

No. 20-15949

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RON GIVENS, an individual; CHRISTINE BISH, an individual
Plaintiffs, Appellants, and Petitioners

v.

GAVIN NEWSOM,
in his official capacity as Governor of California, et al.,
Defendants and Appellees.

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

**PLAINTIFFS-APPELLANTS-PETITIONERS' PETITION FOR
REHEARING EN BANC**

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STATEMENT OF REASONS FOR EN BANC REVIEW

In *Roman Catholic Diocese v. Cuomo*, 592 U.S. ____ at ____, 2020 WL 6948354 (2020) (“Cuomo”), the Supreme Court clarified that traditional tiered scrutiny analysis applies to violations of constitutional rights, even in a pandemic. The Court further immediately enjoined the challenged orders, stating that “prompt[]” and “immediate relief” is “*essential*” when COVID-19 restrictions infringe on First Amendment rights. *Id.* Following the Supreme Court’s lead, on December 15, 2020, in *Calvary Chapel Dayton Valley v. Sisolak*, ____ F.3d ____ 2020 WL 7350247 (December 15, 2020) (“*Dayton*”), this Court reversed a district court’s opinion which applied rational basis review to First Amendment violations rather than traditional tiered scrutiny. *Id.* This Court additionally granted immediate injunctive relief to appellants, despite the *Dayton* district court not having considered plaintiff’s claims in light of strict scrutiny. *Id.* at *4. Petitioners seek *en banc* review to request the full court apply the *Cuomo* and *Dayton* standards and remedy in their analogous case.

INTRODUCTION

There is no pandemic exception to the Constitution, including the First Amendment’s requirement for swift review of orders that limit free speech rights—even if the order is the denial of a temporary restraining order. Yet for months, the Appellees (“state officials” or the “government”) prohibited Ron Givens and

Christine Bish (“Petitioners”) from obtaining permits to lawfully protest the government’s unprecedented COVID-19 restrictions. Petitioners sought to engage with state officials to negotiate a mutually agreeable standard that would both address COVID-19 health concerns and allow Petitioners to exercise their First Amendment rights. ER 177-79, ¶¶22–31; 168 ¶13 170, ¶¶ 4, 7–9. State officials refused and banned protests, but then did an about face and began *supporting protests* when the protests were about police brutality instead of government malfeasance. RJN Exs 6–7, 9, 14–16.

This fickle adherence to the First Amendment has now continued for many months with constantly changing standards and regulations, and an ever-present threat that state officials will again crack down on disfavored speech. “The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 247, 373 (1976). Yet the *Givens* district court denied Petitioners’ request for a temporary restraining order, applying a never before used “emergency police powers” review standard, below even rational basis review. *Givens v. Newsom*, 459 F. Supp. 3d 1302, 1317 (E.D. Cal. 2020). The *Givens* district court stated, “when a state exercises emergency police powers to enact an emergency public health measure, courts will uphold it unless (1) there is no real or substantial relation to public health, or (2) the measures are ‘beyond all question’ a ‘plain, palpable invasion of rights secured by

[] fundamental law.” *Id.* at 1310 (citation omitted). In *Cuomo*, the Supreme Court disavowed this standard and applied traditional tiered scrutiny analysis to violations of First Amendment rights, making clear that “even in a pandemic, the Constitution cannot be put away and forgotten.” *Cuomo*, 592 U.S. at *3.

The *Givens* panel did not address the district court’s error of law. *Givens v. Newsom*, No. 20-15949, 2020 WL 7090826, at *1 (9th Cir. Dec. 4, 2020) (“Op.”). Instead, it dismissed Petitioners appeal without granting any relief, stating the district court “did not dispositively foreclose Plaintiffs from again seeking interlocutory relief,” because Plaintiffs were invited to present “*more evidence*” to attempt to meet the court’s erroneous standard. *Id.*

Like *Cuomo* and *Dayton*, the *Givens* district court wrongly decided the purely legal question of the appropriate standard of review, resolution of the issue is clear, and injustice will result if this Court allows the panel’s decision to stand without intervening to correct the courts’ errors of law and providing Petitioners immediate injunctive relief. Petitioners respectfully request *en banc* review to address these errors.

LEGAL STANDARD

An *en banc* hearing is appropriate when: (1) *en banc* consideration is necessary to secure or maintain uniformity of the court’s decisions; or (2) the proceeding involves a question of exceptional importance. Fed. R. App. P.

