’s bans on gatherings, Santa Clara County officials can create, amend,
8 enforce, or retract directives involving political and religious activities.

9 69. On October 5, 2020, the Santa Clara County Public Health Officer issued an Order
10 “Establishing Revised Mandatory Risk Reduction Measures Applicable to All Activities and Sectors
11 to Address the COVID-19 Pandemic.” This revised directive purports to “supersede[] the July 2, 2020
12 Risk Reduction Order of the Health Officer.”³⁵ It also instructs: “Participants in gatherings of any size
13 must adhere to Health Officer directives applicable to gatherings, including restrictions on the size of
14 gatherings”

15 **II. DEFENDANTS’ ACTIONS INFRINGE ON PLAINTIFFS’ CONSTITUTIONAL** 16 **RIGHTS**

17 **A. Free Speech Plaintiffs**

18 70. Plaintiffs Tandon and the Gannons want to speak about important policy and political
19 issues at in-person gatherings at their homes and outdoors, but the County’s Orders prohibit them from
20 holding indoor gatherings, and the State’s Orders likely prohibit them from meeting outdoors because
21 their gatherings are not “protests” or “cultural gatherings.” And even if they could meet outdoors, the
22 County’s Orders would limit their assemblies to no more than 60 persons.

23 71. **Plaintiff Tandon**, for example, would like to host outdoor gatherings of more than 60
24 persons to share his message about why he is running for the U.S. Congress and his ideas for how best
25 to represent the 17th Congressional District. Before Governor Newsom issued the first safer-at-home
26 order, Tandon had generated significant support by way of traditional campaigning, such as
27 fundraising events at the homes of friends, via invitations to concerts and speaker events, meet-the-

28 ³⁵ <https://www.sccgov.org/sites/covid19/Pages/order-health-officer-10-05-20.aspx>.

1 candidate events and other gatherings, policy discussions, debates, and more. All these activities
2 ground to a halt when the Defendants released the Orders. As a result, Tandon has been unable to
3 express his ideas and policies during the most crucial moments of a political campaign—the weeks
4 right before election day.

5 72. Part of Tandon’s campaign strategy is to conduct fundraisers where supporters can hear
6 his ideas and support his candidacy. The Orders’ ban on gatherings curtails his ability to host
7 fundraisers. He cannot host such gatherings indoors, and any outdoor events are limited to no more
8 than 60 people in Santa Clara, if they are even allowed at all under the State’s Orders, which authorize
9 only “protests” and religious and cultural ceremonies. Although Tandon can reach donors through
10 online outreach, running advertisements on social media and elsewhere costs significant amounts of
11 money, which he cannot raise because the Orders ban in-person gatherings. The Orders have thus put
12 Tandon in a Catch 22: He must move his campaign online, but he is prohibited from holding the type
13 of events that would generate the necessary funds to run a successful online campaign. Regardless,
14 online campaigning is no substitute for the person-to-person interaction necessary to truly
15 communicate with his district’s constituents and understand their concerns.

16 73. To make matters worse, social media platforms have announced that they will not host
17 political ads during the most important time in an election—one week before the vote.³⁶ Tandon is
18 therefore effectively silenced while his opponent, by virtue of his incumbency, can exploit free media
19 coverage. Indeed, the current officeholder Tandon is hoping to unseat has appeared on CNBC,³⁷
20 NBC,³⁸ and MSNBC³⁹ to discuss his views on current affairs.

21 74. Similarly, **Plaintiffs Terry and Carolyn Gannon** have hosted a broad and diverse
22 network of persons in their home for over twelve years to discuss public policy. At these in-home
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24 ³⁶ See, e.g., Steven Overly, *Facebook bans new political ads in the week before Election Day*,
25 POLITICO (Sept. 3, 2020), available at <https://tinyurl.com/y4nf7o6y>.

26 ³⁷ *Rep. Ro Khanna on appointment to White House coronavirus advisory council*, CNBC (April 16,
2020), available at <https://tinyurl.com/y5x9jdt>.

27 ³⁸ *Rep. Ro Khanna Discusses Coronavirus Stimulus Bill*, NBC Bay Area (March 26, 2020), available
at <https://tinyurl.com/yxnanspr>.

28 ³⁹ *Rep. Ro Khanna with Chris Hayes, MSNBC, Coronavirus*, Youtube.com (April 20, 2020), available
at <https://tinyurl.com/y2hozlh5>.

1 assemblies, their group would propose topics to discuss, hear each other’s views on the issues, probe
2 the evidentiary support for the ideas, debate the merits of the proposals, and then try and reach a
3 consensus on the best solution. One recent discussion, for example, involved American policy
4 concerning climate change. Since the Defendants banned in-person gatherings, however, the Gannons
5 have not been able to host any in-person events.

6 75. The Free Speech Plaintiffs are eager to host in-person gatherings to discuss and support
7 their ideas—either indoor or outdoor—and they are capable of doing so safely. Each has ample home
8 or outdoor space to host persons with social distancing of more than six feet the entire time. People
9 attending their assemblies would also be asked to wear masks, and the Free Speech Plaintiffs are
10 willing to provide gloves, screens, or other devices to prevent the spread of COVID-19. To further
11 guard against infection and contagion, they would sterilize the venue just as many businesses and
12 schools currently do.

13 76. These assemblies, which would all be planned and controlled one-off events with strict
14 social distancing procedures, present a much smaller risk of contagion than the weeks-long racial-
15 justice protests Defendants have condoned—and even championed—despite the lack of social
16 distancing.⁴⁰

17 **B. Free Exercise Plaintiffs**

18 77. **Plaintiff Wong** wants to host a small number of his congregation in his home for
19 communal worship, including Biblical studies, theological discussions, collective prayer, and musical
20 praise, as he has done regularly for nearly three years. However, Defendants’ Orders prohibit Wong
21 from hosting such in-person gatherings at his house. Wong may not hold communal worship and Bible
22 study in the privacy of his home with a few members of his congregation, even though he could
23 employ social distancing and other mitigation measures that Defendants have deemed sufficient for
24 other indoor activities. Indeed, under CDPH’s Order, which prohibits all gatherings except for
25 religious ceremonies, protests, and cultural gatherings, Wong likely cannot hold a Bible study in his
26 backyard either.

