

No. 20-55445

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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WENDY GISH, *et al.*,  
Plaintiffs and Appellants,

v.

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

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On Appeal from the Order of the United States  
District Court for the Central District of California  
The Honorable Jesus G. Bernal  
District Court Case Number: 5:20-00755-JGB-KK

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**APPELLANTS' OPENING BRIEF**

HARMEET K. DHILLON (SBN: 207873)  
harmeet@dhillonlaw.com  
MARK P. MEUSER (SBN: 231335)  
mmeuser@dhillonlaw.com  
GREGORY R. MICHAEL (SBN: 306814)  
gmichael@dhillonlaw.com  
KARIN SWEIGART (SBN: 247462)

DHILLON LAW GROUP INC.  
177 Post Street – Suite 700  
San Francisco, CA 94108  
Phone: 415.433.1700  
Fax: 415.520.6593

Attorneys for Plaintiffs and Appellants Wendy Gish, Patrick Scales, James Dean  
Moffatt, and Brenda Wood.

## TABLE OF CONTENTS

INTRODUCTION .....	1
ISSUES PRESENTED .....	3
STATEMENT OF JURISDICTION .....	4
STATEMENT OF THE CASE .....	6
I. STATEMENT OF FACTS .....	6
II. PROCEDURAL HISTORY .....	11
STANDARD OF REVIEW .....	12
SUMMARY OF THE ARGUMENT .....	13
ARGUMENT .....	15
I. THE DISTRICT COURT IS NOT FREE TO INVENT AND THEN MISAPPLY A NEW CONSTITUTIONAL STANDARD UNMOORED FROM ESTABLISHED SUPREME COURT PRECEDENT. ....	16
A. <i>Jacobson</i> Does Not Establish a “Minimal Scrutiny” Standard for Reviewing the Government’s Actions During an Emergency. ....	16
B. The Church Members Are Likely to Prevail Even Under the District Court’s Faulty Minimal Scrutiny Standard.....	20
II. THE CHURCH MEMBERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS. ....	21
A. The Government’s Criminalization of Communal Religious Worship Violates the Church Members’ Free Exercise Rights. ....	21
1. The Orders are not neutral nor generally applicable because they restrict religiously-motivated activity but not comparable secular activity.....	22
2. The district court impermissibly weighed the reasonableness of the Church Members’ religious beliefs in coming to its	

determination that the Orders did not violate the Free Exercise Clause. ....	27
3.    The Government does not have a compelling interest pursued through the least restrictive means for its disparate treatment of houses of worship.....	29
B.    The Government’s Orders Violate the Establishment Clause. ....	31
C.    The Orders Ban All Public and Private Assembly in Violation of the First Amendment to the U.S. Constitution and California Constitution.....	34
D.    The Government’s Orders Are Void for Reasons of Vagueness.....	36
E.    The Orders Violate Article I, Section 1 of the California Constitution.....	38
F.    The Government Violates the Equal Protection Clause of the Fourteenth Amendment. ....	40
III.   THE CHURCH MEMBERS FACE IMMINENT IRREPARABLE HARM ABSENT IMMEDIATE INJUNCTIVE RELIEF. ....	42
IV.   THE REMAINING FACTORS WEIGH IN FAVOR OF GRANTING INJUNCTIVE RELIEF.....	43
CONCLUSION .....	44
CERTIFICATE OF COMPLIANCE .....	46
CERTIFICATE OF SERVICE.....	47

## TABLE OF AUTHORITIES

Case	Page(s)
<b>UNITED STATES CONSTITUTION</b>	
U. S. Const. amend. I.....	21, 34
U.S. Const. amend. XIV, § 1.....	40
<b>CALIFORNIA CONSTITUTION</b>	
Cal. Const. Art. I, § 1. ....	13, 38
Cal. Const. Art. I, § 2. ....	13, 34
Cal. Const. Art. I, § 3. ....	13, 34
Cal. Const. Art. I, § 4. ....	13
<b>CASES</b>	
<i>All. for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011).....	12, 15
<i>Americans for Prosperity Foundation v. Harris</i> , 182 F. Supp. 3d 1049 (C.D. Cal. 2016).....	42
<i>Berean Baptist Church v. Cooper</i> , No. 4:20-CV-81-D, 2020 WL 2514313 (E.D. N.C. May 16, 2020). ....	26
<i>California v. U.S. Dep’t of Health &amp; Human Servs.</i> , 941 F.3d 410 (9th Cir. 2019).....	12
<i>Cantwell v. State of Connecticut</i> , 310 U.S. 296 (1940). ....	17, 21
<i>Catholic Charities of Sacramento, Inc. v. Superior Court</i> , 32 Cal. 4th 527 (2004) .....	22
<i>Church of the Lukumi Babalu Aye, Inc. v. Hialeah</i> , 508 U.S. 520 (1993). ....	19, 22, 23

<i>City of Cleburne, Tex. v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).	40
<i>College Republicans at San Francisco State University v. Reed</i> , 523 F. Supp. 2d 1005 (N.D. Cal. 2007).	42, 43
<i>Connally v. General Const. Co.</i> , 269 U.S. 385 (1926).	36
<i>Cruzan by Cruzan v. Dir., Missouri Dep’t of Health</i> , 497 U.S. 261 (1990).	18
<i>De Jonge v. Oregon</i> , 299 U.S. 353 (1937).	17
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972).	30
<i>Earth Island Inst. v. United States Forest Serv.</i> , 351 F.3d 1291 (9th Cir. 2003).	15
<i>Edwards v. Aguillard</i> , 482 U.S. 578 (1987).	33
<i>Edwards v. South Carolina</i> , 372 U.S. 229 (1963).	17
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).	42, 43
<i>Emp’t Div., Dep’t of Human Res. of Or. v. Smith</i> , 494 U.S. 872 (1990).	18, 22
<i>Envtl. Defense Fund, Inc. v. Andrus</i> , 625 F.2d 861 (9th Cir. 1980).	4
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968).	31
<i>Everson v. Board of Ed. Ewing Tp.</i> , 330 U.S. 1 (1947).	18, 31

<i>Ex parte Arta</i> , 52 Cal. App. 380 (1921).....	39
<i>Ex parte Martin</i> , 83 Cal. App. 2d 164 (1948).....	38
<i>Ex parte Milligan</i> , 71 U.S. 2 (1866). ....	16
<i>First Baptist Church v. Kelly</i> , No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020).....	26
<i>G &amp; V Lounge, Inc. v. Mich. Liquor Control Comm’n</i> , 23 F.3d 1071 (6th Cir. 1994).....	43
<i>Gitlow v. New York</i> , 268 U.S. 652 (1925). ....	17
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972). ....	37
<i>Hernandez v. Sessions</i> , 872 F.3d 976 (9th Cir. 2017).....	43
<i>Houston v. Hill</i> , 482 U.S. 451 (1987). ....	36
<i>In re J.M.</i> , 36 Cal. App. 5th 668 (2019).....	34
<i>Jew Ho v. Williamson</i> , 103 F. 10 (C.C. Cal. 1900). ....	39
<i>Korematsu v. U.S.</i> , 323 U.S. 214 (1944). ....	16
<i>Lopez v. Heckler</i> , 713 F.2d 1432 (9th Cir. 1983).....	43
<i>Los Angeles All. For Survival v. City of Los Angeles</i> , 22 Cal. 4th 352 (2000). ....	35

<i>Maynard v. U.S. Dist. Court for Cent. Dist. of California</i> , 915 F.2d 1581 (9th Cir. 1990).....	40
<i>Maynard v. U.S. Dist. Court for the Cent. Dist. of California</i> , 701 F. Supp. 738 (C.D. Cal. 1988).....	40
<i>McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.</i> , 545 U.S. 844 (2005).....	31
<i>Melendres v. Arpaio</i> , 695 F.3d 990 (9th Cir. 2012).....	43
<i>Mem’l Hosp. v. Maricopa Cnty.</i> , 415 U.S. 250 (1974).....	41
<i>Mills v. Rogers</i> , 457 U.S. 299 (1982).....	18
<i>New York Times Co. v. United States</i> , 403 U.S. 713 (1971).....	19
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	15, 43
<i>Okrand v. City of Los Angeles</i> , 207 Cal. App. 3d 566 (1989).....	32
<i>On Fire Christian Ctr., Inc. v. Fischer</i> , No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020).....	26
<i>People ex rel. Gallo v. Acuna</i> , 14 Cal.4th 1090 (1997). ....	36
<i>People v. Chambers</i> , 22 Cal. App. 2d 687 (1937).....	34
<i>Pimentel v. Dreyfus</i> , 670 F.3d 1096 (9th Cir. 2012).....	12
<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992).....	18

<i>Religious Tech. Ctr., Church of Scientology Int’l, Inc. v. Scott</i> , 869 F.2d 1306 (9th Cir. 1989).....	4
<i>Roberts v. Neace</i> , No. 20-5465, 2020 WL 2316679 (6th Cir. May 9, 2020). ....	passim
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984). ....	35
<i>Robinson v. Marshall</i> , No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020).....	20
<i>Roe v. Wade</i> , 410 U.S. 113 (1973). ....	18
<i>S.O.C., Inc. v. Cnty. of Clark</i> , 152 F.3d 1136 (9th Cir. 1998).....	42
<i>Sammartano v. First Jud. Dist. Ct.</i> , 303 F.3d 959 (9th Cir. 2002).....	42, 43
<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> , 411 U.S. 1 (1973). ....	30, 35
<i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018). ....	37
<i>Stormans, Inc. v. Selecky</i> , 586 F.3d 1109 (9th Cir. 2009).....	42
<i>Stormans, Inc. v. Wiesman</i> , 794 F.3d 1064 (9th Cir. 2015).....	22, 23, 25, 27
<i>Thomas v. Review Bd. of Indiana Employment Security Div.</i> , 450 U.S. 707 (1981). ....	27
<i>Trump v. Hawaii</i> , 138 S. Ct. 2392 (2018). ....	16
<i>United States v. Ballard</i> , 322 U.S. 78 (1944). ....	27



<i>Vernon v. City of Los Angeles</i> , 27 F.3d 1385 (9th Cir. 1994).....	32, 33
<i>W. Va. State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943).....	21
<i>Whitney v. California</i> , 274 U.S. 357 (1927).....	34
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981).....	35
<i>Wilson v. Superior Court</i> , 13 Cal.3d 652 (1975).....	34
<i>Winter v. Natural Res. Def. Council, Inc.</i> , 555 U.S. 7 (2008).....	15, 43
<i>Wong Wai v. Williamson</i> , 103 F. 1 (C.C. Cal. 1900).....	39
<i>Zepeda v. U.S. I.N.S.</i> , 753 F.2d 719 (9th Cir. 1983).....	12

## STATUTES

28 U.S.C. § 1292(a)(1).....	4, 5
28 U.S.C. § 1331.....	4
28 U.S.C. § 1343(a).....	4
28 U.S.C. § 1367.....	4

## INTRODUCTION

There is no pandemic exception to the Constitution. Yet, for months, the Government's Orders have prohibited Appellants Wendy Gish, Patrick Scales, James Dean Moffatt, and Brenda Wood ("Church Members") and their congregations from engaging in communal worship.<sup>1</sup> The Orders allow secular activities of an indistinguishable nature to continue provided that social distancing

<sup>1</sup> "Orders" hereinafter refers to the Stay-at-Home Executive Order issued by California Governor Gavin Newsom, ER 96-97, the San Bernardino Order, ER 99-102, the San Bernardino Order Clarification, ER 197, the Riverside Order, ER 104-111, as modified by Governor Newsom's May 4, 2020 Order detailing California's Reopening Plan, Executive Order N-60-20, RJN Exs. 1-2. The Counties have since rescinded their orders, and now rely solely on the Governor's Executive Orders for purposes of enforcement. RJN Ex. 5.

"Government" hereinafter refers to Defendants-Appellees Gavin Newsom, in his official capacity as Governor of California; Xavier Becerra, in his official capacity as Attorney General of California; Erin Gustafson, in her official capacity as the San Bernardino County Acting Public Health Officer; John McMahon, in his official capacity as the San Bernardino County Sheriff; Robert A. Lovingood, in his official capacity as a San Bernardino County Supervisor; Janice Rutherford, in her official capacity as a San Bernardino County Supervisor; Dawn Rowe, in her official capacity as a San Bernardino County Supervisor; Curt Hagman, in his official capacity as a San Bernardino County Supervisor; Josie Gonzales, in his official capacity as a San Bernardino County Supervisor; Cameron Kaiser, in his official capacity as the Riverside County Public Health Officer; George Johnson, in his official capacity as the Riverside County Executive Officer and Director of Emergency Services; Chad Bianco, in his official capacity as the Riverside County Sheriff; Kevin Jeffries, in his official capacity as a Riverside County Supervisor; Karen Spiegel, in her official capacity as a Riverside County Supervisor; Chuck Washington, in his official capacity as a Riverside County Supervisor; V. Manuel Perez, in his official capacity as a Riverside County Supervisor; and Jeff Hewitt, in his official capacity as a Riverside County Supervisor.

protocols are observed, while denying religious communities the opportunity to meet under the same standards.

For the duration of California's coronavirus lockdown, the Government has let the public stroll freely down the busy aisles of their local grocery store for an indefinite period of time; go to the hospital for certain types of elective surgeries; and even arrange for plumbers, electricians, and exterminators to come into their homes for extended periods. Yet, the Church Members cannot not go to church; attend a baptism; gather to pray for the sick and dying; or even attend an outdoor funeral service for departed loved ones, regardless of the number of persons attending or the precautions they offered to take.

As the Governor has now started to move toward a phased reopening, shopping malls, swap meets, hair salons, and dine-in restaurants will soon be allowed to open with social distancing, but churches, mosques, synagogues, and other places of worship will, at best, be subjected to cumbersome capacity and other restrictions applicable to religious activities only. At worst, communal worship will remain or revert to being altogether criminalized by the Government, which the Government has indicated is a real possibility. RJN Ex. 9, p. 2 (“[n]ot adhering to all of the guidelines in their entirety [sic] could result in . . . the re-closing of places of worship”).

The Government's criminalization of communal worship violates the Church Members' fundamental rights to religious liberty, freedom of speech and assembly, and due process and equal protection under the law. Accordingly, the Church Members respectfully request that this Court reverse the district court's denial of interlocutory injunctive relief, and remand to the district court for further proceedings.

### **ISSUES PRESENTED**

1. Did the district court err by creating an unprecedented "minimal scrutiny" standard for emergencies when reviewing the Church Members' claims for the deprivation of their fundamental rights?

2. Are the Church Members likely to succeed on the merits of their claims that the Government's actual and threatened prohibition on communal religious worship violates the United States and California Constitutions?

3. Are the Church Members likely to suffer irreparable harm absent an injunction prohibiting the Government from further criminalizing communal religious worship?

4. Do the public consequences of a preliminary injunction weigh in favor of temporarily enjoining the Government from further prohibiting religious worship on terms more restrictive than those applicable to comparable secular activities?

## STATEMENT OF JURISDICTION

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

This Court has jurisdiction over appeals from interlocutory orders of the district court that grant, continue, modify, refuse, or dissolve injunctions. 28 U.S.C. § 1292(a)(1). An order denying a temporary restraining order may be appealable if it is tantamount to the denial of a preliminary injunction. *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (citing *Env'tl. Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)). This is so where the denial followed a “full adversary hearing” and if, “in the absence of review, the appellant would be effectively foreclosed from pursuing further interlocutory relief.” *Andrus*, 625 F.2d at 862.

Here, this Court has jurisdiction over this appeal because the order below is tantamount to the denial of a preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). Appellants had moved for (1) a temporary restraining order and (2) an order to show cause why a preliminary injunction should not issue. ER 129. The district court denied their requests following a full briefing on the merits and a lengthy telephonic hearing, at which all parties were represented by counsel. ER 10-46.

At the conclusion of the hearing, the Church Members’ counsel renewed their request for a further hearing on whether a preliminary injunction should issue. ER 45:8-16. The Honorable Jesus G. Bernal responded by stating that he would “consider that,” and thereafter issued the order denying the Church Members’ motion in full, and without setting any further hearing on the Church Members’ request for a preliminary injunction. *Id.*

By denying the Church Members’ motion, the district court effectively decided the merits of the case and foreclosed the possibility of any further interlocutory relief. In the order, the district court erroneously held, for example, that “as acts of the executive in response to a national emergency, the [Government’s] Orders are subject to only minimal scrutiny, which they easily survive.” ER 4-5. The court further held that “even absent consideration of greater leeway afforded to executive acts during a state of emergency, the Orders do not violate [the Church Members’] rights under traditional constitutional analysis,” because the Orders survive rational basis review. ER 5.

The district court’s decision not only conclusively denies interlocutory injunctive relief, but it effectively decided the merits of the case, providing this Court jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

## STATEMENT OF THE CASE

### I. STATEMENT OF FACTS

On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency as a result of the threat of COVID-19. ER 274-78. He then issued Executive Order N-33-20 on March 19, 2020, requiring that “all residents . . . heed the current State public health directives.” ER 96-97. The state public health directive requires “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors . . . .” *Id.* The directive provides that it “shall stay in effect until further notice.” *Id.*

On March 22, 2020, the California Public Health Officer designated a list of “Essential Critical Infrastructure Workers.”<sup>2</sup> ER 285-98. Listed as a part of the “essential workforce” were coffee baristas, grocery store workers, laundromats employees, workers supporting the entertainment industry, and workers supporting ecommerce. *Id.* The list also included “faith based services [] provided through streaming or other technology.”<sup>3</sup> ER 295. Accordingly, the Executive Order

<sup>2</sup> On April 28, 2020, state officials issued an amended “Essential Critical Infrastructure Workers” list, revising slightly the list of allowable “essential” activities under the Governor’s shelter-in-place order. RJN Ex. 4.

<sup>3</sup> After the Church Members initiated this action, Governor Newsom stated in court filings that drive-in worship services were permitted under the Executive Order as

prohibits religious leaders from providing communal religious services to their congregations, regardless of whether any non-technological measures might be taken to reduce or eliminate the risk of the virus spreading, such as offering socially-distanced seating for family units, or mask and glove requirements. ER 96-97.

On May 4, 2020, Governor Newsom issued Executive Order N-60-20, also called California's Reopening Plan. RJN Exs. 1, 2. The plan allows schools, restaurants, factories, offices, shopping malls, swap meets, and others to operate with social distancing in Stage 2 of California's four-stage reopening process, but does not permit houses of worship to hold religious worship services until Stage 3, which may be several months from now. *Id.* The Reopening Plan permits counties to "move through Stage 2 faster if they are able to show greater progress," through a "variance and attestation" procedure. *Id.*; *see also* RJN Ex. 3. San Bernardino and Riverside Counties submitted variance and attestation forms that do not indicate that communal worship reopen earlier than Stage 3. RJN Ex. 3.

On May 19, 2020, the United States Department of Justice Civil Rights Division sent a letter to Governor Gavin Newsom raising "several civil rights

a form of "other technology." ER 17:2-13. Thereafter, San Bernardino and Riverside Counties issued statements indicating that drive-in worship services would henceforth be permitted. *Id.*



concerns with the treatment of places of worship” in Executive Orders N-33-20 and N-60-20 and documents relating to the California Reopening Plan. RJN Ex. 6. Four days later, on May 23, 2020, the CDC issued guidance declaring religious worship to be “essential,” and offering suggestions on how religious communities may practice their faiths while minimizing the risk of transmission of the virus. RJN Ex. 7.

Despite the federal government’s insistence that places of worship be allowed to reopen safely, Governor Newsom has refused to do so. Instead, on May 25, 2020, the Government issued guidance materials imposing *additional* constraints on religious activities. RJN Ex. 8. Under these new guidelines, even if a county obtains a variance from the State’s orders, religious observers must still comply with a laundry list of requirements that other variance-approved activities need not. *Id.*

For example, under the May 25 guidance, “[p]laces of worship must [] limit attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower.” *Id.* This is regardless of the size of the house of worship. No other sector of California’s economy is subjected to such arbitrary burdens. *See* RJN Ex. 3, p. 101 (establishing Stage 2 variances in San Bernardino County for, *inter alia*, retail stores to operate at 50% capacity and dine-in restaurants to operate at any capacity provided there is “safe physical distance” between patrons). Further, because such

variances would be subject to review every three weeks, even if requested by the counties and approved by the State, there remains a real possibility that the Government will simply reinstate its totalitarian ban on communal worship at any time through an unelected county bureaucrat revoking the government “license to pray” that variance renewals constitute.

On May 25, 2020, San Bernardino County issued a News Release stating that religious services could resume in a limited capacity, subject to the State’s May 25 guidance. RJN Ex. 9. In the release, the County threatens that “[n]ot adhering to all of the guidelines in their entirety [sic] could result in . . . the re-closing of places of worship.” RJN Ex. 9, p. 2.

Appellant Patrick Scales’ church, Shield of Faith Family Church, Inc., is located in San Bernardino County. ER 234-236. He desires to hold in-person religious services for those congregants who desire to attend church. *Id.* Scales believes that he can hold such religious services and abide by social distancing tips recommended by the CDC by keeping congregants at least six feet apart and providing masks and gloves. *Id.* He believes that religious services are essential for the spiritual health of the congregation so that the congregants may exhort one another during these difficult times. *Id.* Scales recognizes that most of his congregants will stay at home, but he wants to be available for those who are

healthy and feel that in-person church service can be safely attended with social distancing and other measures. *Id.*

Appellant Wendy Gish attends Shield of Faith Family Church and would attend an in-person church service should it be made available to her. ER 232-33. She regularly attends church services and believes that she has a scriptural command to “not neglect meeting together.” *Id.*

Appellant James Moffatt’s church, Church Unlimited, is located in Riverside County. ER 217-20. Upon learning about the coronavirus, he immediately had his church building cleaned and disinfected. *Id.* Moffatt ensured that sanitizing materials were available to each person who entered his church and encouraged family units to sit at least six feet apart. *Id.* He encouraged anyone who was uncomfortable with gathering to stay at home. *Id.* He also encouraged anyone experiencing symptoms of illness to stay at home. *Id.*

On April 9, 2020, Moffatt was threatened with a fine of one thousand dollars for holding a church service on April 5, 2020, Palm Sunday. ER 218. But for the Orders, Moffatt would continue to hold in-person religious services in Riverside County, while taking the same social distancing precautions taken by the multitude of “essential businesses” that continue to operate in the county, despite any prevalence of COVID-19. He believes that it is important for Christians to come together, remember, and celebrate all that Jesus has done for this world. *Id.*

Appellant Brenda Wood's church, Word of Life Ministries International Inc. is located in Riverside County. ER 237-39. Word of Life Ministries International Inc. has approximately 20-30 regular attendees. *Id.* Wood believes Scripture commands her to provide opportunities for the believers to obey Hebrews 10:25 where the believers meet together and encourage one another. *Id.*

During a drive-up Easter Sunday service at Wood's church, communion was served by an individual wearing a mask and gloves and the elements were pre-packaged. *Id.* The person serving Holy Communion used tongs to remove the communion cups from the pre-packaged box. *Id.* At this time, Wood has postponed all baptisms at her church. *Id.* She would like to hold drive-up church services every Sunday, including by following reasonable precautions while sharing Holy Communion with her congregation. *Id.*

## **II. PROCEDURAL HISTORY**

On April 13, 2020, the Church Members filed their Verified Complaint, followed by an emergency motion for a temporary restraining order and for an order to show cause why a preliminary injunction should not issue on April 14, 2020. ER 56, 129. The Government filed oppositions to the motion on April 17, 2020. ER 242, 378, 745. The Church Members filed their reply and motion for leave to file the same on April 19. ER 999. On April 22, 2020, the district court

held a telephonic hearing on the motion, and later issued the order denying the motion on April 24, 2020. ER 1-46, 47-55.

The Church Members filed their notice of appeal on the following court day, April 27, 2020. ER 1072. On May 3, 2020, the Church Members filed an emergency motion for an injunction pending appeal with this Court, Dkt. 9, which was denied on May 7, 2020. Dkt. 21.

### **STANDARD OF REVIEW**

This Court reviews a district court's "denial of a preliminary injunction for abuse of discretion." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In deciding whether the district court has abused its discretion, the Court employs a two-part test: first the Court "determine[s] de novo whether the trial court identified the correct legal rule to apply to the relief requested; second, [the court] determine[s] if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 420 (9th Cir. 2019) (*citing Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012)); *see also Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1983). The district court in this case based its decision on multiple erroneous legal standards, and applied such standards in a manner that is illogical, implausible, and draws upon unreasonable inferences from facts in the record.

## SUMMARY OF THE ARGUMENT

The Government's criminalization of gatherings for religious purposes violates multiple provisions of the U.S. and California Constitutions.<sup>4</sup> The district court abused its discretion by holding that "traditional constitutional scrutiny does not apply" to constitutional violations in an emergency and creating a new, never before recognized "minimal scrutiny" standard to analyze the violations of the Church Members' constitutional rights. ER 4-5. The district court invented this standard by misapprehended the Supreme Court's 1905 decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). When the Supreme Court has cited *Jacobson* over the last century, the case has been analyzed within the Court's traditional tiered scrutiny analysis, not in the context of a "minimal scrutiny" standard for emergencies.

<sup>4</sup> The Verified Complaint asserts the following causes of action: (1) violation of the Free Exercise Clause of First Amendment; (2) violation of the Establishment Clause of First Amendment; (3) violation of the Free Speech Clause of First Amendment; (4) violation of the First Amendment Freedom of Assembly; (5) violation of the Due Process Clause of Fourteenth Amendment by reason of vagueness; (6) violation of substantive rights protected by the Due Process Clause of Fourteenth Amendment; (7) violation of the Equal Protection Clause of Fourteenth Amendment; (8) violation of the Right to Liberty (Cal. Const. Art. I, § 1); (9) Freedom of Speech (Cal. Const. Art. I, § 2); (10) Freedom of Assembly (Cal. Const. Art. I, § 3); and (11) Free Exercise and Enjoyment of Religion (Cal. Const. Art. I, § 4). ER 56-91.

The district court further abused its discretion in finding that the Government's Orders are neutral and generally applicable, and therefore only considering the Church Members' free exercise claims under rational basis review. ER 5. The Orders are neither neutral, nor generally applicable. They single out religious gatherings for explicit restrictions when similarly situated secular entities may remain open while following social distancing guidelines. In its reasoning, the district court inserted its own value judgment that religious worship deserved lesser protection than going to the grocery store or picking up coffee, because there remains an inherent risk in any community gathering during the pandemic. In determining that the Church Members' fulfillment of deeply held religious beliefs was worthy of less protection than picking up fast food or marijuana, the Court lumped religious worship, a fundamental civil right protected by our Constitution since its inception, in a column with mere entertainment at concerts or sporting events. ER 6. Free exercise jurisprudence does not permit the government to allow some activities to proceed with risk, but then prohibit comparable religiously-motivated activities. Supreme Court precedent holds freedom of religion in much higher regard.

Finally, the district court chose not to address the Church Members' other claims in detail, stating they fail because the Orders were neutral. The Church Members' other claims state independent bases for relief and should not have been

dismissed out of hand. For these reasons, the Church Members ask that this Court reverse the decision of the district court and remand to the district court for further proceedings.

### **ARGUMENT**

This Court has established two sets of criteria for evaluating a request for injunctive relief. *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir. 2003). Under the “traditional” criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) a likelihood of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where the government is the opposing party, balancing of the harm and the public interest merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, the Court asks whether any significant “public consequences” would result from issuing the preliminary injunction. *Winter*, 555 U.S. at 24.

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



For the reasons addressed below, the Church Members meet all the criteria for injunctive relief. They have proved a clear violation of their constitutional rights; they will continue to be irreparably injured if relief is not granted; the balance of hardships tips in favor of protecting the Church Members' constitutional rights; and it is in the public interest to protect constitutional rights from government overreach.

**I. THE DISTRICT COURT IS NOT FREE TO INVENT AND THEN MISAPPLY A NEW CONSTITUTIONAL STANDARD UNMOORED FROM ESTABLISHED SUPREME COURT PRECEDENT.**

**A. *Jacobson* Does Not Establish a “Minimal Scrutiny” Standard for Reviewing the Government’s Actions During an Emergency.**

The district court erred by determining that “traditional constitutional scrutiny does not apply” during an emergency and then inventing a new standard of “minimal scrutiny” out of whole cloth. ER 4, 7. No court has ever held that Constitutional rights give way to plenary state power wholesale in an emergency, and *Jacobson*, a case examining liberty interests in the context of the Fourteenth Amendment, does not suggest or require this result. *Jacobson*, 197 U.S. at 27; *see also Ex parte Milligan*, 71 U.S. 2, 39 (1866) (holding during the Civil War that civilians cannot be convicted by military tribunals while courts remain open); *Korematsu v. U.S.*, 323 U.S. 214 (1944) (condoning internment of Japanese citizens during World Word II); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* [*v. U.S.*, 323 U.S. 214 (1944)], condoning internment of Japanese

citizens during World Word II,] was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.”).

The district court’s analysis of *Jacobson* both misinterprets the case itself and fails to consider the last century of Supreme Court precedent both applying *Jacobson* and developing an established constitutional framework for analyzing potential violations of constitutional rights, sometimes in very trying circumstances. *Jacobson* did not create a “minimal scrutiny” standard for violations of constitutional rights in emergency situations and the Supreme Court has never recognized such a standard. *Id.*

In *Jacobson*, the Supreme Court upheld a conviction under a Massachusetts statute that criminalized the defendant’s refusal to vaccinate himself from smallpox, despite the defendant’s assertion that the statute violated his liberty interests under the Fourteenth Amendment. *Id.* at 12.

*Jacobson* was decided decades before the First Amendment was held to apply to the States by incorporation. *See Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940); (incorporating the Free Exercise Clause against the States); *Gitlow v. New York*, 268 U.S. 652 (1925) (Free Speech Clause); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (Free Assembly Clause); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (Right to Petition). It was not a case involving

religious liberty, and therefore does not, and could not, control this Court's analysis of the Church Members' First Amendment claims.

Subsequent Supreme Court citations of *Jacobson* focus largely on questions surrounding interpretations of the Fourteenth Amendment. For example, in *Cruzan by Cruzan v. Dir., Missouri Department of Health*, the Supreme Court compared the liberty interest at issue in *Jacobson* with the liberty interest at issue in the decision to withhold life-sustaining treatment before applying traditional constitutional scrutiny to the Missouri policy at issue. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Similarly, in *Mills v. Rogers*, the Court cited *Jacobson* in its discussion of how, under the applicable constitutional framework, individuals' liberty interests should be weighed against competing state interests. *Mills v. Rogers*, 457 U.S. 291, 299 (1982).

The Supreme Court has frequently cited *Jacobson* in its discussion of the right to privacy under the Fourteenth Amendment in the reproductive rights context. *See, e.g., Roe v. Wade*, 410 U.S. 113, 154 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992). When cited outside the context of Fourteenth Amendment violations, the Court has used it as an example of potentially permissible restrictions on rights if neutrally applied. *See, e.g., Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990); *Everson v. Board of Ed. Ewing Tp.*, 330 U.S. 1, 32 (1947).

During the 115 years since *Jacobson* was decided, the Supreme Court has developed a substantial and durable body of case law establishing, unequivocally, that a state's infringement of fundamental rights enshrined by the First Amendment to the U.S. Constitution is subject to the most rigorous form of judicial scrutiny: strict scrutiny. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."). The Court should not abandon this analysis here, for the first time.

The Supreme Court cases citing *Jacobson* show the Court intends *Jacobson's* analysis be incorporated within the Court's traditional tiered scrutiny framework for constitutional rights. Emergency use of the police power is to be considered in the context of the court's broader traditional constitutional tests, as evidence of the government's rational or compelling purpose, *see Roberts*, No. 20-5465, 2020 WL 2316679, at \*3, not as a separate standard to be applied in emergency situations. None of the Supreme Court's citations to *Jacobson* in the last century suggest *Jacobson* established a separate tier of scrutiny courts should apply in emergencies. The district court abused its discretion by dismissing the Supreme Court's traditional constitutional analysis in favor a new "minimal scrutiny" standard.

**B. The Church Members Are Likely to Prevail Even Under the District Court's Faulty Minimal Scrutiny Standard.**

Even under the district court's erroneous interpretation of *Jacobson*, government action is still rendered unconstitutional if it "has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31; *see also Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020) (granting a temporary restraining order to abortion providers) (appeal pending); *First Baptist Church*, No. 20-1102-JWB, 2020 WL 1910021, at \*3 (applying strict scrutiny to the plaintiff's claims of constitutional violations arising from Kansas' prohibition on public gatherings).

For reasons discussed in greater detail in Section II below, the Government cannot meet even this standard; its indefinite and total ban on gatherings undertaken for purposes of communal worship is beyond all question, a plain, palpable invasion of fundamental rights. *See Roberts*, No. 20-5465, 2020 WL 2316679, at \*4. Allowing the entertainment industry to continue business under CDC guidelines but restricting houses of worship from continuing under the same exact guidelines clearly singles out religion for disfavored treatment. All pretenses of neutrality found in the original Orders have been shed in the Government's recently released plans for reopening as the State will allow restaurants, shopping malls, and swap meets to open, but will continue to restrict houses of worship from

meeting under the exact same standards, or at least threaten to do so. RJN Exs. 1-2, 8, 9. Under California’s Reopening Plan, a church that has a coffee shop can serve coffee as long as people refrain from prayer and the barista refrains from distributing Holy Communion. The arbitrary Orders are a plain and palpable invasion of the Church Members’ rights and do not satisfy even the district court’s newly created *Jacobson* “minimal scrutiny” standard.

The district court abused its discretion both in its interpretation of *Jacobson* as providing a free-standing tier of minimal constitutional scrutiny to be applied in emergency situations, and in its application of that standard to the facts of this case. Thus, this Court should reverse the district court’s order denying injunctive relief.

## **II. THE CHURCH MEMBERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.**

### **A. The Government’s Criminalization of Communal Religious Worship Violates the Church Members’ Free Exercise Rights.**

The First Amendment to the U.S. Constitution prohibits government actors from enforcing any “law respecting an establishment of religion, or prohibiting the free exercise thereof.” U. S. Const. amend. I. Fundamental to this protection is the right to gather and worship. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Cantwell*, 310 U.S. at 304. Because of this fundamental protection, “a law burdening religious practice that is not neutral or not of general

application must undergo the most rigorous of scrutiny.” *Lukumi*, 508 U.S. at 546. The requirements to satisfy this scrutiny are so high that the government action will only survive this standard “in rare cases,” and the government bears the burden of proving they further a compelling interest and are pursued through the least restrictive means possible. *Id.*

Similarly, Article I, Section 4 of the California Constitution provides that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.” California Courts largely defer to the federal Free Exercise standard when examining potential constitutional violations. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004) (stating the California Supreme Court has thus far not decided whether an independent interpretation of California’s Free Exercise clause exists apart from the federal standard articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

**1. The Orders are not neutral nor generally applicable because they restrict religiously-motivated activity but not comparable secular activity.**

“[I]f a law pursues the government’s interest ‘only against conduct motivated by religious belief,’ but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government’s interest, then the law is not generally applicable.” *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing *Lukumi*, 508 U.S. at 542–46). Laws that

accomplish a “religious gerrymander,” singling out religious practices while not restricting similar secular practices, are not generally applicable. *See id.* at 535–37. The Free Exercise Clause “‘forbids subtle departures from neutrality,’ and ‘covert suppression of particular religious beliefs.’” *Id.* at 542. This is because “an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” *Roberts*, No. 20-5465, 2020 WL 2316679, at \*3.

Since the Free Exercise Clause “protect[s] religious observers against unequal treatment,” *id.*, prohibitions are not generally applicable if they “substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect.” *Wiesman*, 794 F.3d at 1079. Similarly, an overinclusive law that includes more protected conduct than necessary to achieve its goal is not generally applicable. *Lukumi*, 508 U.S. at 579.

The Governments’ Orders are neither neutral nor generally applicable. Religious gatherings have been singled out for disfavored treatment. Executive Order N-33-20 (March 19, 2020) ordered Californians to remain home but deemed “faith-based services” as essential only if the services can be “provided through streaming or other technologies.” ER 295; RJN Ex. 4. Yet the list of essential



workers not restricted exclusively to telework included workers in the “entertainment industries, studios, and other related establishments” and “workers supporting ecommerce,” without reference to whether the goods provided are life-preserving. As noted by the United States Justice Department in its May 19, 2020, letter to Governor Newsom raising civil rights concerns about the treatment of houses of worship, this sliding scale of “essential worker” that allows Hollywood and Amazon to maintain their activities with appropriate social distancing but prohibits churches, synagogues, and mosques from doing the same “facially discriminates against religious exercise.” RJN Ex. 6.

Even more egregious is the disparate treatment of houses of worship in California’s Reopening Plan. Localities moving to Stage 2 of the plan may reopen schools, restaurants, factories, offices, shopping malls, swap meets, and other general business with social distancing, but houses of worship are not permitted to hold religious services until Stage 3, regardless of what social distancing measures they employ, unless special permission is acquired from the State. RJN Exs. 1-3. A reopening plan that allows people to gather in schools, restaurants, shopping malls and swap meets, but excludes houses of worship from meeting under the exact same standards, is not neutral or generally applicable.

The law does not permit a finding that activity undertaken for a secular purpose, can suddenly become criminal if undertaken for a religious purpose. *See,*

*e.g.*, *Roberts*, No. 20-5465, 2020 WL 2316679, at \*3. The Orders criminalize activity when it is undertaken for a religious purpose and single out religious institutions for disfavored treatment in violation of the Church Members’ constitutional rights.

The Orders are both underinclusive—by permitting equally risky non-religiously motivated activities—and overinclusive—by restricting religious activities to a degree greater than necessary. *See Wiesman*, 794 F.3d at 1079. The district court’s opinion effectively admitted the Orders were underinclusive when it declared there was inherent and unavoidable risk in having grocery stores, pharmacies, and restaurants with takeout services remain open. ER 6. The Court made an unpermitted value judgment on the worthiness of religious exercise in deeming the religious exercise in question “nonessential” in comparison to the permissible activities. *Id.*

The Government clearly has a legitimate interest in mitigating the effects of the pandemic. Allowing businesses such as grocery stores, movie studios, and fast food restaurants to remain open endangers the governmental interest in flattening the curve of infection. The Constitution does not allow the Government to endanger its stated goal by allowing secular activity to continue while shuttering the doors of religious institutions under the same risk threshold. *Wiesman*, 794 F.3d at 1079; *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020

WL 1820249, at \*7 (W.D. Ky. Apr. 11, 2020) (granting a temporary restraining order against Louisville's prohibition on religious gatherings); *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at \*6 (D. Kan. Apr. 18, 2020) (granting a temporary restraining order against Kansas State's prohibition on religious gatherings); *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 WL 2514313, at \*7 (E.D. N.C. May 16, 2020) (granting injunction).

Similarly, the Orders are overinclusive because they restrict more religious activity than necessary to achieve the Government's stated goals. *See* RJN Exs. 7 (CDC guidelines for places of worship), 10 (finding that most states have religious exemptions to COVID-19 social distancing rules). California's blanket prohibition on religious gatherings means there are lots religious activities prohibited which could be undertaken with appropriate safety measures. The Government has provided no defense as to why a church could not gather for a religious service with a limited number of participants, or an outdoor baptism where individuals keep safe distances from one another.

Because the Orders are neither neutral nor generally applicable, they violate the First Amendment to the U.S. Constitution and Article I, Section 4 of the California Constitution unless the Government can prove they further a compelling interest pursued through the least restrictive means. The Government has not met that standard.

**2. The district court impermissibly weighed the reasonableness of the Church Members' religious beliefs in coming to its determination that the Orders did not violate the Free Exercise Clause.**

Determinations as to the sincerity of religious belief “[are] not to turn upon a judicial perception of the particular belief or practice in question.” *Thomas v.*

*Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981).

“[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Id.* In applying the Free

Exercise clause of the First Amendment, “courts may not inquire into the truth, validity, or reasonableness of a claimant’s religious beliefs.” *See United States v.*

*Ballard*, 322 U.S. 78, 87 (1944). “[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect,” and courts are

not to be “arbiters of scriptural interpretation.” *Thomas*, 450 U.S. at 716. And as discussed above, when the government designs a law to further a particular

government interest, the law is not permitted to allow secularly motivated conduct endangering that interest while restricting religious conduct endangering the same

interest. *Wiesman*, 794 F.3d at 1079.

In its order, the district court refused to apply the neutral social distancing rules available for the operation of grocery stores and movie studios to houses of worship because, the court reasoned, if it applied “the same rules to in-person religious gatherings as it does to grocery stores, people will get sick and die from

attending religious gatherings just as they are dying from working in grocery stores.” ER 6. The Court then went on to determine that religious gatherings were “non-essential activities,” likening them to a concert or a sporting event, that must be suspended so that “essential functions,” as defined by the Orders, may be undertaken more safely. *Id.* In so doing, the district court substituted its own judgment of the level of risk the Church Members should be willing to take to follow the tenets of their faith for that of the faithful, including the Church Members.

For the Church Members, following biblical commands to gather with believers for communal worship is as essential, if not more so, than grocery shopping, picking up coffee, and going to the local hardware store. ER 217-19, 232-39. While the district court judged fulfillment of their beliefs not worthy of the level of risk the Orders allow for similar secular activities, it is not a prerogative of the court to be the arbiter of what the Church Members’ faiths require. This was not the court’s judgment to make. If “[w]orkers supporting the entertainment industries, studios, and other related establishments” or “supporting ecommerce” are allowed to gather with some risk to themselves in order to perform the secular tasks they undertake on a daily basis, the fact that the court does not consider the Church Members’ religious beliefs of similar import does not mean religious adherents should not have the opportunity to meet under the same standards. As

discussed by the Sixth Circuit in its recent decision striking down similarly unconstitutional restrictions on religious freedom, “[a]ssuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?” *Roberts*, No. 20-5465, 2020 WL 2316679, at \*4.

The Free Exercise Clause is not limited to supporting religious freedom for faith decisions with which a Judge agrees. That the district court Judge does not find in-person religious worship “essential” is not the governing principle of the law, and is also contrary to guidelines issued by the federal government. RJN Exs. 6, 7. The Government has a right to enforce neutral laws to stop the flow of a virus. It does not have the right to declare that selected businesses may continue with a lessened risk of transmission but houses of worship may not. The Church Members only ask to be held to the same standards as the other secular activities in the Orders, as recommended by the CDC.

**3. The Government does not have a compelling interest pursued through the least restrictive means for its disparate treatment of houses of worship.**

When a government practice restricts fundamental rights, it is subject to strict scrutiny and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. *See, e.g.,*

*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

The Government does not have a compelling government purpose for continuing to restrict houses of worship from meeting when they are increasingly allowing comparable secular entities to open and meet with social distancing. In their current form, the Orders do not allow any gatherings undertaken for a religious purpose, even those that can take place while maintaining CDC guidelines. RJN Ex. 7. Further, San Bernardino and Riverside Counties have both stated in documents provided to the State that healthcare facilities are well-below surge capacity and the Counties have increased their readiness to respond to the crisis. RJN Ex. 3, p. 114 (“hospitals within the County of San Bernardino have additional surge capacity sufficient to handle current projections”); p. 149 (“Riverside County has sufficient hospital capacity, including Intensive Care Unit (ICU) beds and ventilators, and adequate PPE to handle standard healthcare needs, current COVID-19 cases, and a potential surge due to COVID-19.”). The Orders substantially burden the free exercise of religion by prohibiting every Californian from attending religious services during this time of crisis. Not all Californians own cars or have access to “other technology” needed to engage in communal worship while sheltering at home, and not all religious practices may be observed remotely.

Even if the Government did have a compelling purpose for singling out religious worship in this way, there are less restrictive means to achieve the same end. *See, e.g.*, Ex. 5, 8. The Government could limit the numbers of family units allowed in church buildings based on square footage, or allow churches to provide religious worship for those who may not have electronic access for remote participation. *See, e.g.*, Ex. 6. There are numerous other measures the government could pursue that would be less restrictive on the Church Members' Free Exercise rights. Rather than do so, the Government opted to criminalize communal worship altogether.<sup>5</sup> Accordingly, the Orders violate the Free Exercise Clause of the U.S. and California constitutions.