35(a)(1)-(2). *En banc* rehearing gives “all active judges an opportunity to hear a case where ... there is a difference in view among the judges upon a question of fundamental importance, and especially in a case where two of the three judges sitting in a case may have a view contrary to that of the other ... judges of the court.” *Hart v. Massanari*, 266 F.3d 1155, 1174 (9th Cir. 2001) (citing *Comm’r v. Textile Mills Secs. Corp.*, 117 F.2d 62, 70 (3d Cir. 1940)). The goal of *en banc* review is to “preserve consistency in circuit law.” *U.S. v. Easterday*, 564 F.3d 1004, 1011 (9th Cir. 2009).

ARGUMENT

I. ***CUOMO* AFFIRMED THE PREEMINENCE OF TRADITIONAL TIERED CONSTITUTIONAL SCRUTINY, EVEN IN A PANDEMIC**

The Supreme Court applied traditional tiered scrutiny in its examination of the COVID-19 specific constitutional claims in *Cuomo*. *Cuomo*, at *2. While noting that the special expertise of public health experts should be respected, the Court stated, “even in a pandemic, the Constitution cannot be put away and forgotten.” *Id.*, at *3. This is because, as the Court noted, “[t]he loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 247, 373 (1976).

The majority opinion did not mention *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), utilized by numerous lower courts across the

nation to justify applying rational basis review to pandemic-related government actions where a higher level of scrutiny would normally apply. But in concurrence, Justice Gorsuch made clear his disdain for lower courts' recent *Jacobson* application, labeling *Jacobson* a "modest decision" some courts have mistaken for "a towering authority that overshadows the Constitution during a pandemic." Justice Gorsuch further exhorted his judicial colleagues to "not shelter in place when the Constitution is under attack." *Id.* at *6 (Gorsuch, J., concurring). Applying *Cuomo*, the Supreme Court vacated the district court's order denying an injunction and remanded the case for further consideration in light of *Cuomo*. *Harvest Rock Church v. Newsom*, ___ U.S. ___ 2020 WL 7061630 (December 3, 2020). Likewise, this Court in *Dayton* also applied *Cuomo* and reversed a district court's erroneous application of rational basis review to an appellant's First Amendment claims.

The *Givens* district court reviewed Plaintiffs' First Amendment violations under an erroneous "emergency review" standard, below even rational basis. Because of the "abnormal circumstances" surrounding COVID-19 regulations, the *Givens* district court quoted out of context language from the *Jacobson* decision to determine it would uphold the state's exercise of "emergency police power to enact an emergency public health measure" unless "(1) there is no real or substantial relation to public health, or (2) the measures are 'beyond all question' a 'plain,

palpable invasion of rights secured by [] fundamental law.” *Id.* at 1310 (quoting *Jacobson*, 197 U.S. at 30). The district court then denied Petitioners’ TRO request after finding Petitioners failed to meet this exceptionally deferential standard.

Circuit precedent, authoritative at the time it is issued, “can be effectively overruled by subsequent Supreme Court decisions that ‘are closely on point’ even though those decisions do not expressly overrule the prior circuit precedent.” *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003). “Issues need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.” *Id.* at 900.

Cuomo and *Dayton* irreconcilably undercut the theory and reasoning underlying *Givens*. The Supreme Court did not limit their affirmation of traditional tiered scrutiny to religious liberty cases to the exclusion of other First Amendment rights. The Court was clear, “even in a pandemic, the Constitution cannot be put away and forgotten,” *Cuomo*, at 3, and “[g]overnment is not free to disregard the First Amendment in times of crisis.” *Cuomo*, at 4 (Gorsuch, J., concurring). Despite the Supreme Court having already clarified traditional tiered scrutiny applies to First Amendment claims stemming from pandemic regulations, the *Givens* panel did not correct the district court’s erroneous standard of review. Instead, the *Givens* panel found that, in denying the TRO, the district court “did not

dispositively foreclose Plaintiffs from again seeking interlocutory relief” because Plaintiffs were invited to present “*more evidence.*” Op. 3 (emphasis added). It is wrong to return Petitioners to the district court with an exhortation to provide “more evidence,” without this Court correcting the erroneous standard employed by the district court to examine that evidence. *En banc* review is appropriate to clarify traditional tiered scrutiny applies to Petitioners’ claimed Constitutional violations.