27 _____
28 ⁴⁰ See Eric Tang, *Gavin Newsom asked to reconcile support for protests with new warnings on
gatherings*, SF Gate (July 2, 2020), available at <https://tinyurl.com/y5d3p4ly>.

1 78. Virtual meetings are an inadequate substitute for Wong’s gatherings. Communal
2 worship, congregational study, and collective prayer are central tenets of Wong’s faith and ministry.
3 These types of in-person gatherings are impossible to replicate in an online format. An online or
4 virtual sermon cannot replicate the communal aspect of an assembled church. In-person worship is
5 indispensable. The Bible commands people to engage in certain activities together, and that means in-
6 person gatherings are essential. Every description of the church in the New Testament is that of a
7 physically gathered people. Thus, in-person gathering is a matter of obedience to the Word of God.

8 79. **Plaintiff Busch** likewise wants to host small, in-person Bible studies in her home, as
9 she has done regularly for over two years, but Defendants’ Orders prevent her from doing so. This is
10 true even though the group could maintain social distancing and employ other mitigation techniques
11 that Defendants have deemed sufficient for other indoor activities. And although Busch, like Wong,
12 could host the event outdoors, CDPH’s ban on gatherings likely prohibits her from holding her Bible
13 study in her own backyard.

14 80. Although Busch and her group have attempted to host Zoom meetings, several of the
15 group members do not have computers and are only able to phone in to the session. The online format
16 also fails to provide the same level of engagement and fellowship as in-person gatherings.

17 **C. Business Plaintiffs**

18 81. **Plaintiff Richards** opened her business, Better Life Fitness Academy (“BLFA”), four
19 years ago. BLFA is a fitness center that offers personal training, group workouts, fitness classes, and
20 access to their gym facilities.

21 82. After the Governor declared a state of emergency in California, BLFA remained closed
22 for several months. During this time, Richards continued paying for basic business expenses like rent
23 and electricity while generating no revenue.

24 83. After some time, BLFA was permitted to reopen in an extremely limited capacity by
25 the State of California and Nevada County. At that point, Nevada County was in the Red Tier. Under
26 the Blueprint and CDPH’s Guidance, BLFA could only operate indoors at 10% capacity. BLFA does
27 not have the resources or space to offer fitness services outdoors.

1 84. Operating at 10% capacity was not sufficient to sustain Richards’ business. Richards
2 could no longer offer group classes or workout sessions. Access to gym equipment was sharply
3 limited. As a result, Richards lost over 85% of her clients.

4 85. The fact that Nevada County moved to the Orange Tier on September 22, 2020,
5 allowing gyms to operate at 25% capacity, has not been enough to save BLFA.⁴¹ Because Defendants’
6 Orders have made her business unsustainable, Richards may be forced to close BLFA by the end of
7 October.

8 86. **Plaintiff Evarkiou** is a small business owner who co-owns and operates a relatively
9 new salon called Wavelength. Wavelength, like many other businesses, shut down soon after
10 Governor Newsom issued a state of emergency in California. Although Wavelength is now allowed to
11 operate, Defendants’ Orders still prohibit Wavelength from offering its group events, which are
12 critical marketing tools for this new business.

13 87. Evarkiou can operate Wavelength safely. Because the health and well-being of the
14 stylists and community are Evarkiou’s top priority, Wavelength has expanded its disinfecting practices
15 and currently follows all safety protocols and guidelines from the State of California, Santa Clara
16 County, the California State Board of Barbering Cosmetology, and the Centers for Disease Control.
17 These policies help ensure a safe working environment, safer than the many other similarly situated
18 establishments that continue to operate unencumbered by Defendants’ Orders.

19 88. Nevertheless, Defendants’ Orders prohibit Wavelength from operating at full capacity
20 or hosting key events. As a result, Evarkiou has suffered severe financial hardship.

21 89. **Plaintiff Khanna** owns one of the oldest vineyards in California, Kirigin Cellars. At
22 the time he bought Kirigin Cellars in 2000, it had fallen into disrepair. Khanna replanted the
23 vineyards, built a new event space, added sports fields, and restored some of the vineyard’s original
24 buildings. Today, Kirigin Cellars has ten acres of outdoor event space and nine thousand square feet of
25 indoor event space.

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28 ⁴¹ Nevada Cty. Pub. Health, *Continue to be COVID safe: Nevada County Moves into the Orange
“Moderate” Tier* (Sept. 22, 2020), <https://www.mynevadacounty.com/CivicAlerts.aspx?AID=3268>.

1 90. Today, Khanna bottles and sells small batch wine using the grapes grown on his land.
2 The overwhelming majority of Khanna’s business, however, involves renting event space. Before
3 Defendants required Khanna’s business to shut down, he hosted over 1,000 youth soccer games, which
4 provided advertising and customers to the business. Approximately one third of Kirigin’s revenues
5 came from events such as weddings and corporate gatherings.

6 91. After the Governor declared a state of emergency, Kirigin Cellars was unable to host
7 any events for months. Under Defendants’ current Orders, all gatherings are prohibited except for
8 weddings, religious services, cultural ceremonies, and protests.⁴² Even at these few events, only 60
9 people are permitted to attend due to Santa Clara’s more restrictive provisions.⁴³ As a result, more
10 than 30 events have been cancelled in 2020.

11 92. Khanna is able to host more than 200 people outdoors while maintaining a six-foot
12 distance between households. Because the Defendants’ Orders have gutted its events revenue, Kirigin
13 Cellars been forced to reduce payroll by 30 percent.

14 93. **Plaintiff Mansour** incorporated her business, Lash Me, Inc. d/b/a The Original Facial
15 Bar, in 2017. Her entire livelihood depends on The Original Facial Bar’s continued success. The
16 Original Facial Bar shut down on March 17, 2020, shortly after the Governor declared a state of
17 emergency. Mansour was forced to lay off her entire staff of nine.