**B. The Government's Orders Violate the Establishment Clause.**

The "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (*citing Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).<sup>6</sup> If a secular group receives more favorable treatment than a religious group because they are secular, such treatment violates

<sup>5</sup> While San Bernardino has indicated intends to reopen places of worship, RJN Ex. 9, it also threatens that it may revert to the Governor's Order to shutter such facilities at any time. *Id.*

<sup>6</sup> The Establishment Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. *Everson*, 330 U.S. at 10.



the Establishment Clause. *Id.* Article I, Section 4 of the California Constitution also guarantees the “[f]ree exercise and enjoyment of religion without discrimination or preference.” Cal. Const. Art. I, § 4; *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 571 (1989) (“ ‘California’s constitutional provisions are more comprehensive than those of the federal Constitution’ ”). “Notwithstanding the clear differences between the state and federal guarantees, California courts have recognized that an analysis of establishment claims under the California Constitution frequently produces the same results as one under the federal constitution.” *Id.* (incorporating the federal Establishment Clause’s *Lemon* test into state law analysis); *see also Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (discussing state and federal standards in religious liberty cases).

Under the *Lemon* test, government action violates the establishment clause unless it (1) has a secular purpose; (2) has a “principle or primary effect” that “neither advances nor inhibits religion”; and (3) does not foster “an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *but see Am. Legion v. Am Humanist Ass’n*, 139 S. Ct. 2067 (2019) (writing for the plurality, Justice Samuel Alito refused to apply the *Lemon* test, but failed to garner majority support for an alternate test.) Failure to satisfy any of these factors

renders the challenged state action unconstitutional. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The Government's Orders violate the Establishment Clause and Article I, Section 4 of the California Constitution by favoring secular over religious activity and impermissibly subjecting the faithful the comprehensive, discriminatory, and continuous surveillance so as to excessively entangle itself with religion. *See Vernon*, 27 F.3d at 1399. The Stage 2 reopening plan sheds all suggestion of the Government's neutrality towards religious observance by reopening secular institutions like schools, restaurants, and shopping malls while singling out religious institutions for further restrictions. RJN Exs. 1-2. Under Stage 2 reopening, a church could meet for a garage sale, but not for a funeral. It could host a spaghetti dinner, but not the Lord's supper.

Further, if a county successfully obtains a variance from the State to allow religious worship, the State will require places of worship to comply with a lengthy, detailed set of conditions. RJN Ex. 8. A subset of those conditions is applicable to religious gatherings, only. *Compare* RJN Ex. 8 (limiting religious services to the lesser of 25% of the facility's capacity or 100 persons, regardless of the size of the facility) *with* RJN Ex. 3 (establishing Stage 2 variances in San Bernardino County for, *inter alia*, retail stores to operate at 50% capacity and dine-in restaurants to operate at any capacity provided there is "safe physical distance"

between patrons). In order to ensure compliance with these discriminatory conditions, the Government will need to continuously surveil places of worship in a manner wholly inconsistent with the Church Members' fundamental right to religious liberty. Thus, the Government's Orders violate the Establishment Clause and Article I, Section 4 of the California Constitution by favoring the secular over the religious and excessively entangling the government in the affairs of religious institutions.

**C. The Orders Ban All Public and Private Assembly in Violation of the First Amendment to the U.S. Constitution and California Constitution.**

The Court erred in its one-paragraph dismissal of the Church Members' multiple alternate, independent, and free-standing grounds for relief. The First Amendment right to free speech and to peaceably assemble are fundamental rights protected by the U.S. and California Constitutions. U.S. Const. amend. I; Cal. Const. Art. I §§ 2-3; *Whitney v. California*, 274 U.S. 357, 373 (1927); *People v. Chambers*, 22 Cal. App. 2d 687, 706 (1937) ("laws should not infringe upon our guaranteed freedom of speech and lawful assembly."). California courts treat the prior restraint and overbreadth doctrine similarly to federal courts. *See Wilson v. Superior Court*, 13 Cal.3d 652, 658-62 (1975) (relying mostly on federal citations to analyze prior restraint doctrine under California Constitution); *In re J.M.*, 36 Cal. App. 5th 668, 680 (2019) (citing some federal cases and paralleling

overbreadth doctrine analysis under California Constitution with that under the U.S. Constitution).

“Religious worship and discussion are protected speech under the First Amendment.” *Widmar v. Vincent* (“*Widmar*”), 454 U.S. 263, 269, n. 6 (1981). Accordingly, “[t]he Constitution guarantees Appellants’ right to associate for the purpose of engaging in activities protected by the First Amendment.” *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). When a government practice restricts fundamental rights, it is subject to “strict scrutiny” and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

The Government’s Orders constitute a prior restraint on the Church Members’ fundamental rights to freedom of speech and assembly and therefore fail to pass constitutional scrutiny. The Orders are also substantially overbroad, producing a chilling effect on the Church Members’ ability to engage in religious worship safely, pursuant to federal guidelines and recommendations. RJN Ex. 7. As discussed above, the Government cannot overcome strict scrutiny. The CDC’s social distancing guidelines are appropriate to limit the spread of COVID-19. *Id.* Imposing more restrictive requirements that target churches while at the same time allowing restaurants, coffee shops, and marijuana dispensaries to operate drive-ups

is not the least restrictive means of achieving the Government's public safety goals.

In this case, law enforcement officers have unfettered discretion in enforcing the law because they are provided no standards as to when to enforce, or exempt religious services from the law. *See, e.g., Houston v. Hill*, 482 U.S. 451 (1987). Counties have already exercised that discretion to provide *ad hoc* exemptions for Christians, only. ER 211. Violators of the Orders are liable for criminal penalties, further raising the stakes.

Requiring the Church Members to abstain from religious gatherings, under threat of criminal enforcement, and despite substantial modifications to satisfy the public health interests at stake (modifications that have been deemed acceptable in the cases of operations deemed "essential" by government decree, and by the federal government), violates Church Members' constitutional rights to free speech and peaceful assembly.

**D. The Government's Orders Are Void for Reasons of Vagueness.**

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

*Rockford*, 408 U.S. 104, 108–109 (1972). If “arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Id.* The problem with a vague regulation is that it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.” *Id.*; *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

The Orders at issue in this case are so vague as to their scope and application as to run afoul of the Due Process Clause of the Fourteenth Amendment. Embedded within Executive Order N-33-20 is a public health directive to shelter in place. The order itself merely directs the public to “heed” the public health directive, it does not appear to order compliance therewith; Webster’s Dictionary defines the word “heed” to mean “to give consideration or attention to”—not to “adhere” or comply. Despite this, state and local officials have widely reported the Governor’s order to require compliance with the public health directive by sheltering in place. ER 185.

Given this ambiguity, and particularly in light of the fundamental rights at stake, neither the Church Members, nor any other reasonable person, can understand precisely what is being ordered, and what actions may result in criminal penalties, fines, or imprisonment. Statements by local officials have muddled the

issue further. San Bernardino County, for example, has indicated that it “does not expect law enforcement to broadly impose citations on violators” and that “the expectation is that law enforcement will rely upon community members to use good judgment, common sense, and act in the best interest of their own health and the health of their loved ones and the community at large.” ER 179. As no reasonable person can make sense of what conduct is permitted under the Orders and what conduct will result in criminal penalties, the Government’s Orders are void for vagueness.

**E. The Orders Violate Article I, Section 1 of the California Constitution.**

All Californians “are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. Cal. Const. Art. I, § 1. Understanding the basic fundamental right of liberty, California courts have held that Public Health Officials’ authority is limited. Before exercising their full powers to quarantine, there must be “reasonable grounds [] to support the belief that the person so held is infected.” *Ex parte Martin*, 83 Cal. App. 2d 164 (1948). Public Health Officials must be able to show “probable cause to believe the person so held has an infectious disease . . . .” *Id.*

In a case that is somewhat analogous to what Californians are facing with the coronavirus pandemic of 2020, California courts found that Public Health Officials could not quarantine 12 blocks of San Francisco Chinatown because of nine deaths due to bubonic plague. *See Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900); *Wong Wai v. Williamson*, 103 F. 1 (C.C. Cal. 1900). These courts found it “purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference with the personal liberty of complainant” who had “never had or contracted said bubonic plague; that he has never been at any time exposed to the danger of contracting it, and has never been in any locality where said bubonic plague, or any germs of bacteria thereof, has or have existed.” *Jew Ho*, 103 F. at 10. In *Jew Ho* and *Wong Wai*, the courts found that there were more than 15,000 people living in the twelve blocks of San Francisco Chinatown who were to be quarantined. The courts found it unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths.

California courts have found that “a mere suspicion [of a contagious disease], unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.” *Ex parte Arta*, 52 Cal. App. 380, 383 (1921) (emphasis added). Under prevailing law, the Church Members are presumed to be free of communicable disease unless and



until the Government establishes otherwise. Requiring the Church Members to abstain from all religious gatherings, despite substantial modifications to satisfy the public health interests at stake, violates their California Constitutional liberty rights.

**F. The Government Violates the Equal Protection Clause of the Fourteenth Amendment.**

The Fourteenth Amendment of the Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Equal protection requires the state to govern impartially—not draw arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Strict scrutiny under the Equal Protection Clause applies where, as here, the classification impinges on a fundamental right, including the right to practice religion freely, to right to free speech and assembly, and the right to travel, among others. *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*, 701 F. Supp. 738, 742 (C.D. Cal. 1988) (“When a law disadvantages a suspect class or impinges upon a ‘fundamental right,’ the court will examine the law by applying a strict scrutiny standard”), *aff’d sub nom. Maynard v. U.S. Dist. Court for Cent. Dist. of California*, 915 F.2d 1581 (9th Cir. 1990). Under strict scrutiny review, the law can be justified only if it furthers a compelling government purpose, and, even

then, only if no less restrictive alternative is available. *See, e.g. Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 257-58 (1974).

Here, the Government intentionally and arbitrarily categorizes individuals and conduct as either “essential” or “non-essential.” RJN Ex. 4; ER 285. Those persons classified as “essential,” or as participating in essential services, are permitted to go about their business and activities provided certain social distancing practices are employed. *Id.* Those classified as “nonessential,” or as engaging in non-essential activities, are required to stay in their residence, unless it becomes necessary for them to leave for one of the enumerated “essential” activities. *Id.*

For reasons discussed above, the Government has not and cannot satisfy strict scrutiny; its arbitrary classifications are not narrowly tailored measures that further a compelling government interest. Indeed, the Government’s Orders defy federal guidance, which provides that places of worship are “essential” across the country. RJN Exs. 6, 7. Accordingly, the Government must permit the Church Members to engage in equivalent constitutionally protected activities provided that the Church Members also adhere to the social distancing guidelines established by the CDC.

### **III. THE CHURCH MEMBERS FACE IMMINENT IRREPARABLE HARM ABSENT IMMEDIATE INJUNCTIVE RELIEF.**

Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors. *Roberts*, No. 20-5465, 2020 WL 2316679, at \*5. “In a case like the one at bar, where the First Amendment is implicated, the Supreme Court has made clear that ‘[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury’ for purposes of the issuance of a preliminary injunction.” *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1011 (N.D. Cal. 2007) (citing *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002), in turn citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see also *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). “Unlike a monetary injury, violations of the First Amendment ‘cannot be adequately remedied through damages.’” *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1058 (C.D. Cal. 2016) (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)).

Without an injunction preventing the Government from further enforcing the Orders, the Church Members will suffer irreparable harm in the form of deprivations of fundamental freedoms secured by the First and Fourteenth Amendments to the U.S. and the California Constitutions. Thus, irreparable injury is demonstrated and interim injunctive relief is proper and necessary.

#### **IV. THE REMAINING FACTORS WEIGH IN FAVOR OF GRANTING INJUNCTIVE RELIEF.**

Where the government is the opposing party, balancing of the harm and the public interest merge. *See Nken*, 556 U.S. at 435. Thus, the Court asks whether any significant “public consequences” would result from issuing the preliminary injunction. *Winter*, 555 U.S. at 24. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (*quoting Elrod*, 427 U.S. at 373). “Faced with . . . preventable human suffering, [the Ninth Circuit] ha[s] little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’ favor.” *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (*quoting Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)). “The fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [movant’s] favor.” *Sammartano*, 303 F.3d at 973.

Here, at a minimum, the balance of hardships tips strongly in favor of granting relief because the Orders raise serious constitutional questions concerning the Church Members’ fundamental rights. *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (“it is always in the public interest to prevent the violation of a party’s constitutional rights”); *see also Reed*, 523 F. Supp. 2d at 1101; *Sammartano*, 303 F.3d at 974.

Further, protecting religious liberty will result in positive consequences for the public. There is minimal increased risk to the public by allowing the Church Members to practice their faiths in accordance with federal guidelines issued by the CDC. RJN Ex. 7. Indeed, San Bernardino and Riverside Counties have both stated in documents provided to the State that healthcare facilities are well-below surge capacity and have acquired a measure of control over the situation. RJN Ex. 3, pp. 114, 149 (“Riverside County has sufficient hospital capacity, including Intensive Care Unit (ICU) beds and ventilators, and adequate PPE to handle standard healthcare needs, current COVID-19 cases, and a potential surge due to COVID-19.”). As such, there is no public interest justification for allowing the continued suspension of the Church Members’ fundamental rights, and this Court should reverse the district court’s order.

### **CONCLUSION**

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

May 26, 2020

Respectfully submitted,

/s/ Harmeet K. Dhillon

Harmeet K. Dhillon

Mark P. Meuser

Gregory R. Michael

DHILLON LAW GROUP INC.

177 Post Street, Suite 700  
San Francisco, California 94108  
Telephone: (415) 433-1700

Attorneys for Plaintiffs and Appellants  
Wendy Gish, Patrick Scales, James Dean  
Moffatt, and Brenda Wood

### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing motion complies with the requirements of FRAP 27(d). The Motion was prepared in Times New Roman 14-point font, and contains 10,100 words, as counted by Microsoft Word 2016.

May 26, 2020

/s/ Harmeet K. Dhillon  
Harmeet K. Dhillon

### **CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2020, I filed the foregoing Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

May 26, 2020

/s/ Harmeet K. Dhillon  
Harmeet K. Dhillon





UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES—GENERAL

Case No. **EDCV 20-755 JGB (KKx)** Date April 23, 2020

Title ***Wendy Gish, et al. v. Gavin Newsom, et al.***

Present: The Honorable **JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE**

**MAYNOR GALVEZ**

Deputy Clerk

**Not Reported**

Court Reporter

Attorney(s) Present for Plaintiff(s):

None Present

Attorney(s) Present for Defendant(s):

None Present

**Proceedings: Order DENYING Plaintiffs' Emergency Request for Temporary Restraining Order (Dkt. No. 8) (IN CHAMBERS)**

Before the Court is an Emergency Request for Temporary Restraining Order filed by Plaintiffs Patrick Scales, Wendy Gish, James Dean Moffatt, and Brenda Wood. ("Request," Dkt. No. 8.) The Court held a hearing on the Request on April 22, 2020. After considering the papers filed in support of and in opposition to the Request and argument presented at the hearing, the Court DENIES the Request.

## I. BACKGROUND

On April 13, 2020, Plaintiffs filed their complaint against Defendants Xavier Becerra and Gavin Newsom (collectively, "State Defendants"); Chad Bianco, Jeff Hewitt, Kevin Jeffries, George Johnson, Cameron Kaiser, V. Manuel Perez, Karen Spiegel, and Chuck Washington (collectively, "Riverside Defendants"); Erin Gustafson, John McMahon, Robert A. Lovingood, Janice Rutherford, Dawn Rowe, Curt Hagman, and Josie Gonzales (collectively, "San Bernardino Defendants"). ("Complaint," Dkt. No. 1.) The Complaint alleges eleven causes of action: (1) Violation of Free Exercise Clause of First Amendment to U.S. Constitution; (2) Violation of Establishment Clause of First Amendment to U.S. Constitution; (3) Violation of Free Speech Clause of First Amendment to U.S. Constitution; (4) Violation of First Amendment Freedom of Assembly Clause; (5) Violation of Due Process Clause of Fourteenth Amendment to U.S. Constitution; (6) Violation of Due Process Clause of Fourteenth Amendment to U.S. Constitution; (7) Violation of Equal Protection Clause of Fourteenth Amendment to U.S. Constitution; (8) Right to Liberty (Cal. Const. Art. 1, § 1); (9) Freedom of Speech (Cal. Const.

Art. 1, § 2); (10) Freedom of Assembly (Cal. Const. Art. 1, § 3); and (11) Free Exercise and Enjoyment of Religion (Cal. Const. Art. 1, § 4).

Plaintiffs filed the Request on April 13, 2020, the same day they filed the Complaint. (Request.) In support of the Request, Plaintiffs filed:

- Declaration of Mark Meuser (“Meuser Declaration,” Dkt. No. 8-2);
- Declaration of Wendy Gish (“Gish Declaration,” Dkt. No. 8-3);
- Declaration of James Moffatt (“Moffatt Declaration,” Dkt. No. 8-4);
- Declaration of Patrick Scales (“Scales Declaration,” Dkt. No. 8-5);
- Declaration of Brenda Wood (“Wood Declaration,” Dkt. No. 8-6);

Defendants opposed the Request on April 17, 2020. (“State Opposition,” Dkt. No. 13; “Riverside Opposition,” Dkt. No. 15; “San Bernardino Opposition,” Dkt. No. 18.) In support of the State Opposition, State Defendants filed the Declaration of Todd Grabarsky. (Grabarsky Declaration,” Dkt. No. 13-1.) In support of the Riverside Opposition, Riverside Defendants filed:

- Request for Judicial Notice (“Riverside RJN,” Dkt. No. 15-1);
- Jason Anderson (“Anderson Declaration,” Dkt. No. 15-2);
- Declaration of Kelly A. Moran, (“Moran Declaration,” Dkt. No. 15-3);
- Declaration of Dr. Cameron Kaiser (“Kaiser Declaration,” Dkt. No. 15-4.)

In support of the San Bernardino Opposition, San Bernardino Defendants filed a request for judicial notice. (“San Bernardino RJN,” Dkt. No. 18-1.) The Court held a telephonic hearing on April 22, 2020.

## II. REQUESTS FOR JUDICIAL NOTICE

Riverside Defendants and San Bernardino Defendants separately submit unopposed requests for judicial notice. (See Riverside RJN; San Bernardino RJN.) A court may take judicial notice of an adjudicative fact not subject to “reasonable dispute,” either because it is “generally known within the territorial jurisdiction of the trial court,” or it is capable of accurate and ready determination by resort to sources whose “accuracy cannot reasonably be questioned.” Fed. R. Evid. 201. Under Federal Rule of Evidence 201, “[a] court must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c)(2).

Judicial notice is appropriate here. The documents at issue are publicly available and not subject to reasonable dispute. Moreover, Defendants request only that the Court take judicial notice of the contents of the documents, not of the truth of those contents. Accordingly, the Court GRANTS the Riverside RJN and the San Bernardino RJN.

## III. FACTS

On December 31, 2019, China reported incidents of a pneumonia of unknown cause

to the World Health Organization. Since then, that infectious disease, which came to be known as coronavirus disease 2019 (COVID-19), has swept the globe, infecting millions and killing nearly two hundred thousand people.<sup>1</sup>

Defendant Newsom, the Governor of California, declared a State of Emergency in California on March 4, 2020. (Complaint ¶ 30; Grabarsky Declaration, Exhibit 1.) On March 19, 2020, the Defendant Newsom issued Executive Order N-33-20, which directed all California residents to heed the State's public health directives relating to COVID-19, including the March 19, 2020 Order of the State Public Health Officer ("State Order"). (Complaint ¶ 31; Grabarsky Declaration, Exhibit 3.) The State Order requires "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." (Grabarsky Declaration, Exhibit 3.) On March 22, 2020, the Public Health Officer designated a list of "Essential Critical Infrastructure Workers," including "[f]aith based services that are provided through streaming or other technology." (Grabarsky Declaration, Exhibit 4.)

Defendant Kaiser, Riverside County's Public Health Officer, issued a Declaration of Local Health Emergency in Riverside County on March 8, 2020. (Kaiser Declaration ¶ 10.) On April 6, 2020, Defendants Kaiser and Johnson issued an Amended Order of the Health Officer for the County of Riverside and of the County Executive Officer as Director of Emergency Services ("Riverside Order"). (Complaint ¶ 62; Kaiser Declaration ¶ 10, Exhibit I.) The Riverside Order prohibits "[a]ll public or private gatherings . . . including, but not limited to an auditorium, . . . church, . . . or any other indoor or outdoor space used for any non-essential purpose including, but not limited to . . . church . . . ." (Complaint ¶ 63; Kaiser Declaration, Exhibit I.) Consistent with the State Order, the Riverside Order exempts essential business, including "courts of law, medical providers . . . daycare and child care . . . [and] necessary shopping at fuel stations, stores or malls," provided that a "state and federal guidelines for infection control" are observed. (Complaint ¶ 64; Kaiser Declaration Exhibit I.)

The County of San Bernardino Board of Supervisors declared a Local Health Emergency in San Bernardino County on March 10, 2020. (San Bernardino RJN, Exhibits F and G.) On April 7, 2020, Defendant Gustafson, the San Bernardino Health Officer, signed the Order of the Health Officer of the County of San Bernardino for the Control of COVID-19 ("San Bernardino Order"). (Complaint ¶ 36; San Bernardino RJN, Exhibit I.) The San Bernardino Order "allow[s] faith based services that are provided through streaming or other technology, while individuals remain in their homes, but does not allow individuals to leave their home for driving parades or drive-up services, or for picking up non-essential items." (Complaint ¶ 37; San Bernardino RJN, Exhibit I.)

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<sup>1</sup> World Health Organization, Coronavirus Disease 2019 Situation Report, April 23, 2020 [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200423-sitrep-94-covid-19.pdf?sfvrsn=b8304bf0\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200423-sitrep-94-covid-19.pdf?sfvrsn=b8304bf0_4)

#### IV. LEGAL STANDARD

The purpose of a temporary restraining order is to preserve the status quo and prevent irreparable harm until a hearing may be held on the propriety of a preliminary injunction. See Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006). The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. Lockheed Missile & Space Co. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); see Stuhlbarg Intern. Sales Co., Inc. v. John D. Brushy and Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2011).

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). The Ninth Circuit employs the “serious questions” test, which states “‘serious questions going to the merits’ and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.” Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). “A preliminary injunction is an ‘extraordinary and drastic remedy.’ It should never be awarded as of right.” Munaf v. Geren, 553 U.S. 674, 690 (2008) (citation omitted). When seeking a temporary restraining order through an *ex parte* application, a plaintiff must further show that he is without fault in creating the crisis necessitating the bypass of regular motion procedures. See Mission Power Eng'g Co. v. Cont'l Gas Co., 883 F. Supp. 488, 492–93 (C.D. Cal. 1995). The propriety of a temporary restraining order, in particular, hinges on a significant threat of irreparable injury, Simula, Inc. Autoliv, Inc., 175 F.3d 716, 725 (9th Cir. 1999), that must be imminent in nature, Caribbean Marine Serv. Co. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988).

#### V. DISCUSSION

Plaintiffs request that the Court enjoin enforcement of the State Order, Riverside Order, and San Bernardino Order (collectively, “Orders”) to “Plaintiffs’ engagement in religious services, practices, or activities at which the Center for Disease Control’s social distancing guidelines are followed.” (Request at 24.) To succeed, Plaintiffs must demonstrate that they are likely to succeed on their claims that the Orders violate their constitutional rights and demonstrate that the other factors weigh in favor of granting the temporary restraining order.

##### A. Success on the Merits or Serious Questions

Plaintiffs assert that the Orders violate their constitutionally protected rights, including their right to the free exercise of religion. (Request at 9–21.) In response, Defendants argue that Plaintiffs will not succeed on their constitutional claims for two reasons: First, as acts of the executive in response to a national emergency, the Orders are subject to only minimal scrutiny,

which they easily survive.<sup>2</sup> (State Opposition at 7–14.) Second, even absent consideration of greater leeway afforded to executive acts during a state of emergency, the Orders do not violate Plaintiffs’ rights under traditional constitutional analysis. (State Opposition at 14–19; Riverside Opposition at 16–34; San Bernardino Opposition at 11–17.)

### 1. Exercise of Executive Powers During State of Emergency

State Defendants argue that because the Orders are temporary executive actions taken in response to a national emergency, they are entitled to substantial judicial deference and not subject to traditional constitutional scrutiny. (State Opposition at 7–14.) The Court agrees: Defendants have a right to protect California residents from the spread of COVID-19—even if those protections temporarily burden constitutional rights to a greater degree than normally permissible.

The Supreme Court held over a century ago that “a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27 (1905). The COVID-19 pandemic threatens the lives of all Californians: indeed, nearly 1,500 have already died.<sup>3</sup> The virus has proven to be extremely contagious—it is airborne and can linger on surfaces for days.<sup>4</sup> Because asymptomatic and pre-symptomatic carriers of the virus can infect others, a belief that one “has never had or contracted the coronavirus . . . been at any time exposed to the danger of contracting it . . . and has never been in close proximity to any locality where said coronavirus has or have existed” is largely meaningless. (See Complaint ¶¶ 58, 79.) Anyone could be an unknowing, undetectable vector for the virus at any time. For these reasons, government and health officials have struggled to contain the virus. Without a vaccine, measures limiting physical contact between citizens, such as the Orders, are widely recognized as the only way to effectively slow the spread of the virus.

Undoubtedly, the Orders—and the similar orders in effect around the country—restrict the rights and freedoms normally enjoyed by citizens. The residents of California are confined to their homes, unable to gather with friends and family, unable to attend political rallies, unable to enjoy art and recreation, and largely unable to work or go to school. The Orders also prevent Plaintiffs (and all other California residents) from gathering for in-person worship or laying hands upon each other. Because Plaintiffs’ religious beliefs compel them to do these things, the Orders

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<sup>2</sup> Although only the State Defendants advance this argument, the Court will apply it to all three orders.

<sup>3</sup> *Tracking Coronavirus in California*, Los Angeles Times <https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/> (last accessed April 23, 2020.)

<sup>4</sup> Neeltje van Doremalen, Ph.D., et al., *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, N. England J. Med. 2020; 382:1564-1567 <https://www.nejm.org/doi/full/10.1056/NEJMc2004973> (last accessed April 23, 2020.)

do burden Plaintiffs' unrestrained exercise of their religion. But the Constitution does not guarantee "an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." Jacobson, 197 U.S. at 26. Indeed, "[t]he right to practice religion freely does not include liberty to expose the community . . . to communicable disease." Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

Recognizing that the need to protect the public may trump individual rights during a crisis, the Supreme Court has held that states and municipalities have greater leeway to burden constitutionally protected rights during public emergencies:

In every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Jacobson, 197 U.S. at 29; see also United States v. Caltex, 344 U.S. 149 (1952) (acknowledging that "in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved"). When responding to the COVID-19 pandemic, therefore, Defendants "may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" In re Abbott, 2020 WL 1685929, at \*7 (5th Cir. Apr. 7, 2020) (quoting Jacobson, 197 U.S. at 31). In other words, during an emergency, traditional constitutional scrutiny does not apply. Instead, any measures that limit or suspend constitutional rights (1) must have a "real or substantial relation" to the crisis and (2) must not represent "plain, palpable" invasions of clearly protected rights. Jacobson, 197 U.S. at 31.

The Orders easily meet that test. First, they have a substantial relation to the COVID-19 crisis: they require the physical distancing that is needed to slow the spread of the virus. Second, there is no "plain, palpable invasion" of Plaintiffs' free exercise of religion. While Plaintiffs are unable to gather together in-person, they are free to gather virtually or over the phone. They are also free to gather in-person with the members of their household. They remain free to practice their religion in whatever way they see fit so long as they remain within the confines of their own homes. Although physical contact with others is curtailed, a wide swath of religious expression remains untouched by the Orders. The Orders, therefore, do not represent a plain or palpable invasion of the general right to free exercise of religion. Accordingly, the Orders are likely a permissible exercise of executive authority during a national emergency.

## 2. Traditional Constitutional Analysis

Because the Orders survive the minimal scrutiny required where executive action taken in response to an emergency, the Court need not determine whether the Orders likewise survive traditional constitutional analysis. But they do: the Request must also be denied because the



Orders likely do not impermissibly infringe on Plaintiffs’ constitutional rights even when applying the traditional constitutional scrutiny.

**a. Free Exercise of Religion**

Plaintiffs argue that the Orders target religion and must therefore be subjected to a strict scrutiny analysis. (Request at 9–11.) Defendants respond that the Orders are neutral and generally applicable and therefore only rational basis review applies. (State Opposition 15–16; Riverside Opposition at 16–19; San Bernardino Opposition at 11–13.) “In assessing neutrality and general applicability, courts evaluate both ‘the text of the challenged law as well as the effect . . . in its real operation.’” Parents for Privacy v. Barr, 949 F.3d 1210, 1234 (9th Cir. 2020).

The Orders are neutral on their faces: they “make no reference to any religious practice, conduct, belief, or motivation.” Stormans, Inc. v. Wiesman, 794 F.3d 1064, 1076 (9th Cir. 2015). While they do list faith-based gatherings as a type of in-person gathering that is prohibited, faith-based gatherings are referenced as an example—they are not the target of the Orders. (See e.g., Kaiser Declaration Exhibit I (prohibiting all gatherings including those for “church”).) Facial neutrality does not require freedom from any mention of religion, instead “the minimum requirement of neutrality is that a law not *discriminate* on its face.” Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993) (emphasis added). Because the orders apply to both religious and secular gatherings, they do not discriminate, and are therefore facially neutral.

The Orders are also neutral in operation: they apply to both religious and secular conduct and do not “substantially underinclude nonreligiously motivated conduct that might endanger the same governmental interest that the law is designed to protect.” See Stormans, 794 F.3d at 1079. The Supreme Court has long recognized that “[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.” Church of the Lukumi Babalu Aye, 508 U.S. at 534. Plaintiffs have presented no evidence that the Orders target religious conduct over secular conduct. And a review of the Orders demonstrates that both secular and religious conduct are prohibited equally. The majority of the prohibited conduct is secular: schools are closed, restaurants are shuttered, concerts and sporting events are canceled; citizens cannot visit public recreation spaces or gather with friends who live outside of their household; non-essential workers fortunate enough to still have jobs must work from home. Far from singling out religious conduct for additional restrictions, the State Order identifies workers preparing religious videoconferences as essential workers—an exception that facilitates religious conduct. Similar exceptions have not been made for sports, concerts, or non-essential work events. The Orders, therefore, are not restrictions against religion in disguise. They are generally applicable restrictions on gatherings of all kinds.

Plaintiffs argue that the Orders are underinclusive of secular activities that may also contribute to the spread of COVID-19 because they allow grocery stores, fast food restaurants, and marijuana dispensaries to remain open. (Request at 10.) But these are all essential services: without access to the food and medicines sold at these locations, more citizens would become ill or die. And despite social distancing the virus is spreading at these locations—grocery store



employees are falling ill and dying.<sup>5</sup> If the state applies the same rules to in-person religious gatherings as it does to grocery stores, people will get sick and die from attending religious gatherings just as they are dying from working in grocery stores.

Moreover, because the risk of transmission increases with every out-of-home contact, it is necessary to suspend non-essential activities so that essential functions can be less dangerous. Many older and immunocompromised people must leave their homes to purchase food and medicine. Grocery store employees, food preparers, delivery drivers, pharmacists, and other essential workers must go to work to ensure that California residents have what they need to survive. These individuals risk contracting the virus when performing these essential tasks. If those that they encounter engage in non-essential contacts, the risk of transmission increases. But if everyone limits their out-of-home contacts to only essential tasks, the risk decreases. When we all reduce our contacts to the minimum possible level, the rates of transmission go down. In sum, Californians need to stay home whenever possible to protect those who cannot.

Finally, as Defendants argued at the hearing, constitutional analysis only requires that the Court compare the prohibited religious conduct with analogous secular conduct when assessing underinclusivity. See *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (holding that a law is only fatally underinclusive if it prohibits religious conduct but not “comparable secular conduct”). An in-person religious gathering is not analogous to picking up groceries, food, or medicine, where people enter a building quickly, do not engage directly with others except at points of sale, and leave once the task is complete. Instead, it is more analogous to attending school or a concert—activities where people sit together in an enclosed space to share a communal experience. Those activities are prohibited under the Orders. Because the Orders treat in-person religious gatherings the same as they treat secular in-person communal activities, they are generally applicable.

Because the Orders are facially neutral and generally applicable, they are subject to rational basis review. *Stormans, Inc.*, 794 F.3d at 1075–76. And they easily survive rational basis: the social distancing measures implemented by the Order are rationally related to slowing the spread of COVID-19—a state interest that is not only legitimate but compelling. Accordingly, the Orders likely do not violate the Free Exercise Clause.

#### **b. Establishment of Religion**

A government action violates the Establishment Clause if it lacks a “secular legislative purpose” or endorses religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); see also *Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2011) (noting that “the Supreme Court

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<sup>5</sup> Dalvin Brown, *COVID-19 Claims Lives of 30 Grocery Store Workers, Thousands More May Have It, Union Says*, USA Today, <https://www.usatoday.com/story/money/2020/04/14/coronavirus-claims-lives-30-grocery-store-workers-union-says/2987754001/> (last accessed April 23, 2020.)

(continued . . . )

essentially has collapsed the[] last two prongs [of the test articulated in Lemon] to ask whether the challenged governmental practice has the effect of endorsing religion.”) The Orders do neither. First, they serve the important secular purpose of slowing the spread of COVID-19. Second, they do not endorse any religion: the order bans gatherings for all religions along with secular gatherings.<sup>6</sup> Accordingly, the Orders likely do not violate the Establishment Clause.

### **c. Other Alleged Constitutional Violations**

Plaintiffs make several other claims for violations of their rights under the U.S. and California Constitutions. (Request at 12–20.) Each of these, however, is premised on Plaintiffs’ argument that the Orders impermissibly restrict their religious exercise. (See, e.g., Request at 13 (arguing that the Orders are an unconstitutional prior restraint on speech because religious worship is protected speech).) Because the Court concludes that the Orders do not impermissibly restrict Plaintiffs’ free exercise of religion, Plaintiffs’ other claims likely fail as well.

### **B. Remaining TRO Factors**

Defendants have shown that because the Orders are likely a proper exercise of executive authority in a state of emergency they are entitled to enhanced deference, even where they infringe on typically protected rights. Moreover, even applying a traditional constitutional analysis, Plaintiffs’ claims are unlikely to succeed. Accordingly, Plaintiffs are not likely to succeed on the merits of their claims, and the Court need not consider the remaining factors.

## **VI. CONCLUSION**

For the reasons above, the Court DENIES Plaintiffs’ Request.

**IT IS SO ORDERED.**

---

<sup>6</sup> Plaintiffs argue that special accommodations were made by the Riverside Defendants and the San Bernardino Defendants for Christians celebrating Easter. (Request at 2.) However, they do not seek to enjoin enforcement of any Easter exception. And they could not: Easter has passed. Accordingly, the Court need not determine whether the Easter exceptions violated the Establishment Clause.



# EXHIBIT 1

1 HARMEET K. DHILLON (SBN: 207873)  
2 harmeet@dhillonlaw.com  
3 MARK P. MEUSER (SBN: 231335)  
4 mmeuser@dhillonlaw.com  
5 GREGORY R. MICHAEL (SBN: 306814)  
6 gmichael@dhillonlaw.com  
7 DHILLON LAW GROUP INC.  
8 177 Post Street, Suite 700  
9 San Francisco, California 94108  
10 Telephone: (415) 433-1700  
11 Facsimile: (415) 520-6593

12 Attorneys for Plaintiffs

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

16 **WENDY GISH**, an individual, *et al.*,  
17 Plaintiffs,

18 v.

19 **GAVIN NEWSOM**, in his official  
20 capacity as Governor of California, *et al.*,  
21 Defendants.

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

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

22 Date: April 22, 2020

23 Time: 2:00 p.m.

24 Judge: Hon. Jesus G. Bernal

## INTRODUCTION

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

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

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

//

## ARGUMENT

### I. Strict Scrutiny Applies to Plaintiffs’ Claims.

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

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

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

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

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

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

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

17  
 18 <sup>1</sup> The Supreme Court’s more recent citations to *Jacobson* cast further doubt as to its  
 19 continued applicability to modern constitutional analysis. For example, in *Kansas v.*  
 20 *Hendricks*, 521 U.S. 346 (1997), cited by Defendants, the Court upheld the civil  
 21 commitment of a convicted sexual predator. In its decision, the Court cited *Jacobson*  
 22 for the limited purpose of establishing that there is no “absolute” right to liberty—a  
 23 concept Plaintiffs do not challenge here. The Court did not hold that those rights are  
 24 diminished during an emergency. *Id.* at 353 (emphasis added).

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



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

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

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

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

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

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

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

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

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

15 **CONCLUSION**

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

19 Respectfully submitted,

20 Date: April 20, 2020

DHILLON LAW GROUP INC.

21 By: /s/ Harmeet K. Dhillon  
22 HARMEET K. DHILLON (SBN: 207873)  
23 harmeet@dhillonlaw.com

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

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

1 MARK P. MEUSER (SBN: 231335)  
2 mmeuser@dhillonlaw.com  
3 GREGORY R. MICHAEL (SBN: 306814)  
4 gmichael@dhillonlaw.com  
5 DHILLON LAW GROUP INC.  
6 177 Post Street, Suite 700  
7 San Francisco, California 94108  
8 Telephone: (415) 433-1700

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Attorneys for Plaintiffs



1 XAVIER BECERRA  
Attorney General of California  
2 MARK R. BECKINGTON  
Supervising Deputy Attorney General  
3 AMIE L. MEDLEY  
Deputy Attorney General  
4 TODD GRABARSKY  
Deputy Attorney General  
5 State Bar No. 286999  
300 South Spring Street, Suite 1702  
6 Los Angeles, CA 90013  
Telephone: (213) 269-6044  
7 Fax: (916) 731-2124  
E-mail: Todd.Grabarsky@doj.ca.gov  
8 *Attorneys for Gavin Newsom, in his official*  
*capacity as Governor of California, and Xavier*  
9 *Becerra, in his official capacity as Attorney*  
*General of California*

10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12 EASTERN DIVISION  
13

14  
15 **WENDY GISH, et al.,**

16 Plaintiffs,

17 v.

18 **GAVIN NEWSOM, in his official**  
19 **capacity as Governor of California, et**  
20 **al,**

21 Defendants.  
22

5:20-cv-00755-JGB-KK

**OPPOSITION OF DEFENDANTS  
GOVERNOR GAVIN NEWSOM  
AND ATTORNEY GENERAL  
XAVIER BECERRA TO  
PLAINTIFFS' APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER AND ORDER TO SHOW  
CAUSE**

Judge: The Honorable Jesus G.  
Bernal  
Action Filed: April 13, 2020  
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## TABLE OF CONTENTS

	<b>Page</b>
Introduction .....	1
Background.....	3
I.    The Governor’s Proclamation of a State of Emergency Related to the COVID-19 Pandemic.....	3
II.   The Present Lawsuit.....	5
Legal Standard.....	6
Argument.....	7
I.    Plaintiffs Are Not Likely to Succeed on the Merits of Their Claims .....	7
A.   The State Executive Order Is a Constitutional Exercise of the Governor’s Emergency Powers to Combat the COVID-19 Pandemic .....	7
B.   Even Under the Standard of Review for Non-Emergency Situations, the State Executive Order Would Not Violate Plaintiffs’ Constitutional Rights Given the Current Pandemic .....	14
1.    The Executive Order Is a Neutral Law of General Application that Survives Rational Basis Review.....	15
2.    The Executive Order Survives Strict Scrutiny .....	16
II.   The Remaining Factors Weigh Heavily Against Issuance of a Temporary Restraining Order .....	20
Conclusion.....	23

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Abeel v. Clark</i> 84 Cal. 226 (1890).....	9
<i>Abiding Place Ministries v. Wooten</i> No. 3:20-cv-00683-BAS-AHG (S.D. Cal. Apr. 10, 2020).....	11
<i>Alliance for the Wild Rockies v. Cottrell</i> 632 F.3d 1127 (9th Cir. 2011).....	7
<i>Benson v. Walker</i> 274 F. 622 (4th Cir. 1921).....	8
<i>Compagnie Francaise de Navigation a Vapeur v. Bd. of Health of State of La.</i> 186 U.S. 380 (1902) .....	8
<i>Drakes Bay Oyster Co. v. Jewell</i> 747 F.3d 1073 (9th Cir. 2014).....	20
<i>Hickox v. Christie</i> 205 F. Supp. 3d 579 (D.N.J. 2016).....	8, 13
<i>In re Abbott</i> No. 20-50264, 2020 WL 1685929 (5th Cir. Apr. 7, 2020) .....	9, 10
<i>In re Approval of the Judicial Emergency Declared in the S. Dist. of Cal.</i> 2020 WL 1814265 (9th Cir. Apr. 2, 2020).....	10
<i>Jacobson v. Massachusetts</i> 197 U.S. 11 (1905) .....	8, 9, 10
<i>Jew Ho v. Williamson</i> 103 F. 10 (C.C.N.D. Cal. 1900) .....	12, 13
<i>Kansas v. Hendricks</i> 521 U.S. 346 (1997) .....	8

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Mazurek v. Armstrong</i> 520 U.S. 968 (1997) .....	7
<i>Murphy v. Palmer</i> 2017 WL 2364195 (D.N.J. May 31, 2017) .....	10
<i>Phillips v. City of New York</i> 775 F.3d 538 (2d Cir.) .....	9
<i>Prince v. Massachusetts</i> 321 U.S. 158 (1944) .....	passim
<i>Rasmussen v. Idaho</i> 181 U.S. 198 (1901) .....	8
<i>Smith v. Avino</i> 91 F.3d 105 (11th Cir. 1996) .....	10
<i>Stormans, Inc. v. Wiesman</i> 794 F.3d 1064 (9th Cir. 2015) .....	15, 16
<i>United States v. Chalk</i> 441 F.2d 1277 (4th Cir. 1971) .....	8, 9
<i>Vaccaro v. Sparks</i> No. SACV 11-00164, 2011 WL 318039 (C.D. Cal. Jan. 28, 2011) .....	6
<i>Whitlow v. California</i> 203 F. Supp. 3d 1079 (S.D. Cal. 2016) .....	9
<i>Winter v. Nat. Res. Def. Council, Inc.</i> 555 U.S. 7 (2008) .....	6, 7, 20
<i>Wong Wai v. Williamson</i> 103 F. 1 (C.C.N.D. Cal. 1900) .....	12, 13
<i>Workman v. Mingo Cty. Bd. of Educ.</i> 419 Fed.Appx. 348 (4th Cir. 2011) .....	16
<i>Zucht v. King</i> 260 U.S. 174 (1922) .....	9



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**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

**CONSTITUTIONAL PROVISIONS**

United States Constitution

    First Amendment.....6, 20

    Fourteenth Amendment.....6, 9

California Constitution Article 1 .....6

1 Defendants California Governor Gavin Newsom and California Attorney  
2 General Xavier Becerra (collectively, the State Defendants) file this opposition to  
3 Plaintiffs' Application for Temporary Restraining Order and for Order to Show  
4 Cause Why Preliminary Injunction Should Not Issue (ECF No. 8).

### 5 INTRODUCTION

6 The State of California, like the rest of the world, is combatting a public health  
7 emergency of a magnitude unseen for at least a century. COVID-19, the novel  
8 coronavirus spreading through the country, is a virulently infectious and frequently  
9 deadly disease that already has killed nearly 35,000 Americans, and because the  
10 virus is new, there is not yet any vaccine or even widely effective treatment for it.  
11 This extraordinary pandemic calls for swift and decisive action using the limited  
12 tools available to curb the disease's spread. Accordingly, the Governor has  
13 proclaimed a state of emergency and issued an Executive Order prohibiting public  
14 and private gatherings of any size and directing all Californians except those  
15 working in critical infrastructure to stay home to slow the spread of COVID-19 and  
16 preserve the health and safety of all Californians.

17 Both the virulence of COVID-19 and the emergency public health stay-at-  
18 home order issued to combat it have forced changes on many fundamental  
19 institutions. Schools have closed their classrooms and moved classes online.  
20 Courthouses have been closed to the public, jury trials have been postponed, and  
21 hearings are now conducted telephonically. Public meetings across the State are  
22 similarly being conducted electronically. And houses of worship have stopped  
23 holding in-person services.

24 Most churches, mosques, synagogues, and other places of worship have  
25 accepted the need for these temporary emergency measures, and are now  
26 conducting their services online, often through free video conferencing tools such  
27 as Zoom, Skype, and WebEx. Plaintiffs, however, believe that these precautions  
28 are unnecessary and that they can conduct in-person services safely by providing

1 hand sanitizers, enforcing physical distancing, and using other measures. Indeed,  
2 they contend that the Executive Order—along with related orders issued by San  
3 Bernardino and Riverside Counties—is unconstitutional, claiming that it infringes  
4 on their religious freedom to congregate in indoor places of worship and perform  
5 rituals that involve physical contact with others. Moreover, they seek a temporary  
6 restraining order to immediately enjoin the enforcement of the Order against  
7 religious or faith based services.