II. IMMEDIATE INJUNCTIVE RELIEF IS “ESSENTIAL” HERE, AS IT WAS IN *CUOMO*, TO PROTECT FIRST AMENDMENT SPEECH OF THE HIGHEST ORDER

For most of 2020, courts have provided government officials with nearly unfettered power to combat COVID-19 as they see fit, without regard to Constitutional rights. But *Cuomo* made clear, “[g]overnment is not free to disregard the First Amendment in times of crisis.” *Cuomo*, at *4 (Gorsuch, J., concurring). In addition to clarifying the appropriate standard of review for assessing pandemic related constitutional violations, the Court reaffirmed the need to issue prompt and immediate injunctive relief pending appellate review for COVID-19 related government restrictions of First Amendment rights. *Id.* at *1 (“Because of the need to issue an order promptly, we provide only a brief summary of the reasons why immediate relief is essential.”).

This Court in *Dayton* provided a similar remedy to appellants. After discussing the need to apply strict scrutiny, this Court stated:

The district court never reached the question of whether the Directive survives strict scrutiny review because it thought that then-current law required only rational basis review. Although, “[a]s a general rule,” we do “not consider an issue not passed upon below,” we have discretion to decide “a purely legal” question where “resolution of the issue is clear and ... injustice might otherwise result.” *Quinn v. Robinson*, 783 F.2d 776, 814 (9th Cir. 1986).”

Dayton Valley at *4. This Court also considers “the effect a delay” in decision would have and whether “significant questions of general impact are raised” in its determination whether to act on an issue undecided at the district court level.

Planned Parenthood of Greater Washington & N. Idaho v. U.S. Dep't of Health & Human Servs., 946 F.3d 1100, 1110 (9th Cir. 2020).

As in *Cuomo* and *Dayton*, here immediate injunctive relief is appropriate. The right to free speech is no less crucial to our constitutional order than the right to religious liberty. “Political speech is core First Amendment speech, critical to the functioning of our democratic system” and “rest[s] on the highest rung of the hierarchy of First Amendment values.” *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009); *see also Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”). The Supreme Court has recognized that “the practice of persons sharing common views banding together to

achieve a common end is deeply embedded in the American political process.” *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (quoting *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981)).

Moreover, the United States Supreme Court requires *immediate* judicial review when a court imposes a prior restraint on expression. *National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (“If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review.”). See *Puruczky v. Corsi*, 110 N.E.3d 73, 78 (11th App. Dist. 2018), at ¶ 15 (requiring immediate appellate review of court orders enjoining speech); *Connor Group v. Raney*, 2016-Ohio-2959 (2d App. Dist.) (same); *Internat’l Diamond Exchange Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc.*, 591 N.E.2d 881, 70 Ohio App.3d 667, 671 (2d App. Dist. 1991) (noting that even *temporary* restrictions on speech require immediate access to appellate review).

Here, any ambiguity regarding the appropriate standard of review to apply to alleged Constitutional violations stemming from pandemic regulations has been resolved by the Supreme Court. See *Cuomo*, at *1. The government unconstitutionally restricted Petitioners’ First Amendment rights, and as in *Cuomo* and *Dayton*, injustice will result if this Court does not take immediate corrective

action to clarify Petitioners’ rights. Petitioners’ rights have been held in abeyance, waiting for Court clarification, as, like the appellants in *Cuomo*, Petitioners “remain under constant threat” that Appellees will again implement regulations limiting their speech. And this matter potentially has national implications as health officials seek appropriate measures to combat the ebb and flow of COVID-19 infections. It is appropriate and necessary for this Court to grant *en banc* review so it may immediately provide clarity on the appropriate standard of review as well as granting Petitioners’ requested injunctive relief.

Petitioners were denied relief because the district court applied an erroneous “emergency” standard of scrutiny below rational basis, and further because the Panel did not clarify the appropriate standard of review nor consider the ongoing injustice caused by the failure to address Petitioners’ claims. This Court should rectify the district court and panel’s errors by granting *en banc* review to consider Petitioners’ claims.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant their request for a rehearing *en banc*.

December 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the length limits permitted by Ninth Circuit Rule 40-1(a) and Rule 32-2(b). The brief contains 2,227 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

December 18, 2020

/s/ Harmeet K. Dhillon
Harmeet K. Dhillon

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2020, I filed the foregoing Plaintiffs-Appellants-Petitioners' Petition for Rehearing En Banc with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

December 18, 2020

/s/ Harmeet K. Dhillon
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