18 94. While the Original Facial Bar could have operated under State guidance, including by
19 providing outdoor services,⁴⁴ until October 4, 2020, Santa Clara County’s “Mandatory Directive for
20 Personal Care Services” prevented Mansour from reopening her business. Under Santa Clara County’s
21 Order, “No personal care services business may offer or perform any service that requires or would
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24 ⁴² Cal. Dep’t of Pub. Health, “Are gatherings permitted?,” *Stay home Q&A* (Oct. 8, 2020),
<https://covid19.ca.gov/stay-home-except-for-essential-needs/>.

25 ⁴³ Santa Clara Cty. Dep’t of Pub. Health, *Mandatory Directive for Gatherings* (Sept. 24, 2020),
<https://www.sccgov.org/sites/covid19/Pages/mandatory-directives-gatherings.aspx>.

26 ⁴⁴ The State Order permits personal care services businesses to operate outdoors in counties in the
27 purple tier, and indoors “with modifications” in the red tier. Cal. Dep’t of Pub. Health, *Blueprint*
Activity and Business Tiers,

28 https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf (last accessed Oct. 9, 2020).

1 likely lead the client to remove or adjust a face covering.”⁴⁵ Providing “facials and facial massages”
2 was explicitly prohibited.⁴⁶

3 95. On October 4, 2020, Santa Clara County updated its order relating to personal care
4 services. Under the updated Order, businesses can provide personal care services to the face and neck
5 area, but workers performing these services must wear N95 masks and eye protection.⁴⁷ However, it is
6 virtually impossible to obtain N95 masks if you are not a healthcare worker.

7 96. The Original Facial Bar has been closed for almost seven months now. And while the
8 newest guidance from Santa Clara County theoretically allows The Original Facial Bar to reopen, the
9 salon has not yet been able to obtain sufficient staffing and supplies to reopen.

10 97. Meanwhile, medical facilities in Santa Clara County have been allowed to perform
11 elective procedures like teeth whitening, botox, and facials. These elective services offered in medical
12 facilities office require patients to remove their facial coverings. And some of the skincare treatments
13 (i.e. facials) offered in medical facilities are similar to those offered by the Original Facial Bar.

14 98. Mansour’s business is fully capable of adhering to public health measures to prevent
15 the spread of infection. Her employees are prepared to wear disposable gloves and smocks and
16 sterilize instruments and surfaces. They have also been trained to prevent the spread of infection even
17 before the start of the pandemic. If The Original Facial Bar is permitted to remain open, it will comply
18 with all required social distancing measures, such as requiring employees to wear masks and eye
19 coverings, and maintaining six feet of distance between clients.

22 ⁴⁵ Santa Clara Cty. Dep’t of Pub. Health, *Mandatory Directive for Personal Care Services Businesses*
23 (Sept. 8, 2020), [https://web.archive.org/web/20201001010934/https://www.sccgov.org/sites/covid19/Pages/mandatory-
24 directives-personal-care.aspx](https://web.archive.org/web/20201001010934/https://www.sccgov.org/sites/covid19/Pages/mandatory-directives-personal-care.aspx).

25 ⁴⁶ *Id.* Compare Cal. Dep’t of Pub. Health, *Guidance for the Use of Face Coverings* (June 29, 2020),
26 [https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-
27 19/Guidance-for-Face-Coverings_06-18-2020.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Guidance-for-Face-Coverings_06-18-2020.pdf) (stating that individuals must wear face coverings
except when they are “obtaining a service involving the nose or face for which temporary removal of
the face covering is necessary to perform the service”).

28 ⁴⁷ Santa Clara Cty. Dep’t of Pub. Health, *Mandatory Directive for Personal Care Services Businesses*
(Oct. 4, 2020), <https://www.sccgov.org/sites/covid19/Pages/mandatory-directives-personal-care.aspx>.

1 99. **Plaintiff Frances Beudet** is the co-owner of Old City Hall Restaurant located in
2 Gilroy, California, in Santa Clara County. The restaurant is within historic downtown Gilroy, in the
3 former municipal building. Beudet has owned the restaurant since 2012.

4 100. Old City Hall Restaurant has approximately 25,000 square feet of indoor dining space
5 and can seat up to 254 customers indoors. The restaurant also has an outdoor patio that can seat up to
6 66 customers.

7 101. Since Governor Newsom, CDPH, and Santa Clara County issued their safer-at-home
8 orders restricting businesses, Old City Hall Restaurant has suffered significant losses. The restaurant is
9 unable to utilize any of its indoor dining space. This has reduced the restaurant's business by 60
10 percent compared to last year. Beudet is thus experiencing extreme financial hardship as a result of
11 Defendants' Orders.

12 **III. DEFENDANTS' ACTIONS ARE NOT SUPPORTED BY PUBLIC HEALTH DATA**

13 **A. COVID-19 is Not as Dangerous as Initially Believed**

14 102. When Governor Newsom first declared a state of emergency, some public health
15 experts were predicting that 2 million people in the United States would die from COVID-19.⁴⁸ The
16 actual number has been far lower, and the infection fatality rate from COVID-19 appears to be ten to
17 forty times lower than estimates that motivated extreme isolation.⁴⁹

18 103. It is also now well established that COVID-19 is not equally dangerous across all age
19 groups. In fact, younger, healthier people have virtually zero risk of death from COVID-19. The
20 CDC's current best estimates are that the infection fatality rate from COVID-19 among persons less
21 than 19 years old is 0.003%, or 3 in 100,000; 0.02% for those between ages 20 and 49, or 2 in 10,000;
22 0.5% for those ages 50 to 69, and 5.4% for those 70 and above.⁵⁰

23
24 ⁴⁸ See Alan Reynolds, *How One Model Simulated 2.2 Million U.S. Deaths from COVID-19*, CATO
25 Institute (April 21, 2020), <https://www.cato.org/blog/how-one-model-simulated-22-million-us-deaths-covid-19>.

26 ⁴⁹ See John P.A. Ioannidis, *The infection fatality rate of COVID-19 inferred from seroprevalence data*, *MedRxiv*, BMJ Yale,
27 <https://www.medrxiv.org/content/10.1101/2020.05.13.20101253v2> (July 14, 2020).