8 In seeking emergency equitable relief, plaintiffs always bear a heavy burden,  
9 and that burden is even heavier where they are asking the Court to grant such relief  
10 in the midst of a public health emergency. Plaintiffs have not even begun to satisfy  
11 this burden. Indeed, in seeking a temporary restraining order, Plaintiffs all but  
12 ignore the extraordinary and imminent threat the COVID-19 pandemic poses to the  
13 health and safety of Californians absent measures like those outlined in the  
14 Executive Order. The State, however, has a compelling interest in protecting public  
15 health, and it is well-settled that it has broad emergency power to combat an  
16 epidemic even where the temporary measures taken to do so restrict activities that  
17 normally would be constitutionally protected. And though the free exercise of  
18 one's religion is a fundamental right afforded constitutional protection, as the  
19 Supreme Court has recognized, "[t]he right to practice religion freely does not  
20 include liberty to expose the community . . . to communicable disease." *Prince v.*  
21 *Massachusetts*, 321 U.S. 158, 166-67 (1944). Plaintiffs do not—and cannot—show  
22 that the Executive Order exceeds those emergency powers. Therefore, Plaintiffs  
23 have failed to show a likelihood of success on their challenge to the Order.

24 Nor have Plaintiffs shown that the balance of equities weighs in favor of a  
25 temporary restraining order. Any injury that Plaintiffs have suffered to their  
26 constitutional rights is limited, not only because the Executive Order is temporary  
27 and restricted to the current emergency, but also because the Order permits them to  
28 conduct services online and even to hold drive-in services as long as those in

attendance abide by physical distancing guidelines and refrain from direct and indirect physical contact with others. Moreover, the public interest weighs heavily against the relief that Plaintiffs seek. The current pandemic unfortunately provides copious examples of individuals, including asymptomatic ones, spreading COVID-19 throughout communities through attendance at public gatherings, including in places of worship where physical distancing and cleanliness precautions were implemented. Exempting Plaintiffs from the Executive Order's stay-at-home requirement so they may congregate for extended periods of time would pose a public health risk and create an unreasonable risk of exacerbating the spread of COVID-19, infecting, and potentially killing, many others. It is hard to imagine a situation in which equitable relief could be more inappropriate.

For these reasons, and those explained herein, the Court should deny Plaintiff's Application for a Temporary Restraining Order.

## BACKGROUND

### **I. THE GOVERNOR'S PROCLAMATION OF A STATE OF EMERGENCY RELATED TO THE COVID-19 PANDEMIC**

In mere months, the infectious coronavirus disease 2019 (COVID-19) has infected nearly two million people and caused the deaths of over 130,000 people worldwide.<sup>1</sup> In the United States alone, COVID-19 has infected over 600,000 people and caused the deaths of over 30,000 people to date.<sup>2</sup> California recognized early that COVID-19 has the potential to spread rapidly throughout the state. As early as December 2019, California began working closely with the national Centers for Disease Control and Prevention, the United States Health and Human Services Agency, and local health departments to monitor and plan for the potential

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<sup>1</sup> See Coronavirus disease 2019 (COVID-19) Situation Report, [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200416-sitrep-87-covid-19.pdf?sfvrsn=9523115a\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200416-sitrep-87-covid-19.pdf?sfvrsn=9523115a_2) (last accessed April 16, 2020).

<sup>2</sup> See Cases in U.S., <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last accessed April 16, 2020).

1 spread of COVID-19 to the United States. *See* Decl. of Todd Grabarsky in Supp. of  
2 Opp’n to Pls.’ TRO Ex. 1. The California Department of Public Health has been in  
3 regular communication with hospitals, clinics, and other health providers and has  
4 been providing guidance to health facilities and providers regarding COVID-19. *Id.*

5 To prepare for and respond to suspected or confirmed cases of COVID-19 in  
6 California and to implement measures to mitigate the spread of COVID-19, the  
7 Governor proclaimed a State of Emergency in California on March 4, 2020. *Id.*  
8 This proclamation makes additional resources available, formalizes emergency state  
9 actions already underway, and helps the state prepare for the broader spread of  
10 COVID-19. *See* Grabarsky Decl. Ex. 2.

11 On March 19, 2020, the Governor issued Executive Order N-33-20.  
12 Grabarsky Decl. Ex. 3. Executive Order N-33-20 directed all California residents  
13 to heed the State public health directives relating to COVID-19, which the  
14 Executive Order expressly incorporated in the form of the March 19, 2020 Order of  
15 the State Public Health Officer (Public Health Order). *Id.* Specifically, the Public  
16 Health Order, and thus Executive Order N-33-20, requires “all individuals living in  
17 the State of California to stay home or at their place of residence except as needed  
18 to maintain continuity of operations of the federal critical infrastructure sectors, as  
19 outlined at [https://www.cisa.gov/identifying-critical-infrastructure-during-covid-](https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19)  
20 [19.](https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19)” *Id.* Observing that “[t]he federal government has identified 16 critical  
21 infrastructure sectors” considered vital to the United States, the order provides that  
22 “Californians working in these 16 critical infrastructure sectors may continue their  
23 work because of the importance of these sectors to Californians’ health and well-  
24 being.” *Id.* The Order does not identify any specific industry, retailer, or business  
25 as essential or provide any specific criteria, instead incorporating the infrastructure  
26 designations of the federal government. *See* Grabarsky Decl. Exs. 3, 5.

27 The Executive Order further provides that the Public Health Officer “may  
28 designate additional sectors as critical in order to protect the health and well-being

1 of all Californians.” *Id.* On March 22, 2020, the Public Health Officer designated a  
 2 list of “Essential Critical Infrastructure Workers.”<sup>3</sup> Grabarsky Decl. Ex. 4.  
 3 Included in that list is “[f]aith based services that are provided through streaming or  
 4 other technology.”<sup>4</sup> *Id.* at 11.

5 In April 2020, the Counties of Riverside and San Bernardino issued similar  
 6 “stay-at-home” orders that prohibit non-essential public gatherings. Compl. (ECF  
 7 No. 1) Exs. 2, 3.

## 8 **II. THE PRESENT LAWSUIT**

9 Plaintiffs filed their Complaint in this action on April 13, 2020, against the  
 10 State Defendants as well as numerous officials of San Bernardino and Riverside  
 11 Counties. Compl. ¶¶ 10-26 (listing defendants). Plaintiffs include: Wendy Gish, a  
 12 congregant of the Shield of Faith Family Church in Fontana, California, located in  
 13 San Bernardino County; Patrick Scales, head pastor at Shield of Faith; James Dean  
 14 Moffatt, senior pastor at Church Unlimited in Indio, California, located in Riverside  
 15 County;<sup>5</sup> and Brenda Wood, senior pastor at Word of Life Ministries International,  
 16 Inc., in Riverside, California. *Id.* ¶¶ 6-9.

17 Plaintiffs challenge the State’s Executive Order and the county orders on state  
 18 and federal constitutional grounds, alleging primarily that they infringe on  
 19 Plaintiffs’ freedom to engage in in-person religious congregation, worship, and

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20  
 21 <sup>3</sup> Executive Order N-33-20 and the March 22 Public Health Officer  
 22 designations will be collectively referenced as the “Executive Order.”

23 <sup>4</sup> Given the rapidly evolving circumstances relating to COVID-19 in  
 24 California and in the United States, the State Defendants continue to update the list  
 25 of essential workers and may issue other orders or directives in the future to combat  
 26 the further spread of COVID-19. *See* Grabarsky Decl. Ex. 3.

27 <sup>5</sup> On April 8, 2020, the County of Riverside sought a temporary restraining  
 28 order in the California Superior Court for the County of Riverside enjoining  
 Plaintiff James Moffatt and Church Unlimited from holding an in-person service on  
 Easter Sunday. That request was denied as moot once Mr. Moffatt represented that  
 he would “not host in-person church services, including but not limited to on Easter  
 Sunday, April 12, 2020.” Grabarsky Decl. Ex. 6.

1 ritual. In total, Plaintiffs bring eleven claims under the First and Fourteenth  
 2 Amendments to the United State Constitution and Article 1 of the California  
 3 Constitution. *See id.* ¶ 3. Plaintiffs primarily object to the Executive Order’s  
 4 prohibition on in-person public gatherings and the lack of an exemption for in-  
 5 person religious worship services. They contend that the Order infringes on their  
 6 religious mandate to congregate in indoor places of worship as well as to perform  
 7 rituals that involve the physical touching of other individuals such as baptisms,  
 8 communions, and “lay[ing] hands on people to pray for them.” *Id.* ¶¶ 6-9, 88.

9 On April 14, 2019, one day after filing their Complaint, Plaintiffs filed the  
 10 instant Application for Temporary Restraining Order and for Order to Show Cause  
 11 Why Preliminary Injunction Should Not Issue (herein, “Pls.’ TRO”).<sup>6</sup> ECF No. 8.  
 12 For the reasons explained herein, the Court should deny that Application.

### 13 LEGAL STANDARD

14 “An application for a temporary restraining order involves the invocation of a  
 15 drastic remedy which a court of equity ordinarily does not grant, unless a very  
 16 strong showing is made of a necessity and desirability of such action.” *Vaccaro v.*  
 17 *Sparks*, No. SACV 11-00164, 2011 WL 318039, at \*1 (C.D. Cal. Jan. 28, 2011)  
 18 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 978, 980 (D.D.C.  
 19 1952)). Temporary restraining orders are subject to standards similar to those  
 20 governing preliminary injunctions. Plaintiffs must demonstrate that they are likely  
 21 to succeed on the merits of their claims, that they are likely to suffer irreparable  
 22 harm without preliminary relief, that the balance of equities tips in their favor, and  
 23 that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*,

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24  
 25 <sup>6</sup> In their memorandum of points and authorities supporting their TRO  
 26 Application, Plaintiffs request that Defendants be enjoined from enforcing the  
 27 relevant orders against *Plaintiffs*. Pls.’ TRO at 24-25. However, in their proposed  
 28 order submitted with their application, Plaintiffs request that Defendants be  
 enjoined from enforcing the orders against “any faith based or religious services *in*  
*the State of California*.” ECF No. 8-1. Neither form of relief is merited here.



1 555 U.S. 7, 20 (2008); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127,  
 2 1135 (9th Cir. 2011).

3 Alternatively, injunctive relief “is appropriate when a plaintiff demonstrates  
 4 that serious questions going to the merits were raised and the balance of hardships  
 5 tips sharply in the plaintiff’s favor.” *Id.* at 1134-35. Even under this alternative  
 6 sliding scale test, plaintiffs must make a showing of all four *Winter* factors. *Id.* at  
 7 1132, 1135. Injunctive relief “is ‘an extraordinary and drastic remedy, one that  
 8 should not be granted unless the movant, by a clear showing, carries the burden of  
 9 persuasion.’” *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).

## 10 **ARGUMENT**

11 Plaintiffs have not met their burden of demonstrating that they are entitled to a  
 12 temporary restraining order or a preliminary injunction in this case. They cannot  
 13 demonstrate a likelihood of success on the merits of their claims in light of the  
 14 current public health crisis and the constitutional standard applicable to the  
 15 Governor’s exercise of his emergency powers to combat that crisis. Nor have  
 16 Plaintiffs shown that the balance of equities tips in their favor. To the contrary, any  
 17 harm they may suffer in absence of a temporary restraining order is greatly  
 18 outweighed by the significant risk of harm to the public if Plaintiffs are permitted to  
 19 hold gatherings that could further spread COVID-19 and undermine efforts to  
 20 protect the health of the public. Plaintiffs’ application should be denied.

### 21 **I. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR** 22 **CLAIMS.**

#### 23 **A. The State Executive Order Is a Constitutional Exercise of the** 24 **Governor’s Emergency Powers to Combat the COVID-19** 25 **Pandemic.**

26 California is in the throes of an unprecedented, once-in-a-century public health  
 27 crisis that has essentially brought normal life to a halt. In response, the Governor—  
 28 along with other state, local, and national officials—proclaimed a state of



1 emergency and issued the Executive Order to protect the health and safety of  
 2 Californians. In an extraordinary public health crisis such as this, the State has  
 3 broad emergency powers, and courts must afford deference to temporary actions  
 4 taken to curb the spread of a dangerous disease and mitigate its effects.

5 The Supreme Court has long recognized that “a community has the right to  
 6 protect itself against an epidemic of disease which threatens the safety of its  
 7 members.” *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905) (internal quotation  
 8 marks omitted).<sup>7</sup> In that regard, the Court has permitted states to enact “quarantine  
 9 laws and health laws of every description,” *id.* at 25, similar to the Executive  
 10 Order’s measures to combat the COVID-19 pandemic. *See, e.g., Compagnie*  
 11 *Francaise de Navigation a Vapeur v. Bd. of Health of State of La.*, 186 U.S. 380  
 12 (1902) (upholding quarantine law against constitutional challenges); *Rasmussen v.*  
 13 *Idaho*, 181 U.S. 198 (1901) (permitting a ban on certain animal imports if evidence  
 14 of disease was found); *see also Benson v. Walker*, 274 F. 622 (4th Cir. 1921)  
 15 (upholding board of health resolution that prevented carnivals and circuses from  
 16 entering a certain county in response to the 1918-1919 influenza epidemic); *Hickox*  
 17 *v. Christie*, 205 F. Supp. 3d 579 (D.N.J. 2016) (upholding the eighty-hour  
 18 quarantine of a nurse returning from treating Ebola patients in Sierra Leone).

19 The State’s proclamation of a state of emergency and invocation of emergency  
 20 powers “necessarily restrict[] activities that would normally be constitutionally  
 21 protected,” and “[a]ctions which citizens are normally free to engage in [have]  
 22 become subject to criminal penalty.” *United States v. Chalk*, 441 F.2d 1277, 1281  
 23 (4th Cir. 1971). But “measures [that] would be constitutionally intolerable in  
 24 ordinary times [] are recognized as appropriate and even necessary responses to the

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25 <sup>7</sup> *Jacobson*’s restriction of civil liberties in the face of overriding  
 26 circumstances has been recognized as potent precedent by the Supreme Court as  
 27 recently as 1997. *See Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (recognizing  
 28 that an individual’s constitutionally protected interest in avoiding physical restraint  
 may be overridden in the civil context) (citing *Jacobson*, 197 U.S. at 26).

1 present [COVID-19 pandemic] crisis.” *In re Abbott*, No. 20-50264, 2020 WL  
 2 1685929, at \*9 (5th Cir. Apr. 7, 2020). Although the Constitution is not suspended  
 3 during a state of emergency, the Supreme Court has recognized that “under the  
 4 pressure of great dangers,” constitutional rights may be reasonably restricted “as the  
 5 safety of the general public may demand.”<sup>8</sup> *Jacobson*, 197 U.S. at 29; *see also*  
 6 *Prince*, 321 U.S. at 166-67 (“The right to practice religion freely does not include  
 7 liberty to expose the community . . . to communicable disease.”). This “settled  
 8 rule” allows states facing emergencies to “restrict, for example, one’s right to  
 9 peaceably assemble, *to publicly worship*, to travel, and even to leave one’s home.”  
 10 *Abbott*, 2020 WL 1685929, at \*1 (emphasis added).

11 To combat a virulently infectious disease in an emergency pandemic, the State  
 12 must be able to take swift and decisive action. *Cf. Chalk*, 441 F.2d at 1281. The  
 13 court’s review of temporary measures taken during such an emergency,  
 14 accordingly, is “limited to a determination of whether the [executive’s] actions  
 15 were taken in good faith and whether there is some factual basis for [the  
 16 Governor’s] decision that the restrictions he imposed were necessary to maintain  
 17 order.” *Id.* (citing *Moyer v. Peabody*, 212 U.S. 78 (1909)); *see also Jacobson*, 197  
 18 U.S. at 29 (“reasonable regulations” may be implemented in the face of an  
 19

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20 <sup>8</sup> That is why courts have routinely upheld mandatory vaccination programs  
 21 against infectious diseases even in the face of challenges based on freedom of  
 22 religion and other liberties. *See, e.g., Jacobson*, 197 U.S. 11 (upholding a  
 23 mandatory vaccination program for smallpox against a Fourteenth Amendment  
 24 challenge); *Zucht v. King*, 260 U.S. 174 (1922) (upholding the exclusion of non-  
 25 vaccinated children from a school district in against a due process and equal  
 26 protection challenge); *Abeel v. Clark*, 84 Cal. 226 (1890) (upholding vaccination  
 27 mandate in California); *Phillips v. City of New York*, 775 F.3d 538 (2d Cir.)  
 28 (finding that a challenge to mandatory vaccination law was “foreclosed” by  
*Jacobson*), *cert. denied*, 136 S.Ct. 104 (2015); *Whitlow v. California*, 203 F. Supp.  
 3d 1079, 1083 (S.D. Cal. 2016) (finding no likelihood of success on a free exercise  
 challenge to a law removing a religious- or conscious-based exemption for  
 mandatory vaccination of schoolchildren).

1 infectious disease epidemic); *Abbott*, 2020 WL 1685929, at \*8-\*9 (applying a  
 2 deferential, rational-basis standard to an executive order restricting otherwise  
 3 constitutionally protected abortion access in the face of the COVID-19 crisis);  
 4 *Murphy v. Palmer*, 2017 WL 2364195, at \*10 (D.N.J. May 31, 2017) (“Courts have  
 5 concluded that, during a state of emergency, governmental entities may impose  
 6 more onerous restrictions upon its citizens, as long as such restrictions are  
 7 reasonably necessary for the preservation of order.”). This deferential standard  
 8 recognizes that, in a public health crisis, “it is no part of the function of a court . . .  
 9 to determine which one of two modes was likely to be the most effective for the  
 10 protection of the public against disease.” *Jacobson*, 197 U.S. at 30. And, it reflects  
 11 the reality that “governing authorities must be granted the proper deference and  
 12 wide latitude necessary for dealing with . . . emergenc[ies].” *Smith v. Avino*, 91  
 13 F.3d 105, 109 (11th Cir. 1996), *abrogated on other grounds*, *Steel Co. v. Citizens*  
 14 *for a Better Env’t*, 523 U.S. 83 (1998); *see also In re Approval of the Judicial*  
 15 *Emergency Declared in the S. Dist. of Cal.*, 2020 WL 1814265 (9th Cir. Apr. 2,  
 16 2020) (approving declaration of emergency extending time limits in the Speedy  
 17 Trial Act for bringing accused criminal defendants to trial).<sup>9</sup>

18 The current emergency brought on by the COVID-19 pandemic is  
 19 undoubtedly a moment demanding deference to temporary measures taken to  
 20 combat that pandemic. The Governor issued the Executive Order and ensuing  
 21 directives in good-faith response to the imminent threat COVID-19 poses to the  
 22 State of California and its residents. To date, the disease has infected over 600,000  
 23  
 24

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25 <sup>9</sup> In citing case law recognizing the broad authority of state executive  
 26 officials to combat a public health emergency, the State Defendants do not mean to  
 27 suggest that they necessarily agree with the actions taken by officials of other states  
 28 in each and every case. But the broad principle of deference to state officials stands  
 universally recognized.

1 people and caused the deaths of over 30,000 people in the United States;<sup>10</sup> in  
 2 California, which fortunately took measures early on to prevent the spread, more  
 3 than 26,000 people have been infected and 890 have died.<sup>11</sup> The virulently  
 4 infectious nature of the novel coronavirus and the absence of any vaccination or  
 5 widely effective treatment has made the Order's temporary prohibition on  
 6 gatherings crucial to slowing spread of the disease.<sup>12</sup> Public gatherings generally—  
 7 including, but not limited to, in-person religious services—have fueled the spread  
 8 of COVID-19. *See* Section I(B)(2), *infra* (detailing instances of public gatherings  
 9 exacerbating the spread of COVID-19). Authorities have estimated that, in the  
 10 worst case scenario, millions of Americans will die if governments did nothing to  
 11 prevent the spread of COVID-19, and the CDC has determined that limiting face-  
 12 to-face contact is the best way to slow to its spread.<sup>13</sup> The clear and manifest need  
 13 for the Executive Order's temporary prohibition on in-person gatherings in light of  
 14 this emergency—which parallels similar measures by other state, local, and national  
 15 officials—refutes any suggestion that the Governor acted in bad faith or arbitrarily.  
 16 Accordingly, the Governor's "stay-at-home" strategy for combating the spread of

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18 <sup>10</sup> *See* Cases in U.S., [https://www.cdc.gov/coronavirus/2019-ncov/cases-](https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html)  
 19 [updates/cases-in-us.html](https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html) (last accessed April 16, 2020).

20 <sup>11</sup> *See* COVID-19 by the Numbers,  
 21 <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers> (last accessed April 16, 2020).

22 <sup>12</sup> Plaintiffs appear to argue that because "the anticipated national death toll  
 23 related to the virus has decreased substantially, by an order of magnitude,"  
 24 Defendants should loosen the restrictions currently in place. Pls.' TRO at 2. This  
 25 argument ignores the role played by the precise types of orders Plaintiffs challenge  
 26 here in the reduction of anticipated deaths and the ongoing nature of the threat. The  
 27 argument also ignores the proper role of government, as distinct from Plaintiffs or  
 28 even the Court, in making informed decisions regarding what emergency measures  
 are no longer needed and when.

<sup>13</sup> *See* Social Distancing, Quarantine, and Isolation,  
[https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html)  
[distancing.html](https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html) (last accessed April 16, 2020).

1 COVID-19 warrants appropriate judicial deference. *See Abiding Place Ministries*  
2 *v. Wooten*, No. 3:20-cv-00683-BAS-AHG (S.D. Cal. Apr. 10, 2020) (ECF No. 7)  
3 (denying an *ex parte* motion for a temporary restraining order in a religious free  
4 exercise challenge to San Diego County’s stay-at-home COVID-19 order)  
5 (available at Grabarsky Decl. Ex. 7).

6 Plaintiffs have not met their burden of showing that the Executive Order was  
7 issued in bad faith, nor do they argue a lack of rational basis for the Order.  
8 Although they recognize the state of emergencies proclaimed at the national and  
9 state level, Plaintiffs contend that their religious exercise rights have been violated  
10 as if this temporary, emergency action occurred during normal times. But Plaintiffs  
11 do not cite any cases applying the constitutional analysis applicable under such  
12 extraordinary emergency circumstances as the COVID-19 pandemic. In fact,  
13 Plaintiffs largely ignore the once-in-a-century nature of the current global health  
14 crisis, and they fail to consider the scope of the COVID-19 pandemic, the  
15 Governor’s rationale behind the Executive Order, the Order’s temporary nature, or  
16 its effectiveness so far in slowing the spread of COVID-19.

17 The only case Plaintiffs cite involving a government order issued to combat an  
18 infectious disease concerned a suspect quarantine of San Francisco’s Chinatown in  
19 1900. *See* Pls.’ TRO at 19 (analogizing *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D.  
20 Cal. 1900) and *Wong Wai v. Williamson*, 103 F. 1 (C.C.N.D. Cal. 1900) to the  
21 COVID-19 pandemic). But the situation in that case was drastically different from  
22 the present COVID-19 pandemic; it involved a racially motivated quarantine of a  
23 few city blocks. The *Jew Ho* court found that the quarantine of tens of thousands of  
24 persons in the same area where nine incidents of the bubonic plague purportedly  
25 occurred was an irrational measure that would not contain the disease but, to the  
26 contrary, would “increase its danger and its destructive force.” *Jew Ho*, 103 F. at  
27 22-23. Thus, the purported quarantine was “not a reasonable regulation to  
28 accomplish the purposes sought,” especially considering that the evidence

1 demonstrated that “the bubonic plague has not existed, and does not now exist, in  
2 San Francisco.” *Id.* at 22-23, 26.<sup>14</sup> That conclusion was bolstered by the finding of  
3 an impermissible motivation:

4       The evidence here is clear that this is made to operate against the Chinese  
5 population only, and the reason given for it is that the Chinese may  
6 communicate the disease from one to the other. That explanation, in the  
7 judgment of the court, is not sufficient. It is, in effect, a discrimination, and it  
8 is the discrimination that has been frequently called to the attention of the  
federal courts where matters of this character have arisen with respect to  
Chinese.

9 *Id.* at 23; *see also Hickox*, 205 F. Supp. 3d at 592 n.4 (“The rationale for the  
10 quarantine [in *Jew Ho*] was also suspect on its own terms. . . . [T]he court found the  
11 quarantine to be discriminatory because it targeted people of Chinese origin. . . .  
12 There is, in the fact patterns of the old cases, a lamentable tinge of xenophobia;  
13 declarations of quarantine seem to have borne some relation to exclusionary  
14 sentiment.”). *Jew Ho*’s decision to overturn the lamentable order before it does not  
15 undermine in any way the numerous cases permitting the State to impose temporary  
16 restrictions on constitutionally protected freedoms—including religious freedoms—  
17 to combat a public health crisis in good faith.

18       It is also important to recognize that the Executive Order is limited in scope.  
19 Plaintiffs may continue their religious practices in their homes and connect with  
20 others in their religious communities online or through other technologies. Indeed,  
21 drive-in worship services are permitted under the existing Executive Order, which  
22 expressly allows “[f]aith based services that are provided through . . . other  
23 technology,” as long as the individuals engaged in such services abide by physical  
24 distancing guidelines and refrain from direct and indirect physical touching of  
25 others. And while the inability to hold in-person indoor services does restrict the  
26

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27       <sup>14</sup> *Wong Wai v. Williamson*, too, is inapposite in that it involved racially  
28 motivated, irrational, and dangerous measures directed at persons of Chinese  
descent, measures that endangered public health and safety. 103 F. at 7-9.



1 manner in which Plaintiffs may practice their religion during the existing  
 2 emergency, the Executive Order and its suspension on public gatherings are  
 3 temporary.

4 In sum, California has a legitimate—and, indeed, compelling—interest in  
 5 slowing the spread of COVID-19 and protecting public health, and the temporary  
 6 stay-at-home order issued by the Governor is rationally related to that purpose.  
 7 And though Plaintiffs’ religious exercise rights are fundamental, they do not  
 8 include the “liberty to expose the community . . . to communicable disease,”  
 9 *Prince*, 321 U.S. at 166-67, especially one as contagious and deadly as COVID-19.

10 Therefore, Plaintiffs are unlikely to succeed on the merits of their claims  
 11 challenging the Executive Order.

12 **B. Even Under the Standard of Review for Non-Emergency**  
 13 **Situations, the State Executive Order Would Not Violate**  
 14 **Plaintiffs’ Constitutional Rights Given the Current Pandemic.**

15 For the reasons explained in the previous section, the State’s Executive Order  
 16 is entitled to substantial judicial deference in light of the public health emergency it  
 17 attempts in good faith to combat. But even if Plaintiffs’ claims are analyzed under  
 18 the normally applicable constitutional standard of review that is applied in non-  
 19 emergency circumstances, Plaintiffs’ claims are still unlikely to succeed because  
 20 the Governor’s Order is a response to extraordinary health concerns presented by  
 21 the pandemic. Plaintiffs bring eleven claims raising a variety of constitutional  
 22 issues, such as free speech, assembly, due process, equal protection, and the federal  
 23 Establishment Clause. All of those claims, however, hinge on Plaintiffs’ right to  
 24 freely exercise their religious rights by holding in-person gatherings during the  
 25 current pandemic despite the Executive Order’s stay-at-home provisions.<sup>15</sup>

26 \_\_\_\_\_  
 27 <sup>15</sup> In light of the expedited circumstances under which Plaintiffs’ Application  
 28 was filed and is being heard, the State Defendants consider all the claims under the

(continued...)

1                   **1. The Executive Order Is a Neutral Law of General**  
 2                   **Application that Survives Rational Basis Review.**

3           The Executive Order does not violate Plaintiffs' constitutional right to  
 4 freedom of religion because it is a neutral law of general application. "[A] neutral  
 5 law of general application need not be supported by a compelling government  
 6 interest even when 'the law has the incidental effect of burdening a particular  
 7 religious practice.'" *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir.  
 8 2015). Instead, "[s]uch laws need only survive rational basis review." *Id.* at 1076.

9           The Executive Order is a neutral law. It "make[s] no reference to any  
 10 religious practice, conduct, belief, or motivation" and is thus facially neutral. *Id.*  
 11 The Executive Order is also operationally neutral, because it does not single out  
 12 religious or faith based services as opposed to other public gatherings such as  
 13 sporting events, conferences, or festivals. To the contrary, the Order is broad and  
 14 instructs California residents to heed the Public Health Officer's order to "stay  
 15 home or at their place of residence except as needed to maintain continuity of  
 16 operations of the federal critical infrastructure sectors." Grabarsky Decl. Ex. 3.  
 17 The Order makes no exceptions for public gatherings of any kind.

18           The Executive Order is also generally applicable. It does not "'in a selective  
 19 manner, impose[] burden[] only on conduct motivated by religious belief.'" *Stormans*,  
 20 794 F.3d at 1079 (quoting *Church of Lukumi Babalu Aye, Inc. v. City of*  
 21 *Hialeah*, 508 U.S. 520, 543 (1993)). Rather, the Order broadly instructs California  
 22 residents to heed the Public Health Officer's order to "stay home or at their place of  
 23 residence except as needed to maintain continuity of operations of the federal  
 24 critical infrastructure sectors." Grabarsky Decl. Ex. 3. As a result of the COVID-

25 \_\_\_\_\_  
 26 free exercise jurisprudential analysis. Should the Court wish to analyze the claims  
 27 that are not explicitly labeled as free exercise claims under their corresponding  
 28 constitutional analyses, the State Defendants would be happy to provide  
 supplemental briefing demonstrating why those claims are unlikely to prove  
 successful.



1 19 pandemic and Executive Order, a wide variety of California businesses and  
 2 community activities have shut down or reduced operations. Rather than allow  
 3 people to gather, restaurants have shuttered dining rooms, sporting events and  
 4 concerts have been cancelled, schools have moved online, and outdoor recreational  
 5 areas like beaches, parks, playgrounds, and hiking trails are off-limits; even the  
 6 state and federal courts have taken the drastic measures of closing their doors with  
 7 only narrow exceptions. For Plaintiffs to argue that the Executive Order targets  
 8 them based on their religion ignores the dire public health crisis that has halted  
 9 nearly every type of public gathering across California.

10 Because the Executive Order is both neutral and generally applicable, it is  
 11 subject to rational basis review, which it easily satisfies. *See Stormans*, 794 F.3d at  
 12 1084. California’s interest in stopping the spread of COVID-19 and protecting the  
 13 health of its citizens is not only legitimate—it is compelling. *See* Section I(A)(1),  
 14 *supra*, and Section I(C), *infra*. And the temporary stay-at-home instructions issued  
 15 in the Executive Order are rationally related to that purpose.

## 16 **2. The Executive Order Survives Strict Scrutiny.**

17 As explained above, there is no reason to apply strict scrutiny to Plaintiffs’  
 18 claims in light of the current pandemic emergency and also the neutral and  
 19 generally applicable nature of the Executive Order. But even if strict scrutiny were  
 20 applied, the Executive Order would satisfy that standard. The State and other  
 21 Defendants have a compelling interest in protecting the public from the spread of  
 22 the COVID-19 virus. As explained above, “[t]he right to practice religion freely  
 23 does not include liberty to expose the community . . . to communicable disease.”  
 24 *Prince*, 321 U.S. at 166-67; *see also Workman v. Mingo Cty. Bd. of Educ.*, 419  
 25 Fed.Appx. 348, 353 (4th Cir. 2011) (“[T]he state’s wish to prevent the spread of  
 26 communicable diseases clearly constitutes a compelling interest.”). Plaintiffs do  
 27 not—and cannot—argue otherwise.  
 28

1 To appreciate the gravity of the threat facing the State of California and its  
 2 residents, one need only to look at the number of confirmed cases of COVID-19  
 3 and the resulting deaths that have occurred in the state of New York—222,284  
 4 cases and 12,192 deaths as of April 16, 2020.<sup>16</sup> New York state has suffered 1,161  
 5 cases and 50.3 deaths per 100,000 people, compared to California’s 61 cases and  
 6 1.8 deaths per 100,000 people.<sup>17</sup> Indeed, California’s swift and decisive measures  
 7 in instructing residents to stay at home and prohibiting public gatherings may prove  
 8 to have been determinative, allowing the State to limit the spread of the disease and  
 9 not experience the overwhelming of hospitals and health care providers that has  
 10 been seen in other places. Thus, the State has a compelling interest in continuing  
 11 its public health measures, including the Executive Order, that appear to be  
 12 working.

13 The Executive Order is narrowly tailored to serve the State’s interest in  
 14 avoiding the spread of the COVID-19 disease because the virus is highly  
 15 contagious and has been shown to spread from person to person, including and  
 16 especially at public gatherings. The current pandemic has provided many examples  
 17 of individuals, including asymptomatic individuals, spreading the virus through  
 18 attendance at public gatherings. Such gatherings, including religious services, have  
 19 fueled the spread of COVID-19:

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22 <sup>16</sup> See NYSDOH COVID-19 Tracker, [https://covid19tracker.health.ny.gov/](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCovid-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n)  
 23 [views/NYS-COVID19-Tracker/NYSDOHCovid-19Tracker-](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCovid-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n)  
 24 [Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCovid-19Tracker-Map?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n); Fatalities,  
 25 [https://covid19tracker.health.ny.gov/views/NYS-COVID19-](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCovid-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n)  
 26 [Tracker/NYSDOHCovid-19Tracker-](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCovid-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n)  
 27 [Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n](https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCovid-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n) (last accessed April 16,  
 28 2020).

27 <sup>17</sup> See Regan Morris, How California kept ahead of the curve,  
 28 <https://www.bbc.com/news/world-us-canada-52272651> (last accessed April 16,  
 2020).

1       • In South Korea, as of March 25, 2020, at least 5,080 confirmed cases of  
2 COVID-19—over half of South Korea’s confirmed cases—have been traced back  
3 to one individual who attended a religious service at the Shincheonji Church of  
4 Jesus in Daegu.<sup>18</sup>

5       • Near Seattle, Washington, a church choir held its weekly rehearsal at  
6 Mount Vernon Presbyterian Church on March 10, 2020. Following that gathering,  
7 at least forty-five individuals were diagnosed with COVID-19 and at least two died.  
8 This spread occurred even though, according to news reports, hand sanitizer was  
9 offered to the choir members at the rehearsals, the members attempted to refrain  
10 from physical contact with one another, and the members tried to maintain physical  
11 distance between one another.<sup>19</sup>

12       • On April 6, 2020, Kansas Governor Lee Norman announced that the state  
13 had identified eleven clusters of COVID-19 cases, three of which were linked to  
14 churches.<sup>20</sup>

15       • In California, seventy-one cases of COVID-19 have been linked to the  
16 Bethany Slavic Missionary Church in Sacramento.<sup>21</sup>

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18  
19       <sup>18</sup> See Youjin Shin, Bonnie Berkowitz, Min Joo-Kim, *How a South Korean*  
20 *church helped fuel the spread of the coronavirus*, Washington Post, March 25,  
21 2020, <https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/>.

22       <sup>19</sup> See Richard Read, *A choir decided to go ahead with rehearsal. Now*  
23 *dozens have COVID-19 and two are dead*, Los Angeles Times, March 29, 2020,  
24 <https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak>.

25       <sup>20</sup> See Jonathan Shorman, *Kansas has 3 church-related COVID-19 clusters,*  
26 *state says amid scramble for supplies*, The Wichita Eagle, April 6, 2020,  
27 <https://www.kansas.com/news/coronavirus/article241810656.html>.

28       <sup>21</sup> See Anita Chabria, Sean Greene, Rong-Gong Lin II, *Pentecostal church in*  
*Sacramento linked to dozens of coronavirus cases*, Los Angeles Times, April 2,  
2020, <https://www.latimes.com/california/story/2020-04-02/pentecostal-church-in-sacramento-linked-to-dozens-of-coronavirus-cases>.

1        Given the documented examples of how public gatherings can lead to the  
2 spread of the virus not only to those in attendance, but also to the larger  
3 community, the Executive Order’s instruction to residents to stay home and the  
4 guidance to avoid public gatherings is no broader than required to address the  
5 problem at hand. As recognized above, “[t]he right to practice religion freely does  
6 not include liberty to expose the community . . . to communicable disease.” *Prince*,  
7 321 U.S. at 166-67.

8        In addition, despite the necessary, temporary prohibition on public gatherings,  
9 Plaintiffs and other Californians who wish to maintain their religious practices  
10 during the current emergency have options to stay connected with their  
11 communities and to hold religious services other than gathering in person.  
12 Religious leaders and staff are specifically included in the Public Health Officer’s  
13 list of workers who provide an essential service so that they may continue  
14 providing religious services in any form other than in-person gatherings involving  
15 close physical proximity. Grabarsky Decl. Ex. 4. These options include free  
16 streaming services online and conducting drive-in services, where appropriate  
17 distancing precautions are taken.

18        Plaintiffs propose alternatives to the Executive Order’s instruction to stay  
19 home, such as wearing masks and maintaining six feet of physical distance between  
20 congregants. But notably absent from their application is any evidence that those  
21 measures would be as effective in combatting the spread of COVID-19 as  
22 refraining from public gatherings. In fact, scientific research on that issue  
23 continues to evolve on almost a daily basis.<sup>22</sup> Because Plaintiffs have not shown  
24 that their proposed measures would be effective in addressing the compelling

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25        <sup>22</sup> See, e.g., Knvul Skeikh, James Gorman and Kenneth Chang, *Stay 6 Feet*  
26 *Apart, We’re Told. But How Far Can Air Carry Coronavirus?*, New York Times,  
27 April 14, 2020, [https://www.nytimes.com/2020/04/14/health/coronavirus-six-](https://www.nytimes.com/2020/04/14/health/coronavirus-six-feet.html)  
28 [feet.html](https://www.nytimes.com/2020/04/14/health/coronavirus-six-feet.html); Michelle Roberts, *Coronavirus: Who needs masks or other protective*  
*gear?*, BBC News, April 13, 2020, <https://www.bbc.com/news/health-51205344>.

1 interest in stopping the spread of COVID, Defendants are under no obligation to  
2 adopt them and thus gamble with the public's health and safety.

3 For these reasons, and because the Executive Order addresses a compelling  
4 government interest in combatting the virulence of the COVID-19 pandemic, the  
5 Order satisfies strict scrutiny. For this reason as well, Plaintiffs have failed to show  
6 a likelihood of success on the merits.

7 **II. THE REMAINING FACTORS WEIGH HEAVILY AGAINST ISSUANCE OF A**  
8 **TEMPORARY RESTRAINING ORDER .**

9 Plaintiffs' motion fails for an additional, independent reason. To obtain a  
10 temporary restraining order, Plaintiffs must show that they will suffer irreparable  
11 harm, that balance of equities tips in their favor, and that a temporary restraining  
12 order is in the public interest. *Winter*, 555 U.S. at 20; *see also Drakes Bay Oyster*  
13 *Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) ("Where the government is a  
14 party to a case in which a preliminary injunction is sought, the balance of the  
15 equities and public interest factors merge."). Plaintiffs do not—and cannot—make  
16 this showing.

17 Plaintiffs contend that they will suffer irreparable harm in the absence of a  
18 temporary restraining order because the "loss of First Amendment freedoms, for  
19 even minimal periods of time, unquestionably constitutes irreparable injury for  
20 purposes of the issuance of a preliminary injunction." Pls.' TRO at 21 (internal  
21 quotation marks omitted). Even if, however, Plaintiffs could show a constitutional  
22 violation, any injury suffered by them would be limited. The Executive Order is  
23 temporary, and it does not prohibit them from conducting religious services, only  
24 from conducting in-person gatherings during the present health emergency. And  
25 Plaintiffs have other options to continue their religious practices to the extent  
26 feasible given the current crisis, including by holding religious services online  
27 using the many free services now available or holding drive-in services without any  
28 direct or indirect physical contact.

1 Any harm that Plaintiffs might suffer as a result of such temporary restrictions  
2 is far outweighed by the potential harm to the public health and to individuals in  
3 Plaintiffs' community from conducting in-person services. The public interest  
4 would not be served by the temporary restraining order Plaintiffs seek—far from it,  
5 the public interest in the health, safety, and well-being of individuals and the  
6 community would be greatly threatened. Permitting indoor public gatherings could  
7 have detrimental effects far beyond those individuals who would choose to  
8 disregard government warnings and orders and attend public gatherings. One  
9 reason COVID-19 is so contagious, and thus dangerous, is that “a significant  
10 portion of individuals with coronavirus lack symptoms (‘asymptomatic’) and that  
11 even those who eventually develop symptoms (‘pre-symptomatic’) can transmit the  
12 virus to others before showing symptoms.”<sup>23</sup> Thus, Plaintiffs' assurances that they  
13 themselves “[t]o [their] knowledge, have never had or contracted the coronavirus”  
14 and “do not believe that [they’ve] ever been in close proximity or exposed to it” are  
15 of no consequence. Decl. of Brenda Wood ¶ 7; Decl. of Patrick Scales ¶ 8; Decl. of  
16 James Moffatt ¶ 11; Decl. of Wendy Gish ¶ 7. Likewise, Plaintiffs' representations  
17 that, if permitted to hold in-person religious services, they will abide by CDC  
18 guidance on physical distancing are insufficient. Indeed, Plaintiffs do not even  
19 specify the CDC guidance they intend to follow. Notably, even while  
20 recommending that individuals maintain physical distance and wear face coverings,  
21 the CDC also states that “[t]his recommendation complements and does not replace

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26 <sup>23</sup> See Recommendation Regarding the Use of Cloth Face Coverings,  
27 Especially in Areas of Significant Community-Based Transmission, CDC, April 3,  
28 2020, <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cloth-face-cover.html#studies>.

1 the President’s Coronavirus Guidelines for America,” which advises individuals to  
2 “avoid social gatherings in groups of more than 10 people.”<sup>24</sup>

3 Moreover, the examples discussed above in Section I(B)(2) demonstrate that  
4 allowing public gatherings for *any* reason beyond those recognized as essential to  
5 the health and safety of the community—including religious reasons—puts not only  
6 those in attendance at the gathering, but the entire surrounding community,  
7 including individuals who do not wish to participate in religious worship or attend  
8 gatherings or any type, at risk of contracting and spreading COVID-19. Those  
9 examples even include gatherings where individuals took distancing and cleanliness  
10 precautions.

11 The rights of all Californians to practice their religion freely are of  
12 fundamental importance. However, those rights must be considered along with  
13 these extraordinary circumstances in which each and every public gathering—  
14 whether at a church, temple, or mosque, or in a stadium, park, school, or  
15 courthouse—places the lives and health of Californians at risk. In light of the  
16 ongoing global pandemic, a temporary restraining order exempting religious and  
17 faith based gatherings from the Executive Order and the various county orders  
18 would not be in the public interest, but instead would threaten the effectiveness of  
19 the State’s efforts to stop the spread of COVID-19 and protect the health of all  
20 individuals in California.

21 Therefore, and because the public interest in keeping the Executive Order in  
22 place greatly outweighs any harm caused to Plaintiffs, the remaining factors weigh  
23 heavily against issuing the temporary restraining order.

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27 <sup>24</sup> See 30 Days to Slow the Spread, available at  
28 [https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20\\_coronavirus-guidance\\_8.5x11\\_315PM.pdf](https://www.whitehouse.gov/wp-content/uploads/2020/03/03.16.20_coronavirus-guidance_8.5x11_315PM.pdf) (last accessed April 16, 2020).



1 **CONCLUSION**

2 For the foregoing reasons, the Court should deny Plaintiffs' Application for  
3 Temporary Restraining Order.

4  
5 Dated: April 17, 2020

Respectfully submitted,

6 XAVIER BECERRA  
7 Attorney General of California  
8 MARK R. BECKINGTON  
9 Supervising Deputy Attorney General

10 /s/ Todd Grabarsky  
11 TODD GRABARSKY  
12 Deputy Attorney General  
13 AMIE L. MEDLEY  
14 Deputy Attorney General  
15 *Attorneys for Gavin Newsom, in his*  
16 *official capacity as Governor of*  
17 *California, and Xavier Becerra, in his*  
18 *official capacity as Attorney General*  
19 *of California*  
20  
21  
22  
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24  
25  
26  
27  
28





JAMES E. BROWN, Assistant County Counsel (SBN 162579)  
 RONAK N. PATEL, Deputy County Counsel (SBN 249982)  
 KELLY A. MORAN, Deputy County Counsel (SBN 267147)  
 OFFICE OF COUNTY COUNSEL  
 3960 Orange Street, Suite 500  
 Riverside, CA 92501-3674  
 Telephone: (951) 955-6300  
 Facsimile: (951) 955-6363  
 Email: [kmoran@rivco.org](mailto:kmoran@rivco.org)

Attorneys for Defendants, CAMERON KAISER, in his official capacity as the  
 Riverside County Public Health Officer; GEORGE JOHNSON, in his official capacity as  
 Riverside County Executive Officer and Director of Emergency Services; CHAD BIANCO,  
 in his official capacity as the Riverside County Sheriff; KEVIN JEFFRIES, in his official  
 capacity as a Riverside County Supervisor; KAREN SPIEGEL, in her official  
 capacity as a Riverside County Supervisor; CHUCH WASHINGTON, in his official  
 capacity as a Riverside County Supervisor; V. MANUEL PEREZ, in his official capacity as  
 a Riverside County Supervisor; and JEFF HEWITT, in his official capacity as a Riverside  
 County Supervisor

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA – EASTERN DIVISION

WENDY GISH, an individual, *et al.*,

Plaintiffs,

v.