28 ⁵⁰ Centers for Disease Control and Prevention, *COVID-19 Pandemic Planning Scenarios*,
<https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html> (last visited Sept. 24, 2020).

1 104. According to a CDC update published on October 7, 2020, of the first 198,809 US
2 deaths involving COVID-19, 0.2% occurred in people under 25 years of age while 79% were in people
3 over 65.⁵¹

4 105. Over 40% of the COVID-19 deaths in the United States have occurred in nursing
5 homes. And 94% of all deaths associated with the COVID-19 condition involved victims with pre-
6 existing underlying medical conditions—such as diabetes or heart disease.⁵²

7 106. The numbers in California are similar. As of October 8, 2020, 73% of deaths in the
8 state were in those over the age of 65; 93% were in people over 50.⁵³

9 107. The infection fatality rate from the Santa Clara County seroprevalence study conducted
10 by Dr. Jayanta Bhattacharya is 0% among people between 0 and 19 years (there were no deaths in
11 Santa Clara in that age range up to that date); 0.013% for people between 20 and 39 years (1.3 deaths
12 per 10,000 infections); 0.16% for people between 40 and 69 years (1.6 deaths per 1,000 infections);
13 and 1.3% for people above 70 years. 77.5% of all COVID-19 related deaths in the county occurred in
14 patients 65 and older.

15 108. Given the disparate risks COVID-19 presents for various populations, Defendants
16 could target their public health interventions at the most vulnerable. Nursing home patients and those
17 in long-term care facilities are most at risk, and there are numerous precautions the state could take to
18 protect that population without burdening other people's ability to work and gather together. For
19 example, employees at these facilities could be tested regularly—perhaps even daily—to ensure that
20 they are not spreading infection to the elderly. People working in nursing homes could also be
21 required to wear the same PPE employed in hospitals to prevent infection. Those in nursing homes
22 could also undergo more regular testing to ensure that needed interventions are provided as soon as
23

24 ⁵¹ Centers for Disease Control and Prevention, *Weekly Updates by Select Demographic and*
25 *Geographic Characteristics*,
https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm (October 9, 2020).

26 ⁵² *Id.*

27 ⁵³ California Dep't of Pub. Health, *Cases and Deaths Associated with COVID-19 by Age Group in*
California, (last visited October 8, 2020)

28 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-19-Cases-by-Age-Group.aspx>.

1 possible and to quickly quarantine infected individuals in these settings. A recent article published in
 2 Politico highlighted the dramatic difference between the death rate in nursing homes operated by
 3 California’s Veterans Affairs Department and other nursing homes.⁵⁴ The article noted that “an
 4 average nursing home patient in California is 31 times more likely to die from the coronavirus than a
 5 resident of a CalVet home” because of the rigorous precautions taken by CalVet facilities.⁵⁵ If every
 6 nursing home had implemented the same precautions, the total number of deaths in the state from
 7 COVID-19 would be a fraction of the current total.

8 109. In short, reducing the risk of infection and severe illness in nursing homes and long-
 9 term care facilities would dramatically reduce the mortality rates from COVID-19 without imposing
 10 onerous restrictions on the lives of younger, working-age people. Those under the age of 65 with
 11 comorbidities—the same population at a slightly heightened risk from influenza—could also be
 12 provided with special accommodations. Yet the state and county regulations infringing on Plaintiffs’
 13 constitutional rights treat all population groups equally and impose across-the-board restrictions on
 14 people of all ages.

15 **B. The State’s Reliance on the Single Metric of Positive Test Results is**
 16 **Unprecedented and Has No Scientific Basis**

17 110. When the Governor first declared a state of emergency, he argued that this drastic
 18 measure was necessary to protect the public health system from being overwhelmed.⁵⁶ The declaration
 19 asserted that “if COVID-19 spreads in California at a rate comparable to the rate of spread in other
 20 countries, the number of persons requiring medical care may exceed locally available resources.”⁵⁷

21 _____
 22 ⁵⁴ Maggie Severns, *Could massive numbers of nursing home deaths have been prevented?*, POLITICO,
 23 (August 10, 2020), <https://www.politico.com/news/2020/08/10/could-nursing-home-deaths-be-prevented-393131>.

24 ⁵⁵ *Id.*

25 ⁵⁶ See Governor Gavin Newsom, *Proclamation of a State of Emergency* (March 4, 2020),
 26 <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>;
 27 Press Release, Office of Governor Gavin Newsom, *Governor Newsom Declares State of Emergency to Help State Prepare for Broader Spread of COVID-19* (March 4, 2020),
 28 <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>.

⁵⁷ Proclamation of State of Emergency, <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

1 The declaration further asserted that the “conditions caused by COVID-19 are likely to require the
 2 combined forced of a mutual aid region or regions to appropriately respond”—suggesting that county
 3 hospital systems could be overwhelmed with COVID-19 patients and thus require assistance from
 4 other counties.⁵⁸ The Governor’s early focus on burdens to the public health system was consistent
 5 with CDPH’s longstanding use of the rates of hospitalizations and deaths to measure the severity of an
 6 epidemic. It was also consistent with the CDC’s current practice and recent scholarship indicating that
 7 new hospital admissions for SARS-CoV-2 compatible disease syndromes are the most reliable and
 8 timely measures for pandemic surveillance.⁵⁹

9
 10 111. As it turns out, the state’s hospital system has never come close to being overwhelmed.
 11 Although many counties set up surge units to handle expected capacity, most of these units were never
 12 utilized and were quickly dismantled. Even at their July peak, hospitalizations resulting from COVID-
 13 19 did not exceed 10% of total capacity.⁶⁰ And hospitalizations attributable to COVID-19 have
 14 plummeted by more than two-thirds from their mid-July highs, and are now at their lowest levels since
 15 early April.⁶¹ The number of patients in the ICU with COVID-19 has dropped to its lowest level since
 16 late March.⁶² There are now more than 2,900 ICU beds available across the state.⁶³ Indeed, the state
 17 has never had fewer than 1,800 ICU beds available during the entirety of the pandemic.⁶⁴ According to
 18

19
 20 _____
 21 ⁵⁸ *Id.*

22 ⁵⁹ Centers for Disease Control and Prevention, *COVID View: A weekly surveillance summary of U.S.*
 23 *COVID-19 activity*. Available at: [https://www.cdc.gov/coronavirus/2019-ncov/covid-](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html)
 24 [data/covidview/index.html](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html); García-Basteiro AL, Chaccour C, Guinovart C, Llupià A, Brew J, Trilla A,
 25 Plasencia A, *Monitoring the COVID-19 epidemic in the context of widespread local transmission*,
 26 LANCET RESPIR MED, 2020 May;8(5):440-442.

27 ⁶⁰ COVID-19: Hospitals, California Department of Public Health
 28 [https://public.tableau.com/views/COVID-](https://public.tableau.com/views/COVID-19HospitalsDashboard/Hospitals?:embed=y&:showVizHome=no)
 29 [19HospitalsDashboard/Hospitals?:embed=y&:showVizHome=no](https://public.tableau.com/views/COVID-19HospitalsDashboard/Hospitals?:embed=y&:showVizHome=no).

30 ⁶¹ COVID-19: Hospitals, California Department of Public Health,
 31 [https://public.tableau.com/views/COVID-](https://public.tableau.com/views/COVID-19HospitalsDashboard/Hospitals?:embed=y&:showVizHome=no)
 32 [19HospitalsDashboard/Hospitals?:embed=y&:showVizHome=no](https://public.tableau.com/views/COVID-19HospitalsDashboard/Hospitals?:embed=y&:showVizHome=no).

33 ⁶² *Id.*

34 ⁶³ *Id.*

35 ⁶⁴ *Id.*

1 the traditional measures used by the State, any public health emergency in California has long since
2 abated.

3 112. The State's Blueprint ignores this data because it relies exclusively on case counts and
4 positivity rates to determine the level of restrictions to be imposed on each county's residents and
5 businesses. CDPH has not previously calculated the severity of influenza or other respiratory disease
6 by focusing on positive test results. For example, in 2009, CDPH did not measure the severity of
7 H1N1 using case rates.⁶⁵ The CDC also stopped collecting individual case counts and instead
8 collected weekly state reports of hospitalizations and deaths.⁶⁶ There is no rational scientific
9 explanation as to why CDPH is now relying exclusively on case rates to measure the severity of the
10 novel coronavirus.

11
12 113. New hospital admissions would be a much more reliable measure of harm, as it is
13 directly correlated with pandemic infection rates and serious consequences of infection, and the state
14 could easily use laboratory confirmed hospitalized cases as an alternative measure of public harm.

15 114. Defendants' narrow focus on case counts provides a grossly misleading picture of the
16 state's public health situation. Over the course of the epidemic, laboratory positive case counts have
17 not tracked well with severe disease and death. This is partly because case counts are largely
18 dependent on supply and demand for testing, which has varied considerably over the course of the
19 epidemic.

20 115. It is also partly because the PCR test, as it is currently used, can yield positive results
21 even for individuals with trace amounts of the virus in their bodies who are neither symptomatic nor
22

23
24
25 ⁶⁵ California Department of Public Health, *Influenza Surveillance Program*,
26 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/Flu-Reports.aspx>.

27 ⁶⁶ Jhung MA, Swerdlow D, Olsen SJ, Jernigan D, Biggerstaff M, Kamimoto L, Kniss K, Reed C, Fry
28 A, Brammer L, Gindler J, Gregg WJ, Bresee J, Finelli L, *Epidemiology of 2009 pandemic influenza A
(H1N1) in the United States*, CLINICAL INFECTIOUS DISEASE 2011 Jan 1;52 Suppl 1:S13-26.

<https://doi.org/10.1093/cid/ciq008> PMID: 21342884.

1 infectious.⁶⁷ Evidence shows that because of the way the PCR tests are evaluated, individuals can test
 2 “positive” up to 80 days following their initial infection, weeks after they have ceased to be
 3 infectious.⁶⁸ One survey of PCR results concluded that up to 90 percent of positive SARS-CoV-2 PCR
 4 test results may be clinically insignificant or non-contagious.⁶⁹ Even if the percentage is lower,
 5 Defendants are justifying their draconian Orders on the basis of positive test results from a large
 6 number of asymptomatic and non-infectious individuals that do not present *any* risk to the public
 7 healthcare system.

8
 9 116. The use of cases also overstates the rate of community spread because California has
 10 not adopted random testing for SARS-CoV-2, but rather has focused on symptomatic and high-risk
 11 populations. This approach makes sense to the extent the State is attempting to locate infected
 12 individuals for treatment and/or quarantine. But it makes no sense to use those case counts as a
 13 reflection of the overall level of community spread within a county.

14 117. Additionally, individuals who have COVID-19 can be tested multiple times and
 15 counted as multiple “cases,” further inflating the case count numbers.⁷⁰

16 118. The CDC test kits for SARS-CoV-2 have also been found to generate up to 30% false
 17 positives.⁷¹ When the virus is prevalent in the population at low levels and testing is done in high

18
 19 ⁶⁷ See T. Jefferson, E.A. Spencer, J. Brassey, and C. Heneghan “Viral Cultures for COVID-19
 20 Infectivity Assessment – A Systematic Review (Update 3)” medRxiv, August 2020,
 21 <https://www.medrxiv.org/content/10.1101/2020.08.04.20167932v3.full.pdf> Accessed Sept. 30, 2020.

22 ⁶⁸ *Id.*

23 ⁶⁹ Rachel Schraer, *Coronavirus: Tests ‘could be picking up dead virus’*, BBC News (Sept. 5, 2020),
 24 <https://www.bbc.com/news/health-54000629>; Just the News, *Report: Up to 90% of confirmed COVID-19 cases might not be contagious* (Sept. 1, 2020), <https://justthenews.com/politics-policy/coronavirus/report-90-covid-19-cases-might-not-be-contagious>.

25 ⁷⁰ See, John Hopkins Coronavirus Resource Center, *Testing FAQ*
 26 <https://coronavirus.jhu.edu/testing/testing-faq/overview#why-are-there-inconsistencies-among-testing-data-for-covid-19>.