GAVIN NEWSON, in his official  
 capacity as Governor of California, *et al.*,

Defendants.

Case No. 5:20-cv-00755-JGB-KK

Judge Hon. Jesus G. Bernal  
 Magistrate Judge Kenly Kiya Kato

**COUNTY OF RIVERSIDE, ET AL.'S,  
 OPPOSITION TO PLAINTIFFS'  
 APPLICATION FOR TEMPORARY  
 RESTRAINING ORDER (DOCKET  
 NO. 8)**

*(Filed concurrently with:  
 Declaration of Kelly A. Moran;  
 Declaration of Jason Anderson;  
 Declaration of Dr. Cameron Kaiser; and  
 Request for Judicial Notice)*

**DATE:** TBD  
**TIME:** TBD  
**COURTROOM:** 1  
**LOCATION:** 3470 Twelfth Street  
 Riverside, CA 92501-3801

Complaint Filed: April 14, 2020

## **TABLE OF CONTENTS**

	<b><u>Page</u></b>
I. INTRODUCTION .....	7
II. BACKGROUND AND FACTS .....	8
III. LEGAL ANALYSIS – Plaintiffs are Not Entitled to a TRO ....	15
A. Standard for Issuance of a TRO .....	15
B. It is Unlikely that Plaintiffs Will Succeed on the Merits .....	16
1. The Free Exercise Clause and the California Constitution	
Have Not Been Violated. ....	16
2. The Establishment Clause Has Not Been Violated.....	20
3. The Orders Do Not Violate Plaintiff’s Right to Free Speech	24
4. Plaintiffs’ Right to Assembly is Not Violated .....	26
5. County’s Orders are Not Vague, Nor are they Void.....	28
6. Plaintiffs’ General Due Process Argument Fails .....	29
7. Plaintiffs’ Right to Liberty Has Not Been Violated.....	30
8. Plaintiffs Are Not a Member of a Protected Class .....	34
C. Plaintiffs’ Do Not Face Irreparable Injury .....	35
D. The Balance of Equities and Public Interest Support Denial	
Of the TRO .....	35
IV. CONCLUSION	36

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Aids Healthcare Foundation v. Los Angeles County Department of Health</i> (2011) 197	
Cal.App. 8 <sup>th</sup> 693, 701-702 .....	31
<i>Albright v. Oliver</i> , 510 U.S. 266, 273-274 (1994) .....	30
<i>Alexander v. United States</i> , 509 U.S. 544, 550 (1993) .....	24
<i>Am. Trucking Ass'ns v. City of Los Angeles</i> , 559 F.3d 1046, 1052 (9th Cir. 2009) .....	15
<i>Barren v. Harrington</i> , 152 F.3d 1193, 1194 (9th Cir. 1998) .....	34
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) .....	26
<i>Cantwell v. State of Connecticut</i> , 310 U.S. 296 (1940) .....	17
<i>Caribbean Marine Services, Inc. v. Baldrige</i> , 844 F.2d 668, 674 (9th Cir. 1988) .....	35
<i>Carroll v. President and Com'rs of Princess Anne</i> , 393, U.S. 175 (1968) .....	26
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> , 508 U.S. 520, 53 (1993) .....	17
<i>City of Cleburne</i> , 473 U.S. 432, 440 (1985) .....	35
<i>City of Lakewood v. Plain Dealer Pub. Co.</i> , 486 U.S. 750, 759 (1988) .....	24
<i>Doe v. McAleenan</i> , 415 F. Supp. 3d 971, 976 (S.D. Cal. 2019) .....	15
<i>Does 1–5 v. Chandler</i> , 83 F.3d 1150, 1155 (9th Cir.1996) .....	35
<i>Edwards v. Aguillard</i> , 482 U.S. 578, 594–95 (1987) .....	21
<i>Employment Div., Dep't of Human Res. of Or. v. Smith</i> , 494 U.S. 872, 879 (1990) .....	17
<i>F.C.C. v. Beach Communs., Inc.</i> , 508 U.S. 307, 315 (1993) .....	20

1	<i>Forsyth County v. Nationalist Movement</i> , 505 U.S. 123, 129–30 (1992) .....	25
2	<i>Foti</i> , 146 F.3d at 638 .....	28
3		
4	<i>Garcia v. Google, Inc.</i> , 786 F.3d 733, 740 (9th Cir. 2015) .....	16
5	<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters &amp; Auto Truck Drivers</i> , 415 U.S.	
6	423, 439 (1974) .....	15
7		
8	<i>Grayned</i> , 408 U.S. at 110, 92 S.Ct. 2294 .....	29
9	<i>Heller v. Doe by Doe</i> , 509 U.S. 312, 320-321 (1993) .....	20
10	<i>Hill v. Colorado</i> , 530 U.S. 703, 733, 120 S.Ct. 2480 (2000) .....	29
11		
12	<i>Jew Ho v. Williamson</i> , 104 F.10. (C.C. Cal.1900) .....	30
13	<i>Kolender v. Lawson</i> , 461 U.S. 352, 361 (1983) .....	29
14	<i>Lemon v. Kurtzman</i> , 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) .....	21, 23
15		
16	<i>Lukumi</i> , supra, 508 at 542 .....	19, 19
17	<i>Lukumi</i> , supra, at 542-543 .....	18
18		
19	<i>Lynch v. Donnelly</i> , 465 U.S. 668, 690 .....	23
20	<i>Mazurek v. Armstrong</i> , 520 U.S. 968, 972 (1997) .....	15
21	<i>McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.</i> , 545	
22	U.S. 844, 862, 866 (2005) .....	21, 22
23		
24	<i>Parents for Privacy v. Barr</i> , 949 F.3d 1210, 1234 (9th Cir. 2020)	
25	( <i>Parents for Privacy</i> ) .....	17, 18, 19
26		
27	<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> 508 F.3d 1146, 1158 (9th Cir. 2007) .....	16
28		

1	<i>Sandry v. Brooklyn School District No. 78 of Williams County</i> (1921) 47 N.D. 444 .....	28
2		
3	<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290, 308 (2000) .....	21, 22
4	<i>Santa Monica Nativity Scenes Comm. v. City of Santa Monica</i> , 784 F.3d 1286, 1299 n. 7	
5	(9th Cir. 2015 .....	21, 23
6		
7	<i>Selecky</i> , 586 F.3d at 1127- 1128 .....	17, 20
8	<i>Selecky</i> , 586 F.3d at 1129.....	19
9		
10	<i>Set Enterps., Inc. v. City of Hallandale Beach</i> , 2010 WL 11549707,	
11	at *12 (S.D. Fla. Dec. 30, 2010) .....	24
12	<i>Stormans, Inc. v. Selecky</i> , 586 F.3d 1109, 1127 (9th Cir. 2009) .....	16
13		
14	<i>Thomas v. Collins</i> , 323 U.S. 516 (1945); <i>West Virginia State Board of Education v.</i>	
15	<i>Barnette</i> 319 U.S.624 (1943) .....	26
16		
17	<i>Trunk v. City of San Diego</i> , 629 F.3d 1099, 1106 (9th Cir. 2011) .....	23
18	<i>Vasquez v. Los Angeles County</i> , 487 F.3d 1246, 1256 (9th Cir. 2007).....	23
19	<i>Virginia v. Hicks</i> , 539 U.S. 113, 118–19(2003) .....	26
20		
21	<i>Ward v. Rock Against Racism</i> , 491 U.S. 781, 794 (1989).....	28
22	<i>Winter</i> , supra, 555 U.S. at 20; <i>see also</i> , Fed. R. Civ. P. 65(b) .....	15, 16
23		
24	<b>Statutes</b>	
25	42 U.S.C. § 1983 .....	34
26	Article XI of the California Constitution California	
27	sections 8610, 8630, 8634 and 8655 .....	11
28		

1	<i>Government Code</i> section 8558 .....	31
2	<i>Government Code</i> section 8684 .....	31
3		
4	<i>Health and Safety Code</i> sections 101030 .....	11
5	<i>Health &amp; Safety Code</i> section 101040 .....	11, 32
6	<i>Health &amp; Safety Code</i> section 101080 .....	31
7		
8	<i>Health &amp; Safety Code</i> section 101085 .....	11
9	<i>Health &amp; Safety Code</i> section 120175 .....	11, 31
10	Title 17 California Code of Regulations section 2501 .....	11
11		
12	<b>Other Authorities</b>	
13	Riverside County Code sections 442 .....	11
14		
15	Riverside County Code sections 533.6 .....	11
16	<b>Rules</b>	
17		
18	17 C.C.R. section 2501(a) .....	31
19	<b>Constitutional Provisions</b>	
20		
21	Equal Protection Clause of the Fourteenth Amendment .....	34
22		
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**TO THE PLAINTIFFS AND THEIR COUNSEL OF RECORD:**

DEFENDANTS, CAMERON KAISER, in his official capacity as the Riverside County Public Health Officer; GEORGE JOHNSON, in his official capacity as Riverside County Executive Officer and Director of Emergency Services; CHAD BIANCO, in his official capacity as the Riverside County Sheriff; KEVIN JEFFRIES, in his official capacity as a Riverside County Supervisor; KAREN SPIEGEL, in her official capacity as a Riverside County Supervisor; CHUCH WASHINGTON, in his official capacity as a Riverside County Supervisor; V. MANUEL PEREZ, in his official capacity as a Riverside County Supervisor; and JEFF HEWITT, in his official capacity as a Riverside County Supervisor (hereinafter collectively the “County”) hereby offer the following Opposition to the Application for Temporary Restraining Order (Docket No. 8).

**I.**

**INTRODUCTION**

Asymptomatic human-to-human transmission of COVID-19 is devastating the world. From a silent and deadly spread at a Kings County nursing home in Washington to a “super-spread” event at the Tablighi Jamaat in India to the spike in Daegu, South Korea, the ruthless efficiency of human-to-human transmission continues with blatant disregard to borders, race, gender, color or faith. Driven by individuals who are pre-symptomatic or asymptomatic, the State of California (“State”) and the County have issued numerous public health orders in an effort to stem the spread of the virus and to slow the growth rate of the



1 infected and hospitalized. The singular purpose: to “flatten the curve” to avoid the collapse  
2 of our hospitals, medical professionals and healthcare institutions throughout California.  
3 Despite numerous examples of “super-spread” events, even at religious gatherings that  
4 observe social distancing and safety processes, COVID-19 continues to spread. Now,  
5 Plaintiffs demand that this Court ignore the clear and present danger of this pandemic and  
6 allow in-person religious services to continue. For the following reasons, Plaintiffs’ ex parte  
7 application for a temporary restraining order (“TRO”) should be denied.  
8  
9

## 10 II.

### 11 BACKGROUND AND FACTS

12  
13 These are unprecedented times. To date, the worldwide pandemic of COVID-19  
14 disease, also known as “novel coronavirus,” has infected over 2.1 million individuals  
15 worldwide in over 180 countries and is implicated in nearly 140,000 worldwide deaths,  
16 including over 2,000 cases and 54 deaths in Riverside County. In response to this healthcare  
17 crisis, the County, and the elected officials and employees therein, have been working  
18 around the clock to determine how to best meet the needs of all residents. From the youngest  
19 to the oldest, the inmate to the un-incarcerated, and the unsheltered to those residing in  
20 mansions, the County is focused on protecting the health and safety of the more than 2.4  
21 million people within its boundaries.  
22  
23  
24

25 Over the past six weeks, the County has taken several steps in an attempt to control  
26 the spread of COVID-19. The actions taken by the County have addressed and affected a  
27 wide-variety of industries and events, all with the common goal of reducing the spread of  
28

COVID-19 and minimizing the strain upon the healthcare system. On March 8, 2020 the County's Public Health Officer, Dr. Cameron Kaiser, issued a Declaration of Local Health Emergency based on an imminent and proximate threat to public health from the introduction of novel COVID-19 in Riverside County. On March 10, 2020 the Board of Supervisors of the County of Riverside issued a Resolution proclaiming the existence of a Local Emergency in the County of Riverside regarding COVID-19 and a Resolution ratifying and extending the Declaration of Local Health Emergency due to COVID-19. Also on March 10, 2020, Dr. Kaiser issued an Order cancelling the Coachella Valley Music and Arts Festival and Stagecoach Music Festival. On March 12, 2020, Dr. Kaiser issued an Order cancelling all events with an anticipated attendance in excess of 250 persons. On March 13, 2020, Dr. Kaiser issued an Order closing all schools (extended through June 19, 2020 by subsequent Orders of the Health Officer). On March 16, 2020 Dr. Kaiser issued an Order prohibiting all gatherings with expected presence above ten (10) individuals. On March 27, 2020, Dr. Kaiser issued an Order restricting short-term lodgings within the County of Riverside. On April 2, 2020, the Health Officer and the County Executive Officer as the Director of Emergency Services issued an Order closing all golf courses and ancillary use areas. On April 4, 2020, later amended on April 6, 2020, the Health Officer and the County Executive Officer as the Director of Emergency Services issued an Order prohibiting all public gatherings and requiring the use of face coverings by all persons. *See Declaration of Dr. Cameron Kaiser, M.D., M.P.H. (hereinafter the "Kaiser Declaration")*, Paragraph 10, Page 4, Line 1 – Page 6, Line 3; Exhibits A through I.

1 By way of the April 4, 2020 Order and the amendment of April 6, 2020 (collectively  
2 “Orders Against Public Gatherings”), the County immediately prohibited all public events  
3 and gatherings regardless of size or venue. A "gathering" was defined “as any event or  
4 convening that brings together people in a single room or single space at the same time,  
5 including, but not limited to, an auditorium, stadium, arena, theater, church, casino,  
6 conference room, meeting hall, cafeteria, drive-in theater, parking lot, or any other indoor  
7 or outdoor space used for any non-essential purpose including, but not limited to,  
8 movies, church services, swap meets, etc.” A gathering does not include: (1) a convening of  
9 persons who reside in the same residence; (2) operations at airports and/or public  
10 transportation; (3) operations at essential businesses where many people are present but are  
11 able to practice social distancing; and (4) funerals and burial services conducted in strict  
12 compliance with social distancing requirements. *See* Kaiser Declaration, Paragraph 10,  
13 Exhibit I at Page 4.  
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19 Notably, the Orders Against Public Gatherings are orders of laws of *general*  
20 *applicability*; they apply to all residents and visitors in the State and this County. These  
21 orders were specifically based upon the March 19<sup>th</sup> Orders of the Governor and the Director  
22 of the California Department of Public Health since the County does not have any legal  
23 authority to issue orders less restrictive than the State’s orders. Neither Plaintiffs’ church  
24 services nor churches are singled out or otherwise treated adversely under the orders.  
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27 The Orders Against Public Gatherings were issued by the Health Officer and County  
28 Executive Order as a result of the worldwide pandemic of COVID-19 disease, also known

1 as “novel coronavirus,” which at the time of issuing the Orders Against Public Gatherings  
2 had infected over one million individuals worldwide in over 180 countries and was  
3 implicated in over 50,000 worldwide deaths, including six hundred cases and fifteen (15)  
4 deaths in Riverside County. The Orders Against Public Gatherings were intended to address  
5 the strain upon the health care system from the effects of the COVID-19 virus. And to  
6 reduce the likelihood of exposure to COVID-19, thereby slowing the spread of COVID-19  
7 in communities worldwide.  
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10 The Orders Against Public Gatherings were made pursuant to: California *Health and*  
11 *Safety Code* sections 101030, 101040, 101085, AND 120175; Title 17 California Code of  
12 Regulations section 2501; Article XI of the California Constitution; California sections  
13 8610, 8630, 8634 and 8655; and Riverside County Code sections 442 and 533.6.  
14  
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16 The Orders Against Public Gatherings were issued in accordance with, and  
17 incorporated by reference, the:

- 18 • March 4, 2020 Proclamation of a State Emergency issued by Governor Gavin  
19 Newsom;
- 20 • March 8, 2020 Declaration of Local Health Emergency based on an imminent and  
21 proximate threat to public health from the introduction of novel COVID-19 in  
22 Riverside County;  
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- 1       • March 10, 2020 Resolution of the Board of Supervisors of the County of Riverside  
2       proclaiming the existence of a Local Emergency in the County of Riverside regarding  
3       COVID-19;
- 4       • March 10, 2020 Resolution of the Board of Supervisors of the County of Riverside  
5       ratifying and extending the Declaration of Local Health Emergency due to COVID-  
6       19;
- 7       • Guidance issued on March 11, 2020 by the California Department of Public Health  
8       regarding large gatherings of 250 people or more;
- 9       • Governor Gavin Newsom's Executive Order N-25-20 of March 12, 2020 preparing  
10      the State to commandeer hotels and other places of temporary residence, medical  
11      facilities, and other facilities that are suitable as places of temporary residence or  
12      medical facilities as necessary for quarantining, isolating or treating individuals who  
13      test positive for COVID-19 or who have had a high-risk exposure and are thought to  
14      be in the incubation period;
- 15      • Guidance issued on March 15, 2020 by the Centers for Disease Control and  
16      Prevention, the California Department of Public Health, and other public health  
17      officials through the United States and around the world recommending the  
18      cancellation of gatherings involving more than fifty (50) or more persons in a single  
19      space at the same time;
- 20      • Guidance issued on March 15, 2020 by the Centers for Disease Control and  
21      Prevention, the California Department of Public Health, and other public health  
22      officials through the United States and around the world recommending the  
23      cancellation of gatherings involving more than fifty (50) or more persons in a single  
24      space at the same time;
- 25      • Guidance issued on March 15, 2020 by the Centers for Disease Control and  
26      Prevention, the California Department of Public Health, and other public health  
27      officials through the United States and around the world recommending the  
28      cancellation of gatherings involving more than fifty (50) or more persons in a single  
29      space at the same time;

- 1 • March 16, 2020 order of the Public Health Officer prohibiting all gatherings with  
2 expected presence above ten (10) individuals;
- 3
- 4 • Governor Newsom's Executive Order N-33-20 of March 19, 2020 ordering all  
5 persons to stay at home to protect the health and well-being of all Californians and to  
6 establish consistency across the state in order to slow the spread of COVID-19;  
7
- 8 • The Order of the State Public Health Officer of March 19, 2020 requiring all  
9 individuals living in the State of California to stay home or at their place of residence  
10 except as needed to maintain continuity of operations of the federal critical  
11 infrastructure sectors, as outlined at [https://www.cisa.gov/identifying-critical-](https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19)  
12 [infrastructure-during-covid-19](https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19).  
13
- 14 • The State Public Health Officer's March 22, 2020 designation of "Essential Critical  
15 Infrastructure Workers' to help state, local, tribal, and industry partners as they work  
16 to protect communities, while ensuring the continuity of functions critical to public  
17 health and safety, as well as economic and national security".  
18
- 19 • Governor Newsom's Executive Order N-35-20 giving the state the ability to increase  
20 the health care capacity in clinics, mobile health care units and adult day health care  
21 facilities and allowing local governments more flexibility to utilize the skills of retired  
22 employees in order to meet the COVID-19 surge.  
23
- 24 • Governor Newsom's Executive Order N-39-20 intended to expand the health care  
25 workforce and recruit health care professionals to address the COVID-19 surge.  
26  
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- 1       • The Centers for Disease Control and Prevention’s "Interim Additional Guidance for
- 2       Infection Prevention and Control for Patients with Suspected or Confirmed COVID-
- 3       19 in Nursing Homes”.
- 4
- 5       • The California Department of Public Health Face Covering Guidance issued on April
- 6       1, 2020.
- 7

8       On April 13, 2020, Plaintiffs WENDY GISH, PATRICK SCALES, JAMES DEAN

9       MOFFATT, and BRENDA WOOD filed their lawsuit against Governor Gavin Newsom,

10       Attorney General Xavier Becerra, the County of San Bernardino, the County of Riverside,

11       and elected officials and named employees thereof, alleging various violations of the First

12       and Fourteenth Amendments to the U.S. Constitution and Article 1, Sections 1, 2, and 4 of

13       the California Constitution.

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15

16       On April 14, 2020, Plaintiffs filed an Application for Temporary Restraining Order,

17       seeking a broad Order of the Court that “Defendants, as well as their agents, employees, and

18       successors in office, shall be restrained and enjoined from enforcing, attempting to enforce,

19       threatening to enforce, or otherwise requiring compliance with any prohibition on Plaintiffs’

20       engagement in religious services, practices, or activities at which the Center for Disease

21       Control’s social distancing guidelines are followed”. [See Doc. 8, p. 1, lines 24-28.]

22

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24       The County refutes Plaintiffs’ claims that they are entitled to this relief and requests

25       that the Court deny the Application in its entirety for the reasons set forth herein.

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### III.

## LEGAL ANALYSIS

### Plaintiffs are Not Entitled to a Temporary Restraining Order

#### A. Standard for Issuance of a TRO.

“The purpose of a TRO is to preserve the status quo before a preliminary injunction hearing may be held; its provisional remedial nature is designed merely to prevent irreparable loss of rights prior to judgment.” [*Doe v. McAleenan*, 415 F. Supp. 3d 971, 976 (S.D. Cal. 2019), citing *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974).] “The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F. Supp. 1320, 1323 (N.D. Cal. 1995).” [*Id.*] “Injunctive relief is an ‘extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.’” [*Id.*, quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 22 (2008).] The “clear showing” requirement is particularly strong when a party seeks a TRO. [*Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997).]

In order to obtain a TRO, Plaintiffs must satisfy the four-part or traditional test under *Winter* by a clear showing. Plaintiffs “must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” [*Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009), quoting *Winter*, supra, 555 U.S. at 20; see also, Fed. R. Civ. P. 65(b).]



1           **B. It is Unlikely that Plaintiffs Will Succeed on the Merits.**

2           “The first factor under *Winter* is the most important – likely success on the merits.”  
 3  
 4 [Garcia v. Google, Inc., 786 F.3d 733, 740 (9th Cir. 2015).] A TRO is an “extraordinary  
 5 remedy that may only be awarded upon a *clear showing* that the plaintiff is entitled to such  
 6 relief.” [Winter, supra, 555 U.S. at 22 (italics added).] Plaintiffs have not satisfied this heavy  
 7  
 8 burden, and in fact it is unlikely that Plaintiffs’ claims will succeed on the merits.

9           In the unlikely event that Plaintiffs have established a likelihood of success, the County  
 10 will show that its affirmative defense will succeed. [Perfect 10, Inc. v. Amazon.com, Inc.  
 11 508 F.3d 1146, 1158 (9th Cir. 2007).]  
 12

13           **1. The Free Exercise Clause and the California Constitution Have Not**  
 14  
 15           **Been Violated.**

16           Plaintiffs argue that the County’s Orders Against Public Gatherings are “neither  
 17 neutral nor of general application.” [See Doc. 8, p. 10, line 16.] Plaintiffs further argue that  
 18 the Orders Against Public Gatherings target religious and “faith-based” services. [Doc. 8,  
 19 p.10, line 17-18.] Plaintiffs’ arguments, however, fail because the County’s Orders Against  
 20 Public Gatherings are valid and neutral law of general applicability that do not target  
 21 Plaintiffs’ exercise of faith.  
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 23

24           “The Free Exercise Clause, applicable to the states through the Fourteenth  
 25 Amendment, provides that ‘Congress shall make no law . . . prohibiting the free exercise [of  
 26 religion],’ U.S. Const., amend. I.” [Stormans, Inc. v. Selecky, 586 F.3d 1109, 1127 (9th Cir.  
 27 2009) (Selecky) (internal citation omitted).] “The right to freely exercise one’s religion,  
 28

1 however, ‘does not relieve an individual of the obligation to comply with a valid and neutral  
2 law of general applicability on the ground that the law proscribes (or prescribes) conduct  
3 that his religion prescribes (or proscribes).’ [*Id.*, quoting *Employment Div., Dep’t of Human*  
4 *Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (*Smith*) (internal quotation omitted).]

5  
6 Indeed, the right to free exercise of chosen form of religion is not absolute, in that  
7 conduct remains subject to regulation for protection of society. [*Cantwell v. State of*  
8 *Connecticut*, 310 U.S. 296 (1940).]

9  
10 “Underlying the Supreme Court’s jurisprudence is the principle that the Free Exercise  
11 Clause ‘embraces two concepts – freedom to believe and freedom to act. The first is absolute  
12 but, in the nature of things, the second cannot be. Conduct remains subject to regulation for  
13 the protection of society.’” [*Selecky*, at 1128, quoting *Cantwell v. State of Conn.*, *supra* at  
14 303-304 (underscore added).] “Under the governing standard, ‘a law that is neutral and of  
15 general applicability need not be justified by a compelling governmental interest even if the  
16 law has the incidental effect of burdening a particular religious practice.’” [*Id.* at 1127-1128,  
17 quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 53 (1993)  
18 (*Lukumi*).]

19  
20 “In assessing neutrality and general applicability, courts evaluate both ‘the text of the  
21 challenged law as well as the effect . . . in its real operation.’” [*Parents for Privacy v. Barr*,  
22 949 F.3d 1210, 1234 (9th Cir. 2020) (*Parents for Privacy*), quoting *Selecky*, *supra*, 794 F.3d  
23 at 1076 (ellipsis in original).] “[T]he two tests for whether a law is neutral and generally  
24 applicable focus on whether a law specifically targets or singles out religion.” [*Id.* at 1234-  
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1 1235.] The County’s challenged Orders Against Public Gatherings does neither of those  
2 things.

3  
4 The first test asks whether the law is “neutral” with respect to religion. “If the object  
5 of a law is to infringe upon or restrict practices *because of* their religious motivation, the law  
6 is not neutral.” [*Parents for Privacy*, supra, 949 F.3d at 1235 (internal citation omitted).]  
7  
8 Here, Plaintiffs neither argue nor presents any evidence that the County issued its emergency  
9 public health orders out of any desire or intent to target Plaintiffs gatherings (or religious  
10 gatherings in general) because of the gatherings’ religious nature or motivation. The  
11 County’s stay-at-home order applies generally countywide, and has required the temporary  
12 closure of a wide-range of businesses, events, and areas where people gather, without respect  
13 to the secular or religious nature of any such establishment or gathering, including, but not  
14 limited to, stadiums, casinos and restaurants.  
15  
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17 The second test asks whether the challenged law has “general applicability” – that is,  
18 “whether a law treats religious observers unequally.” [*Parents for Privacy*, supra, 949 F.3d  
19 at 1235, citing *Lukumi*, supra, 508 at 542.] As the Supreme Court has noted, “inequality  
20 results when a legislature decides that the governmental interests it seeks to advance are  
21 worthy of being pursued *only* against conduct with a religious motivation.” [*Lukumi*, supra,  
22 at 542-543 (italics added).] “Thus, a law is not generally applicable if its prohibitions  
23 substantially underinclude non-religiously motivated conduct that might endanger the same  
24 governmental interest that the law is designed to protect.” [*Parents for Privacy*, supra, 949  
25 F.3d at 1235 (internal citations omitted).]  
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1 “In other words, if a law pursues the government's interest ‘*only against conduct*  
2 *motivated by religious belief*,’ but fails to include in its prohibitions substantial, comparable  
3 secular conduct that would similarly threaten the government's interest, then the law is not  
4 generally applicable.” [*Parents for Privacy*, supra, 949 F.3d at 1235, quoting *Lukumi*, 508  
5 U.S. at 545.] “For example, in *Lukumi*, the Court concluded that the challenged ordinances  
6 were not generally applicable because they ‘pursue[d] the city's governmental interests only  
7 against conduct motivated by religious belief’ and ‘fail[ed] to prohibit nonreligious conduct  
8 that endanger[ed] these interests in a similar or greater degree than Santeria sacrifice does.’”  
9 [*Id.*, quoting *Lukumi*, 508 U.S. at 543, 545.]

13 Here, the County’s challenged public health Order in no way places “demands  
14 exclusively (or even principally) on religious persons or conduct.” [*Parents for Privacy*,  
15 supra, 949 F.3d at 1235.] The Orders Against Public Gatherings instead apply generally to  
16 all residents, businesses, and other gatherings of people in the County, except for a limited  
17 number of businesses in “critical infrastructure sectors” designated by the federal and State  
18 governments as necessary to protect the health and safety of the community while people  
19 hunker down and engage in the extreme social distancing needed to flatten the curve by  
20 stemming and slowing the transmission of the virus.

24 Because the challenged County public health Order “qualifies as neutral and generally  
25 applicable, it is not subject to strict scrutiny.” [*Parents for Privacy*, supra, 949 F.3d at 1236,  
26 citing *Selecky*, 586 F.3d at 1129 (“[A] neutral law of general applicability will not be subject  
27 to strict scrutiny review.”).] Instead, the County’s Order Against Public Gatherings is

1 reviewed “for a rational basis, which means that the [order] must be upheld if it is rationally  
2 related to a legitimate governmental purpose.” [*Id.* at 1238; *see also Selecky*, 586 F.3d at  
3 1127- 1128 (“Under the governing standard, ‘a law that is neutral and of general  
4 applicability need not be justified by a compelling governmental interest even if the law has  
5 the incidental effect of burdening a particular religious practice.’”).]

6  
7  
8 Under rational basis review, Plaintiff has the burden to negate “every conceivable  
9 basis which might support” the County’s Orders Against Public Gatherings. [*F.C.C. v.*  
10 *Beach Communs., Inc.*, 508 U.S. 307, 315 (1993) (underscore added).] And Plaintiffs’ duty  
11 to negate every rational basis supporting the order exists “whether or not the basis has a  
12 foundation in the record.” [*Heller v. Doe by Doe*, 509 U.S. 312, 320-321 (1993).] In its  
13 application, Plaintiff made no attempt to negate every conceivable basis that might support  
14 the County’s Orders Against Public Gatherings. And although the County is not required to  
15 do so, it points to ample evidence in the record supporting the stay-at-home order’s rational  
16 basis. [See Kaiser Declaration, Paragraph 10, Exhibit I at Paragraphs 4-11; Kaiser  
17 Declaration, Paragraph 11, Page 6, Lines 4-10.]

## 21 **2. The Establishment Clause Has Not Been Violated.**

22 The Federal Establishment Clause prohibits the government from making any law  
23 “respecting an establishment of religion” or undertaking any act that unduly favors one  
24 religion over another. [U.S. Const. amend. I.] The test articulated by the Supreme Court  
25 in *Lemon v. Kurtzman* “remains the Court’s principal framework for applying the  
26 Establishment Clause,” although *Lemon* has been “much criticized both inside and outside  
27  
28

1 the Court,” and “sometimes ignored by the Court altogether.” [*Santa Monica Nativity Scenes*  
 2 *Comm. v. City of Santa Monica*, 784 F.3d 1286, 1299 n. 7 (9th Cir.  
 3 2015)(citing *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)  
 4 ).]

5  
 6 Under the Lemon test, a government action violates the Establishment Clause if (1) it  
 7 lacks a “secular legislative purpose,” (2) “its principal or primary effect” is to “advance  
 8 [or] inhibit[ ] religion,” or (3) it “foster[s] an excessive government entanglement with  
 9 religion.” [*Lemon*, 403 U.S. at 612–613 (internal quotation marks omitted).]  
 10  
 11

12 First, there can be no reasonable dispute that the Orders Against Public Gatherings  
 13 have secular legislative purpose. Under *Lemon's* “purpose” inquiry, the Court assesses the  
 14 underlying purpose of the government action from the vantage point of “an ‘objective  
 15 observer’ ” who is “presumed to be familiar with the history of the government's actions and  
 16 competent to learn what history has to show.” [*McCreary Cty., Ky. v. Am. Civil Liberties*  
 17 *Union of Ky.*, 545 U.S. 844, 862, 866 (2005) (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530  
 18 U.S. 290, 308 (2000)).]  
 19  
 20

21 In assessing purpose, the Court may “take[ ] account of the traditional external signs  
 22 that show up in the “text, legislative history, and implementation of the statute,” or  
 23 comparable official act.” [*Id.* at 862 (citation omitted); see also *Edwards v. Aguillard*, 482  
 24 U.S. 578, 594–95 (1987) (noting that the Court's inquiry looks to the “plain meaning of the  
 25 statute's words, enlightened by their context and the contemporaneous legislative history  
 26  
 27  
 28

1 [and] the historical context of the statute, ... and the specific sequence of events leading to  
2 [its] passage”).]

3  
4 Crucially, “although a [legislative body's] stated reasons will generally get deference,  
5 the secular purpose required has to be genuine, not a sham, and not merely secondary to a  
6 religious objective.” [*McCreary*, 545 U.S. at 864 (citing *Santa Fe*, 530 U.S. at 308, (“When  
7 a governmental entity professes a secular purpose for an arguably religious policy, the  
8 government's characterization is, of course, entitled to some deference. But it is nonetheless  
9 the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.' ”))].  
10  
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12 Here, there is absolutely no doubt that the Orders Against Public Gatherings are  
13 intended to have a secular legislative purpose – to slow down the spread of COVID-19 and  
14 to “flatten the curve”. [*See*, Kaiser Declaration, Paragraph 12, Page 6, Lines 12-21.] The  
15 number of hospitalizations and deaths alone clearly support a finding that there is a genuine  
16 secular purpose in issuing the Orders Against Public Gatherings. Moreover, this Court can  
17 objectively review the specific sequence of orders from the federal government, State  
18 government and the County to determine that a secular legislative intent exists in support of  
19 the Orders Against Public Gatherings.  
20  
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22 With respect to the second and third prong of the *Lemon* test, the principal effect of  
23 the Orders Against Public Gatherings is not to effect the advance of religion. Under *Lemon's*  
24 second prong, a “[g]overnmental act[ ] has the primary effect of advancing or disapproving  
25 of religion if it is ‘sufficiently likely to be perceived by adherents of the controlling  
26 denominations as an endorsement, and by the nonadherents as a disapproval, of their  
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individual religious choices.’ ” [*Vasquez v. Los Angeles County*, 487 F.3d 1246, 1256 (9th Cir. 2007) (citation omitted); see also *Lynch v. Donnelly*, 465 U.S. 668, 690 (O'Connor, J., concurring) (“The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”).]

Under the *Lemon* test's third prong, a government action must not “foster[ ] an excessive government entanglement with religion.” [*Santa Monica Nativity Scenes Comm.*, 784 F.3d at 1299 (citation omitted).] While Plaintiffs do not adequately address either prong in their Complaint or in their TRO, “the Supreme Court essentially has collapsed the[ ] last two prongs to ask whether the challenged governmental practice has the effect of endorsing religion.” [*Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2011) (internal quotation marks and citation omitted); see also *id.* at 1109 (defining “endorsement” as “those acts that send the stigmatic message to nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members’ ”) (citation omitted).]

Again, the challenged governmental action in this TRO is the County’s Orders Against Public Gatherings, which are intended to slow down the spread of the COVID-19 pandemic. [*See*, Kaiser Declaration, Paragraph 12, Page 6, Lines 12-21.] These Orders are clearly not fostering excessive entanglement with religion or advancing a religion of any kind. In other words, the Orders are not establishing the placement of the Ten Commandments or a cross on public land in violation of the Establishment Clause. There is no likelihood of success by the Plaintiffs for violation of the Establishment Clause.



### 3. The Orders Do Not Violate Plaintiffs' Right to Free Speech.

First, Plaintiffs argue that the Orders Against Public Gatherings are a prior restraint. This argument lacks merit as Plaintiffs remain able to communicate with members of their congregation by various means, including by teleconference, video-conference, and by streaming video or audio services, methods specifically identified by the State Public Health Officer as “essential”. [See Kaiser Declaration, Paragraph 19, Page 8, Lines 7-15, Exhibit identifying “Faith based services that are provided through streaming or other technology” as part of the “Other Community-Based Government Operations and Essential Functions” sector, at Page 11; See Moran Declaration, Paragraph 3, Page 2, Lines 17 – 28, Exhibit L.]

The United States Supreme Court has defined prior restraint to be “administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.” [Alexander v. United States, 509 U.S. 544, 550 (1993) (emphasis in original) (internal quotation marks omitted).] Indeed, “not every governmental action that may affect future protected expression is ... [a] prior restraint.” *Set Enterps., Inc. v. City of Hallandale Beach*, 2010 WL 11549707, at \*12 (S.D. Fla. Dec. 30, 2010).

Moreover, United States Supreme Court precedent confirms that in order for a law to be a prior restraint of speech, the law “must have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988).

1 Here, there is no ban on communication or censorship of speech or religious speech  
2 of any kind. Rather, there is a ban on in-person gatherings to prevent the spread of COVID-  
3 19. Additionally, faith-based services are able to communicate religious messages or speech  
4 via various technological mediums such as teleconference, video conference, and other  
5 streaming services. For example, Zoom.com allows an individual to use up to forty-five  
6 minutes of free videoconferencing without any payment. Indeed, there is no ban on  
7 expression or speech that is akin to censorship of any kind. Furthermore, there is no  
8 preferential treatment of any specific faith that existed in the *Widmar* case as cited by the  
9 Plaintiffs.  
10  
11  
12

13 Second, Plaintiffs argue that the Orders Against Public Gatherings are facially  
14 unconstitutional as they are overbroad. [Doc. No. 8, p. 14, lines 1-2.] The overbreadth  
15 doctrine is an “exception from general standing rules” that allows a plaintiff to seek facial  
16 invalidation of a law that “sweeps too broadly, penalizing a substantial amount of speech  
17 that is constitutionally protected,” even if that law is constitutional as applied to the  
18 plaintiff. [*Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129–30 (1992).] This  
19 doctrine recognizes that “the very existence of some broadly written laws has the potential  
20 to chill the expressive activity of others not before the court.” [*Id.* at 129.]  
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23

24 To succeed on their overbreadth claim, Plaintiffs must show that the Orders Against  
25 Public Gatherings “punish a ‘substantial’ amount of protected free speech, ‘judged in  
26 relation to the statute’s plainly legitimate sweep.’ ” [*Virginia v. Hicks*, 539 U.S. 113, 118–  
27  
28

1 19(2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d  
 2 830 (1973)).]

3  
 4 Plaintiffs' TRO does not identify a substantial amount of protected free speech.  
 5 Rather, Plaintiffs instead point to a number of faiths that are allegedly burdened by the  
 6 Orders Against Public Gathering in attempt to expand the amount of speech at stake. In  
 7 reality, the Orders Against Public Gatherings are intended to encourage people to stay at  
 8 home. The Orders do not prohibit religious speech of any kind, nor do they discriminate on  
 9 the basis of faith.  
 10

#### 11 **4. Plaintiffs' Right to Assembly Is Not Violated.**

12  
 13 There is no dispute that the United States Constitution and the California Constitution  
 14 protect the rights of individuals to peacefully assemble and/or worship. This right, however,  
 15 has certain limitations as explained by the United States Supreme Court on a number of  
 16 occasions. [*Carroll v. President and Com'rs of Princess Anne*, 393, U.S. 175 (1968);  
 17 *Thomas v. Collins*, 323 U.S. 516 (1945); *West Virginia State Board of Education v. Barnette*  
 18 319 U.S.624 (1943).] Indeed, any attempt to restrict free assembly or free worship must be  
 19 justified by clear and present danger. [*Collins*, supra, 323 U.S. at 530-531.] California's  
 20 Supreme Court has ruled that any prohibitions against a lawful assembly must be limited to  
 21 situations which are violent or which pose clear and present danger of imminent violence or  
 22 harm to others. *In re Brown* (1973) 9 Cal. 3d 612, 623.  
 23  
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1 As described above, the Orders Against Public Gatherings were issued specifically to  
2 prevent such a clear and present danger of harm, namely the spread of the COVID-19 virus  
3 through individuals closely gathering to larger members of the public. As this Court may  
4 be aware, groups that gather, despite public health orders that prohibit such gathering, have  
5 been termed: “super-spreaders”. In South Korea, at the Shincheonji Church of Jesus in  
6 Daegu, a single individual is known to have infected at least 5,080 confirmed cases of  
7 COVID-19, more than half of South Korea’s total. *See Youjin Shin, Bonnie Berkowitz, Min*  
8 *Joo-Kim, How a South Korean church helped fuel the spread of the coronavirus,*  
9 *Washington Post, March 25, 2020,*  
10 <https://www.washingtonpost.com/graphics/2020/world/coronavirus-south-korea-church/>.  
11

12 In Seattle, the choir of the Mount Vernon Presbyterian Church of Mount Vernon,  
13 Washington, gathered for choir practice on Tuesday, March 10, 2020. Despite practicing  
14 social distancing, passing out hand sanitizer and avoiding physical contact, COVID-19  
15 spread throughout the group. Now, at least forty-five (45) individuals have been diagnosed  
16 with COVID-19 or ill with symptoms and at least two have died. *See Richard Read, A choir*  
17 *decided to go ahead with rehearsal. Now dozens have COVID-19 and two are dead, March*  
18 *29, 2020,* [https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-](https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak)  
19 [outbreak](https://www.latimes.com/world-nation/story/2020-03-29/coronavirus-choir-outbreak).  
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1        These are just two examples of a single assembly of individuals, whether for a church-  
 2  
 3 service or for a choice practice, that resulted in the uncontrolled spread of COVID-19 that  
 4 resulted in harm against other individuals and the community at large. In fact, the Supreme  
 5 Court of South Dakota has ruled that public authorities have the right to prohibit gatherings  
 6 or congregations of persons during the prevalence of an epidemic. *Sandry v. Brooklyn*  
 7  
 8 *School District No. 78 of Williams County* (1921) 47 N.D. 444.  
 9

##### 10                    **5. County's Orders Are Not Vague, Nor Are They Void.**

11  
 12        Plaintiffs argue that the Orders Against Public Gatherings are vague as to their scope  
 13 and application as to run afoul of the Due Process Clause of the Fourteenth Amendment.  
 14 [Doc. 8, p. 16, lines 15-16.] Plaintiffs' sole argument is that the State's Order uses the word  
 15 "heed", which "does not appear to order compliance therewith." [Doc. 8, p. 16, lines 19-20.]  
 16

17        Vague statutes are objectionable for three primary reasons. First, they trap the  
 18 innocent by not providing adequate warning. Second, they impermissibly delegate basic  
 19 policy matters to lower level officials for resolution on an ad hoc and subjective basis, with  
 20 the attendant dangers of arbitrary and discriminatory application. Third, when vague statutes  
 21 involve sensitive areas of First Amendment freedoms, they operate to inhibit the exercise of  
 22 those freedoms. [*Foti*, 146 F.3d at 638.]  
 23  
 24

25        Nevertheless, perfect clarity is not required even when a law regulates protected  
 26 speech. [*Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989).] "Condemned to the use  
 27 of words, we can never expect mathematical certainty from our language." [*Grayned*, 408  
 28

1 U.S. at 110, 92 S.Ct. 2294; *see Kolender v. Lawson*, 461 U.S. 352, 361 (1983) (even in the  
2 strictest sense, “due process does not require impossible standards of clarity”) (quotation  
3 marks omitted).]

4  
5 Therefore, even when a law implicates First Amendment rights, the constitution must  
6 tolerate a certain amount of vagueness. Indeed, uncertainty at a statute's margins will not  
7 warrant facial invalidation if it is clear what the statute proscribes “in the vast majority of  
8 its intended applications.” [*Hill v. Colorado*, 530 U.S. 703, 733, 120 S.Ct. 2480  
9 (2000) (quotation marks omitted).]

10  
11  
12 Plaintiffs argue that no reasonable person can understand a “stay-at-home” order and  
13 nitpicks at words such as “heed” and “visitors”. Plaintiffs ignore the intent and application  
14 of the Orders Against Public Gatherings – to stay home and prevent the spread of COVID-  
15 19. Indeed, the touchstone of a facial vagueness challenge in the First Amendment context  
16 does not turn on the words “heed” and “visitors”, but on a substantial amount of legitimate  
17 speech that can be burdened. No such burden exists here and the Orders Against Public  
18 Gatherings are not void, nor are they vague.

19  
20  
21 **6. Plaintiffs’ General Due Process Argument Fails.**

22 Plaintiffs argue that their substantive due process rights have secured by the  
23 Fourteenth Amendment have been violated. For purposes of this TRO, this Court should  
24 not engage in a generalized substantive due process argument as Plaintiffs’ rights are being  
25 determined by the First Amendment. In other words, Plaintiffs’ claim should be analyzed  
26 under the First Amendment to free exercise of religion rather than any generalized notion of  
27  
28

1 substantive due process under the Fourteenth Amendment. [*Albright v. Oliver*, 510 U.S. 266,  
2 273-274 (1994).]

3  
4 **7. Plaintiffs' Right to Liberty Has Not Been Violated.**

5 Plaintiffs' next argue that the Orders Against Public Gatherings violate the California  
6 Constitution's right to liberty. [Doc. 8, p. 19, line 2.] Plaintiffs' further argue that because  
7 Plaintiffs have never had, been exposed to or been in a locality of the coronavirus, they are  
8 being arbitrarily detained.

9  
10 As a threshold point, it is interesting to note that Plaintiffs do not state whether they  
11 have been tested or not for COVID-19, especially in light of pre-symptomatic and  
12 asymptomatic carriers that have been transmitting the disease around the world.  
13 Notwithstanding those undisputable facts, Plaintiffs' argument is that it is outside the local  
14 health official's powers to assert a quarantine because there has been "only one death for  
15 every 70,464 inhabitants". [Doc. 8, p. 19, lines 21-25.] Plaintiffs, of course, ignore the  
16 number of individuals hospitalized by COVID-19 in both counties, the limited number of  
17 hospitals and hospital beds in both counties, the limited number of ventilators in the counties,  
18 or the fact that health care professionals are being overwhelmed by the disease.

19  
20 With respect to the *Jew Ho* case cited by the Plaintiffs, the facts are significantly  
21 different than those currently facing California. In that case, there was no living person with  
22 the bubonic plague! [*Jew Ho v. Williamson*, 104 F.10. (C.C. Cal.1900). Again, Plaintiffs  
23 simply ignore the fact that there are over 27,098 known infections and 405 deaths in  
24 California and the disease is spread through human-to-human interaction.

1           The Covid-19 virus has created both a health emergency as defined by *Health &*  
2 *Safety Code* section 101080 and a local emergency as defined by *Government Code* section  
3 8558 for the State of California including the County of Riverside. As such, based upon  
4 these statutes, Dr. Kaiser, as the County of Riverside's Public Health Officer, may  
5 promulgate orders as necessary to protect life and property pursuant to *Government Code*  
6 section 8684. "Each health officer knowing or having reason to believe that any case of the  
7 diseases made reportable by regulation of the department, or any other contagious, infectious  
8 or communicable disease exists, or has recently existed, within the territory under his or her  
9 jurisdiction, shall take measures as may be necessary to prevent the spread of the disease or  
10 occurrence of additional cases." *Health & Safety Code* section 120175. See also 17 C.C.R.  
11 section 2501(a) which states in relevant part: "Upon receiving a report made pursuant to  
12 Section 2500 or 2505, the local health officer shall take whatever steps deemed necessary  
13 for the investigation and control of the disease, condition or outbreak reported." Thus, Dr.  
14 Kaiser, as the local Health Officer, may take any measures as may be necessary to prevent  
15 the spread of disease or the occurrence of additional cases.  
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21           Notably, *Health and Safety Code* section 120175 specifically states it is the duty of  
22 the Health Officer to investigate all cases, to ascertain the sources of infection, and to take  
23 "all measures reasonably necessary to prevent the transmission of infection." *Aids*  
24 *Healthcare Foundation v. Los Angeles County Department of Health* (2011) 197 Cal.App.  
25 8<sup>th</sup> 693, 701-702. "The health officer must take "measures as may be necessary," or  
26 "reasonably necessary," to achieve the Department's goals and policies, leaving the course  
27  
28



1 of action to the health officer's discretion. The statutory scheme sets forth certain actions,  
2 ranging from quarantine and isolation for contagious and communicable diseases ....”  
3 (citations omitted). These statutory measures, however, are not exhaustive or mandatory,  
4 giving the health officer discretion to act in a particular manner depending upon the  
5 circumstances.” *Id.* at 702. “Preventative measure” means abatement, correction, removal  
6 of any other protective step that may be taken against any public health hazard that is caused  
7 by a disaster and affects the public health. *Health & Safety Code* section 101040. (Emphasis  
8 added.)  
9  
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11

12 Based upon the trajectory of the Covid-19 pandemic, Dr. Kaiser determined that the  
13 prohibition on public gatherings was necessary:  
14

- 15 • “...as a result of the worldwide pandemic of COVID-19 disease, also known as ‘novel  
16 coronavirus,’ which has infected over one million individuals worldwide in over 180  
17 countries and is implicated in over 50,000 worldwide deaths, including over 600 cases  
18 and 15 deaths in Riverside County. These numbers increase significantly every  
19 day....” [See Kaiser Declaration, Exhibit I at Paragraph 4.]  
20  
21
- 22 • “...to reduce the likelihood of exposure to COVID-19, thereby slowing the spread of  
23 COVID-19 in communities worldwide...” [See Kaiser Declaration, Exhibit I at  
24 Paragraph 6.]  
25  
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- 1       • “...to prevent circumstances often present in gatherings that may exacerbate the  
2       spread of COVID-19, such as: 1) the increased likelihood that gatherings will attract  
3       people from a broad geographic area; 2) the prolonged time period in which large  
4       numbers of people are in close proximity; 3) the difficulty in tracing exposure when  
5       large numbers of people attend a single event or are at a single location; and 4) the  
6       inability to ensure that such persons follow adequate hygienic practices...” [See  
7       Kaiser Declaration, Exhibit I at Paragraph 6.]  
8  
9  
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11  
12       • “...to address the strain upon the health care system from the effects of the COVID-  
13       19 virus. Similarly, this Order is intended to reduce the likelihood of exposure to  
14       COVID-19, thereby slowing the spread of COVID-19 in communities worldwide...”  
15       [See Kaiser Declaration, Exhibit I at Paragraph 7.]  
16  
17

18       Using their authority to take measures that are “necessary to prevent the transmission  
19  
20 of” the Covid-19 virus, the Health Officer and the County Executive Officer as the Director  
21 of Emergency Services issued the Orders Against Public Gatherings “based on evidence of  
22  
23 increasing transmission of COVID-19 both within the County of Riverside and worldwide,  
24  
25 scientific evidence regarding the most effective approach to slow transmission of  
26  
27 communicable diseases generally and COVID-19 specifically, as well as best practices as  
28  
currently known and available to protect the public from the risk of spread of or exposure to

1 COVID-19”. [See Kaiser Declaration, Exhibit I at Paragraph 5.] These measures also took  
2  
3 into account and incorporated (1) substantial guidance issued by the Centers for Disease  
4 Control and Prevention and the California Department of Public Health; (2) Executive  
5 Orders issued by Governor Newsom, including Orders of the State Public Health Officer, as  
6 related to the prevention of the spread of COVID-19; and (3) prior Orders of the local health  
7 officer. [See Kaiser Declaration, Exhibit I at Paragraph 8.]  
8  
9

10 In short, Article I, Section 1 of the California Constitution has not been violated  
11 because the County’s Orders Against Public Gatherings are valid.  
12

13 **8. Plaintiffs Are Not A Member of a Protected Class.**

14 Plaintiffs argue that they have been intentionally and arbitrarily categorized as either  
15 “essential” or “non-essential”. As such, they have been treated differently in violation of the  
16 Equal Protection Clause of the Fourteenth Amendment. [Doc. 8, p. 20, lines 19-21.] To state  
17 a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the  
18 Fourteenth Amendment, a plaintiff must show that the defendants acted with an intent or  
19 purpose to discriminate against the plaintiff based upon membership in a protected class.”  
20 [Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998).]  
21  
22

23 Plaintiffs will not prevail on this cause of action as “essential” versus “non-essential”  
24 membership is not a protected class. More importantly, Plaintiffs will not be able to show  
25 membership in a protected class as the Orders Against Public Gatherings do not apply  
26 different to members of a protected class such as race or gender. As Plaintiffs are not  
27  
28

members of a protected class, a governmental policy that treats individuals differently needs only to be "rationally related to legitimate legislative goals" to pass constitutional muster. [*Does 1–5 v. Chandler*, 83 F.3d 1150, 1155 (9th Cir.1996) (citing *City of Cleburne*, 473 U.S. 432, 440 (1985).] As explained above, the Orders Against Public Gatherings serve a legitimate public interest to protect against the spread of an infectious disease and to protect our healthcare infrastructure.

**C. Plaintiffs Do Not Face Irreparable Injury.**

Plaintiffs must demonstrate an “immediate threatened harm” under the irreparable injury standard. [*Caribbean Marine Services, Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).] Plaintiffs have not shown there is an immediate threatened harm to their exercise of religion as they are still able to hold services through other means. As noted above, Plaintiffs may use teleconference, video conference, streaming services and other technological methods such as FaceTime or Google Hangout to hold services. They could livestream through Facebook or YouTube. In other words, Plaintiffs are still able to hold faith-based services and meet with their parishioners in other meaningful ways.

**D. The Balance of Equities and Public Interest Support Denial of The TRO.**

With respect to the final two TRO factors, the balance of the equities and the public interest heavily support denial of the TRO. For California in general, and the County in particular, the next few weeks are *critical* for flattening the curve, requiring all County residents to share in the sacrifice by staying at home in an effort to stem the spread of the virus. [*See* Kaiser Declaration, Paragraph 12, Page 6, Lines 12-21.] A single trip to a place

1 of worship would naturally require one leave the safety of their home, potentially make an  
2 extra stop for gas, snacks or coffee, and arrive to use a common restroom. Coupled with the  
3 fact that the County is home to hundreds of churches, mosques, synagogues, and temples,  
4 Plaintiffs' demand to attend services exposes hundreds and thousands of Californians  
5 needlessly to COVID-19.  
6

7  
8 In a County of over 2.4 million people, there simply are not enough law enforcement  
9 personnel and resources to enforce the public health order at hundreds of places of worship  
10 throughout one the largest geographic counties in the United States. Indeed, there are not  
11 sufficient hospital beds, ventilators or personnel to adequately defend against this pandemic.  
12 As such, there is a strong public interest that favors the denial of this TRO because if we can  
13 successfully flatten the curve in the upcoming weeks, then the County can begin  
14 implementing other safeguards such as contact-tracing to prevent further outbreak of this  
15 disease.  
16  
17

#### 18 IV.

#### 19 CONCLUSION

20  
21 The County's Orders Against Public Gatherings were put into place (1) as a result of  
22 what has now grown to over two million cases of COVID-19 worldwide and over 2,000  
23 cases and 59 deaths in Riverside County; (2) to reduce the likelihood of exposure to COVID-  
24 19, thereby slowing the spread of COVID-19 in communities worldwide; (3) to prevent  
25  
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1 circumstances often present in gatherings that may exacerbate the spread of COVID-19; and  
 2  
 3 (4) to address the strain upon the health care system from the effects of the COVID-19 virus.  
 4 The application of these Orders is neutral and generally applicable to all residents and  
 5  
 6 visitors of the County, and affects a wide-range of businesses, events, and arenas, without  
 7  
 8 respect to the secular or religious nature of any such establishment or gathering. Finally,  
 9  
 10 failure to abide by the Orders of the State and County Health Officers put at risk the health  
 11  
 12 and safety of all persons within the County of Riverside and the State as a whole. For these  
 13  
 14 reasons, and all those discussed in detail herein, the County respectfully requests that the  
 15  
 16 Court deny Plaintiffs' Application for a Temporary Restraining Order in its entirety.

17 Dated: April 17, 2020

18 *Kelly A. Moran*  
 19 By: \_\_\_\_\_  
 20 JAMES E. BROWN,  
 21 Assistant County Counsel  
 22 RONAK N. PATEL,  
 23 Deputy County Counsel  
 24 KELLY A. MORAN,  
 25 Deputy County Counsel  
 26 Attorneys for Defendants, CAMERON  
 27 KAISER, GEORGE JOHNSON, CHAD  
 28 BIANCO; KEVIN JEFFRIES; KAREN  
 SPIEGEL, CHUCH WASHINGTON, V.  
 MANUEL PEREZ, and JEFF HEWITT



Deborah J. Fox (SBN: 110929)  
dfox@meyersnave.com  
Margaret W. Rosequist (SBN: 203790)  
mrosequist@meyersnave.com  
MEYERS, NAVE, RIBACK, SILVER & WILSON  
707 Wilshire Blvd., 24<sup>th</sup> Floor  
Los Angeles, California 90017  
Telephone: (213) 626-2906  
Facsimile: (213) 626-0215

Michelle D. Blakemore, County Counsel (SBN: 110474)  
Penny Alexander-Kelley, Chief Assistant  
County Counsel (SBN: 145129)  
Office of County Counsel  
County of San Bernardino  
385 North Arrowhead Avenue  
San Bernardino, California 92415  
Telephone: (909) 387-5455  
Facsimile: (909) 387-5462

Attorneys For Defendants

COUNTY OF SAN BERNARDINO, DR. ERIN  
GUSTAFSON, SHERIFF JOHN MCMAHON,  
SUPERVISOR ROBERT A. LOVINGOOD, SUPERVISOR  
JANICE RUTHERFORD, SUPERVISOR DAWN ROWE,  
SUPERVISOR CURT HAGMAN, AND SUPERVISOR  
JOSIE GONZALES

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION**

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

Plaintiffs,

v.

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

[CONTINUED ON NEXT PAGE]

Case No. 5:20-cv-00755

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

Trial Date: None Set



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

Defendants.

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## TABLE OF CONTENTS

### Page

I.	INTRODUCTION .....	1
II.	THE COVID-19 PANDEMIC AND PUBLIC HEALTH RESPONSES .....	3
	A. State Of California Declares Emergency And Mandates Shelter In Place Except For Essential Critical Workers .....	3
	B. The County Of San Bernardino’s Declared Emergency And Public Health Orders .....	5
III.	PLAINTIFFS HAVE NOT MET THE HIGH BAR REQUIRED TO SATISFY THE NEED FOR EMERGENCY EX PARTE RELIEF .....	7
IV.	PLAINTIFFS HAVE FAILED TO MEET THE SUBSTANTIVE REQUIREMENTS FOR THE ISSUANCE OF A TRO .....	10
	A. Plaintiffs Have Not Established A Likelihood Of Success On The Merits And Accordingly The TRO Must Be Denied .....	11
	1. The County of San Bernardino’s Public Health Order Does Not Violate The Free Exercise Clause Or The Freedom Of Assembly Clause .....	11
	2. The County’s Public Health Order Does Not Violate The Establishment Clause .....	14
	3. The County’s Public Health Order Does Not Violate The Free Speech Clause .....	17
	4. The County’s Public Health Order Is Not Invalid Under The Vagueness, Due Process Or Equal Protection Doctrines .....	17
	B. The Other TRO Factors Also Mandate Denial Of Plaintiffs’ TRO .....	18
V.	CONCLUSION .....	19

## TABLE OF AUTHORITIES

**Page(s)**

### **Federal Cases**

<i>Alliance for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir.2011) .....	11
<i>Brown Jordan Intern. v. Mind's Eye Interiors, Inc.</i> , 236 F. Supp. 2d 1152 (D. Haw. 2002) .....	8
<i>Cammack v. Waihee</i> , 932 F.2d 765 (9th Cir. 1991) .....	15, 16
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940) .....	12
<i>Catholic League for Religious &amp; Civil Rights v. City &amp; Cnty. of San Francisco</i> , 624 F.3d 1043 (9th Cir. 2010) .....	15
<i>Elrod v. Burns</i> 427 U.S. 347 (1976) .....	9, 10
<i>Granny Goose Foods, Inc. v. Bhd. of Teamsters</i> , 415 U.S. 423 (1974) .....	7, 8
<i>Hunt v. Nat'l Broad. Co., Inc.</i> , 872 F.2d 289 (9th Cir.1989) .....	7
<i>Kikumura v. Hurley</i> , 242 F.3d 950 (10th Cir. 2001) .....	18
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1972). Here, the Public Health Order .....	15
<i>Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League</i> , 634 F.2d 1197 (9th Cir. 1980) .....	18
<i>McCreary Cnty. v. ACLU</i> , 545 U.S. 844 (2005) .....	15
<i>Miller v. Reed</i> , 176 F.3d 1202 (9th Cir. 1999) .....	12

1	<i>Reno Air Racing Ass'n., Inc. v. McCord</i> ,	
2	452 F.3d 1126 (9th Cir. 2006) .....	7
3	<i>Reno v. Flores</i> ,	
4	507 U.S. 292 (1993) .....	18
5	<i>Sch. Dist. of Grand Rapids v. Phyllis Ball</i> ,	
6	473 U.S. 373 (1985) [portions of the opinion overruled on other	
7	grounds by <i>Agostini v. Felton</i> , 521 U.S. 203 (1997)] .....	15
8	<i>Stanchart Sec. Int'l, Inc. v. Galvadon</i> ,	
9	2012 WL 5286952 (S.D. Cal. 2012) .....	8
10	<i>Stormans, Inc. v. Wiesman</i> ,	
11	794 F.3d 1064 (9th Cir. 2015) .....	12, 13, 14, 18
12	<i>Ward v. Rock Against Racism</i> ,	
13	491 U.S. 781 (1989) .....	17
14	<i>Washington v. Glucksberg</i> ,	
15	521 U.S. 702 (1997) .....	18
16	<i>Winter v. Nat'l Res. Def. Council, Inc.</i> ,	
17	555 U.S. 7 (2008) .....	10, 11
18	<i>Yi Tai Shao v. Tsan-Kuen Wang</i> ,	
19	2014 WL 12796401 (N.D. Cal. 2014) .....	8
20	<b>California Statutes</b>	
21	California Health and Safety Code	
22	§ 120125 .....	4
23	§ 120130(c) .....	4
24	§ 120135 .....	4
25	§ 120140 .....	4
26	§ 120145 .....	4
27	§ 120150 .....	4
28	§ 120175 .....	4
	§ 131080 .....	4

**Other State Statutes**

**Government Code**

§ 8567 ..... 4

§ 8627 ..... 4

§ 8665 ..... 4

**Other Authorities**

First Amendment ..... 14, 17

**Federal Rule of Civil Procedure**

§ 65(b)..... 8

§ 65(b)(1)..... 11

§ 65(b)(1)(A) ..... 7

1 **I. INTRODUCTION**

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

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

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

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

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

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

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

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

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

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

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

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



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

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

9 [www.cisa.gov/sites/default/files/publications/CISA\\_Guidance\\_on\\_the\\_Essential\\_Cr](http://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf)  
10 [itical\\_Infrastructure\\_Workforce\\_Version\\_2.0\\_Updated.pdf](http://www.cisa.gov/sites/default/files/publications/CISA_Guidance_on_the_Essential_Critical_Infrastructure_Workforce_Version_2.0_Updated.pdf). The federal critical  
11 infrastructure designation includes "Clergy for essential support." *Id.* at 12.

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

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

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

28

**B. The County Of San Bernardino's Declared Emergency And Public Health Orders**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

1 **V. CONCLUSION**

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

8  
9 DATED: April 17, 2020

MEYERS, NAVE, RIBACK, SILVER &  
WILSON

11  
12  
13 By: 

14 DEBORAH J. FOX  
15 MARGARET W. ROSEQUIST  
16 Attorneys for Defendants  
County of San Bernardino, et al.

17 3510242.1





1 HARMEET K. DHILLON (SBN: 207873)  
2 harmeet@dhillonlaw.com  
3 MARK P. MEUSER (SBN: 231335)  
4 mmeuser@dhillonlaw.com  
5 GREGORY R. MICHAEL (SBN: 306814)  
6 gmichael@dhillonlaw.com  
7 DHILLON LAW GROUP INC.  
8 177 Post Street, Suite 700  
9 San Francisco, California 94108  
10 Telephone: (415) 433-1700  
11 Facsimile: (415) 520-6593

12 *Attorneys for Plaintiffs*

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**UNITED STATES DISTRICT COURT FOR  
THE CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION**

**WENDY GISH**, an individual;  
**PATRICK SCALES**, an individual,  
**JAMES DEAN MOFFATT**, an  
individual; and **BRENDA WOOD**, an  
individual,

Plaintiffs,  
v.

Case No.: \_\_\_\_\_

**VERIFIED COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

**GAVIN NEWSOM**, in his official  
capacity as the Governor of California;  
**XAVIER BECERRA**, in his official  
capacity as the Attorney General of  
California; **ERIN GUSTAFSON**, in  
her official capacity as the San  
Bernardino County Acting Public  
Health Officer; **JOHN MCMAHON**,  
in his official capacity as the San  
Bernardino County Sheriff; **ROBERT  
A. LOVINGGOOD**, in his official

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

Defendants.

*Liberty must at all hazards be supported. We have a right to it, derived from our  
Maker. But if we had not, our fathers have earned and bought it for us, at the expense of  
their ease, their estates, their pleasure, and their blood.*

– John Adams, 1765

1 NOW COME the above-named Plaintiffs Wendy Gish, Patrick Scales, James  
2 Dean Moffatt, and Brenda Wood, by and through their attorneys, Dhillon Law Group,  
3 Inc., as and for claims against the above-named Defendants Gavin Newsom, in his  
4 official capacity as Governor of California; Xavier Becerra, in his official capacity as  
5 Attorney General of California; Erin Gustafson, in her official capacity as the San  
6 Bernardino County Acting Public Health Officer; John McMahon, in his official  
7 capacity as the San Bernardino County Sheriff; Robert A. Lovinggood, in his official  
8 capacity as a San Bernardino County Supervisor; Janice Rutherford, in her official  
9 capacity as a San Bernardino County Supervisor; Dawn Rowe, in her official capacity  
10 as a San Bernardino County Supervisor; Curt Hagman, in his official capacity as a San  
11 Bernardino County Supervisor; Josie Gonzales, in his official capacity as a San  
12 Bernardino County Supervisor; Cameron Kaiser, in his official capacity as the  
13 Riverside County Public Health Officer; George Johnson, in his official capacity as the  
14 Riverside County Executive Officer and Director of Emergency Services; Chad Bianco,  
15 in his official capacity as the Riverside County Sheriff; Kevin Jeffries, in his official  
16 capacity as a Riverside County Supervisor; Karen Spiegel, in her official capacity as a  
17 Riverside County Supervisor; Chuck Washington, in his official capacity as a Riverside  
18 County Supervisor; V. Manuel Perez, in his official capacity as a Riverside County  
19 Supervisor; and Jeff Hewitt, in his official capacity as a Riverside County Supervisor,  
20 allege and show the Court as follows (this “Complaint”).

### 21 NATURE OF ACTION

22 1. Defendants, in a gross abuse of their power, have seized the Coronavirus  
23 pandemic to expand their authority by unprecedented lengths, depriving Plaintiffs and  
24 all other residents of California of fundamental rights protected by the U.S. and  
25 California Constitutions, including freedom of religion, speech, and assembly, and due  
26 process and equal protection under the law. It is this Court’s duty to defend these  
27 constitutional principles, by safeguarding the many rights and liberties of Californians  
28 that Defendants so brazenly violate.

1           2.       This Action presents facial and as-applied challenges to the Governor of  
2 California's March 19, 2020 Executive Order N-33-20 (the "State Order") attached here  
3 as Exhibit 1; the April 7, 2020 "Order of the Health Officer of the County of San  
4 Bernardino for the Control of COVID-19" (the "San Bernardino Order") attached here  
5 as Exhibit 2; and the April 6, 2020 "Amended Order of the Health Officer for the  
6 County of Riverside and of the County Executive Officer as Director of Emergency  
7 Services" (the "Riverside Order") attached here as Exhibit 3, which violate the  
8 constitutional rights of Plaintiffs and the people of California. The State Order, San  
9 Bernardino Order, and Riverside Order may at times be referred to collectively as the  
10 "Orders" in this Complaint.<sup>1</sup>

11           3.       The Orders and Defendants' enforcement thereof violate (I) the Free  
12 Exercise Clause of the First Amendment; (II) the Establishment Clause of the First  
13 Amendment; (III) the Free Speech Clause of the First Amendment; (IV) the Freedom of  
14 Assembly Clause of the First Amendment; (V) the Vagueness Doctrine enshrined by  
15 Due Process of Clause of the Fourteenth Amendment; (VI) substantive rights protected  
16 by Due Process of Clause of the Fourteenth Amendment; (VII) the Equal Protection  
17 Clause of the Fourteenth Amendment; (VIII) California Constitution Article 1, Section  
18 1's right to liberty; (IX) California Constitution Article 1, Section 2's right to free  
19

20  
21 <sup>1</sup> As of the date of this filing, the State Order, San Bernardino Order, and Riverside  
22 Order, respectively, may be accessed online at the following URLs:

23 State Order: <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>;

24 San Bernardino Order: [http://wp.sbcounty.gov/dph/wp-](http://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2020/04/SKM_C45820040714190.pdf)  
25 [content/uploads/sites/7/2020/04/SKM\\_C45820040714190.pdf](http://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2020/04/SKM_C45820040714190.pdf);

26 Riverside Order:  
27 [https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/PHOrders/Riv-](https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/PHOrders/Riv-EOC_20200406_090004.pdf?ver=2020-04-06-102528-423&timestamp=1586193935186)  
28 [EOC\\_20200406\\_090004.pdf?ver=2020-04-06-102528-](https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/PHOrders/Riv-EOC_20200406_090004.pdf?ver=2020-04-06-102528-423&timestamp=1586193935186)  
[423&timestamp=1586193935186](https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/PHOrders/Riv-EOC_20200406_090004.pdf?ver=2020-04-06-102528-423&timestamp=1586193935186).

1 speech; (X) California Constitution Article 1, Section 3's right to assemble freely; (XI)  
2 California Constitution Article 1, Section 4's right free exercise and enjoyment of  
3 religion.

#### 4 **JURISDICTION AND VENUE**

5 4. This action arises under 42 U.S.C. § 1983 in relation to Defendants'  
6 deprivation of Plaintiffs' constitutional rights to freedom of religion, speech, and  
7 assembly, due process, and equal protection rights under the First and Fourteenth  
8 Amendments to the U.S. Constitution. Accordingly, this Court has federal question  
9 jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has authority to award the  
10 requested declaratory relief under 28 U.S.C. § 2201; the requested injunctive relief and  
11 damages under 28 U.S.C. § 1343(a); and attorneys' fees and costs under 42 U.S.C. §  
12 1988.

13 5. The Central District of California is the appropriate venue for this action  
14 pursuant to 28 U.S.C. §§ 1391(b)(1) and (2) because it is the District in which  
15 Defendants maintain offices, exercise their authority in their official capacities, and will  
16 enforce the Orders; and it is the District in which substantially all of the events giving  
17 rise to the claims occurred.

#### 18 **PARTIES**

19 6. Plaintiff Wendy Gish is a resident of San Bernardino County, California.  
20 She attends Shield of Faith Family Church located in Fontana, California. Gish is a  
21 strong believer in the scriptural command found in Hebrew 10:25: "Let us not neglect  
22 meeting together, as some have made a habit, but let us encourage one another, and all  
23 the more as you see the Day approaching." In fulfillment of her sincerely held religious  
24 belief, Gish attends church twice a week, Sundays and Wednesday.

25 7. Plaintiff Patrick Scales is a resident of San Bernardino County, California.  
26 He is the head pastor of Shield of Faith Family Church located in Fontana, California.  
27 Scales believes that he must serve the needs of his church's parishioners, especially  
28 right now in the midst of the COVID-19 crisis. James 5:14 commands believers that "Is

1 any sick among you? Let him call for the elders of the church; and let them pray over  
2 him, anointing him with oil in the name of the Lord ... .” Scales desires to keep Shield  
3 of Faith Family Church open to help deal with the spiritual and physical needs of its  
4 congregants. Scales believes that he can have in-person church services while making  
5 every effort to prevent contact between congregants by adhering to social distancing  
6 guidance, just as grocery stores, laundromats, and marijuana dispensaries are  
7 implementing to keep their customers safe. Congregants in the Shield of Faith Family  
8 Church are seated with family units at least six feet apart, and all worshippers wearing  
9 masks in the church.

10 8. Plaintiff James Dean Moffatt is a resident of Riverside County. Moffatt is  
11 the senior pastor at Church Unlimited located in Indio, California. Moffatt believes that  
12 scripture commands him as a pastor to lay hands on people and pray for them, this  
13 includes the sick. Moffatt also believes that he is required by scripture to baptize  
14 individuals, something that cannot be done at an online service.

15 9. Plaintiff Brenda Wood is a resident of Riverside County. Wood is the  
16 senior pastor at Word of Life Ministries International, Inc. located in Riverside,  
17 California. Wood desires to hold services in a manner that properly protects her  
18 parishioners so that its parishioners may follow Hebrews 10:25 and encourage one  
19 another during these troubling times of COVID-19. Wood believes that her parishioners  
20 need to connect with other people so as to give them hope and encouragement. Wood  
21 believes she can implement proper social distancing measures similar to those practiced  
22 by restaurants, auto mechanics, and abortion clinics. Wood also would like to offer  
23 drive-in services for parishioners.

24 10. Defendant Gavin Newsom is made a party to this Action in his official  
25 capacity as the Governor of California. The California Constitution vests the “supreme  
26 executive power of the State” in the Governor, who “shall see that the law is faithfully  
27 executed.” Cal. Const. Art. V, § 1. Governor Newsom signed the State Order.  
28

1           11. Defendant Xavier Becerra is made a party to this Action in his official  
2 capacity as the Attorney General of California. Under California law he is the chief law  
3 enforcement officer with supervision over all sheriffs in the state. Cal. Const. Art. V, §  
4 13.

5           12. Defendant Erin Gustafson is made a party to this Action in her official  
6 capacity as the San Bernardino County Acting Public Health Officer. She signed the  
7 San Bernardino Order.

8           13. Defendant John Mahon is made a party to this Action in his official  
9 capacity as the San Bernardino County Sheriff. Under California law he has the  
10 responsibility to enforce the San Bernardino Order in San Bernardino County. *See* Cal.  
11 Gov't. Code § 26601.

12           14. Defendant Robert A. Lovinggood is made a party to this Action in his  
13 official capacity as a member of the San Bernardino County Board of Supervisors,  
14 which exercises broad legislative, executive, and quasi-judicial authority under  
15 California law, including the supervision of the county sheriff and public health  
16 officials. *See, e.g.,* Cal. Gov't. Code § 25000, *et seq.*; Cal. Health & Safety Code §  
17 101000.

18           15. Defendant Janice Rutherford is made a party to this Action in her official  
19 capacity as a member of the San Bernardino County Board of Supervisors, which  
20 exercises broad legislative, executive, and quasi-judicial authority under California law,  
21 including the supervision of the county sheriff and public health officials. *See, e.g.,* Cal.  
22 Gov't. Code § 25000, *et seq.*; Cal. Health & Safety Code § 101000.

23           16. Defendant Dawn Rowe is made a party to this Action in her official  
24 capacity as a member of the San Bernardino County Board of Supervisors, which  
25 exercises broad legislative, executive, and quasi-judicial authority under California law,  
26 including the supervision of the county sheriff and public health officials. *See, e.g.,* Cal.  
27 Gov't. Code § 25000, *et seq.*; Cal. Health & Safety Code § 101000.



1           17. Defendant Curt Hagman is made a party to this Action in his official  
2 capacity as a member of the San Bernardino County Board of Supervisors, which  
3 exercises broad legislative, executive, and quasi-judicial authority under California law,  
4 including the supervision of the county sheriff and public health officials. *See, e.g.*, Cal.  
5 Gov't. Code § 25000, *et seq.*; Cal. Health & Safety Code § 101000.

6           18. Defendant Josie Gonzales is made a party to this Action in his official  
7 capacity as a member of the San Bernardino County Board of Supervisors, which  
8 exercises broad legislative, executive, and quasi-judicial authority under California law,  
9 including the supervision of the county sheriff and public health officials. *See, e.g.*, Cal.  
10 Gov't. Code § 25000, *et seq.*; Cal. Health & Safety Code § 101000.

11           19. Defendant Cameron Kaiser is made a party to this Action in his official  
12 capacity as the Riverside County Public Health Officer. He signed the Riverside Order  
13 on April 6, 2020.

14           20. Defendant George Johnson is made a party to this Action in his official  
15 capacity as the Riverside County Executive Officer and Director of Emergency  
16 Services. He also signed the Riverside Order on April 6, 2020.

17           21. Defendant Chad Bianco is made a party to this Action in his official  
18 capacity as the Riverside County Sheriff. Under California law he has the responsibility  
19 to enforce the Riverside Amend Order in Riverside County. *See* Cal. Gov't. Code §  
20 26601.

21           22. Defendant Kevin Jeffries is made a party to this Action in his official  
22 capacity as a member of the Riverside County Board of Supervisors, which exercises  
23 broad legislative, executive, and quasi-judicial authority under California law, including  
24 the supervision of the county sheriff and public health officials. *See, e.g.*, Cal. Gov't.  
25 Code § 25000, *et seq.*; Cal. Health & Safety Code § 101000.

26           23. Defendant Karen Spiegel is made a party to this Action in her official  
27 capacity as a member of the Riverside County Board of Supervisors, which exercises  
28 broad legislative, executive, and quasi-judicial authority under California law, including

1 the supervision of the county sheriff and public health officials. *See, e.g.*, Cal. Gov't.  
2 Code § 25000, *et seq.*; Cal. Health & Safety Code § 101000.

3 24. Defendant Chuck Washington is made a party to this Action in his official  
4 capacity as a member of the Riverside County Board of Supervisors, which exercises  
5 broad legislative, executive, and quasi-judicial authority under California law, including  
6 the supervision of the county sheriff and public health officials. *See, e.g.*, Cal. Gov't.  
7 Code § 25000, *et seq.*; Cal. Health & Safety Code § 101000.

8 25. Defendant V. Manuel Perez is made a party to this Action in his official  
9 capacity as a member of the Riverside County Board of Supervisors, which exercises  
10 broad legislative, executive, and quasi-judicial authority under California law, including  
11 the supervision of the county sheriff and public health officials. *See, e.g.*, Cal. Gov't.  
12 Code § 25000, *et seq.*; Cal. Health & Safety Code § 101000.

13 26. Defendant Jeff Hewitt is made a party to this Action in his official capacity  
14 as a member of the Riverside County Board of Supervisors, which exercises broad  
15 legislative, executive, and quasi-judicial authority under California law, including the  
16 supervision of the county sheriff and public health officials. *See, e.g.*, Cal. Gov't. Code  
17 § 25000, *et seq.*; Cal. Health & Safety Code § 101000.

18 27. Each and every Defendant acted under color of state law with respect to all  
19 acts or omissions herein alleged.

## 20 FACTUAL ALLEGATIONS

21 28. On or about March 13, 2020, President Donald J. Trump proclaimed a  
22 National State of Emergency as a result of the threat of the emergence of a novel  
23 coronavirus, COVID-19.<sup>2</sup>

24 29. Since the initial outbreak of COVID-19 in the United States in February  
25 and March 2020, the federal government's projections of the anticipated national death  
26

27 <sup>2</sup> As of the date of this filing, the Proclamation of a National Emergency can be found  
28 online at: <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

1 toll related to the virus has decreased substantially, by an order of magnitude. Despite  
2 such revisions, Defendants have increasingly restricted—where not outright banned—  
3 Plaintiffs’ engagement in constitutionally-protected activities.<sup>3</sup>

4 **FACTUAL ALLEGATIONS AS TO THE STATE OF CALIFORNIA**

5 30. On or about March 4, 2020, California Governor Gavin Newsom  
6 proclaimed a State of Emergency as a result of the threat of COVID-19.<sup>4</sup>

7 31. On or about March 19, 2020, California Governor Newsom issued  
8 Executive Order N-33-20 in which he ordered “all residents are directed to immediately  
9 heed the current State public health directives.”

10 32. The state public health directive requires “all individuals living in the State  
11 of California to stay home or at their place of residence except as needed to maintain  
12 continuity of operations of the federal critical infrastructure sectors ...”.<sup>5</sup>

13 33. On or about March 22, 2020, the California Public Health Officer  
14 designated a list of “Essential Critical Infrastructure Workers.”<sup>6</sup> Included on the list of  
15 the “essential workforce” are “faith based services that are provided through streaming  
16 or other technology.”

17  
18  
19  
20 <sup>3</sup> See, e.g.,

21 [https://www.usatoday.com/story/news/investigations/2020/04/09/coronavirus-deaths-u-](https://www.usatoday.com/story/news/investigations/2020/04/09/coronavirus-deaths-u-s-could-closer-60-k-new-model-shows/5122467002/)  
22 [s-could-closer-60-k-new-model-shows/5122467002/](https://www.usatoday.com/story/news/investigations/2020/04/09/coronavirus-deaths-u-s-could-closer-60-k-new-model-shows/5122467002/)

23 <sup>4</sup> As of the date of this filing, the Proclamation of a State of Emergency can be found  
24 online at: [https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf)  
25 [SOE-Proclamation.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf).

26 <sup>5</sup>The State Public Health Directive was included in the text of Executive Order N-33-  
27 20.

28 <sup>6</sup> As of the date of this filing, the list of Essential Critical Infrastructure Workers can be  
found online at: <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>.

1           34. Accordingly, this list prohibits all religious leaders from conducting in-  
2 person and out-of-home religious services, regardless of the measures taken to reduce or  
3 eliminate the risk of the virus spreading. Meanwhile, the list deems the continuity of  
4 services provided by coffee baristas, burger flippers, and laundromat technicians to be  
5 so necessary for society that these activities are permitted to continue under the State  
6 Order, despite the existence of the very same risk Defendants rely on to stymie the  
7 exercise of fundamental rights.

8           35. The public health directive provides that its directives “shall stay in effect  
9 until further notice.” Ex. 1.

10           **FACTUAL ALLEGATIONS AS TO SAN BERNADINO COUNTY**

11           36. On or about April 7, 2020, defendant Dr. Erin Gustafson signed the San  
12 Bernardino Order.<sup>7</sup>

13           37. The San Bernardino Order “allow[s] faith based services that are provided  
14 through streaming or other technology, while individuals remain in their homes, but  
15 does not allow individuals to leave their home for driving parades or drive-up services,  
16 or for picking up non-essential items.” Ex. 2, § 2.

17           38. The San Bernardino Order requires all residents to “wear face coverings,  
18 such as scarves (dense fabric, without holes), bandanas, neck gaiters, or other fabric  
19 face coverings when they leave their homes or places of residence for essential  
20 activities.” Ex. 2, § 4.

21           39. The San Bernardino Order states that any violation “is a crime punishable  
22 by fine, imprisonment, or both.” Ex. 2.

23           40. The Order states that it will remain in effect “until rescinded.” Ex. 2.

24           41. The San Bernardino Order is signed by Defendant Dr. Erin Gustafson.  
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27 <sup>7</sup> As of the date of this filing, the San Bernardino Order may be accessed online at the  
28 following URLs: [http://wp.sbcounty.gov/dph/wp-  
content/uploads/sites/7/2020/04/SKM\\_C45820040714190.pdf](http://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2020/04/SKM_C45820040714190.pdf).

1           42. Dr. Erin Gustafson is not an elected official but is the Acting Public Health  
2 Officer of San Bernardino. The San Bernardino Board of Supervisors have not appointed  
3 a Public Health Officer pursuant to Cal. Health & Safety Code §101000.

4           43. On April 8, 2020, San Bernardino County released a document on their  
5 website titled “Clarification of religious services and face-covering order” (hereinafter  
6 Clarification”). A copy of the Clarification is attached here as Exhibit 4.<sup>8</sup>

7           44. The Clarification is not signed by the Public Health Officer.

8           45. The Clarification does not revoke the San Bernardino Order.

9           46. The Clarification states “[o]n the subject of enforcement, the public is  
10 advised that although violation of a health order is a violation of the California Health  
11 and Safety Code, the County does not expect law enforcement to broadly impose  
12 citations on violators.”

13           47. The Clarification does not revoke law enforcement authority to criminally  
14 charge any individual who violates the San Bernardino Order.

15           48. Defendants have granted law enforcement unfettered discretion when  
16 deciding whether or not to enforce the San Bernardino Order.

17           49. The Clarification states that the “specific reference to drive-in religious  
18 service so close to major religious observances taking place during the next four days,  
19 for which organizations had already conducted considerable planning and incurred  
20 expenses, are clarified as follows: Organizations that have planned such services for the  
21 coming weekend should proceed with those services if they choose to do so and make  
22 every effort to prevent contact between congregants.”

23           50. The Clarification, which is not signed by any individual and is simply a  
24 document posted online, directly contradicts the written San Bernardino Order that  
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27 \_\_\_\_\_  
28 <sup>8</sup> As of the date of this filing, the San Bernardino Clarification can be found online at:  
<http://wp.sbcounty.gov/cao/countywire/?p=5862>.

1 makes it a crime for churches to have drive-in religious services and for parishioners to  
2 attend such services.

3 51. Plaintiff Patrick Scales' church, Shield of Faith Family Church, Inc., is  
4 located in San Bernardino County.

5 52. Plaintiff Scales desires to hold in-person religious services for those  
6 congregants who desire to attend church.

7 53. Plaintiff Scales believes that he can hold such religious services and  
8 abiding by social distancing tips recommended by the CDC by keeping congregants at  
9 least six feet apart, and provide for the wearing of masks and gloves.

10 54. Plaintiff Scales believes that religious services are essential for the spiritual  
11 health of the congregation so that the congregants can exhort one another during these  
12 difficult times.

13 55. Plaintiff Scales recognizes that most of his congregants will stay at home  
14 but he wants to be available for those who are healthy and feel that in-person church  
15 service can be safely attended.

16 56. Plaintiff Wendy Gish attends Shield of Faith Family Church and would  
17 attend an in-person church service should it be made available to her.

18 57. Plaintiff Gish regularly attends church services and believes that she has a  
19 scriptural command to "not neglect meeting together."

20 58. To her knowledge, Plaintiff Gish has never had or contracted said  
21 coronavirus; she has never been at any time exposed to the danger of contracting it and  
22 has never been in close proximity to any locality where said coronavirus has or have  
23 existed.

24 59. As a result of not being able to attend in-person church, Plaintiff Gish has  
25 been deprived of the opportunity for important cultural, social, and religious activities,  
26 including speech activities pertaining to the coronavirus outbreak and the government's  
27 response.

28

1           60. As of April 11, 2020, San Bernardino County has eight hundred ten (810)  
2 coronavirus cases and twenty-five (25) COVID-19 associated deaths, according to  
3 information posted on the county's website.<sup>9</sup>

4           61. The United States Census estimates that as of July 1, 2019, San Bernardino  
5 County's population is 2,180,085 people.<sup>10</sup>

6                           **FACTUAL ALLEGATIONS AS TO RIVERSIDE COUNTY**

7           62. On or about April 6, 2020, defendants Dr. Cameron Kaiser and George  
8 Johnson signed the Riverside Order.<sup>11</sup>

9           63. The Riverside Order prohibits "[a]ll public or private gatherings . . .  
10 including, but not limited to an auditorium, . . . church, . . . or any other indoor or  
11 outdoor space used for any non-essential purpose including, but not limited to . . .  
12 church . . . ." Ex. 3, § 1(a).

13           64. Exempted from its prohibition on public or private gatherings are  
14 numerous services, industries, and activities, including: "courts of law, medical  
15 providers . . . daycare and child care . . . [and] necessary shopping at fuel stations, stores  
16 or malls," provided that a "state and federal guidelines for infection control" are  
17 observed. Ex. 3, § 1(b).

18  
19  
20 <sup>9</sup> Per San Bernardino County Department of Public Health's web page visited on April  
21 11, 2020 <http://wp.sbcounty.gov/dph/coronavirus/>.

22 <sup>10</sup> United States Census Bureau quick facts for San Bernardino County can be found  
23 online at:  
24 [https://www.census.gov/quickfacts/fact/table/sanbernardinocountycalifornia/PST04521](https://www.census.gov/quickfacts/fact/table/sanbernardinocountycalifornia/PST045219)  
25 [9](https://www.census.gov/quickfacts/fact/table/sanbernardinocountycalifornia/PST045219).

26 <sup>11</sup> As of the date of this filing, the Riverside Order may be accessed online at the  
27 following URLs:  
28 [https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/PHOrders/Riv-EOC\\_20200406\\_090004.pdf?ver=2020-04-06-102528-423&timestamp=1586193935186](https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/PHOrders/Riv-EOC_20200406_090004.pdf?ver=2020-04-06-102528-423&timestamp=1586193935186).