27 ⁷¹ Businesswire, *CDC Coronavirus Test Kits Generate 30% False Positive and 20% False Negative Results – Connecticut Pathologist’s Newly Published Findings Confirm* (July 17, 2020)

28 <https://www.businesswire.com/news/home/20200717005397/en/CDC-Coronavirus-Test-Kits-Generate-30-False>; Prof. Carl Heneghan, *How many Covid diagnoses are false positives?*, The Spectator (July 20, 2020) <https://www.spectator.co.uk/article/how-many-covid-diagnoses-are-false-positives->.

1 numbers, even a small error rate creating false positives will dramatically inflate the number of
2 positive tests, making positive test results an unreliable metric for determining public health strategy.⁷²
3 Indeed, PCR tests have led to pseudo-epidemics in the past, with healthcare responses to perceived
4 disease being driven almost entirely by false positives.⁷³ This is why public health officials have
5 historically used hospitalization and death rates to determine the presence and severity of epidemics.

6 119. Yet despite the fact that hospitals across the state were never close to being
7 overwhelmed, and that total hospitalizations of COVID-19 patients have dropped by two-thirds since
8 the July peaks, the majority of the state continues to be in the “purple” or “red” tier, and Defendants
9 continue to impose onerous restrictions that infringe on Plaintiffs’ constitutional rights.

10
11 **C. The State’s Restrictions on Various Activities Are Arbitrary and Irrational**

12 120. Neither the County nor the State has published credible scientific evidence to
13 demonstrate that the specific restrictions adopted will result in either reductions in laboratory-positive
14 counts or, more importantly, reductions in severe disease and death.

15 121. Neither the County nor the State has reported information collected in its contact
16 tracing investigation that could shed light on the relative importance of settings of exposure and risk,
17 which might support a nexus between specific restrictions on various activities and infection risk. The
18 State and County have also failed to provide any valid way of measuring how their restrictions on
19 California citizens are affecting the spread of the disease. In other words, both the County and State
20 appear to be imposing restrictions based solely on intuition and guesswork.

21 **CLAIMS**

22 **COUNT ONE: Violation of the First Amendment – Right to Free Speech and Assembly**
23 **(42 U.S.C. § 1983)**

24 122. Plaintiffs hereby incorporate by reference all preceding paragraphs.

25 123. Under the First Amendment, Plaintiffs are guaranteed freedom of speech and freedom

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27 ⁷² Prof. Carl Henegan, *How many Covid diagnoses are false positives?*, The Spectator (July 20, 2020)
<https://www.spectator.co.uk/article/how-many-covid-diagnoses-are-false-positives->.

28 ⁷³ Gina Kolata, *Faith in Quick Test Leads to Epidemic that Wasn’t*, The New York Times (Jan. 22,
2007), <https://www.nytimes.com/2007/01/22/health/22whoop.html>.

1 of peaceable assembly. Political speech is at the core of the First Amendment. *See, e.g., Citizens*
2 *United v. FEC*, 558 U.S. 310, 339 (2010) (“The right of citizens to inquire, to hear, to speak, and to
3 use information to reach consensus is a precondition to enlightened self-government and a necessary
4 means to protect it.”); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223
5 (1989) (The First Amendment “‘has its fullest and most urgent application’ to speech uttered during a
6 campaign for political office.”) (citation omitted).

7 124. Free Speech Plaintiffs seek to exercise their right to speech and assembly in the weeks
8 leading up to and after the November election. However, the Orders burden Plaintiffs’ First
9 Amendment rights because they make it impossible for Plaintiffs to hold indoor or outdoor gatherings,
10 including for the purpose of fundraising and campaigning, and simply for the purpose of discussing
11 and debating important current events and government policies.

12 125. The Orders’ burden on Tandon’s First Amendment rights is particularly severe because
13 he is running for elected office this November. And Plaintiffs Terry and Carolyn Gannon wish to share
14 their beliefs and convictions with others, including through in-person discussions and debates about
15 state and national policies.

16 126. There are no viable alternative avenues by which Free Speech Plaintiffs can exercise
17 their First Amendment rights. Social media platforms are expensive, and they will ban Tandon’s
18 political advertisements right before the election. This means that he will have no mainstream way to
19 connect to his voters. He cannot host a rally, attend a meet-the-candidate event, or advertise on
20 Facebook. The Orders effectively silence him while the current officeholder can take advantage of free
21 media coverage by virtue of his incumbency.

22 127. Moreover, these restrictions on speech are clearly content based. Whereas CDPH
23 allows “protests” to take place outdoors, it does not allow other types of political gatherings. Because
24 the Orders effect a complete ban on certain types of political activities, and are not content neutral,
25 they are subject to strict, or at least intermediate, scrutiny.

26 128. Even assuming Defendants have a compelling interest in limiting the harms caused by
27 COVID-19, the Orders are not narrowly tailored. Defendants could implement policies that target
28 those most at risk instead of arbitrarily restricting Plaintiffs’ freedoms. The state’s one-size-fits-all

1 regulations are the opposite of a narrowly tailored approach. Moreover, there is no evidence that the
2 risk of viral spread is substantial when persons are practicing social distancing and wearing face masks
3 in a constantly sanitized environment. This is especially true of gatherings that take place outdoors.

4 129. Even if Defendants’ Orders burdening the Free Speech Plaintiffs’ rights were subject
5 only to intermediate scrutiny they should be invalidated because Defendants’ use of case counts and
6 testing positivity to impose restrictions on Plaintiffs First Amendment rights is not a narrowly tailored
7 response to the supposed public health emergency. Case counts generated by the PCR test have little
8 relationship to any potential burden to the public health system situation in any given county, and
9 Defendants’ Orders *do not even consider* hospitalization or death rates—the traditional metrics used to
10 evaluate the seriousness of an epidemic—in the Blueprint for reopening.

11 130. In sum, Defendants’ Orders—including EO N-60-20, Blueprint, Stay Home Q&A,
12 CDPH gatherings guidance, and Santa Clara Mandatory Directive for Gatherings—unconstitutionally
13 burden Free Speech Plaintiffs’ rights to the freedom of speech and peaceable assembly.