1           65. The Riverside Order provides that “[a]ll essential business that remain in  
2 operation . . . shall follow the Social Distancing and Infection Control Guidelines  
3 published by the [Center for Disease Control] and California Department of Public  
4 Health . . . or the facility shall be closed.” Ex. 3, § 1(c).

5           66. The Riverside Order mandates that all people wear face coverings. Ex. 3, §  
6 1(d).

7           67. The Riverside Order expressly states that any violation “is a crime  
8 publishable by fine, imprisonment, or both.” Ex. 3, § 11.

9           68. The Riverside Order is signed by Defendant Dr. Cameron Kaiser.

10          69. The Riverside Order is also signed by Defendant George Johnson as County  
11 Executive Officer and Director of Emergency Services.

12          70. Dr. Cameron Kaiser is not an elected official but is appointed by the  
13 Riverside County Board of Supervisors. *See* Cal. Health & Safety Code §101000.

14          71. On April 10, 2020, Riverside County issued a press release in which they  
15 stated that “Drive-up church services that practice proper social distancing will be  
16 allowed this weekend in Riverside County, although the order to prohibit such activities  
17 will remain after Easter Sunday.”<sup>12</sup>

18          72. The April 10<sup>th</sup> clarification was issued by Defendant George Johnson.

19          73. Plaintiff James Dean Moffatt’s church, “Church Unlimited” is located in  
20 Riverside County.

21          74. Plaintiff James Dean Moffatt, upon learning about the coronavirus,  
22 immediately had his church building cleaned and disinfected.

23          75. Plaintiff Moffatt ensured that sanitizing materials were available to each  
24 person who entered his church and encouraged family units to sit at least six feet apart.  
25

26 \_\_\_\_\_  
27 <sup>12</sup> As of the date of this filing, the Riverside County News Release can be found online  
28 at:

[https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/News/April\\_10.pdf?ver=2020-04-11-105351-463&timestamp=1586627749323](https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/News/April_10.pdf?ver=2020-04-11-105351-463&timestamp=1586627749323).



1           76. Plaintiff Moffatt encouraged anyone who was uncomfortable with  
2 gathering during coronavirus to stay at home.

3           77. Plaintiff Moffatt encouraged anyone who was sick to stay at home.

4           78. On April 9, 2020, Plaintiff Moffatt was fined \$1,000 for violating the  
5 Riverside Order for holding a church service on April 5, 2020, Palm Sunday.

6           79. To his knowledge, Plaintiff Moffatt has never had or contracted the  
7 coronavirus; he has never been at any time exposed to the danger of contracting it; and  
8 has never been in close proximity to any locality where said coronavirus has or have  
9 existed.

10          80. But for the Riverside Order and Defendants' enforcement thereof, Plaintiff  
11 Moffatt would continue to hold in-person religious services in Riverside County, while  
12 taking the same social distancing precautions taken by "essential businesses" that  
13 Defendants continue to allow to operate in the county, despite any prevalence of  
14 COVID-19. Plaintiff Moffatt believes that it is important for Christians to come  
15 together, remember, and celebrate all that Jesus has done for this world.

16          81. As a result of not being able to conduct an in-person church service,  
17 Plaintiff Moffatt has been deprived of the opportunity for important cultural, socials,  
18 and religious activities, including speech activities pertaining to the coronavirus  
19 outbreak and the government's response.

20          82. Plaintiff Brenda Wood's church, Word of Life Ministries International Inc.  
21 is located in Riverside County.

22          83. Word of Life Ministries International Inc. has approximately 20-30 regular  
23 attendees.

24          84. Plaintiff Brenda Wood believes Scripture commands her to provide  
25 opportunities for the believers to obey Hebrews 10:25 where the believers meet together  
26 and encourage one another.

27          85. Plaintiff Brenda Wood held a drive-up church service on Easter Sunday.  
28

1        86. The drive-up church service provided appropriate social distancing, with  
2 everyone wearing masks and staying in their vehicles. The restrooms were not made  
3 available. Each car was parked at least six feet from other vehicles.

4        87. During the service, Plaintiff Brenda Wood used a portable sound  
5 amplification system. The congregants had to roll down their windows in order to listen.

6        88. During the service, communion was served by an individual wearing a  
7 mask and gloves and the elements were pre-packaged. The person serving communion  
8 used tongs to remove the communion cups from the pre-packaged box.

9        89. At this time, Plaintiff Brenda Wood has postponed all baptisms at her  
10 church.

11       90. Plaintiff Brenda Wood would like to hold drive-up church services every  
12 Sunday following safe social distancing practices until the state of emergency has been  
13 lifted.

14       91. As of April 11, 2020, Riverside County has one thousand four hundred  
15 thirty-one (1,431) coronavirus cases and forty-one (41) coronavirus associated deaths,  
16 according to information posted on the county's website.<sup>13</sup>

17       92. The United States Census estimates that as of July 1, 2019, Riverside  
18 County's population is 2,470,546 people.<sup>14</sup>

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26 <sup>13</sup> Per Riverside County Department of Public Health's web page visited on April 11,  
27 2020 <https://rivcoph.org/coronavirus>.

28 <sup>14</sup> United States Census Bureau quick facts for Riverside County can be found online at:  
<https://www.census.gov/quickfacts/fact/table/riversidecountycalifornia/PST045219>.

1 **CLAIMS**

2 **FIRST CLAIM FOR RELIEF**

3 **Free Exercise Clause of First Amendment to U.S. Constitution**

4 **(42 U.S.C. § 1983)**

5 *(By all Plaintiffs against all Defendants)*

6 93. Plaintiffs incorporate by reference the allegations in the preceding  
7 paragraphs, as if fully set forth herein.

8 94. The Orders and Defendants' enforcement thereof violate the First  
9 Amendment, both facially and as-applied to Plaintiffs. The First Amendment of the  
10 Constitution protects the "free exercise" of religion. Fundamental to this protection is  
11 the right to gather and worship. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624,  
12 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects  
13 from the vicissitudes of political controversy, to place them beyond the reach of  
14 majorities and officials and to establish them as legal principles to be applied by the  
15 courts ... [such as the] freedom of worship and assembly."). The Free Exercise Clause  
16 applies to the states through the Due Process Clause of the Fourteenth Amendment.  
17 *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

18 95. As the Supreme Court has noted, "a law burdening religious practice that is  
19 not neutral or not of general application must undergo the most rigorous of scrutiny."  
20 *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). "A law is  
21 not generally applicable if its prohibitions substantially underinclude non-religiously  
22 motivated conduct that might endanger the same governmental interest that the law is  
23 designed to protect." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015)  
24 (citing *Lukumi*, 508 U.S. at 542–46). "In other words, if a law pursues the government's  
25 interest 'only against conduct motivated by religious belief,' but fails to include in its  
26 prohibitions substantial, comparable secular conduct that would similarly threaten the  
27 government's interest, then the law is not generally applicable." *Id.*

1           96. The Orders are neither neutral nor of general application. Defendants’  
2 restrictions have specifically and explicitly targeted religious and “faith-based” services  
3 and are thus not neutral on their face. Defendants have prohibited certain public and  
4 private gatherings deemed “non-essential,” including out-of-home religious services,  
5 while exempting a laundry list of industries and services purportedly “essential” to the  
6 government’s various interests, including medical cannabis dispensaries and other  
7 medical providers, courts, public utilities, daycare and childcare, and “necessary”  
8 shopping. Further, several Defendants have granted *ad hoc* exemptions to the Orders for  
9 particular religious gatherings of particular faiths – i.e., Christians permitted to  
10 celebrate Easter, but no other gatherings, and other faiths given no exemptions.

11           97. In addition to relegating all faith activities to a second-class status (at best),  
12 Defendants have threatened criminal penalties for holding in person services, and have  
13 thus substantially burdened Plaintiffs’ religious exercise by forcing them to choose  
14 between their sincerely held religious beliefs and their desire to follow secular rules, in  
15 many cases imposed by unelected officials.

16           98. Laws and government actions that burden religious practice and are either  
17 not neutral or not generally applicable must satisfy a compelling governmental interest  
18 and be narrowly tailored to achieve that end.

19           99. Defendants’ mandates are not “narrowly tailored” to further any  
20 compelling governmental interest. Defendants have granted numerous special  
21 exemptions to their bans on public gatherings and conduct, including for purportedly  
22 “essential” businesses and activities, provided that social distancing practices are  
23 observed; and even for out-of-home religious services during Easter, an important day  
24 of religious significance for Christians. Since these gatherings may be permitted, there  
25 can be no doubt that Defendants may, and therefore must, permit Plaintiffs to engage in  
26 equivalent religious activities and services provided that Plaintiffs also adhere to the  
27 social distancing guidelines currently in place.

1           100. Requiring Plaintiffs to abstain from religious gatherings, despite  
2 substantial modifications to satisfy the public health interests at stake, violates  
3 Plaintiffs' Constitutional right to free exercise of religion. The state does not have the  
4 power under our Constitutional scheme to decree that as to faith activities, "streaming"  
5 (for those congregations and parishioners with the wealth and technological acumen to  
6 partake of such truncated substitutes) is "good enough" when at the same time the state  
7 protects the media organizations' First Amendment rights to freedom of the press while  
8 denying the plaintiffs First Amendment Free Exercise of Religion.

9           101. Plaintiffs have no adequate remedy at law and will suffer serious and  
10 irreparable harm to their constitutional rights unless Defendants are enjoined from  
11 implementing and enforcing the Orders.

12           102. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to  
13 declaratory relief and temporary, preliminary, and permanent injunctive relief  
14 invalidating and restraining enforcement of the Orders.

15           103. Plaintiffs found it necessary to engage the services of private counsel to  
16 vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
17 attorneys' fees pursuant to 42 U.S.C. § 1988.

## 18                                   **SECOND CLAIM FOR RELIEF**

### 19                   **Establishment Clause of First Amendment to U.S. Constitution**

#### 20                                   **(42 U.S.C. § 1983)**

21                                   *(By all Plaintiffs against all Defendants)*

22           104. Plaintiffs incorporate by reference the allegations in the preceding  
23 paragraphs, as if fully set forth herein.

24           105. The Orders and Defendants' enforcement thereof violate the First  
25 Amendment, both facially and as-applied to Plaintiffs. The Establishment Clause of the  
26 "First Amendment mandates governmental neutrality between religion and religion, and  
27 between religion and nonreligion." *McCreary Cty., Ky. v. Am. Civil Liberties Union of*  
28 *Ky.*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

1 The Establishment Clause applies to the states through the Due Process Clause of the  
2 Fourteenth Amendment. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947).

3 106. Defendants have not and do not act with a clearly secular purpose in  
4 adopting and enforcing the Orders. Defendants have made several exceptions to their  
5 Orders, including certain religious activities during Easter, a day significant to  
6 Christians, without exempting those same activities when occurring on days both before  
7 and after Easter, or on days significant to other faiths. It is not for Defendants to  
8 determine which faiths, and on which days of religious significance to those faiths,  
9 religious services may take place.

10 107. The Orders and Defendants' *ad hoc* enforcement thereof have the primary  
11 effect of inhibiting religious activity.

12 108. Defendants have failed to avoid excessive government entanglement with  
13 religion. Defendants permit only some forms of religious observance, such as live-  
14 streamed, at-home religious activities, and, as to the Riverside Order only, in-person  
15 services during Easter weekend.

16 109. There is no historical precedence in the United States for inhibiting  
17 religious practices on terms more restrictive than those imposed on identical secular  
18 activities, as Defendants do now.

19 110. Plaintiffs have no adequate remedy at law and will suffer serious and  
20 irreparable harm to their constitutional rights unless Defendants are enjoined from  
21 implementing and enforcing the Orders.

22 111. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to  
23 declaratory relief and temporary, preliminary, and permanent injunctive relief  
24 invalidating and restraining enforcement of the Orders.

25 112. Plaintiffs found it necessary to engage the services of private counsel to  
26 vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
27 attorneys' fees pursuant to 42 U.S.C. § 1988.  
28

1 **THIRD CLAIM FOR RELIEF**

2 **Free Speech Clause of First Amendment to U.S. Constitution**

3 **(42 U.S.C. § 1983)**

4 *(By all Plaintiffs against all Defendants)*

5 113. Plaintiffs incorporate by reference the allegations in the preceding  
6 paragraphs, as if fully set forth herein.

7 114. The Orders and Defendants' enforcement thereof violate the First  
8 Amendment, both facially and as-applied to Plaintiffs.

9 115. Under Defendants' Orders, public gatherings and church services are  
10 prohibited.

11 116. Plaintiffs engage in protected speech through worship, religious  
12 discussions, singing hymnals, and praying with their congregation.

13 117. Defendants' imposition of the Orders is unreasonable and has a chilling  
14 effect on protected speech by outright banning in-person church services at the pain of  
15 criminal penalty. Furthermore, several of the Defendants have granted *ad hoc*  
16 exemptions to the Orders for Easter, but not any other Sunday or day of religious  
17 significance to other faiths. Additionally, a representative of Riverside County has  
18 stated that Sheriffs are not expected to enforce every violation, but failed to provide any  
19 guidance as to what violations would be prioritized, leaving it up to the Sheriffs'  
20 unfettered discretion to decide which violations to enforce. Such a lack of standards  
21 along with a grant of such discretion renders the Orders unconstitutional both facially  
22 and as they are applied.

23 118. The Orders are unconstitutionally overbroad, and therefore void as a matter  
24 of law, both on their faces, and as it is applied.

25 119. Plaintiffs have no adequate remedy at law and will suffer serious and  
26 irreparable harm to their constitutional rights unless Defendants are enjoined from  
27 implementing and enforcing the Orders.

28 120. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to



1 declaratory relief and temporary, preliminary, and permanent injunctive relief  
2 invalidating and restraining enforcement of the Orders.

3 121. Plaintiffs found it necessary to engage the services of private counsel to  
4 vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
5 attorneys' fees pursuant to 42 U.S.C. § 1988.

#### 6 **FOURTH CLAIM FOR RELIEF**

##### 7 **Violation of First Amendment Freedom of Assembly Clause**

##### 8 **(42 U.S.C. § 1983)**

9 *(By all Plaintiffs against all Defendants)*

10 122. Plaintiffs incorporate by reference the allegations in the preceding  
11 paragraphs, as if fully set forth herein.

12 123. The Orders and Defendants' enforcement thereof violate the First  
13 Amendment, both facially and as-applied to Plaintiffs. The First Amendment of the  
14 Constitution protects the "right of the people peaceably to assemble." The Freedom of  
15 Assembly Clause was incorporated against the states in *De Jonge v. Oregon*, 299 U.S.  
16 353 (1937).

17 124. "The right of free speech, the right to teach, and the right of assembly are,  
18 of course, fundamental rights." *Whitney v. California*, 274 U.S. 357, 373 (1927). When  
19 a government practice restricts fundamental rights, it is subject to "strict scrutiny" and  
20 can be justified only if it furthers a compelling government purpose and, even then,  
21 only if no less restrictive alternative is available. *See, e.g., San Antonio Indep. Sch. Dist.*  
22 *v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

23 125. By denying Plaintiff Brenda Wood the ability to conduct services via a  
24 drive-in church service that complies with the CDC guidelines for social distancing,  
25 Defendants are in violation of the Freedom of Assembly Clause. Defendants cannot  
26 meet the no-less-restrictive-alternative test. The CDC's social distancing guidelines are  
27 appropriate to limit the spread of COVID-19. Imposing more restrictive requirements  
28 that target churches and their drive-in services while at the same time allowing



1 restaurants, coffee shops, marijuana dispensaries to operate drive-ups is not the least  
2 restrictive means of achieving Defendants' public safety goals.

3 126. By denying Plaintiff Patrick Scales from Shield of Faith Family Church  
4 and Plaintiff James Moffatt of Church Unlimited the ability to assemble via an in-  
5 person church service that complies with the CDC guidelines for social distancing,  
6 Defendants are in violation of the Freedom of Assembly Clause. Defendants cannot  
7 meet the no-less restrictive-alternative test. The CDC's social distancing guidelines are  
8 appropriate to limit the spread of COVID-19. Imposing more restrictive requirements  
9 that target churches and their in-person services while allowing grocery stores,  
10 laundromats, and marijuana dispensaries is not the least restrictive means of achieving  
11 Defendants' public safety goals.

12 127. Requiring Plaintiffs to abstain from religious gatherings, despite  
13 substantial modifications to satisfy the public health interests at stake, violates  
14 Plaintiffs' Constitutional right to peaceably assemble.

15 128. Plaintiffs have no adequate remedy at law and will suffer serious and  
16 irreparable harm to their constitutional rights unless Defendants are enjoined from  
17 implementing and enforcing the Orders.

18 129. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to  
19 declaratory relief and temporary, preliminary, and permanent injunctive relief  
20 invalidating and restraining enforcement of the Orders.

21 130. Plaintiffs found it necessary to engage the services of private counsel to  
22 vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
23 attorneys' fees pursuant to 42 U.S.C. § 1988.

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1 **FIFTH CLAIM FOR RELIEF**

2 **Due Process Clause of Fourteenth Amendment to U.S. Constitution**

3 **(42 U.S.C. § 1983)**

4 *(By all Plaintiffs against all Defendants)*

5 131. Plaintiffs incorporate by reference the allegations in the preceding  
6 paragraphs, as if fully set forth herein.

7 132. The Orders and Defendants' enforcement thereof violate the Due Process  
8 Clause of the Fourteenth Amendment, both facially and as-applied to Plaintiffs.

9 133. A regulation is constitutionally void on its face when, as matter of due  
10 process, it is so vague that persons "of common intelligence must necessarily guess at  
11 its meaning and differ as to its application" *Connally v. General Const. Co.*, 269 U.S.  
12 385, 391 (1926); *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1115 (1997). The void  
13 for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement.  
14 The problem with a vague regulation is that it "impermissibly delegates basic policy  
15 matters to policemen, judges, and juries for resolution on an ad hoc and subjective  
16 basis...." *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972).

17 134. Defendants' Orders are void for vagueness. In conjunction with issuing the  
18 Orders, including for the following reasons:

19 a. The State Order provides that individuals are ordered to "heed" State  
20 public health directives. The word "heed" is defined by Webster's Dictionary to mean  
21 "to give consideration or attention to" —not specifically to adhere to those directives.  
22 Yet, the State Order is widely reported in the media and cited by local and state  
23 officials, including the San Bernardino and Riverside Orders, as compelling compliance  
24 with State public health directives to shelter in place unless conducting essential  
25 business. The State Order also includes the text of the public health directive, which  
26 includes language that ostensibly "order[s]" compliance, creating further ambiguity as  
27 to whether Plaintiffs must comply with, or merely heed, the public health directive.  
28

1 Accordingly, the State Order is vague as to what precisely is being ordered, and what  
2 actions may result in criminal penalties, fines, or imprisonment.

3 b. The San Bernardino Order does not exempt any particular religious  
4 holidays, yet San Bernardino has explicitly exempted compliance during Easter  
5 weekend. County officials have also stated that it “does not expect law enforcement to  
6 broadly impose citations on violators” and that “the expectation is that law enforcement  
7 will rely upon community members to use good judgment, common sense, and act in  
8 the best interest of their own health and the health of their loved ones and the  
9 community at large.”

10 c. The Riverside County Order states that “non-essential personnel . . . are  
11 prohibited from entry into any hospital or long-term care facility,” ostensibly banning  
12 “non-essential” people from seeking medical care. Yet, the Order states that “visitors”  
13 may be permitted access to hospitals under certain conditions. No reasonable person can  
14 make sense of what conduct is permitted under the Order

15 135. As a result of these ambiguities, no reasonable person could understand  
16 what conduct violates the Order and might subject that person to criminal penalties.

17 136. Plaintiffs have no adequate remedy at law and will suffer serious and  
18 irreparable harm to their constitutional rights unless Defendants are enjoined from  
19 implementing and enforcing the Orders.

20 137. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to  
21 declaratory relief and temporary, preliminary, and permanent injunctive relief  
22 invalidating and restraining enforcement of the Orders.

23 138. Plaintiffs found it necessary to engage the services of private counsel to  
24 vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
25 attorneys’ fees pursuant to 42 U.S.C. § 1988.

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1 **SIXTH CLAIM FOR RELIEF**

2 **Due Process Clause of Fourteenth Amendment to U.S. Constitution**

3 **(42 U.S.C. § 1983)**

4 *(By all Plaintiffs against all Defendants)*

5 139. Plaintiffs incorporate by reference the allegations in the preceding  
6 paragraphs, as if fully set forth herein.

7 140. The Orders and Defendants' enforcement thereof violate Plaintiffs'  
8 substantive due process rights secured by the Fourteenth Amendment to the U.S.  
9 Constitution. Under the Due Process Clause of the Fourteenth Amendment, no State  
10 shall "deprive any person of life, liberty, or property, without due process of law." The  
11 fundamental liberties protected by this Clause include most of the rights enumerated in  
12 the Bill of Rights. *See Duncan v. Louisiana*, 391 U.S. 145, 147–149 (1968). In addition,  
13 these liberties extend to certain personal choices central to individual dignity and  
14 autonomy, including intimate choices that define personal identity and beliefs. *See, e.g.,*  
15 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479,  
16 484–486 (1965).

17 141. Plaintiffs' rights to freedom of religion, assembly, speech, and travel are  
18 fundamental rights protected by the U.S. Constitution. *See, e.g., Aptheker v. Secretary*  
19 *of State*, 378 U.S. 500, 520 (1964); *Kent v. Dulles*, 357 U.S. 116, 127 (1958).

20 142. When a government practice restricts fundamental rights such as the right  
21 to practice religion freely, assemble peacefully, speak, and travel, it is subject to "strict  
22 scrutiny" and can be justified only if it furthers a compelling government purpose, and,  
23 even then, only if no less restrictive alternative is available. *See, e.g. Memorial Hospital*  
24 *v. Maricopa County*, 415 U.S. 250, 257-258 (1974); *Dunn v. Blumstein*, 405 U.S. 330,  
25 339-341 (1972); *Shapiro v. Thompson*, 394 U.S. 618, 89 (1969), *Maher v. Roe*, 432  
26 U.S. 464, 488 (1977).

27 143. Strict scrutiny applies to Plaintiffs' claims because both the Riverside  
28 Order and the San Bernardino Order mandate that Plaintiffs stay at home, impinging on

1 their fundamental rights to freedom of religion, assembly, speech, and travel. These  
2 Orders do not permit Plaintiffs to exercise these rights, even while conforming to the  
3 CDC guidelines for social distancing, unless Defendants deem them “essential” or as  
4 participating in “essential” activities.

5 144. Defendants’ mandates are not “narrowly tailored” to further any  
6 compelling governmental interest. Defendants’ have granted numerous special  
7 exemptions to their bans on public gatherings, including for purportedly “essential”  
8 businesses and activities, provided that social distancing practices are observed; and  
9 even for out-of-home religious services during Easter, an important day of religious  
10 significance for Christians. Since these gatherings can be permitted, there can be no  
11 doubt that Defendants may, and therefore must, permit Plaintiffs to engage in  
12 equivalent constitutionally-protected activities provided that Plaintiffs also adhere to the  
13 social distancing guidelines.

14 145. Plaintiffs have no adequate remedy at law and will suffer serious and  
15 irreparable harm to their constitutional rights unless Defendants are enjoined from  
16 implementing and enforcing the Orders.

17 146. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to  
18 declaratory relief and temporary, preliminary, and permanent injunctive relief  
19 invalidating and restraining enforcement of the Orders.

20 147. Plaintiffs found it necessary to engage the services of private counsel to  
21 vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
22 attorneys’ fees pursuant to 42 U.S.C. § 1988.

## 23 **SEVENTH CLAIM FOR RELIEF**

### 24 **Equal Protection Clause of Fourteenth Amendment to U.S. Constitution** 25 **(42 U.S.C. § 1983)**

26 *(By all Plaintiffs against all Defendants)*

27 148. Plaintiffs incorporate by reference the allegations in the preceding  
28 paragraphs, as if fully set forth herein.

1           149. The Orders and Defendants' enforcement thereof violate the Fourteenth  
2 Amendment, both facially and as-applied to Plaintiffs. The Fourteenth Amendment of  
3 the Constitution provides that "[n]o State shall . . . deny to any person within its  
4 jurisdiction the equal protection of the laws." Equal protection requires the state to  
5 govern impartially—not draw arbitrary distinctions between individuals based solely on  
6 differences that are irrelevant to a legitimate governmental objection.

7           150. Defendants intentionally and arbitrarily categorize individuals and conduct  
8 as either "essential" or "non-essential." Those persons classified as "essential," or as  
9 participating in essential services, are permitted to go about their business and activities  
10 provided certain social distancing practices are employed. Those classified as "non-  
11 essential," or as engaging in non-essential activities, are required to stay in their  
12 residence, unless it becomes necessary for them to leave for one of the enumerated  
13 "essential" activities.

14           151. Strict scrutiny under the Equal Protection Clause applies where, as here,  
15 the classification impinges on a fundamental right, including the right to practice  
16 religion freely, to right to free speech and assembly, and the right to travel, among  
17 others.

18           152. Defendants cannot satisfy strict scrutiny, because their arbitrary  
19 classifications are not narrowly tailored measures that further compelling government  
20 interests, for the reasons stated above.

21           153. Plaintiffs have no adequate remedy at law and will suffer serious and  
22 irreparable harm to their constitutional rights unless Defendants are enjoined from  
23 implementing and enforcing the Orders.

24           154. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to  
25 declaratory relief and temporary, preliminary, and permanent injunctive relief  
26 invalidating and restraining enforcement of the Orders.

27           155. Plaintiffs found it necessary to engage the services of private counsel to  
28 vindicate their rights under the law. Plaintiffs are therefore entitled to an award of

1 attorneys' fees pursuant to 42 U.S.C. § 1988.

2 **EIGHTH CLAIM FOR RELIEF**

3 **Right to Liberty**

4 **(Cal. Const. Art. 1, § 1)**

5 *(By all Plaintiffs against all Defendants)*

6 156. Plaintiffs incorporate by reference the allegations in the preceding  
7 paragraphs, as if fully set forth herein.

8 157. In California, “[a]ll people are by nature free and independent and have  
9 inalienable rights. Among these are enjoying and defending life and liberty, acquiring,  
10 possessing, and protecting property, and pursuing and obtaining safety, happiness, and  
11 privacy. Cal. Const. Art. 1, §1.

12 158. California courts have held that Public Health Officials’ authority over the  
13 rights of personal liberty is limited. Before exercising their full powers to quarantine,  
14 there must be “reasonable grounds [] to support the belief that the person so held is  
15 infected.” *Ex parte Martin*, 83 Cal. App. 2d 164 (1948). Public Health Officials must be  
16 able to show “probable cause to believe the person so held has an infectious disease ...”  
17 *Id.*

18 159. California courts found that Public Health Officials could not quarantine  
19 12 blocks of San Francisco Chinatown because of nine (9) deaths due to bubonic  
20 plague. *See Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900), and *Wong Wai v.*  
21 *Williamson*, 103 F. 1 (C.C. Cal. 1900).

22 160. The court found it “purely arbitrary, unreasonable, unwarranted, wrongful,  
23 and oppressive interference with the personal liberty of complainant” who had “never  
24 had or contracted said bubonic plague; that he has never been at any time exposed to the  
25 danger of contracting it, and has never been in any locality where said bubonic plague,  
26 or any germs of bacteria thereof, has or have existed”. *Jew Ho*, 103 F. 10 (C.C. Cal.  
27 1900).



1 161. California courts have found that “a mere suspicion [of a contagious  
2 disease], unsupported by facts giving rise to reasonable or probable cause, will afford  
3 no justification at all *for depriving persons of their liberty* and subjecting them to virtual  
4 imprisonment under a purported order of quarantine.” *Ex parte Arta*, 52 Cal. App. 380,  
5 383 (1921) (emphasis added).

6 162. In *Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900), and *Wong Wai v.*  
7 *Williamson*, 103 F. 1 (CC Cal. 1900), the California courts found that there were more  
8 than 15,000 people living in the twelve blocks of San Francisco Chinatown who were to  
9 be quarantined. The courts found it unreasonable to shut down the ability of over  
10 15,000 people to make a living because of nine deaths. This was one death for every  
11 1,666 inhabitants of Chinatown.

12 163. As of July 1, 2020, San Bernardino and Riverside Counties have a  
13 combined population of 4,650,631 individuals and as of April 11, 2020, San Bernardino  
14 and Riverside Counties have a total of 66 coronavirus deaths. That is one death for  
15 every 70,464 inhabitants.

16 164. Plaintiffs have never had or contracted said coronavirus; they have never  
17 been at any time exposed to the danger of contracting it, and have never been in any  
18 locality where said coronavirus, or any germs of bacteria thereof, has or have existed.

19 165. Requiring Plaintiffs to abstain from all religious gatherings, despite  
20 substantial modifications to satisfy the public health interests at stake, violates their  
21 California Constitutional liberty rights.

22 166. Plaintiffs have no adequate remedy at law and will suffer serious and  
23 irreparable harm to their constitutional rights unless Defendants are enjoined from  
24 implementing and enforcing the Orders.

25 167. Plaintiffs have found it necessary to engage the services of private counsel  
26 to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
27 attorney fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

28



1 **NINTH CLAIM FOR RELIEF**

2 **Freedom of Speech**

3 **(Cal. Const. Art. 1, § 2)**

4 *(By all Plaintiffs against all Defendants)*

5 168. Plaintiffs incorporate by reference the allegations in the preceding  
6 paragraphs, as if fully set forth herein.

7 169. In California “[e]very person may freely speak, write and publish his or her  
8 sentiments on all subjects, being responsible for the abuse of this right. A law may not  
9 restrain or abridge liberty of speech or press.” Cal. Const. Art. 1, §2.

10 170. “The California Supreme Court has recognized that the California  
11 Constitution is ‘more protective, definitive and inclusive of rights to expression and  
12 speech’ than the First Amendment to the United States Constitution.” *Rosenbaum v.*  
13 *City and County of San Francisco*, 484 F.3d 1142, 1167 (9th Cir. 2007).

14 171. For the reasons stated in Plaintiffs’ Third Claim for Relief, requiring  
15 Plaintiffs to abstain from its religious gatherings, despite substantial modifications to  
16 satisfy the public health interests at stake, violates Plaintiffs’ liberty of speech rights  
17 under the California Constitution as well.

18 172. Plaintiffs have no adequate remedy at law and will suffer serious and  
19 irreparable harm to their constitutional rights unless Defendants are enjoined from  
20 implementing and enforcing the Orders.

21 173. Plaintiffs have found it necessary to engage the services of private counsel  
22 to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
23 attorney fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

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1 **TENTH CLAIM FOR RELIEF**

2 **Freedom of Assembly**

3 **(Cal. Const. Art. 1, § 3)**

4 *(By all Plaintiffs against all Defendants)*

5 174. Plaintiffs incorporate by reference the allegations in the preceding  
6 paragraphs, as if fully set forth herein.

7 175. In California “[t]he people have the right to ... assemble freely to consult  
8 for the common good.” Cal. Const. Art. 1, §3.

9 176. For the reasons stated in Plaintiffs’ Fourth Claim for Relief, requiring  
10 Plaintiffs to abstain from its religious gatherings, despite substantial modifications to  
11 satisfy the public health interests at stake, violates Plaintiffs’ right to assemble freely  
12 under the California Constitution as well.

13 177. Plaintiffs have no adequate remedy at law and will suffer serious and  
14 irreparable harm to their constitutional rights unless Defendants are enjoined from  
15 implementing and enforcing the Orders.

16 178. Plaintiffs have found it necessary to engage the services of private counsel  
17 to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
18 attorney fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

19 **ELEVENTH CLAIM FOR RELIEF**

20 **Free Exercise and Enjoyment of Religion**

21 **(Cal. Const. Art. 1, § 4)**

22 *(By all Plaintiffs against all Defendants)*

23 179. Plaintiffs incorporate by reference the allegations in the preceding  
24 paragraphs, as if fully set forth herein.

25 180. In California “[f]ree exercise and enjoyment of religion without  
26 discrimination or preference are guaranteed.” Cal. Const. Art. 1, §4.

1 181. "In general, the religion clauses of the California Constitution are read  
2 more broadly than their counterparts in the federal Constitution." *Carpenter v. City and*  
3 *County of San Francisco*, 93 F.3d 627, 629 (9th Cir. 1996).

4 182. For the reasons stated in Plaintiffs' First Claim for Relief, requiring  
5 Plaintiffs to abstain from its religious gatherings, despite substantial modifications to  
6 satisfy the public health interests at stake, violates Plaintiffs' free exercise rights under  
7 the California Constitution as well.

8 183. Plaintiffs have no adequate remedy at law and will suffer serious and  
9 irreparable harm to their constitutional rights unless Defendants are enjoined from  
10 implementing and enforcing the Orders.

11 184. Plaintiffs have found it necessary to engage the services of private counsel  
12 to vindicate their rights under the law. Plaintiffs are therefore entitled to an award of  
13 attorney fees and costs pursuant to California Code of Civil Procedure Section 1021.5.

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

16 A. An order and judgment declaring that the Orders, facially and as-applied to  
17 Plaintiffs, violate the First and Fourteenth Amendments to the U.S. Constitution and  
18 Article 1, Sections 1, 2, and 4 of the California Constitution;

19 B. An order temporarily, preliminarily, and permanently enjoining and  
20 prohibiting Defendants from enforcing the Orders;

21 C. For attorneys' fees and costs;

22 D. Such other and further relief as the Court deems appropriate and just.

23  
24 Date: April 13, 2020

DHILLON LAW GROUP INC.

25  
26 By: /s/ Harmeet K. Dhillon

HARMEET K. DHILLON (SBN: 207873)

harmmeet@dhillonlaw.com

27 MARK P. MEUSER (SBN: 231335)

28 mmeuser@dhillonlaw.com

1 GREGORY R. MICHAEL (SBN: 306814)  
2 gmichael@dhillonlaw.com  
3 DHILLON LAW GROUP INC.  
4 177 Post Street, Suite 700  
5 San Francisco, California 94108  
6 Telephone: (415) 433-1700

7 Attorneys for Plaintiffs  
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## VERIFICATION OF COMPLAINT

I, the undersigned, declare as follows:

1. I am a plaintiff in this matter.
2. I have read the foregoing complaint and know the contents thereof.
3. The same is true of my own knowledge, except as to those matters which are therein state on information and belief, and, as to those matters, I believe it to be true.


I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: 4/13/2020

DocuSigned by:  
  
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Wendy Gish

Date: 4/13/2020

DocuSigned by:  
  
14CC6A82B3DB44E...


Patrick Scales

Date: 4/13/2020

DocuSigned by:  
  
80DF67D3F1C5496...

James Dean Moffatt

Date: 4/13/2020

DocuSigned by:  
  
CD23BCCA9F72418...

Brenda Wood

# EXHIBIT 1

EXECUTIVE DEPARTMENT  
STATE OF CALIFORNIA

EXECUTIVE ORDER N-33-20

**WHEREAS** on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

**WHEREAS** in a short period of time, COVID-19 has rapidly spread throughout California, necessitating updated and more stringent guidance from federal, state, and local public health officials; and

**WHEREAS** for the preservation of public health and safety throughout the entire State of California, I find it necessary for all Californians to heed the State public health directives from the Department of Public Health.

**NOW, THEREFORE, I, GAVIN NEWSOM**, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8627, and 8665 do hereby issue the following Order to become effective immediately:

**IT IS HEREBY ORDERED THAT:**

- 1) To preserve the public health and safety, and to ensure the healthcare delivery system is capable of serving all, and prioritizing those at the highest risk and vulnerability, all residents are directed to immediately heed the current State public health directives, which I ordered the Department of Public Health to develop for the current statewide status of COVID-19. Those directives are consistent with the March 19, 2020, Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response, found at: <https://covid19.ca.gov/>. Those directives follow:

ORDER OF THE STATE PUBLIC HEALTH OFFICER  
March 19, 2020

To protect public health, I as State Public Health Officer and Director of the California Department of Public Health order all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors, as outlined at <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19>. In addition, and in consultation with the Director of the Governor's Office of Emergency Services, I may designate additional sectors as critical in order to protect the health and well-being of all Californians.

Pursuant to the authority under the Health and Safety Code 120125, 120140, 131080, 120130(c), 120135, 120145, 120175 and 120150, this order is to go into effect immediately and shall stay in effect until further notice.

The federal government has identified 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or



destruction would have a debilitating effect on security, economic security, public health or safety, or any combination thereof. I order that Californians working in these 16 critical infrastructure sectors may continue their work because of the importance of these sectors to Californians' health and well-being.

This Order is being issued to protect the public health of Californians. The California Department of Public Health looks to establish consistency across the state in order to ensure that we mitigate the impact of COVID-19. Our goal is simple, we want to bend the curve, and disrupt the spread of the virus.

The supply chain must continue, and Californians must have access to such necessities as food, prescriptions, and health care. When people need to leave their homes or places of residence, whether to obtain or perform the functions above, or to otherwise facilitate authorized necessary activities, they should at all times practice social distancing.

- 2) The healthcare delivery system shall prioritize services to serving those who are the sickest and shall prioritize resources, including personal protective equipment, for the providers providing direct care to them.
- 3) The Office of Emergency Services is directed to take necessary steps to ensure compliance with this Order.
- 4) This Order shall be enforceable pursuant to California law, including, but not limited to, Government Code section 8665.

**IT IS FURTHER ORDERED** that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

**IN WITNESS WHEREOF** I have  
hereunto set my hand and caused  
the Great Seal of the State of  
California to be affixed this 19th day  
of March 2020.



\_\_\_\_\_  
GAVIN NEWSOM  
Governor of California

**ATTEST:**

\_\_\_\_\_  
ALEX PADILLA  
Secretary of State



# EXHIBIT 2



## Public Health

Trudy Raymundo  
Director

Corwin Porter  
Assistant Director

Maxwell Ohikhuare, M.D.  
Health Officer

Erin Gustafson, M.D., MPH  
Acting Health Officer

### **ORDER OF THE HEALTH OFFICER OF THE COUNTY OF SAN BERNARDINO** **FOR THE CONTROL OF COVID-19**

**DATE OF ORDER: April 7, 2020**

Please read this Order carefully. Violation of or failure to comply with this Order is a crime punishable by fine, imprisonment, or both. (California Health and Safety Code § 120295; County Code Section 31.0101 Et. Seq.)

UNDER THE AUTHORITY OF CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 101040, 101085, AND 120175, TITLE 17 CALIFORNIA CODE OF REGULATIONS SECTION 2501, AND SAN BERNARDINO COUNTY CODE SECTION 31.0101 ET. SEQ., THE HEALTH OFFICER OF THE COUNTY OF SAN BERNARDINO ("HEALTH OFFICER") ORDERS:

**Effective 12:00 a.m. on Wednesday, April 8, 2020, and continuing until rescinded,** pending further Order of the Public Health Officer, the following will be in effect for the County of San Bernardino (hereinafter the "County"):

1. The Orders of the San Bernardino County Health Officer issued on March 17, 2020 and March 27, 2020, Governor Newsom's Executive Order N-22-20 and order of the California State Public Health Officer issued on March 19, 2020, requiring all persons residing in the State to remain in their homes or places of residence, except as needed to maintain the continuity of operations for critical infrastructure (the "Stay-at-Home Order") remain in effect until the Governor's Executive Order N-22-20, and the Orders of the San Bernardino County Health Officer remain in effect until they are rescinded.
2. Under the Orders of the San Bernardino County Health Officer, the California State Public Health Officer, and Governor Newsom's Executive Order N-22-20, all individuals living in the State of California are ordered to stay home or at their place of residence except as need to maintain continuity of operations of the federal critical infrastructure sectors, as outlined at <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>. This guidance does allow faith based services that are provided through streaming or other technology, while individuals remain in their homes, but does not allow individuals to leave their homes for driving parades or drive-up services, or for picking up non-essential items.

#### BOARD OF SUPERVISORS

ROBERT A. LOVINGOOD  
First District

JANICE RUTHERFORD  
Second District

DAWN ROWE  
Third District

CURT HACMAN  
Chairman, Fourth District

JOSIE GONZALES  
Vice Chair, Fifth District

Gary McBride  
Chief Executive Officer

3. All non-essential businesses that do not fall under the Essential Critical Infrastructure referenced above are ordered to remain closed. All essential businesses that remain in operation in accordance with the above referenced Orders of the San Bernardino County Health Officer, the Order of the California State Public Health Officer, and Governor Newsom's Executive Order N-22-20, shall follow the Social Distancing and Infection Control Guidelines published by the CDC and California Department of Public Health. All essential businesses must ensure all required measures are implemented and must identify and require measures necessary to implement social distancing and sanitation at that particular facility. If the measures identified and implemented are not effective in maintaining proper social distancing and sanitation, additional measures shall be identified and implemented or the facility shall be closed.
4. All persons, including Essential Workers shall wear face coverings, such as scarves (dense fabric, without holes), bandanas, neck gaiters, or other fabric face coverings, when they leave their homes or places of residence for essential activities. All persons, including **non-medical** Essential Workers are discouraged from using Personal Protective Equipment (PPE), such as N95 masks, for **non-medical reasons**. Staff working at facilities listed in Attachment A at <http://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2020/04/Attachment-A-and-B.pdf> must follow the Order of the San Bernardino County Public Health Officer issued on April 6, 2020, requiring staff at these facilities to wear a surgical mask at all times while in the facility.
5. All essential businesses shall make every effort to use telecommuting for its workforce.
6. Government entities shall enforce social distancing requirements at all parks and trails. If a government entity is unable to enforce social distancing at a park or trail, it shall be closed to the public. Parking lots at all parks and/or trails shall be closed and shall be accessible only by members of the public within walking distance of the parks and/or trails. Said parks and/or trails shall be used solely for walking, hiking, equestrian or bicycle riding. The public shall not congregate or participate in group sporting activities at such parks and/or trails.
7. A strong recommendation is made that all persons who are 65 years old or older, have a chronic underlying condition, or have a compromised immune system self-quarantine themselves at home.
8. Hospitals and healthcare providers shall take measures to preserve and prioritize resources including delaying non-emergent or elective surgeries or procedures where feasible.
9. All persons arriving in the county from international locations identified on the Centers for Disease Control and Prevention (CDC) Warning Level 2 or 3 Travel Advisory (available at: <https://www.cdc.gov/travel/notices>) shall be subject to 14-day home quarantine, self-monitoring.
10. A strong recommendation is made for persons exhibiting mild to moderate symptoms of COVID-19 to self-isolate in their place of residence unless seeking medical treatment. A guide to symptoms is found here: <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.
11. This Order is issued based on evidence of increasing transmission of COVID-19 within the County, in the state of California, and worldwide, scientific evidence regarding the most effective approach to slow transmission of communicable diseases generally and COVID-19 specifically, as well as

best practices as currently known and available to protect the public from the risk of spread of or exposure to COVID-19. The virus that causes COVID-19 (known as SARS-CoV2) has infected over one million individuals worldwide in over 180 countries and is implicated in over 76,000 worldwide deaths, including at least 530 cases and 16 deaths in San Bernardino County. These numbers increase significantly every day.

12. This Order is intended to reduce the likelihood of exposure to COVID-19, thereby slowing the spread of COVID-19 in communities worldwide. This Order will help to reduce the number of Californians who contract COVID-19 before an effective treatment or vaccine is available; protect those most likely to experience severe symptoms, such as older Californians and those with underlying chronic conditions; preserve and protect our healthcare delivery system; and minimize the social and economic impacts of COVID-19 over the long run.
13. This Order is issued in accordance with, and incorporates by reference, the: March 4, 2020 Proclamation of a State Emergency issued by Governor Gavin Newsom; the March 10, 2020 Declaration of Local Health Emergency based on an imminent and proximate threat to public health from the introduction of novel COVID-19 in San Bernardino County; the March 10, 2020 Resolution of the Board of Supervisors of the County of San Bernardino proclaiming the existence of a Local Emergency in the County of San Bernardino regarding COVID-19; the March 10, 2020 Resolution of the Board of Supervisors of the County of San Bernardino ratifying and extending the Declaration of Local Health Emergency due to COVID-19; and Executive Order N-22-20 of the Governor of California and Order of the State Public Health Officer issued on March 19, 2020.
14. This Order comes after the release of substantial guidance from the Health Officer, the California Department of Public Health, the Centers for Disease Control and Prevention, and other public health officials throughout the United States and around the world, including but not limited to, the Centers for Disease Control and Prevention's "Interim Additional Guidance for Infection Prevention and Control for Patients with Suspected or Confirmed COVID-19 in Nursing Homes", the California Department of Public Health Face Covering Guidance issued on April 1, 2020, and Recommendation Regarding the Use of Cloth Face Coverings from the Centers for Disease Control and Prevention issued on April 3, 2020.
15. This Order is made in accordance with all applicable State and Federal laws, including but not limited to: Health and Safety Code sections 101030, et seq.; Health and Safety Code sections 120100, et seq.; and Title 17 of the California Code of Regulations section 2501.
16. This Order shall not supersede any conflicting or more restrictive orders issued by the State of California or Federal governments, including any requirements regarding child care. If any portion of this Order or the application thereof to any person or circumstance is held to be invalid the remainder of the Order, including the application of such part or provision to other persons or circumstances, shall not be affected and shall continue in full force and effect. To this end, the provisions of this Order are severable.
17. To the extent necessary, pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029, this order is enforceable by the Sheriff and all Chiefs of Police in the County. The violation of any provision of this Order constitutes an imminent threat to public health.

Copies of this Order shall promptly be: (1) made available at the County of San Bernardino Health Administration office located at 351 N. Mountain View Ave., #303, San Bernardino, CA 92415; (2) posted on the County of San Bernardino Public Health Department's website ([wp.sbcounty.gov/dph](http://wp.sbcounty.gov/dph)); and (3) provided to any member of the public requesting a copy of this Order.

**IT IS SO ORDERED:**

Erin D. Gustafson, MD, MPH

Dated: April 7, 2020

Dr. Erin Gustafson, MD, MPH  
Acting Public Health Officer  
County of San Bernardino

Approved as to form and legality:

Adam Ebright

Dated: April 7, 2020

Adam Ebright  
County Counsel  
County of San Bernardino

# EXHIBIT 3



**AMENDED ORDER OF THE HEALTH OFFICER FOR THE COUNTY OF  
RIVERSIDE AND OF THE COUNTY EXECUTIVE OFFICER AS DIRECTOR OF  
EMERGENCY SERVICES**

**DATE OF ORDER: APRIL 6, 2020**

Please read this Order carefully. Violation of or failure to comply with this Order is a crime punishable by fine, imprisonment, or both. Violators are also subject to civil enforcement actions including civil penalties of up to \$1,000 per violation per day, injunctive relief, and attorneys' fees and costs. (Penal Code section 19; Government Code sections 8665 and 25132; Health and Safety Code section 120295; County Ordinances 533 and 556.)

UNDER THE AUTHORITY OF CALIFORNIA HEALTH AND SAFETY CODE SECTIONS 101030, 101040, 101085, AND 120175, TITLE 17 CALIFORNIA CODE OF REGULATIONS SECTION 2501, ARTICLE XI OF THE CALIFORNIA CONSTITUTION; CALIFORNIA GOVERNMENT CODE SECTIONS 8610, 8630, 8634, AND 8665; AND RIVERSIDE COUNTY CODE SECTIONS 442 AND 533.6, THE HEALTH OFFICER OF THE COUNTY OF RIVERSIDE ("HEALTH OFFICER") ORDERS:

**Effective 12:00 a.m. on Sunday, April 5, 2020, and continuing through April 30, 2020**, pending further Order of the Public Health Officer, the following will be in effect for the County of Riverside (hereinafter the "County"):

1. Executive Order N-33-20 issued by the Governor of the State of California ("Executive Order") (available at: <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>) ordered all individuals living in the State of California to stay home or at their place of residence, except as needed to maintain continuity of operations of sectors designated in the document available at: <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>) as updated by the State Public Health Officer ("Essential Workers"). This also includes all orders of the State Public Health Officer.

In conformance with, and where not superseded by the Executive Order, this Order additionally specifies and orders as follows:

- a. All public or private "gatherings," as defined in section 2 below, within the jurisdiction of the Public Health Officer of the County of Riverside are prohibited, regardless of venue or size.
- b. **Paragraph 1.a. of** this Order does not apply to courts of law, medical providers, public utilities, critical county, city, and special district operations, critical school operations such as nutrition programs, logistics/distribution centers, congregate living settings, daycare and child care, shelters, public transportation, airport travel, or necessary shopping at fuel stations, stores or malls. However, these settings are instructed to observe all applicable state and federal guidelines for infection control.

- c. All essential businesses that remain in operation in accordance with the Order shall follow the Social Distancing and Infection Control Guidelines published by the CDC and California Department of Public Health. All essential businesses must ensure all required measures are implemented and must identify and require measures necessary to implement social distancing are implemented at each facility that will ensure social distancing and sanitation at that particular facility. If the measures identified and implemented are not effective in maintaining proper social distancing and sanitation, additional measures shall be identified and implemented or the facility shall be closed.
- d. All persons, including Essential Workers shall wear face coverings, such as scarves (dense fabric, without holes), bandanas, neck gaiter, or other fabric face coverings. All persons, including Essential Workers are discouraged from using Personal Protective Equipment (PPE), such as N95 masks, for **non-medical reasons**.
- e. All bars, adult entertainment establishments, and other business establishments that serve alcohol and do not serve food shall be and shall remain closed.
- f. All restaurants and other business establishments that serve food shall close all on-site dining. All food served shall be by delivery, or through pick-up or drive thru. Social distancing shall be required for persons picking up food on site.
- g. All gyms and fitness centers shall be and shall remain closed.
- h. All essential businesses shall make every effort to use telecommuting for its workforce.
- i. Government entities shall enforce social distancing requirements at all parks and trails. If a government entity is unable to enforce social distancing at a park or trail, it shall be closed to the public. Parking lots at all parks and/or trails shall be closed and shall be accessible only by members of the public within walking distance of the parks and/or trails. Said parks and/or trails shall be used solely for walking, hiking, equestrian or bicycle riding. The public shall not congregate or participate in group sporting activities at such parks and/or trails.
- j. As outlined in the Public Health Officer's Order of April 2, 2020, all public and private golf courses are closed for play. Golf Clubs may allow members to walk the course solely for exercise. Golf Clubs that provide food services may continue to do so by delivery or through pick-up. Social distancing shall be required for persons picking up food on site and using a course for walking.
- k. As outlined in the Health Officer's Amended Order of April 1, 2020, all schools within the jurisdiction of the Public Health Officer of the County of Riverside



including, but not limited to, all preschools, K-12 public, private and charter schools, community colleges, public, private, nonprofit, and for-profit colleges and universities shall remain closed through June 19, 2020, pending further Order of the Public Health Officer. This closure shall be understood to prohibit any activity where students, staff, parents, or members of the public gather on the school campus, including but not limited to: formal instruction; classes; laboratory sessions; tutoring; meeting; sporting events; or other extracurricular activities. Parents of school-aged minor children shall take steps to ensure children are not participating in activities prohibited by this Order, or the Executive Order, and that social distancing requirements are practiced at all times.

Individual school districts and educational institutions shall continue to have the discretion to determine the minimum essential personnel as required to support critical functions within those districts and institutions such as federal food service programs, security, and necessary maintenance.

This order shall not affect on-campus housing, dormitories or other congregate living arrangements, or staffing required to maintain and operate them.

- l. Daycare and childcare facilities shall continue to operate under the following mandatory conditions: (1) Childcare must be carried out in stable groups of 10 or fewer ("stable" means that the same 10 or fewer children are in the same group each day); (2) Children shall not change from one group to another; (3) If more than one group of children is cared for at one facility, each group shall be in a separate room. Groups shall not mix with each other; and (4) Childcare providers shall remain solely with one group of children.
- m. A strong recommendation is made that all persons who are 65 years old or older, have a chronic underlying condition, or have a compromised immune system self-quarantine themselves at home.
- n. "Non-essential personnel," as defined in section 2(c) below, are prohibited from entry into any hospital or long-term care facility.

All essential personnel who show any potential signs or symptoms of COVID-19 shall be strictly prohibited from entry into hospitals or long-term care facilities.

- o. Hospitals and healthcare providers shall take measures to preserve and prioritize resources including delaying non-emergent or elective surgeries or procedures where feasible.
- p. As outlined in the Health Officer's Order of April 3, 2020, all labs that perform COVID-19 testing for Riverside County clients, including but not limited to Kaiser

Permanente; LabCorp, Quest Diagnostics, and labs operated by hospitals across the County of Riverside, shall continue to share COVID-19 orders and results with demographics with Manifest Medex (MX) to create a countywide COVID-19 dashboard to include information regarding tests performed, both pending and resulted, and occurrences by age, gender, and geographical location. Orders and results with demographics shall be shared either through electronic interfaces (preferred) or via electronic file transfers updated on at least a daily basis.

- q. All persons arriving in the county from international locations identified on the Centers for Disease Control and Prevention (CDC) Warning Level 2 or 3 Travel Advisory (available at: <https://wwwnc.cdc.gov/travel/notices>) shall be subject to 14-day home quarantine, self-monitoring.
  - r. A strong recommendation is made for persons exhibiting mild to moderate symptoms of COVID-19 to self-isolate themselves in their place of residence unless seeking medical treatment. A guide to symptoms is found here: <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>.
2. For purposes of this Order:
- a. "Gathering" is any event or convening that brings together people in a single room or single space at the same time, including, but not limited to, an auditorium, stadium, arena, theater, church, casino, conference room, meeting hall, cafeteria, drive-in theater, parking lot, or any other indoor or outdoor space used for any non-essential purpose including, but not limited to, movies, church services, swap meets, etc. A gathering does not include:
    - i. A convening of persons who reside in the same residence.
    - ii. Operations at airports and/or public transportation.
    - iii. Operations at essential businesses included in the designated sectors referenced in section 1 above, where many people are present but are able to practice social distancing.
    - iv. Funerals and burial services may proceed with not more than 10 persons present. Funerals and burial services must be conducted in strict compliance with social distancing requirements.
  - b. "Long term care facility" is a facility serving adults that require assistance with activities of daily living, including a skilled nursing facility, and that is licensed by the California Department of Community Care and Licensing, or the California Department of Public Health.
  - c. "Non-essential personnel" for the purpose of section 1 above, are employees, contractors, or members of the public who do not perform treatment, maintenance,

support, or administrative tasks deemed essential to the healthcare mission of the long term care facility or hospital. Non-essential personnel do not include first responders, nor State, federal, or local officials, investigators, or medical personnel carrying out lawful duties. Entry of visitors to hospitals and long-term care facilities are allowed upon the approval of the facility's director, or designee, for the purpose of allowing family and friends to visit a resident such as in an end of life situation, to allow parents or guardians to visit a child who is a patient, or any other circumstances deemed appropriate by the facility director, or designee, and where appropriate precautions by the facility that follow federal, State, and local public health guidance regarding COVID-19 are followed.

- d. "Social distancing" is maintaining a six-foot separation from all persons except for household members and medical providers with the appropriate personal protection equipment.
3. This Order shall be effective immediately and will remain in effect until **April 30, 2020**, pending further Order of the Public Health Officer. To the extent that any conflict shall arise, this Order supersedes the prior Orders of the Public Health Officer concerning public gatherings, including those issued on March 12, March 16, and April 4, 2020.
4. This Order is issued as a result of the worldwide pandemic of COVID-19 disease, also known as "novel coronavirus," which has infected over one million individuals worldwide in over 180 countries and is implicated in over 50,000 worldwide deaths, including over 600 cases and 15 deaths in Riverside County. These numbers increase significantly every day.
5. This Order is issued based on evidence of increasing transmission of COVID-19 both within the County of Riverside and worldwide, scientific evidence regarding the most effective approach to slow transmission of communicable diseases generally and COVID-19 specifically, as well as best practices as currently known and available to protect the public from the risk of spread of or exposure to COVID-19.
6. This Order is intended to reduce the likelihood of exposure to COVID-19, thereby slowing the spread of COVID-19 in communities worldwide. This Order is issued to prevent circumstances often present in gatherings that may exacerbate the spread of COVID-19, such as: 1) the increased likelihood that gatherings will attract people from a broad geographic area; 2) the prolonged time period in which large numbers of people are in close proximity; 3) the difficulty in tracing exposure when large numbers of people attend a single event or are at a single location; and 4) the inability to ensure that such persons follow adequate hygienic practices.
7. This Order is intended to address the strain upon the health care system from the effects of the COVID-19 virus. Similarly, this Order is intended to reduce the likelihood of exposure to COVID-19, thereby slowing the spread of COVID-19 in communities worldwide.

8. This Order is issued in accordance with, and incorporates by reference, the: March 4, 2020 Proclamation of a State Emergency issued by Governor Gavin Newsom; the March 8, 2020 Declaration of Local Health Emergency based on an imminent and proximate threat to public health from the introduction of novel COVID-19 in Riverside County; the March 10, 2020 Resolution of the Board of Supervisors of the County of Riverside proclaiming the existence of a Local Emergency in the County of Riverside regarding COVID-19; the March 10, 2020 Resolution of the Board of Supervisors of the County of Riverside ratifying and extending the Declaration of Local Health Emergency due to COVID-19; the guidance issued on March 11, 2020 by the California Department of Public Health regarding large gatherings of 250 people or more; Governor Gavin Newsom's Executive Order N-25-20 of March 12, 2020 preparing the State to commandeer hotels and other places of temporary residence, medical facilities, and other facilities that are suitable as places of temporary residence or medical facilities as necessary for quarantining, isolating or treating individuals who test positive for COVID-19 or who have had a high-risk exposure and are thought to be in the incubation period; the guidance issued on March 15, 2020 by the Centers for Disease Control and Prevention, the California Department of Public Health, and other public health officials through the United States and around the world recommending the cancellation of gatherings involving more than fifty (50) or more persons in a single space at the same time; the March 16, 2020 order of the Public Health Officer prohibiting all gatherings with expected presence above ten (10) individuals; Governor Newsom's Executive Order N-33-20 of March 19, 2020 ordering all persons to stay at home to protect the health and well-being of all Californians and to establish consistency across the state in order to slow the spread of COVID-19; Governor Newsom's Executive Order N-35-20 giving the state the ability to increase the health care capacity in clinics, mobile health care units and adult day health care facilities and allowing local governments more flexibility to utilize the skills of retired employees in order to meet the COVID-19 surge; and Governor Newsom's Executive Order N-39-20 intended to expand the health care workforce and recruit health care professionals to address the COVID-19 surge. The Governor and the County Public Health Officer continue to issue COVID-19-related orders to mitigate the public health crisis.
9. This Order comes after the release of substantial guidance from the Health Officer, the California Department of Public Health, the Centers for Disease Control and Prevention, and other public health officials throughout the United States and around the world, including but not limited to, the Centers for Disease Control and Prevention's "Interim Additional Guidance for Infection Prevention and Control for Patients with Suspected or Confirmed COVID-19 in Nursing Homes" and the California Department of Public Health Face Covering Guidance issued on April 1, 2020.
10. This Order is made in accordance with all applicable State and Federal laws, including but not limited to: Health and Safety Code sections 101030, et seq.; Health and Safety Code sections 120100, et seq.; and Title 17 of the California Code of Regulations section 2501. More specifically, Health and Safety Code section 120175.5(b) which provides that all



governmental entities in the county shall take necessary measures within the governmental entity's control to ensure compliance with this Order and to disseminate this Order to venues or locations within the entity's jurisdiction where gatherings may occur.

11. Violation of this Order is subject to fine, imprisonment, or both. (Penal Code section 19; Government Code sections 8665 and 25132; Health and Safety Code section 120295; County Ordinances 533 and 556.)
12. To the extent necessary, pursuant to Government Code sections 26602 and 41601 and Health and Safety Code section 101029, the Health Officer requests that the Sheriff and all Chiefs of Police in the County ensure compliance with and enforcement of this Order.
13. Copies of this Order shall promptly be: (1) made available at the County of Riverside Health Administration office located at 4065 County Circle Drive, Riverside, CA 92503; (2) posted on the County of Riverside Public Health Department's website (rivcoph.org); and (3) provided to any member of the public requesting a copy of this Order.

**IT IS SO ORDERED:**

A handwritten signature in blue ink, appearing to read 'Cameron Kaiser', is written over a horizontal line.

Dated: April 6, 2020

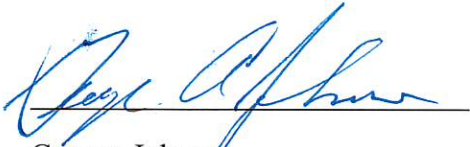
Dr. Cameron Kaiser, MD, MPH, FAAFP  
Public Health Officer  
County of Riverside

**EMERGENCY REGULATIONS**

As Director of Emergency Services for the County of Riverside, I am authorized to promulgate regulations for the protection for life and property pursuant to Government Code section 8634 and Riverside County Ordinances 442 and 533. The following shall be in effect for the duration of the County of Riverside Health Officer's Order issued above which is incorporated in its entirety by reference:

The County of Riverside Health Officer's Order shall be promulgated as a regulation for the protection of life and property.

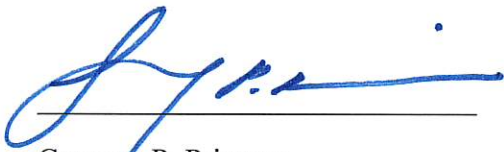
Any person who violates or refuses or willfully neglects to obey this regulation is subject to civil enforcement actions, including civil penalties of up to \$1,000 per violation per day, injunctive relief, and attorneys' fees and costs, imprisonment, or both, pursuant to Government Code section 8665.



George Johnson  
County Executive Officer  
Director of Emergency Services  
County of Riverside

Dated: April 6, 2020

Approved as to form and legality:



Gregory P. Priamos  
County Counsel  
County of Riverside

Dated: April 6, 2020



1 HARMEET K. DHILLON (SBN: 207873)  
2 harmeet@dhillonlaw.com  
3 MARK P. MEUSER (SBN: 231335)  
4 mmeuser@dhillonlaw.com  
5 GREGORY R. MICHAEL (SBN: 306814)  
6 gmichael@dhillonlaw.com  
7 DHILLON LAW GROUP INC.  
8 177 Post Street, Suite 700  
9 San Francisco, California 94108  
10 Telephone: (415) 433-1700  
11 Facsimile: (415) 520-6593

12 Attorneys for Plaintiffs

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

16 **WENDY GISH**, an individual, *et al.*,  
17 Plaintiffs,  
18 v.

19 **GAVIN NEWSOM**, in his official  
20 capacity as Governor of California, *et al.*,  
21 Defendants.

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

Hon. Jesus G. Bernal

**APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER AND FOR ORDER TO  
SHOW CAUSE WHY  
PRELIMINARY INJUNCTION  
SHOULD NOT ISSUE;  
MEMORANDUM OF POINTS  
AND AUTHORITIES**

Date Filed: April 14, 2020



**TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that Plaintiffs Wendy Gish, Patrick Scales, James Dean Moffatt, and Brenda Wood, by and through counsel, will and hereby do apply to this Court pursuant to Fed. R. Civ. P. 65(b) and Local Rule 65-1 for a temporary restraining order against Defendants Gavin Newsom, in his official capacity as Governor of California; Xavier Becerra, in his official capacity as Attorney General of California; Erin Gustafson, in her official capacity as the San Bernardino County Acting Public Health Officer; John McMahon, in his official capacity as the San Bernardino County Sheriff; Robert A. Lovinggood, in his official capacity as a San Bernardino County Supervisor; Janice Rutherford, in her official capacity as a San Bernardino County Supervisor; Dawn Rowe, in her official capacity as a San Bernardino County Supervisor; Curt Hagman, in his official capacity as a San Bernardino County Supervisor; Josie Gonzales, in his official capacity as a San Bernardino County Supervisor; Cameron Kaiser, in his official capacity as the Riverside County Public Health Officer; George Johnson, in his official capacity as the Riverside County Executive Officer and Director of Emergency Services; Chad Bianco, in his official capacity as the Riverside County Sheriff; Kevin Jeffries, in his official capacity as a Riverside County Supervisor; Karen Spiegel, in her official capacity as a Riverside County Supervisor; Chuck Washington, in his official capacity as a Riverside County Supervisor; V. Manuel Perez, in his official capacity as a Riverside County Supervisor; and Jeff Hewitt, in his official capacity as a Riverside County Supervisor (“Defendants”), and for the issuance of an order to show cause why a preliminary injunction should not issue, as follows:

1. Defendants, as well as their agents, employees, and successors in office, shall be restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on Plaintiffs’ engagement in religious services, practices, or activities at which the Center for Disease Control’s social distancing guidelines are followed.

1           2. Defendants shall show cause, at a time and place to be directed by the  
2 Court, why a preliminary injunction should not issue requiring Defendants to act as  
3 described in above; the temporary restraining order shall remain effective until such  
4 time as the Court has ruled on whether a preliminary injunction should issue.

5           This Application is made on the grounds that Plaintiffs are likely to succeed on  
6 the merits of this case, they will suffer irreparable harm without injunctive relief, the  
7 balance of equities tips sharply in their favor, and the relief sought is in the public  
8 interest.

9           Good cause exists to issue the requested Order to preserve Plaintiffs' rights  
10 under the Constitution of the United States and the Constitution of the State of  
11 California, and to avoid irreparable harm to those rights. This Application is supported  
12 by the accompanying Memorandum of Points and Authorities, by Plaintiffs' Verified  
13 Complaint, and all exhibits attached thereto, by the declarations of Plaintiffs and their  
14 counsel, Mark P. Meuser, and all exhibits attached thereto, and by such further  
15 argument and evidence that may be adduced at any hearing on this matter or of which  
16 the Court may take judicial notice.

17           The Verified Complaint in this action was filed on April 13, 2020; this  
18 Application followed. All papers relating to this Application will be delivered by  
19 email to the Defendants' counsel by 4:00 p.m. on April 14. As reflected in the  
20 accompanying declaration of Mark P. Meuser, Plaintiffs have notified the Office of  
21 the California Attorney General and county counsel for San Bernardino and Riverside  
22 Counties, informing counsel of Plaintiffs' intention to file this Application and to seek  
23 a temporary restraining order of the nature described above.

24           Plaintiffs request that the Court waive any bond requirement, because enjoining  
25 Defendants from unconstitutionally prohibiting religious practices will not financially  
26 affect Defendants.

27  
28 //

1  
2 Date: April 14, 2020  
3

Respectfully submitted,

DHILLON LAW GROUP INC.

4 By: /s/ Harmeet K. Dhillon  
HARMEET K. DHILLON (SBN: 207873)  
5 harmeet@dhillonlaw.com  
MARK P. MEUSER (SBN: 231335)  
6 mmeuser@dhillonlaw.com  
7 GREGORY R. MICHAEL (SBN: 306814)  
gmichael@dhillonlaw.com  
8 DHILLON LAW GROUP INC.  
9 177 Post Street, Suite 700  
10 San Francisco, California 94108  
Telephone: (415) 433-1700

11 Attorneys for Plaintiffs  
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## TABLE OF CONTENTS

1		
2	<i>U.S. Attorney General William Barr Issues Statement on Religious Practice and</i>	
3	<i>Social Distance</i> .....	1
4	On April 14, 2020, U.S. Attorney General William Barr issued the following	
5	statement: .....	1
6	INTRODUCTION .....	1
7	RELEVANT FACTUAL BACKGROUND .....	2
8	LEGAL STANDARD .....	7
9	ARGUMENT .....	9
10	I. PLAINTIFFS ARE ENTITLED TO TEMPORARY AND	
11	PRELIMINARY INJUNCTIVE RELIEF. ....	9
12	A. There Is a Strong Likelihood Plaintiffs’ Will Succeed in Proving	
13	Their Claims on Multiple Constitutional Grounds. ....	9
14	1. Defendants’ Ban on Communal Religious Worship Violates the	
15	First Amendment’s Free Exercise Clause and California	
16	Constitution Article 1, Section 4. ....	9
17	2. The Orders Violate the Establishment Clause of the First	
18	Amendment. ....	11
19	3. Defendants Violate Plaintiffs’ Free Speech Rights. ....	12
20	4. The Orders Ban All Public and Private Assembly in Violation of	
21	the First Amendment to the U.S. Constitution and California	
22	Constitution. ....	15
23	5. Defendants’ Orders Are Void for Reasons of Vagueness. ....	16
24	6. The Orders Violate Plaintiffs’ Substantive Due Process Rights	
25	Under the Fourteenth Amendment. ....	17
26	7. The Orders Violate Article 1, Section 1 of the California	
27	Constitution. ....	18
28	8. Defendants Violate the Equal Protection Clause of the Fourteenth	
	Amendment. ....	20
	B. Plaintiffs Face Imminent Irreparable Harm Absent Immediate	
	Injunctive Relief .....	21
	C. The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor. ....	22

1	D. Injunctive Relief Is in the Public Interest .....	23
2	II. THE COURT SHOULD DISPENSE WITH ANY BOND	
3	REQUIREMENT .....	23
4	CONCLUSION .....	24

# TABLE OF AUTHORITIES

Case	Page(s)
<b>UNITED STATES CONSTITUTION</b>	
U. S. Const. amend. I. ....	9, 13
U.S. Const. amend. XIV, § 1.....	20
<b>CALIFORNIA CONSTITUTION</b>	
Cal. Const. art. 1, § 1.....	19
Cal. Const. art. 1, § 2.....	12, 13
Cal. Const. art. 1, § 3.....	15
Cal. Const. art. 1, § 4.....	9, 10
<b>CASES</b>	
<i>All. for Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011).....	8
<i>Am. Legion v. Am. Humanist Ass’n</i> , 139 S. Ct. 2067 (2019).....	12
<i>Americans for Prosperity Foundation v. Harris</i> , 182 F. Supp. 3d 1049 (C.D. Cal. 2016). ....	22, 23
<i>Aptheker v. Secretary of State</i> , 378 U.S. 500 (1964).....	18
<i>Bible Club v. Placentia-Yorba Linda School Dist.</i> , 573 F. Supp. 2d 1291 (C.D. Cal. 2008). ....	24
<i>Cantwell v. Connecticut</i> , 310 U.S. 296 (1940).....	10
<i>Catholic Charities of Sacramento, Inc. v. Superior Court</i> , 32 Cal. 4th 527 (2004) .....	9
<i>Church of the Lukumi Babalu Aye, Inc. v. Hialeah</i> , 508 U.S. 520 (1993).....	10
<i>City of Cleburne, Tex. v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	20

1	<i>College Republicans at San Francisco State University v. Reed</i> ,	
2	523 F. Supp. 2d 1005 (N.D. Cal. 2007). .....	21, 22, 23
3	<i>Connally v. General Const. Co.</i> ,	
4	269 U.S. 385 (1926). .....	16
5	<i>De Jonge v. Oregon</i> ,	
6	299 U.S. 353 (1937). .....	15
7	<i>Dennis v. Higgins</i> ,	
8	498 U.S. 439 (1991). .....	9
9	<i>Doctor John's, Inc. v. Sioux City</i> ,	
10	305 F. Supp. 2d 1022 (N.D. Iowa 2004). .....	24
11	<i>Duncan v. Louisiana</i> ,	
12	391 U.S. 145 (1968). .....	17
13	<i>Dunn v. Blumstein</i> ,	
14	405 U.S. 330 (1972). .....	15, 18
15	<i>Earth Island Inst. v. United States Forest Serv.</i> ,	
16	351 F.3d 1291 (9th Cir. 2003). .....	8
17	<i>Eisenstadt v. Baird</i> ,	
18	405 U.S. 438 (1972). .....	18
19	<i>Elrod v. Burns</i> ,	
20	427 U.S. 347 (1976). .....	21
21	<i>Epperson v. Arkansas</i> ,	
22	393 U.S. 97 (1968). .....	11
23	<i>Everson v. Board of Ed. of Ewing</i> ,	
24	330 U.S. 1 (1947). .....	11
25	<i>Ex parte Arta</i> ,	
26	52 Cal. App. 380 (1921). .....	20
27	<i>Ex parte Martin</i> ,	
28	83 Cal. App. 2d 164 (1948). .....	19
	<i>Fantasyland Video, Inc. v. Cty. of San Diego</i> ,	
	496 F.3d 1040 (9th Cir. 2007). .....	12
	<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters &amp; Auto Truck Drivers</i> ,	
	415 U.S. 423 (1974). .....	8
	<i>Grayned v. City of Rockford</i> ,	
	408 U.S. 104 (1972). .....	16

1	<i>Griswold v. Connecticut</i> ,	18
2	381 U.S. 479 (1965).....	
3	<i>Houston v. Hill</i> ,	14
4	482 U.S. 451 (1987).....	
5	<i>IDK, Inc. v. Clark Cnty.</i> ,	13, 14
6	836 F.2d 1185 (9th Cir. 1988).....	
7	<i>In re J.M.</i> ,	13
8	36 Cal. App. 5th 668 (2019). ....	
9	<i>Jew Ho v. Williamson</i> ,	19
10	103 F. 10 (C.C. Cal. 1900).....	
11	<i>Jorgensen v. Cassiday</i> ,	24
12	320 F.3d 906 (9th Cir. 2003).....	
13	<i>Ketchum v. Alameda Cnty.</i> ,	9
14	811 F.2d 1243 (9th Cir. 1987).....	
15	<i>Lemon v. Kurtzman</i> ,	12
16	403 U. S. 602 (1971).....	
17	<i>Los Angeles All. For Survival v. City of Los Angeles</i> ,	13
18	22 Cal. 4th 352 (2000). ....	
19	<i>Maher v. Roe</i> ,	18
20	432 U.S. 464 (1977).....	
21	<i>Maynard v. U.S. Dist. Court for Cent. Dist. of California</i> ,	21
22	915 F.2d 1581 (9th Cir. 1990).....	
23	<i>Maynard v. U.S. Dist. Court for the Cent. Dist. of California</i> ,	21
24	701 F. Supp. 738 (C.D. Cal. 1988). ....	
25	<i>McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.</i> ,	11
26	545 U.S. 844 (2005).....	
27	<i>Memorial Hospital v. Maricopa Cnty.</i> ,	18, 21
28	415 U.S. 250 (1974).....	
	<i>Monell v. Dept. of Soc. Servs.</i> ,	9
	436 U.S. 658 (1978).....	
	<i>People ex rel. Gallo v. Acuna</i> ,	16
	14 Cal.4th 1090 (1997). ....	
	<i>People v. Chambers</i> ,	15
	22 Cal. App 2d 687 (1937).....	



1	<i>S.O.C., Inc. v. Cnty. of Clark</i> ,	
2	152 F.3d 1136 (9th Cir. 1998).....	21
3	<i>Sammartano v. First Jud. Dist. Ct.</i> ,	
4	303 F.3d 959 (9th Cir. 2002).....	21, 23
5	<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> ,	
6	411 U.S. 1 (1973).....	15
7	<i>Sessions v. Dimaya</i> ,	
8	138 S. Ct. 1204 (2018).....	16
9	<i>Shapiro v. Thompson</i> ,	
10	394 U.S. 618 (1969).....	18
11	<i>Stormans, Inc. v. Selecky</i> ,	
12	586 F.3d 1109 (9th Cir. 2009).....	22
13	<i>Stormans, Inc. v. Wiesman</i> ,	
14	794 F.3d 1064 (9th Cir. 2015).....	10
15	<i>Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush &amp; Co., Inc.</i> ,	
16	240 F.3d 832 (9th Cir. 2001).....	8
17	<i>Whitney v. California</i> ,	
18	274 U.S. 357 (1927).....	15
19	<i>Widmar v. Vincent</i> ,	
20	454 U.S. 263 (1981).....	13, 14
21	<i>Wilson v. Superior Court</i> ,	
22	13 Cal.3d 652 (1975). ....	13
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24	555 U.S. 7 (2008).....	8
25	<i>Wong Wai v. Williamson</i> ,	
26	103 F. 1 (C.C. Cal. 1900).....	19

## STATUTES

42 U.S.C. § 1983.....	9, 12
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## RULES

Fed. R. Civ. P. 65.	8
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# MEMORANDUM OF POINTS AND AUTHORITIES

## *U.S. Attorney General William Barr Issues Statement on Religious Practice and Social Distance*

On April 14, 2020, U.S. Attorney General William Barr issued the following statement:

...As we explain in the Statement of Interest, where a state has not acted evenhandedly, it must have a compelling reason to impose restrictions on places of worship and must ensure that those restrictions are narrowly tailored to advance its compelling interest. While we believe that during this period there is a sufficient basis for the social distancing rules that have been put in place, the scope and justification of restrictions beyond that will have to be assessed based on the circumstances as they evolve.

Religion and religious worship continue to be central to the lives of millions of Americans. This is true more so than ever during this difficult time. The pandemic has changed the ways Americans live their lives. Religious communities have rallied to the critical need to protect the community from the spread of this disease by making services available online and in ways that otherwise comply with social distancing guidelines.

The United States Department of Justice will continue to ensure that religious freedom remains protected if any state or local government, in their response to COVID-19, singles out, targets, or discriminates against any house of worship for special restrictions.

Meuser Dec., Ex. 8.

## INTRODUCTION

The United States and California Constitutions do not contain blanket exceptions for pandemics, and neither may California's lawmakers ignore fundamental Constitutional norms on the basis of a health crisis. In a knee-jerk response to the coronavirus pandemic, at a time when people of faith around the world have a greater need than ever for spiritual solace, Defendants have

1 criminalized communal worship across California. While protecting the health and  
 2 safety of the public during this crisis is certainly critically important—to Plaintiffs  
 3 also—that interest may not be secured by abrogating the rights and liberties  
 4 enshrined by the U.S. and California Constitutions.

5 Despite declarations of national, state, and local emergencies surrounding the  
 6 coronavirus outbreak, Defendants have decided to allow “essential” businesses (as  
 7 determined by Defendants on an *ad hoc* basis) to continue operations provided that  
 8 certain social distancing guidelines are followed. For example, Defendants permit  
 9 marijuana dispensaries, fast food restaurants, and laundromats to continue  
 10 operations, subject to these restrictions. Statewide, the news media have been  
 11 permitted to continue operations.

12 Churches and religious services, however, have not made Defendants’ cut.  
 13 Instead, Defendants insist that all religious worship take place only at home, by live-  
 14 streaming, apparently assuming that all Californians have access to high-speed  
 15 internet, computer equipment, a desire to add intrusive, data-collecting apps to their  
 16 computer devices, and the willingness to suspend a lifetime of worship practices at  
 17 the command of the government. The United States and California Constitutions  
 18 simply do not tolerate such arbitrary and discriminatory restrictions thrust upon  
 19 fundamental rights while less restrictive measures are available and are being  
 20 allowed for entities the Government deems “essential.” This Court should  
 21 immediately enjoin Defendants from further violating Plaintiffs’ religious liberty by  
 22 ascribing second-class status to faith practices.

### 23 **RELEVANT FACTUAL BACKGROUND**

24 On March 13, 2020, President Donald J. Trump proclaimed a National State of  
 25 Emergency as a result of the threat of the emergence of a novel coronavirus, COVID-  
 26 19. Verified Complaint [dkt. #1-1] (“Compl.”), ¶ 28. Since the initial outbreak of  
 27 COVID-19 in the United States in February and March 2020, the federal  
 28 government’s projections of the anticipated national death toll related to the virus has

1 decreased substantially, by an order of magnitude. Despite such revisions, Defendants  
 2 have increasingly restricted—where not outright banned— Plaintiffs’ engagement in  
 3 constitutionally-protected activities. Compl., ¶ 29.

4 On March 4, 2020, California Governor Gavin Newsom proclaimed a State of  
 5 Emergency as a result of the threat of COVID-19. Compl., ¶ 30. On March 19, 2020,  
 6 California Governor Newsom issued Executive Order N-33-20 in which he ordered  
 7 “all residents are directed to immediately heed the current State public health  
 8 directives.” Compl., ¶ 31. The state public health directive requires “all individuals  
 9 living in the State of California to stay home or at their place of residence except as  
 10 needed to maintain continuity of operations of the federal critical infrastructure sectors  
 11 ...”. Compl., ¶ 32. The public health directive provides that its directives “shall stay in  
 12 effect until further notice.” Compl., ¶ 35.

13 On March 22, 2020, the California Public Health Officer designated a list of  
 14 “Essential Critical Infrastructure Workers.” Included on the list of the “essential  
 15 workforce” are “faith based services that are provided through streaming or other  
 16 technology.” Compl., ¶ 33. The California state decree prohibits all religious leaders  
 17 from conducting in-person and out-of-home religious services, regardless of measures  
 18 taken to reduce or eliminate the risk of the virus spreading, such as offering socially  
 19 distanced seating for family units, mask and glove requirements, or drive-in-only  
 20 services. Meanwhile, the list deems the continuity of services provided by coffee  
 21 baristas, burger flippers, and laundromat technicians to be so necessary for society that  
 22 these activities are permitted to continue under the State Order, despite the existence  
 23 of the very same risk Defendants rely on to inhibit the exercise of fundamental First  
 24 Amendment rights. Compl., ¶ 34.

25 On or about April 7, 2020, Dr. Erin Gustafson signed the San Bernardino Order.  
 26 Compl., ¶ 36. This Order “allow[s] faith based services that are provided through  
 27 streaming or other technology, while individuals remain in their homes, but does not  
 28 allow individuals to leave their home for driving parades or drive-up services, or for

1 picking up non-essential items.” Compl., ¶ 37. It also states that any violation “is a  
 2 crime punishable by fine, imprisonment, or both.” Compl., ¶ 39. The Order states that  
 3 it will remain in effect “until rescinded.” Compl., ¶ 40.

4 On April 8, 2020, San Bernardino County released a document on their website  
 5 titled “Clarification of religious services and face-covering order” (hereinafter  
 6 Clarification”). The Clarification is not signed by the Public Health Officer nor does it  
 7 revoke the April 7<sup>th</sup> Order. Compl., ¶ 44-45. It states “[o]n the subject of enforcement,  
 8 the public is advised that although violation of a health order is a violation of the  
 9 California Health and Safety Code, the County does not expect law enforcement to  
 10 broadly impose citations on violators.” Compl., ¶ 46. The Clarification does not  
 11 revoke law enforcement authority to criminally charge any individual who violates the  
 12 San Bernardino Order. Compl., ¶ 47.

13 Defendants have granted law enforcement unfettered discretion when deciding  
 14 whether or not to enforce the San Bernardino Order. Compl., ¶ 48. The Clarification  
 15 states that the “specific reference to drive-in religious service so close to major  
 16 religious observances taking place during the next four days, for which organizations  
 17 had already conducted considerable planning and incurred expenses, are clarified as  
 18 follows: Organizations that have planned such services for the coming weekend  
 19 should proceed with those services if they choose to do so and make every effort to  
 20 prevent contact between congregants.” Compl., ¶ 49.

21 Patrick Scales’ church, Shield of Faith Family Church, Inc., is located in San  
 22 Bernardino County. Compl., ¶ 51. He desires to hold in-person religious services for  
 23 those congregants who desire to attend church. Compl., ¶ 52. Scales believes that he  
 24 can hold such religious services and abide by social distancing tips recommended by  
 25 the CDC by keeping congregants at least six feet apart, and provide for the wearing of  
 26 masks and gloves. Compl., ¶ 53. He believes that religious services are essential for  
 27 the spiritual health of the congregation so that the congregants can exhort one another  
 28 during these difficult times. Compl., ¶ 54. Scales recognizes that most of his

1 congregants will stay at home, but he wants to be available for those who are healthy  
 2 and feel that in-person church service can be safely attended with social distancing  
 3 and other measures. Compl., ¶ 55.

4 Wendy Gish attends Shield of Faith Family Church and would attend an in-  
 5 person church service should it be made available to her. Compl., ¶ 56. She regularly  
 6 attends church services and believes that she has a scriptural command to “not neglect  
 7 meeting together.” Compl., ¶ 57. To her knowledge, Gish has never had or contracted  
 8 said coronavirus; she has never been at any time exposed to the danger of contracting  
 9 it and has never been in close proximity to any locality where said coronavirus has or  
 10 have existed. Compl., ¶ 58. As a result of not being able to attend in-person church,  
 11 she has been deprived of the opportunity for important cultural, social, and religious  
 12 activities, including speech activities pertaining to the coronavirus outbreak and the  
 13 government’s response. Compl., ¶ 59.

14 As of April 11, 2020, San Bernardino County has eight hundred ten (810)  
 15 coronavirus cases and twenty-five (25) COVID-19 associated deaths, according to  
 16 information posted on the county’s website. Compl., ¶ 60. The United States Census  
 17 estimates that as of July 1, 2019, San Bernardino County’s population is 2,180,085  
 18 people. Compl., ¶ 61.

19 On or about April 6, 2020, Dr. Cameron Kaiser and George Johnson signed the  
 20 Riverside Order. Compl., ¶ 62. It prohibits “[a]ll public or private gatherings . . .  
 21 including, but not limited to an auditorium, . . . church, . . . or any other indoor or  
 22 outdoor space used for any non-essential purpose including, but not limited to . . .  
 23 church . . . .” Compl., ¶ 63. Exempted from its prohibition on public or private  
 24 gatherings are numerous services, industries, and activities, including: “courts of law,  
 25 medical providers . . . daycare and child care . . . [and] necessary shopping at fuel  
 26 stations, stores or malls,” provided that a “state and federal guidelines for infection  
 27 control” are observed. Compl., ¶ 64. The Riverside Order provides that “[a]ll essential  
 28 business that remain in operation . . . shall follow the Social Distancing and Infection



1 Control Guidelines published by the [Center for Disease Control] and California  
 2 Department of Public Health . . . or the facility shall be closed.” Compl., ¶ 65. The  
 3 Order expressly states that any violation “is a crime punishable by fine,  
 4 imprisonment, or both.” Compl., ¶ 67.

5 On April 10, 2020, Riverside County issued a press release in which they stated  
 6 that “Drive-up church services that practice proper social distancing will be allowed  
 7 this weekend in Riverside County, although the order to prohibit such activities will  
 8 remain after Easter Sunday.” Compl., ¶ 71. The April 10<sup>th</sup> clarification was issued by  
 9 George Johnson. Compl., ¶ 72.

10 James Moffatt’s church, “Church Unlimited” is located in Riverside County.  
 11 Compl., ¶ 73. Upon learning about the coronavirus, he immediately had his church  
 12 building cleaned and disinfected. Compl., ¶ 74. Moffatt ensured that sanitizing  
 13 materials were available to each person who entered his church and encouraged family  
 14 units to sit at least six feet apart. Compl., ¶ 75. He encouraged anyone who was  
 15 uncomfortable with gathering during coronavirus to stay at home. Compl., ¶ 76. He  
 16 also encouraged anyone who was sick to stay at home. Compl., ¶ 77.

17 On April 9, 2020, Moffatt was fined \$1,000 for violating the Riverside Order  
 18 for holding a church service on April 5, 2020, Palm Sunday. Compl., ¶ 78. To his  
 19 knowledge, he has never had or contracted the coronavirus; he has never been at any  
 20 time exposed to the danger of contracting it; and has never been in close proximity to  
 21 any locality where said coronavirus has or have existed. Compl., ¶ 79. But for the  
 22 Riverside Order and Defendants’ enforcement thereof, Moffatt would continue to hold  
 23 in-person religious services in Riverside County, while taking the same social  
 24 distancing precautions taken by “essential businesses” that Defendants continue to  
 25 allow to operate in the county, despite any prevalence of COVID-19. He believes that  
 26 it is important for Christians to come together, remember, and celebrate all that Jesus  
 27 has done for this world. Compl., ¶ 80. As a result of not being able to conduct an in-  
 28 person church service, Moffatt has been deprived of the opportunity for important

1 cultural, socials, and religious activities, including speech activities pertaining to the  
2 coronavirus outbreak and the government's response. Compl., ¶ 81.

3 Brenda Wood's church, Word of Life Ministries International Inc. is located in  
4 Riverside County. Compl., ¶ 82. Word of Life Ministries International Inc. has  
5 approximately 20-30 regular attendees. Compl., ¶ 83. Wood believes Scripture  
6 commands her to provide opportunities for the believers to obey Hebrews 10:25 where  
7 the believers meet together and encourage one another. Compl., ¶ 84.

8 Wood held a drive-up church service on Easter Sunday. Compl., ¶ 85. The  
9 drive-up church service provided appropriate social distancing, with everyone wearing  
10 masks and staying in their vehicles. The restrooms were not made available. Each car  
11 was parked at least six feet from other vehicles. Compl., ¶ 86. During the service,  
12 Wood used a portable sound amplification system. The congregants had to roll down  
13 their windows in order to listen. Compl., ¶ 87. During the service, communion was  
14 served by an individual wearing a mask and gloves and the elements were pre-  
15 packaged. The person serving communion used tongs to remove the communion cups  
16 from the pre-packaged box. Compl., ¶ 88. At this time, Wood has postponed all  
17 baptisms at her church. Compl., ¶ 89. She would like to hold drive-up church services  
18 every Sunday following safe social distancing practices until the state of emergency  
19 has been lifted. Compl., ¶ 89.