14 **COUNT TWO: Violation of the First Amendment – Right to Free Exercise and Assembly**
15 **(42 U.S.C. § 1983)**

16 131. Plaintiffs hereby incorporate by reference all preceding paragraphs.

17 132. The Free Exercise Clause of the First Amendment protects the right to participate in
18 religious activities, both formal worship services at Church and other less formal religious activities.
19 In-person gatherings for the study of Biblical text and other books on Biblical topics, are central to the
20 faith of Plaintiffs Wong and Busch.

21 133. Defendants’ Orders prohibit Wong and Busch from hosting Bible studies indoors
22 because their homes are not “places of worship.” And although Santa Clara would allow these
23 gatherings to take place outside, CDPH’s guidance does not permit *any* outdoor gatherings that are not
24 worship services, cultural ceremonies, or protests. Accordingly, Plaintiffs are unable to hold Bible
25 studies in person.

26 134. The Orders are subject to strict scrutiny because in addition to burdening religious
27 exercise, they infringe on other First Amendment Rights, including the right to speech and peaceable
28 assembly. *See San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1031 (9th Cir. 2004)

1 (“In such ‘hybrid’ cases, the law or action must survive strict scrutiny.”). The Orders are also subject
2 to strict scrutiny because they are neither neutral nor generally applicable, and they impose a content-
3 based restriction on religiously-motivated expressive speech. *Trinity Lutheran Church of Columbia,*
4 *Inc. v. Comer*, 137 S. Ct. 2012, 2015 (2017) (“It has remained a fundamental principle of this Court’s
5 free exercise jurisprudence that laws imposing special disabilities on the basis of religious status
6 trigger the strictest scrutiny.” (internal quotation marks and ellipses omitted)); *Stormans, Inc. v.*
7 *Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (“For laws that are not neutral or not generally
8 applicable, strict scrutiny applies.”). The bans on gatherings do not apply to protests, and they allow
9 religious activity at “places of worship.” Yet the State and County purport to ban other types of
10 religious expression—such as studying the Bible in a group—whether conducted indoors or outdoors.

11 135. Even assuming Defendants have a compelling interest in limiting the harms caused by
12 COVID-19, the Orders are not narrowly tailored. Defendants could implement policies that target
13 those most at risk instead of arbitrarily restricting the freedoms of younger, healthier people. The
14 state’s one-size-fits-all regulations are the opposite of a narrowly tailored approach. Moreover, there is
15 no evidence that the risk of viral spread is substantial when persons are practicing social distancing
16 outdoors and wearing face masks in a constantly sanitized environment.

17 136. Plaintiffs Wong and Busch can host gatherings safely, using the same mitigation
18 techniques as other activities that are permitted indoors. Indeed, Defendants recognize that events can
19 be held with proper social distancing, because they allow protests, cultural gatherings, and religious
20 ceremonies, and do not prohibit people from congregating on public buses, at airports, and in stores
21 and other similar venues. None of these permitted activities are less risky than small gatherings in the
22 home

23 137. Even if Defendants’ Orders were subject only to rational basis review they should be
24 invalidated because Defendants’ use of case counts and testing positivity to impose restrictions on
25 Plaintiffs First Amendment rights is irrational. Case counts generated by the PCR test have little
26 relationship to any potential burden to the public health system situation in any given county, and
27 Defendants’ Orders *do not even consider* hospitalization or death rates—the traditional metrics used to
28 evaluate the seriousness of an epidemic—in the Blueprint for reopening.

1 138. In sum, Defendants’ Orders—including EO N-60-20, Blueprint, Stay Home Q&A,
2 CDPH gatherings guidance, Santa Clara Mandatory Directive for Gatherings, and the Religious
3 Gatherings Guidance—unconstitutionally burden Plaintiffs Wong and Busch’s right to the free
4 exercise of their religion and the right to peaceably assemble.

5 **COUNT THREE: Violation of the Fourteenth Amendment –Substantive Due Process Right to**
6 **Earn a Living (42 U.S.C. § 1983)**

7 139. Plaintiffs hereby incorporate by reference all preceding paragraphs.

8 140. The Due Process Clause of the Fourteenth Amendment includes a substantive
9 component that bars arbitrary, wrongful, government action “regardless of the fairness of the
10 procedures used to implement them.” *Zinerman v. Burch*, 494 U.S. 113, 125 (1990).

11 141. The right of citizens to support themselves by engaging in a chosen occupation is
12 deeply rooted in our nation’s history and has long been recognized as a component of the liberties
13 protected by the Fourteenth Amendment. *See, e.g., Conn v. Gabbert*, 526 U.S. 286, 292 (1999) (“[T]he
14 liberty component of the Fourteenth Amendment’s Due Process Clause includes some generalized due
15 process right to choose one’s field of private employment ...”); *Erotic Service Provider Legal*
16 *Education and Research Project v. Gascon*, 880 F.3d 450, 459 (9th Cir. 2018) (“The fundamental
17 right to make contracts is guaranteed by the Constitution, which forbids the government from
18 arbitrarily depriving persons of liberty, including the liberty to earn a living and keep the fruits of
19 one’s labor.”) (citing *Lowe v. S.E.C.*, 472 U.S. 181, 22 (1985)).

20 142. Defendants have deprived Plaintiff Mansour of her right to earn a living by arbitrarily
21 forcing her to close her business.

22 143. Mansour is prepared to run her business in a safe and responsible manner that allows
23 her to earn a living. Her skincare salon had measures in place even before the pandemic to prevent the
24 spread of infection. And she has implemented safety protocols to mitigate the spread of COVID-19
25 while providing her services.

26 144. Mansour has been financially devastated by the Orders, and there is no telling how long
27 they will remain in place.

28 145. There is no rational basis for Defendants’ arbitrary deprivation of Mansour’s liberty

1 based on factors unrelated to her capacity or fitness to operate her business safely. The restrictions
2 imposed under the Blueprint are based on case counts and positivity rates, but case counts have never
3 been used to craft public policy, and the results of the PCR test have little relationship to any potential
4 burden to the public health system situation in any given county. Defendants’ Orders do not even
5 consider hospitalization or death rates—the traditional metrics used to evaluate the seriousness of an
6 epidemic—in the Blueprint for reopening. Most importantly, none of these metrics evaluate Plaintiffs’
7 ability to practice their professions safely.

8 146. In sum, Defendants’ Orders—EO N-60-20, Blueprint, and Stay Home Q&A—
9 unconstitutionally and arbitrarily burden Plaintiff Mansour’s right to earn a living.

10 **COUNT FOUR: Violation of the Fourteenth Amendment – Equal Protection (42 U.S.C. § 1983)**

11 147. Plaintiffs hereby incorporate by reference all preceding paragraphs.

12 148. The equal protection doctrine prohibits “government classifications that affect some
13 groups of citizens differently than others.” *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601 (2008)
14 (citations omitted). The touchstone of this analysis is whether a state creates disparity “between
15 classes of individuals whose situations are arguably indistinguishable.” *Ross v. Moffitt*, 471 U.S. 600,
16 609 (1974).

17 149. The Orders treat Plaintiffs Richards, Evarkiou, Mansour, Khanna, and Beaudet, and
18 their businesses differently than other similarly situated individuals and businesses.

19 150. For example, Mansour has been forced to close her skincare salon while
20 dermatologists’ offices can perform the same or similar skin treatments. There is no significant
21 difference between the facials Mansour offered at The Original Facial Bar and a facial provided by a
22 dermatological staff member. The Original Facial Bar is just as capable of adhering to public health
23 measures as a dermatologist’s office. The Original Face Bar complied with hygiene and sanitation
24 standards set by the state and county. Its staff was trained how to prevent infection and maintain a
25 clinically clean space prior to the pandemic. Yet, The Original Face Bar has been closed while
26 dermatologist’s offices are allowed to remain open.

27 151. Similarly, while Defendants’ Orders allow outdoor church services, protests, and
28 cultural events, Kirigin Cellars is prohibited from holding an outdoor wedding reception or other

1 gathering. There is no rational basis for this discriminatory treatment, especially since Kirigin Cellars
2 has enough outdoor space to ensure that all guests comply with social distancing guidelines.

3 152. The Orders also discriminate against businesses based solely on which county they are
4 in. Whereas businesses in Humboldt County can operate with few restrictions, businesses in Santa
5 Clara County, which remains in the Red Tier, are subject to onerous regulations. There is no rational
6 basis for this unequal treatment because the metrics Defendants are using to determine the tiers—case
7 counts and positivity rates—do not accurately reflect the state of community spread or the signal
8 anything meaningful about the risks to the public health system.

9 153. In sum, Defendants’ Orders—including EO N-60-20, Blueprint, and Stay Home Q&A,
10 and Santa Clara Mandatory Directive for Gatherings —irrationally and arbitrarily shuts Plaintiffs’
11 businesses while simultaneously permitting similarly situated businesses to open.

12 **COUNT FIVE: Violation of the Fourteenth Amendment of the U.S. Constitution – Void for**
13 **Vagueness (42 U.S.C. § 1983)**

14 154. Plaintiffs hereby incorporate by reference all preceding paragraphs.

15 155. The Due Process Clause of the Fourteenth Amendment to the United States Constitution
16 provides that no State shall “deprive any person of life, liberty, or property, without due process of law.”
17 U.S. CONST. amend. XIV, § 1.

18 156. The Supreme Court has held that penal laws are unconstitutionally vague where they fail
19 to define criminal conduct with sufficient precision that “ordinary people” can understand what conduct
20 is prohibited, and where the statute encourages arbitrary and discriminatory enforcement. *Kolender v.*
21 *Lawson*, 461 U.S. 352, 357–58 (1983). While the doctrine focuses both on actual notice and arbitrary
22 enforcement, the more important aspect of vagueness doctrine is the “requirement that a [State] establish
23 minimal guidelines to govern law enforcement.” *Id.* at 358.

24 157. Additionally, “[w]hen speech is involved, rigorous adherence to those requirements is
25 necessary to ensure that ambiguity does not chill protected speech.” *F.C.C. v. Fox Television*, 567 U.S.
26 239, 253–54 (2012).

27 158. After declaring a state of emergency due to the COVID-19 pandemic, Governor
28

1 Newsom issued orders requiring the people of California to “heed the current State public health
2 directives” which are available online. EO-N-33-20 at 1. All “orders and regulations” issued by the
3 Governor during a state of emergency “shall have the force of law.” Cal. Govt. § 8567. Violating any
4 of Defendants’ Orders is thus a criminal act. Cal. Govt. § 8665.

5 159. The State Public Health Officer and the California Department of Public Health have
6 issued a tangle of confusing and opaque orders without guidance as to how those orders will be
7 enforced. For example, it is unclear whether an outdoor Bible study is an allowable religious
8 ceremony, or whether a political rally on behalf of a candidate counts as a protest. As a result of this
9 confusion, Plaintiffs are unable to determine which types of gatherings are permitted under the Orders
10 and which are prohibited.

11 160. The vagueness of these orders and lack of guidance from government agencies chills
12 constitutionally protected speech and other expressive conduct because Plaintiffs fear prosecution
13 authorized by Cal. Code. § 8665.

14 **PRAYER FOR RELIEF**

15 WHEREFORE, Plaintiffs respectfully request that this Court enter judgment against
16 Defendants as follows:

- 17 1. An order and judgment declaring that the Orders and the associated guidance, facially and
18 as applied to Plaintiffs, violate the Free Speech, Free Exercise, and Free Association
19 Clauses of the First Amendment and the Equal Protection and Due Process Clauses of the
20 Fourteenth Amendment to the U.S. Constitution.
 - 21 2. An order temporarily, preliminarily, and permanently enjoining and prohibiting Defendants
22 from enforcing the Orders or otherwise interfering with Plaintiffs’ constitutional rights and
23 federal guarantees;
 - 24 3. An award of nominal damages against Santa Clara County for violation of Plaintiffs’
25 constitutional rights;
 - 26 4. For attorneys’ fees and costs;
 - 27 5. Such other and further relief as the Court deems appropriate and just.
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By: /s/ Robert E. Dunn

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