20 As of April 11, 2020, Riverside County has one thousand four hundred thirty-  
21 one (1,431) coronavirus cases and forty-one (41) coronavirus associated deaths,  
22 according to information posted on the county's website. Compl., ¶ 91. The United  
23 States Census estimates that as of July 1, 2019, Riverside County's population is  
24 2,470,546 people. Compl., ¶ 92.

## 25 **LEGAL STANDARD**

26 A temporary restraining order preserves the status quo and prevents irreparable  
27 harm until a hearing can be held on a preliminary injunction application. *See Granny*  
28 *Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423,



1 439 (1974). A temporary restraining order may be issued without providing the  
 2 opposing party an opportunity to be heard where “specific facts in an affidavit or a  
 3 verified complaint clearly show that immediate and irreparable injury, loss, or damage  
 4 will result to the movant before the adverse party can be heard in opposition,” and  
 5 “the movant’s attorney certifies in writing any efforts made to give notice and the  
 6 reasons why it should not be required.” Fed. R. Civ. P. 65(b)(1).

7 The standards for issuing a temporary restraining order and a preliminary  
 8 injunction are the same. *See, e.g., Stuhlbarg Int’l Sales Co., Inc. v. John D. Brush &*  
 9 *Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). The Ninth Circuit has established two  
 10 sets of criteria for evaluating a request for injunctive relief. *Earth Island Inst. v.*  
 11 *United States Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir. 2003). Under the  
 12 “traditional” criteria, a plaintiff must show (1) a strong likelihood of success on the  
 13 merits, (2) a likelihood of irreparable injury to plaintiff if preliminary relief is not  
 14 granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the  
 15 public interest. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20  
 16 (2008). Alternatively, a temporary restraining order or preliminary injunction may be  
 17 appropriate when a movant raises “serious questions going to the merits” and the  
 18 “balance of hardships tips sharply in the plaintiff’s favor,” provided that the plaintiff is  
 19 able to show there is a likelihood of irreparable injury and that the injunction is in the  
 20 public interest. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

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## ARGUMENT

### **I. PLAINTIFFS ARE ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF.**

#### **A. There Is a Strong Likelihood Plaintiffs' Will Succeed in Proving Their Claims on Multiple Constitutional Grounds.**

##### **1. Defendants' Ban on Communal Religious Worship Violates the First Amendment's Free Exercise Clause and California Constitution Article 1, Section 4.**

As Plaintiffs' first and eleventh causes of action, they assert facial and as-applied challenges pursuant to (1) 42 U.S.C. Section 1983 on the grounds that Defendants' Orders violate the Free Exercise Clause of the First Amendment to the U.S. Constitution, and (2) state law on the grounds that the Orders violate Article 1, Section 4 of the California Constitution.<sup>1</sup> *See Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004) (implicitly recognizing state law claim for violations of Art. 1, Section 4 of the California Constitution); *Ketchum v. Alameda Cnty.*, 811 F.2d 1243, 1245 (9th Cir. 1987) (a cause of action arises under Section 1983 where "(1) the conduct that harm[ed] [Plaintiffs] [was] committed under color of state law (i.e. state action), and (2) the conduct . . . deprive[d] [Plaintiffs] of a constitutional right."); *Dennis v. Higgins*, 498 U.S. 439 (1991) (The rights guaranteed by Section 1983 are to be "liberally and beneficently construed.") (*quoting Monell v. Dep't. of Soc. Servs.*, 436 U.S. 658, 684 (1978)).<sup>2</sup>

The First Amendment to the U.S. Constitution prohibits government actors from enforcing any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const. amend. I; *see also Cantwell v. Connecticut*, 310

<sup>1</sup> Defendants cannot credibly contest that the issuance and enforcement of the Orders by Defendants in their official capacities constitute state action. Accordingly, the likelihood of Plaintiffs' success turns on whether Defendants deprived Plaintiffs of a constitutional right. As discussed herein, Plaintiffs have amply established such deprivations.

1 U.S. 296, 303 (1940) (applying the First Amendment to the States through the  
 2 Fourteenth Amendment). The California Constitution similarly protects the “[f]ree  
 3 exercise and enjoyment of religion without discrimination or preference.” Cal. Const.,  
 4 art. I, § 4; *see also Catholic Charities of Sacramento, Inc.*, 32 Cal. 4th at 562.

5 As the Supreme Court has noted, “a law burdening religious practice that is not  
 6 neutral or not of general application must undergo the most rigorous of scrutiny.”  
 7 *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993). “A law  
 8 is not generally applicable if its prohibitions substantially underinclude non-  
 9 religiously motivated conduct that might endanger the same governmental interest that  
 10 the law is designed to protect.” *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th  
 11 Cir. 2015) (citing *Lukumi*, 508 U.S. at 542–46). “In other words, if a law pursues the  
 12 government’s interest ‘only against conduct motivated by religious belief,’ but fails to  
 13 include in its prohibitions substantial, comparable secular conduct that would  
 14 similarly threaten the government’s interest, then the law is not generally applicable.”  
 15 *Id.*

16 The Orders are neither neutral nor of general application. Defendants’  
 17 restrictions have specifically and explicitly targeted religious and “faith-based”  
 18 services and are thus not neutral on their face. Defendants have prohibited certain  
 19 public and private gatherings deemed “non-essential,” including out-of-home religious  
 20 services, while exempting a laundry list of industries and services purportedly  
 21 “essential” to the government’s various interests, including medical cannabis  
 22 dispensaries and other medical providers, courts, public utilities, daycare and  
 23 childcare, and “necessary” shopping. Further, several Defendants have granted *ad hoc*  
 24 exemptions to the Orders for particular religious gatherings of particular faiths – i.e.,  
 25 Christians permitted to celebrate Easter, but not for other gatherings or other faiths.

26 Defendants’ mandates are not “narrowly tailored” to further any compelling  
 27 governmental interest. Defendants have granted numerous special exemptions to their  
 28 bans on public gatherings and conduct, including for purportedly “essential”

businesses and activities, provided that social distancing practices are observed; and even for out-of-home religious services during Easter, an important day of religious significance for Christians. Since these gatherings may be permitted, there can be no doubt that Defendants may, and therefore must, permit Plaintiffs to engage in equivalent religious activities and services provided that Plaintiffs also adhere to the social distancing guidelines currently in place.

Requiring Plaintiffs to abstain from religious gatherings, despite substantial modifications to satisfy the public health interests at stake, violates Plaintiffs' Constitutional right to free exercise of religion. The state does not have the power under our Constitutional scheme to decree that as to faith activities, "streaming" (for those congregations and parishioners with the wealth and technological acumen to partake of such truncated substitutes) is "good enough" while at the same time acknowledging media organizations' First Amendment rights to freedom of the press. Because narrower restrictions may be applied to Plaintiffs, while still protecting legitimate governmental interests, the Orders are unconstitutional and Defendants should be enjoined.

## **2. The Orders Violate the Establishment Clause of the First Amendment.**

The Orders and Defendants' enforcement thereof violate the First Amendment, both facially and as-applied to Plaintiffs. The Establishment Clause of the "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). The Establishment Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947).

Under the *Lemon* test, the courts ask whether the government action (1) has a clear secular purpose; (2) has a "principal or primary effect" that "neither advances

nor inhibits religion”; and (3) does not foster “an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U. S. 602 (1971); *but see Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067 (2019) (writing for the plurality, Justice Samuel Alito refused to apply the *Lemon* test to a religious-display case, but failed to garner majority support for any other test).

Defendants have not and do not act with a clearly secular purpose in adopting and enforcing the Orders. The Orders are ambiguous in scope and application, granting law enforcement unfettered discretion in deciding what conduct shall constitute a crime, and what conduct is “essential,” and therefore permissible. This discretion has already been exercised by government officials to temporarily exempt specific faiths (namely, Christians) from compliance with the Orders during Easter. It is not for Defendants to determine which faiths, and on which days of religious significance to those faiths, religious services may take place.

The Orders and Defendants’ *ad hoc* enforcement thereof have the primary effect of inhibiting religious activity. Indeed, the Orders expressly prohibit religious services unless practiced within the home, by live-streaming. As a result, Defendants have also failed to avoid excessive government entanglement with religion. Defendants permit only some forms of religious observance, while disallowing all communal worship. Thus, the Court should grant this Application and enjoin further enforcement of the Orders.

### **3. Defendants Violate Plaintiffs’ Free Speech Rights.**

As Plaintiffs’ third and ninth causes of action, they assert facial and as-applied challenges pursuant to (1) 42 U.S.C. Section 1983 on the grounds that Defendants’ Orders violate the Free Speech Clause of the First Amendment to the U.S. Constitution, and (2) state law on the grounds that the Orders violate Article 1, Section 2 of the California Constitution. “[T]he California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment.” *Fantasyland Video, Inc. v. Cty. of San Diego*, 496 F.3d 1040, 1042 (9th Cir. 2007).

1 However, in some areas, the protection afforded by the California liberty of speech  
 2 clause is coterminous with that provided by the federal Constitution. *Los Angeles All.*  
 3 *For Survival v. City of Los Angeles*, 22 Cal. 4th 352, 367, n.12 (2000). California  
 4 courts treat the prior restraint and overbreadth doctrine similarly to federal courts. *See*  
 5 *Wilson v. Superior Court*, 13 Cal.3d 652, 658-62 (1975) (relying mostly on federal  
 6 citations to analyze prior restraint doctrine under California Constitution); *In re J.M.*,  
 7 36 Cal. App. 5th 668, 680 (2019) (citing some federal cases and paralleling  
 8 overbreadth doctrine analysis under California Constitution with that under the U.S.  
 9 Constitution).

10 The Orders—by acting as a prior restraint to protected speech—are  
 11 unconstitutional facially and as-applied because they impermissibly burden Plaintiffs’  
 12 right to freedom of speech under the First Amendment and California Constitution,  
 13 Article 1, Section 2. *See IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1191 (9th Cir. 1988)  
 14 (stating that a law is facially unconstitutional if it impermissibly burdened the  
 15 plaintiff’s rights, such as in the case of a prior restraint); U.S. Const., amend. I; Cal.  
 16 Const., art. I, § 2. The term prior restraint is used “to describe administrative and  
 17 judicial orders forbidding certain communications when issued in advance of the time  
 18 that such communications are to occur.” *Alexander v. United States*, 509 U.S. 544,  
 19 550 (1993) (citation omitted). “Religious worship and discussion are protected speech  
 20 under the First Amendment.” *Widmar v. Vincent* (“*Widmar*”), 454 U.S. 263, 269, n. 6  
 21 (1981).

22 Here, the Orders, with the exception of Easter, ban all in-person, religious  
 23 meetings by excluding faith-based services from a list of essential businesses, and  
 24 prohibiting people from going outside their homes. Compl. at ¶¶ 31-50, 62-71. The  
 25 Orders were issued before the protected speech was to occur because they prohibit  
 26 congregating to engage in protected speech for the foreseeable future. Accordingly,  
 27 the Orders are facially unconstitutional because they act as a prior restraint to  
 28 protected speech: religious services.



1 The Orders are also facially unconstitutional on the separate basis that they are  
 2 substantially overbroad. *See IDK, Inc.*, 836 F.2d at 1191 (stating that a law is facially  
 3 unconstitutional if it impermissibly burdens the rights of third parties, such as in the  
 4 case of an unconstitutionally overbroad law). “Substantial overbreadth” is shown not  
 5 where one shows that he can conceive of some impermissible applications of the  
 6 order, but where one can show a significant number of situations where an order could  
 7 be applied to prohibit constitutionally protected speech. *Houston v. Hill* (“*Houston*”),  
 8 482 U.S. 451 (1987) (ordinance--outlawing interruption of police officers while  
 9 carrying out their duties--was unconstitutionally overbroad because it criminalized  
 10 substantial amount of constitutionally protected speech and allowed police unfettered  
 11 discretion in enforcement of the ordinance).

12 Here, the purpose of the Orders is to slow the transmission rate of the COVID-  
 13 19 pandemic in California and its counties. However, it virtually eliminates all in-  
 14 person, religious meetings (Compl. ¶¶ 37-39, 63-67), a form of protected speech  
 15 (*Widmar*, 454 U.S. at 269, n.6), despite the fact that alternatives, such as drive-in  
 16 services, would allow such religious speech without risking transmission. This is a  
 17 substantial burden because it covers the protected speech that every Californian who  
 18 attends mosques, temples, synagogues, gurdwaras, and churches regularly usually  
 19 would enjoy. In their current form, the Orders do not allow drive-in church services;  
 20 unsigned clarifications from San Bernardino and Riverside County allowed such  
 21 services for Easter, but not for any Sunday thereafter, nor exceptions for other  
 22 faiths. Compl. ¶¶ 37, 49-50.

23 Not only this, but here, akin to *Houston*, law enforcement officers have  
 24 unfettered discretion in enforcing the law because they are provided no standards as to  
 25 when to enforce, or exempt some event from, the law. Furthermore, violators of the  
 26 Orders are liable for criminal penalties. Compl. ¶¶ 39, 67. Because the Orders  
 27 criminalize a substantial amount of protected speech that is unnecessary for their  
 28 underlying purpose, and provide law enforcement officers no guidance as to

1 enforcement, the Orders are unconstitutionally overbroad, and this Court should grant  
2 injunctive relief.

3 **4. The Orders Ban All Public and Private Assembly in Violation of the**  
4 **First Amendment to the U.S. Constitution and California**  
5 **Constitution.**

6 “The right of free speech, the right to teach, and the right of assembly are, of  
7 course, fundamental rights.” *Whitney v. California*, 274 U.S. 357, 373 (1927). The  
8 First Amendment of the Constitution protects the “right of the people peaceably to  
9 assemble.” The Freedom of Assembly Clause was incorporated against the states in  
10 *De Jonge v. Oregon*, 299 U.S. 353 (1937). The California Constitution also protects  
11 the right to freely assemble. *See, e.g.*, Cal. Const. art. 1, § 3; *People v. Chambers*, 22  
12 Cal. App 2d 687, 706 (1937) (“laws should not infringe upon our guaranteed freedom  
13 of speech and lawful assembly.”). When a government practice restricts fundamental  
14 rights, it is subject to “strict scrutiny” and can be justified only if it furthers a  
15 compelling government purpose and, even then, only if no less restrictive alternative  
16 is available. *See, e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17  
17 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

18 The Orders and Defendants’ enforcement thereof violate the First Amendment,  
19 both facially and as-applied to Plaintiffs. By denying Plaintiffs the ability to conduct  
20 services that complies with the CDC guidelines for social distancing, Defendants are  
21 in violation of the Freedom of Assembly Clause. Defendants cannot meet the no-less-  
22 restrictive-alternative test. The CDC’s social distancing guidelines are appropriate to  
23 limit the spread of COVID-19. Imposing more restrictive requirements that target  
24 churches and their drive-in services while at the same time allowing restaurants,  
25 coffee shops, marijuana dispensaries to operate drive-ups is not the least restrictive  
26 means of achieving Defendants’ public safety goals.

27 Requiring Plaintiffs to abstain from religious gatherings, despite substantial  
28 modifications to satisfy the public health interests at stake (modifications that have



1 been deemed acceptable in the cases of operations deemed “essential” by government  
2 decree), violates Plaintiffs’ Constitutional right to peaceably assemble.

### 3 **5. Defendants’ Orders Are Void for Reasons of Vagueness.**

4 A regulation is constitutionally void on its face when, as matter of due process,  
5 it is so vague that persons “of common intelligence must necessarily guess at its  
6 meaning and differ as to its application.” *Connally v. General Const. Co.*, 269 U.S.  
7 385, 391 (1926); *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1115 (1997). Vague  
8 laws “trap the innocent by not providing fair warning.” *Grayned v. City of Rockford*,  
9 408 U.S. 104, 108–109 (1972). If “arbitrary and discriminatory enforcement is to be  
10 prevented, laws must provide explicit standards for those who apply them.” *Id.* The  
11 problem with a vague regulation is that it “impermissibly delegates basic policy  
12 matters to policemen, judges, and juries for resolution on an ad hoc and subjective  
13 basis with the attendant dangers of arbitrary and discriminatory application.” *Id.*; *see*  
14 *also Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

15 The Orders at issue in this case are so vague as to their scope and application as  
16 to run afoul of the Due Process Clause of the Fourteenth Amendment. Embedded  
17 within the State Order is a public health directive to shelter in place. The State Order  
18 itself merely orders the public to “heed” the public health directive, it does not appear  
19 to order compliance therewith; Webster’s Dictionary defines the word “heed” to mean  
20 “to give consideration or attention to”—not to “adhere” or comply. Despite this, state  
21 and local officials and the media have widely reported the State Order to require  
22 compliance with the public health directive by sheltering in place. The San Bernardino  
23 and Riverside Orders, for example, both state this.<sup>3</sup> Compl. Ex. 2, ¶ 2; Ex. 3, ¶ 1  
24

25  
26 <sup>3</sup> The New York Times, for example, reported that “Gov. Gavin Newsom of  
27 California on Thursday ordered Californians—all 40 million of them—to stay in their  
28 houses....” As of the date of this filing, the article is available online at the following  
URL: <https://www.nytimes.com/2020/03/19/us/California-stay-at-home-order-virus.html>.

1 (“Executive Order N-33-20 issued by the Governor of the State of California . . .  
 2 ordered all individuals living in the State of California to stay home . . .”). Given this  
 3 ambiguity, neither Plaintiffs nor any other reasonable person can understand precisely  
 4 what is being ordered, and what actions may result in criminal penalties, fines, or  
 5 imprisonment. As such, the State Order is void for vagueness.

6 The San Bernardino and Riverside Orders, and Defendants enforcement thereof,  
 7 muddle the issue further. None of the Orders exempt specific religious holidays.  
 8 Nevertheless, San Bernardino County explicitly exempted compliance during Easter  
 9 weekend, only. Meuser Decl., Ex. 5. San Bernardino County officials have also stated  
 10 that it “does not expect law enforcement to broadly impose citations on violators” and  
 11 that “the expectation is that law enforcement will rely upon community members to  
 12 use good judgment, common sense, and act in the best interest of their own health and  
 13 the health of their loved ones and the community at large.” Meuser Decl., Ex. 2. In  
 14 apparent self-contradiction, the Riverside Order states that “non-essential personnel . .  
 15 . are prohibited from entry into any hospital or long-term care facility,” ostensibly  
 16 banning “non-essential” people from seeking medical care. Compl., Ex. 3. Yet, that  
 17 same Order states that “visitors” may be permitted access to hospitals under certain  
 18 conditions. Compl., Ex. 3.

19 No reasonable person can make sense of what conduct is permitted under the  
 20 Orders and what conduct will result in criminal penalties.

## 21 **6. The Orders Violate Plaintiffs’ Substantive Due Process Rights** 22 **Under the Fourteenth Amendment.**

23 The Orders and Defendants’ enforcement thereof violate Plaintiffs’ substantive  
 24 due process rights secured by the Fourteenth Amendment to the U.S. Constitution.  
 25 Under the Due Process Clause of the Fourteenth Amendment, no State shall “deprive  
 26 any person of life, liberty, or property, without due process of law.” The fundamental  
 27 liberties protected by this Clause include most of the rights enumerated in the Bill of  
 28 Rights. *See Duncan v. Louisiana*, 391 U.S. 145, 147–149 (1968). In addition, these

1 liberties extend to certain personal choices central to individual dignity and autonomy,  
 2 including intimate choices that define personal identity and beliefs. *See, e.g.,*  
 3 *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479,  
 4 484–486 (1965).

5 Plaintiffs’ rights to freedom of religion, assembly, speech, and travel are  
 6 fundamental rights protected by the U.S. Constitution. *See, e.g., Aptheker v. Secretary*  
 7 *of State*, 378 U.S. 500, 520 (1964); *Kent v. Dulles*, 357 U.S. 116, 127 (1958). When a  
 8 government practice restricts fundamental right, as is the case here, it is subject to  
 9 “strict scrutiny” and can be justified only if it furthers a compelling government  
 10 purpose, and, even then, only if no less restrictive alternative is available. *See, e.g.*  
 11 *Memorial Hospital v. Maricopa Cnty.*, 415 U.S. 250, 257-258 (1974); *Dunn*, 405 U.S.  
 12 at 339-341; *Shapiro v. Thompson*, 394 U.S. 618, 660 (1969); *Maher v. Roe*, 432 U.S.  
 13 464, 488 (1977).

14 Strict scrutiny applies to Plaintiffs’ claims because all three Orders mandate that  
 15 Plaintiffs stay at home because Plaintiffs desired actions are not deemed essential,  
 16 impinging on their fundamental rights to freedom of religion, assembly, speech, and  
 17 travel. Defendants’ mandates are not “narrowly tailored” to further any compelling  
 18 governmental interest. Defendants’ have granted numerous special exemptions to their  
 19 bans on public gatherings, including for purportedly “essential” businesses and  
 20 activities, provided that social distancing practices are observed; and even for out-of-  
 21 home religious services during Easter. Since these gatherings can be permitted, there  
 22 can be no doubt that Defendants may, and therefore must, permit Plaintiffs to engage  
 23 in equivalent constitutionally-protected activities provided that Plaintiffs also adhere  
 24 to the social distancing guidelines.

## 25 **7. The Orders Violate Article 1, Section 1 of the California** 26 **Constitution.**

27 All Californians “are by nature free and independent and have inalienable  
 28 rights. Among these are enjoying and defending life and liberty, acquiring, possessing,

1 and protecting property, and pursuing and obtaining safety, happiness, and privacy.  
 2 Cal. Const. art. 1, § 1. Understanding the basic fundamental right of liberty, California  
 3 courts have held that Public Health Officials' authority is limited. Before exercising  
 4 their full powers to quarantine, there must be "reasonable grounds [] to support the  
 5 belief that the person so held is infected." *Ex parte Martin*, 83 Cal. App. 2d 164  
 6 (1948). Public Health Officials must be able to show "probable cause to believe the  
 7 person so held has an infectious disease ..." *Id.*

8 In a case that is somewhat analogous to what Californians are facing with the  
 9 coronavirus pandemic of 2020, California courts found that Public Health Officials  
 10 could not quarantine 12 blocks of San Francisco Chinatown because of nine deaths  
 11 due to bubonic plague. *See Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900); *Wong*  
 12 *Wai v. Williamson*, 103 F. 1 (C.C. Cal. 1900). These courts found it "purely arbitrary,  
 13 unreasonable, unwarranted, wrongful, and oppressive interference with the personal  
 14 liberty of complainant" who had "never had or contracted said bubonic plague; that he  
 15 has never been at any time exposed to the danger of contracting it, and has never been  
 16 in any locality where said bubonic plague, or any germs of bacteria thereof, has or  
 17 have existed." *Jew Ho*, 103 F. at 10.

18 In *Jew Ho* and *Wong Wai*, the courts found that there were more than 15,000  
 19 people living in the twelve blocks of San Francisco Chinatown who were to be  
 20 quarantined. The courts found it unreasonable to shut down the ability of over 15,000  
 21 people to make a living because of nine deaths. This was one death for every 1,666  
 22 inhabitants of Chinatown. As of July 1, 2020, San Bernardino and Riverside Counties  
 23 have a combined population of 4,650,631 individuals and as of April 11, 2020, San  
 24 Bernardino and Riverside Counties have a total of 66 coronavirus deaths. That is one  
 25 death for every 70,464 inhabitants.

26 California courts have found that "a mere suspicion [of a contagious disease],  
 27 unsupported by facts giving rise to reasonable or probable cause, will afford no  
 28 justification at all *for depriving persons of their liberty* and subjecting them to virtual

1 imprisonment under a purported order of quarantine.” *Ex parte Arta*, 52 Cal. App.  
 2 380, 383 (1921) (emphasis added). Plaintiffs have never had or contracted said  
 3 coronavirus; they have never been at any time exposed to the danger of contracting it,  
 4 and have never been in any locality where said coronavirus, or any germs of bacteria  
 5 thereof, are known to have existed.

6 Requiring Plaintiffs to abstain from all religious gatherings, despite substantial  
 7 modifications to satisfy the public health interests at stake, violates their California  
 8 Constitutional liberty rights.

9 **8. Defendants Violate the Equal Protection Clause of the Fourteenth**  
 10 **Amendment.**

11 As to Plaintiffs’ seventh claim, the Orders and Defendants’ enforcement thereof  
 12 violate the Fourteenth Amendment, both facially and as applied to Plaintiffs. The  
 13 Fourteenth Amendment of the Constitution provides that “[n]o State shall . . . deny to  
 14 any person within its jurisdiction the equal protection of the laws.” U.S. Const.  
 15 amend. XIV, § 1. Equal protection requires the state to govern impartially—not draw  
 16 arbitrary distinctions between individuals based solely on differences that are  
 17 irrelevant to a legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne*  
 18 *Living Ctr.*, 473 U.S. 432, 446 (1985).

19 Defendants intentionally and arbitrarily categorize individuals and conduct as  
 20 either “essential” or “non-essential.” Compl. ¶¶ 31-34, 37, 63-65. Those persons  
 21 classified as “essential,” or as participating in essential services, are permitted to go  
 22 about their business and activities provided certain social distancing practices are  
 23 employed. *Id.* Those classified as “nonessential,” or as engaging in non-essential  
 24 activities, are required to stay in their residence, unless it becomes necessary for them  
 25 to leave for one of the enumerated “essential” activities. *Id.*

26 Strict scrutiny under the Equal Protection Clause applies where, as here, the  
 27 classification impinges on a fundamental right, including the right to practice religion  
 28 freely, to right to free speech and assembly, and the right to travel, among

others. *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*, 701 F. Supp. 738, 742 (C.D. Cal. 1988) (“When a law disadvantages a suspect class or impinges upon a ‘fundamental right,’ the court will examine the law by applying a strict scrutiny standard”), *aff’d sub nom. Maynard v. U.S. Dist. Court for Cent. Dist. of California*, 915 F.2d 1581 (9th Cir. 1990). Under strict scrutiny review, the law can be justified only if it furthers a compelling government purpose, and, even then, only if no less restrictive alternative is available. *See, e.g. Memorial Hospital*, 415 U.S. at 257-258.

Defendants cannot satisfy strict scrutiny; their arbitrary classifications are not narrowly tailored measures (that further a compelling government interest) because defendants’ have granted numerous special exemptions to their bans on public gatherings, including for purportedly “essential” businesses and activities—provided that social distancing practices are observed—and even for out-of-home religious services during Easter. Since these gatherings can be permitted, there can be no doubt that Defendants must permit Plaintiffs to engage in equivalent constitutionally-protected activities provided that Plaintiffs also adhere to the social distancing guidelines.

**B. Plaintiffs Face Imminent Irreparable Harm Absent Immediate Injunctive Relief**

“In a case like the one at bar, where the First Amendment is implicated, the Supreme Court has made clear that ‘[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury’ for purposes of the issuance of a preliminary injunction.” *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1011 (N.D. Cal. 2007) (citing *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002), *in turn citing Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated probable success on the merits of its First Amendment overbreadth



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

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

### **C. The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor.**

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

Given Plaintiffs’ showing of the facially and as-applied invalidity of the vague, overbroad Orders, Plaintiffs necessarily have shown that leaving those Orders in place for even a brief period of time “would substantially chill the exercise of fragile and constitutionally fundamental rights,” and thereby constitute an intolerable hardship to Plaintiffs. *Reed*, 523 F.Supp.2d at 1101. As mentioned above, Defendants’ ban on communal religious services will deprive Plaintiffs, and potentially millions of other Californians, of their ability to exercise religious freedom as secured by the First and Fourteenth Amendments and Article 1 of the California Constitution.

By contrast, temporarily enjoining Defendants’ enforcement of the Orders will not result in hardship to Defendants, who are in a position to adopt, at least on an

interim basis, a more narrowly crafted set of equally applied provisions that enable the government to achieve any legitimate ends without unjustifiably invading First and Fourteenth Amendment freedoms. *See id.* In addition, Defendants will suffer no legitimate harm by accommodating a Plaintiffs' exercise of fundamental rights in the same manner Defendants are accommodating thousands—and millions—of others engaged in secular activities. The Constitution demands no less.

#### **D. Injunctive Relief Is in the Public Interest**

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

As discussed above, Plaintiffs' core constitutional rights to practice religion freely, free speech, due process, and equal protection, will remain in jeopardy so long as Defendants remain free to enforce their Orders. Accordingly, issuance of injunctive relief is proper, and the Court should grant this Application.

## **II. THE COURT SHOULD DISPENSE WITH ANY BOND REQUIREMENT**

Rule 65(c) of the Federal Rules of Civil Procedure provides that a TRO or preliminary injunction may be issued “only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” Fed. R. Civ. P. 65(c).



1 However, the Court has discretion as to whether any security is required and, if so, the  
2 amount thereof. *See, e.g., Jorgensen v. Cassidy*, 320 F.3d 906, 919 (9th Cir. 2003).

3 Plaintiffs request that the Court waive any bond requirement, because enjoining  
4 Defendants from unconstitutionally enforcing the orders as to religious activities will  
5 not financially affect Defendants, who already categorically exempt specified non-  
6 religious activities from compliance. A bond would, however, be burdensome on  
7 already burdened Plaintiffs under these circumstances. *See, e.g., Bible Club v.*  
8 *Placentia-Yorba Linda School Dist.*, 573 F. Supp. 2d 1291, fn. 6 (C.D. Cal. 2008)  
9 (waiving requirement of student group to post a bond where case involved “the  
10 probable violation of [the club’s] First Amendment rights” and minimal damages to  
11 the District of issuing injunction); *citing Doctor John’s, Inc. v. Sioux City*, 305 F.  
12 Supp. 2d 1022, 1043-44 (N.D. Iowa 2004) (“requiring a bond to issue before  
13 enjoining potentially unconstitutional conduct by a governmental entity simply seems  
14 inappropriate, because the rights potentially impinged by the governmental entity’s  
15 actions are of such gravity that protection of those rights should not be contingent  
16 upon an ability to pay.”).

## 17 CONCLUSION

18 Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for a  
19 temporary restraining order, and issue an order to show cause why a preliminary  
20 injunction should not be issued, as follows:

21 1. Defendants, as well as their agents, employees, and successors in office,  
22 shall be restrained and enjoined from enforcing, attempting to enforce, threatening to  
23 enforce, or otherwise requiring compliance with any prohibition on Plaintiffs’  
24 engagement in religious services, practices, or activities at which the Center for  
25 Disease Control’s social distancing guidelines are followed.

26 2. Defendants shall show cause, at a time and place to be directed by the  
27 Court, why a preliminary injunction should not issue requiring Defendants to act as  
28

1 described in above; the temporary restraining order shall remain effective until such  
2 time as the Court has ruled on whether a preliminary injunction should issue.  
3 Such relief is necessary to prevent Defendants from further violating Plaintiffs'  
4 constitutional rights, pending trial on the merits of Plaintiffs' claims.

5 Respectfully submitted,

6 Date: April 14, 2020

DHILLON LAW GROUP INC.

7  
8 By: /s/ Harmeet K. Dhillon  
9 HARMEET K. DHILLON (SBN: 207873)  
10 harmeet@dhillonlaw.com  
11 MARK P. MEUSER (SBN: 231335)  
12 mmeuser@dhillonlaw.com  
13 GREGORY R. MICHAEL (SBN: 306814)  
14 gmichael@dhillonlaw.com  
15 DHILLON LAW GROUP INC.  
16 177 Post Street, Suite 700  
17 San Francisco, California 94108  
18 Telephone: (415) 433-1700

19 Attorneys for Plaintiffs  
20  
21  
22  
23  
24  
25  
26  
27  
28





**Harmeet K. Dhillon**  
[Harmeet@DhillonLaw.com](mailto:Harmeet@DhillonLaw.com)

April 8, 2020

**VIA EMAIL**

Robert A. Lovingood, Supervisor  
[Robert.Lovingood@bos.sbcounty.gov](mailto:Robert.Lovingood@bos.sbcounty.gov)

Curt Hagman, Supervisor  
[Curt.Hagman@bos.sbcounty.gov](mailto:Curt.Hagman@bos.sbcounty.gov)

Janice Rutherford, Supervisor  
[Janice.Rutherford@bos.sbcounty.gov](mailto:Janice.Rutherford@bos.sbcounty.gov)

Josie Gonzales, Supervisor  
[Jgonzales@sbcounty.gov](mailto:Jgonzales@sbcounty.gov)

Dawn Rowe, Supervisor  
[Supervisor.rowe@bos.sbcounty.gov](mailto:Supervisor.rowe@bos.sbcounty.gov)

Michelle Blakemore, County Counsel  
[Mblakemore@cc.sbcounty.gov](mailto:Mblakemore@cc.sbcounty.gov)

**Re: Demand for Rescission of Illegitimate and Unconstitutional April 7, 2020  
Order of the Health Office of San Bernardino County**

Dear County Supervisors:

This firm, in coordination with the Center for American Liberty, is in the process of being retained by several San Bernardino County residents in connection with the County's adoption and enforcement of the April 7, 2020 Order of the Health Officer of San Bernardino County (hereinafter "Order").<sup>1</sup> For the reasons addressed in this letter, the Order is unconstitutional on numerous grounds. Accordingly, we ask that the County immediately rescind the Order and notify this office and the public of the same by **5:00 p.m. on April 9, 2020**. If the County fails to do so, our client is prepared to file a federal lawsuit in the immediate future, seeking immediate injunctive relief.

**I. The Order's Ban on In-Person Religious Services Violates the First Amendment.**

The First Amendment to the U.S. Constitution prohibits government actors from enforcing any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const. amend. I; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the First Amendment to the States through the Fourteenth Amendment). The California Constitution similarly protects freedom of religion. Cal. Const., art. I, § 4. Accordingly, the County cannot ban "faith based services" taking place outside the home without

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<sup>1</sup> As of the date of this letter, the Order is available online at the following URL:  
[http://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2020/04/SKM\\_C45820040714190.pdf](http://wp.sbcounty.gov/dph/wp-content/uploads/sites/7/2020/04/SKM_C45820040714190.pdf).

first satisfying the most exacting standard of judicial review: strict scrutiny. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004).

Under strict scrutiny, the government cannot burden religious activity unless it first establishes (1) a compelling interest for imposing such burdens, and (2) that the burdens are the “least restrictive means” necessary to further that compelling interest. Federal courts routinely enjoin the enforcement of laws and policies under this standard. *See e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 524.

Here, the Order states that faith-based services are permitted only “through streaming or other technology, while individuals remain in their homes, but does not allow individuals to leave their homes for driving parades or drive-up services, or for picking up non-essential items.”<sup>2</sup> The Order makes no exceptions for upcoming religious holidays, including Easter, which is a very important religious observance day to many Christians worldwide. The Order also makes no exceptions for congregates taking extensive protective measures, such as in-person services in which participants are separated by more than six feet, etc. Simply put, there was essentially *no* effort to narrowly tailor the Order so as not to violate individuals’ right to religious freedom. Instead, the County proclaimed its draconian restrictions, essentially blanket-banning participation in religious services for an indefinite period of time, while at the same time allowing other necessary and important movement. As the Order cannot withstand strict scrutiny—or any other form of scrutiny—it must be rescinded immediately.

## **II. The Order Is Overbroad and Chills Religious and Expressive Activity Protected by the First Amendment.**

A statute or regulation is overbroad if it “does not aim specifically at evils within the allowable area of [governmental] control, but ... sweeps within its ambit other activities in ordinary circumstances that constitute an exercise” of protected expression and conduct. *Thornhill v. State of Alabama* (1940) 310 U.S. 88, 97. In *Gatto v. Cty. of Sonoma* (2002) 98 Cal. App. 4th 744, 750, for example, the California Court of Appeal held that the Sonoma County Fair dress code was overbroad and void for vagueness. There, the county ejected the plaintiff from the fair for wearing a jacket adorned with a Hell’s Angel insignia because it was deemed “provocative.” *Id.* at 750. The Court of Appeal held the county’s dress code failed to pass constitutional muster.

Here, the Order broadly prohibits entire swaths of activities, including religious, travel, and speech activities, without any effort to except constitutionally-protected activities. In addition to banning all out-of-home religious activities, the Order requires that all essential workers “wear face coverings, such as scarves (dense fabric, without holes,) bandanas, neck gaiters, or other fabric face coverings, when they leave their homes....”

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<sup>2</sup> We understand the County’s recent statement clarifies that the County will now permit drive-in religious services, although at this time no updated order has been released to the public. <http://wp.sbcounty.gov/cao/countywire/?p=5862>.

Courts consistently recognize that a person's clothing may contain or constitute protected speech. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503. The County's compulsory wearing of face coverings necessarily inhibits—through prior restraint no less—all expressive conduct related to facial adornments, and may even compel citizens to speak when they would otherwise not. *Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31* (2018) 138 S. Ct. 2448, 2464 [“Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence.”]. Even where such clothing is not expressive *per se*, the forced dress still violates citizen's protected liberty interest in choosing their own attire. *See Karr v. Schmidt* (5th Cir.1972) 460 F.2d 609, 621 (dis. opn. of Wisdom, J.) [“[f]orced dress ... humiliates the unwilling complier, forces him to submerge his individuality in the ‘undistracting’ mass, and in general, smacks of the exaltation of organization over member, unit over component, and state over individual.”]. Accordingly, the Order runs afoul of the overbreadth doctrine and is wholly unconstitutional.

### **III. The Order Is Void for Vagueness.**

A regulation is constitutionally void on its face when, as matter of due process, it is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application” *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115. The void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement. *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 477. The problem with a vague regulation is that it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis....” *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108–109.

Here, the Order is vague for several reasons, including but not limited to those addressed below.

#### **A. The Order Relies on Absent and Inapplicable Authority.**

The County states that the Order is authorized by California Health and Safety Code Sections 101080 and 101085. This is simply incorrect. Emergency powers exercised pursuant to Section 101085 require that an emergency be declared pursuant to Section 101080, which in turn applies only when “a release, spill, escape, or entry of waste occurs as described in paragraph (2) of subdivision (b) of Section 101075.” Since there is no “release, spill, escape, or entry of waste,” Section 101085 is not applicable, and the Order is void.

The County also states that it relies upon “Executive Order N-22-20” as authority for issuing the Order. As far as we are aware, no such executive order exists.

## **B. Governor Newsom's Order Requires Only that Persons "Heed" the Public Health Official's "Stay-at-Home" Notice.**

Governor Newsom's March 19, 2020 Executive Order N-33-20 appears to be the intended reference mistakenly titled N-22-20 in the Order. Even so, the County brazenly mischaracterizes it.

Contrary to the County's assertions in the Order, Governor Newsom's order does *not* state that "all persons residing in the State [are] to remain in their homes or places of residence ...". A careful reading of the Governor's order reveals that residents are only instructed to "heed" State public health directives ...". According to Meriam-Webster, the plain meaning of the word "heed" is "to give consideration or attention to"—not to submit or comply with, as suggested by the County's interpretation. Governor Newsom's order that California residents give careful thought to the directives of the Department of Public Health does not equate to an order to comply with those directives.

The Public Health directive itself carries no legal weight, despite nominally "ordering" that all persons not engaging in essential activities stay at home. Under established California law, the Public Health Department cannot forcibly quarantine persons unless there is probable cause that such persons are actually infected. *Ex parte Martin* (1948) 83 Ca.App.2d 164, 167; *Jew Ho v. Williamson* (C.C. Cal. 1900) 103 F. 10 [San Francisco's quarantine to contain bubonic plague in May 1900 found to be unreasonable]; *Wong Wai v. Williamson* (CC Cal. 1900) 103 F. 1 [holding that San Francisco's May 1900 quarantine violated rights secured by the Equal Protection Clause]; *see also Ex parte Arta* (1921) 52 Cal.App. 380, 383 ["a mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine."]. As such, directives from California public health officials are enforceable only to the extent there exists probable cause that *each* such non-essential worker has contracted Covid-19—which is clearly not the case. Absent such probable cause, the directive has no legally enforceable effect as to any person not shown to be exposed within the meaning of the statute and precedent.

## **IV. The Order Violates the Fundamental Right to Travel.**

The United States Supreme Court has held that the "right to travel is a part of the liberty of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." *Kent v. Dulles* (1958) 357 U.S. 116, 126. The Court found that "[t]ravel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Id* at 126. They have also ruled that the "right to travel is an unconditional personal right, a right whose exercise may not be conditioned." *Dunn v. Blumstein* (1972) 405 U.S. 330, 341.

Courts apply the compelling state interest test to assess the constitutionality of the government's action when that action implicates the fundamental right to travel. *See, e.g., Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250; *Dunn v. Blumstein* (1972) 405 U.S. 330; and *Shapiro v. Thompson*, (1969) 394 U.S. 618. Under the compelling state interest test, the



government must prove that there is a “clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.” *Dunn* at 341. The *Dunn* Court continued by finding that in order to prove that there is a substantial government interest, the government “cannot choose means that unnecessarily burden or restrict constitutionally protected activity,” that the statute must be “drawn with precision,” and “must be tailored to serve their legitimate objectives.” *Dunn* at 343.

The County fails to satisfy this standard. The County is picking and choosing who can be open and who cannot be open. As such, this order is not narrowly tailored and the fact that the County is not allowing businesses or churches to attempt to practice social distancing clearly shows that the government is not executing a plan that is the least restrictive one possible.

#### **V. The Mandate to Wear a Mask has a Disproportionate Impact Upon the Poor and Those that Cannot Wear a Mask for Medical or Other Reasons.**

The Order also violates the Equal Protection Clause, by mandating that all persons who leave their places of residence must wear a face covering, disproportionately affecting indigent residents of the County, and those that cannot wear a face covering for legitimate medical or other reasons. Indeed, those without facial coverings cannot exercise fundamental constitutional rights—including leaving their home for essential goods and services—while more affluent individuals may be able to comply. The order does not provide for the provision to purchase such face coverings for those who do not already have suitable masks and are not able to afford them.<sup>3</sup> The Order mandates that everyone use or purchase suitable masks in order to comply with the Order. As such, at a minimum, the County needs to have provisions in place to fund the purchase the applicable masks for those who cannot afford them. It fails to provide for this, and therefore cannot rest the exercise of fundamental rights on people’s ability to afford those rights.

#### **VI. The Order Fails to Properly Educate the Public on Proper Use of the Mask.**

Finally, the Order seems to be grossly negligent in that it mandates the wearing of cloth masks without any instruction to the public as to how to properly maintain the mask or how often it is to be changed. In light of all the contradictory evidence being presented on mask use, if the County is going to mandate it, they owe a duty to the general public to ensure that along with the order, proper instructions are given as to how to use and maintain the mask for public health.

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<sup>3</sup> In other contexts, for example, California law prohibits schools from imposing a dress code on children unless there are adequate provisions to “assist economically disadvantage pupils”. Educ. Code § 35183(d). Likewise, employers who mandate that an employee must wear a uniform are required to pay for that uniform. Labor Code § 2802.

San Bernardino County

April 8, 2020

Page 6 of 6

In conclusion, for the foregoing reasons, we feel that the Order is defective and needs to be immediately rescinded in order to limit the County's liability for violations to residents' constitutional rights. Our firm is preparing the necessary paperwork to file a temporary and permanent restraining order. Failure to rescind this order by the end of business on April 9<sup>th</sup> will result in a lawsuit being filed.

Regards,



Harmeet K. Dhillon





Harmeet K. Dhillon  
Harmeet@DhillonLaw.com

April 8, 2020

**VIA EMAIL**

Kevin Jeffries, Supervisor  
[district1@rivco.org](mailto:district1@rivco.org)

Gregory Priamos, County Counsel  
[gpriamos@rivco.org](mailto:gpriamos@rivco.org)

Karen Spiegel, Supervisor  
[district2@rivco.org](mailto:district2@rivco.org)

Dr. Cameron Kaiser, Public Health Officer  
[chawebmaster@rivcocha.org](mailto:chawebmaster@rivcocha.org)

Chuck Washington, Supervisor  
[District3@rivco.org](mailto:District3@rivco.org)

Jose Arballo, Jr., Senior Public Information  
Specialist  
[Jarballojr@ruhealth.org](mailto:Jarballojr@ruhealth.org)

V. Manuel Perez, Supervisor  
[district4@rivco.org](mailto:district4@rivco.org)

Brooke Federico, County Public  
Information Officer  
[bcfederico@rivco.org](mailto:bcfederico@rivco.org)

Jeff Hewitt, Supervisor  
[district5@rivco.org](mailto:district5@rivco.org)

**Re: Demand for Rescission of Illegitimate and Unconstitutional April 6, 2020  
Amended Order of the Health Office of Riverside County**

Dear County Supervisors:

This firm, in coordination with the Center for American Liberty, is in the process of being retained by residents of Riverside County in connection with the County's adoption and enforcement of the April 6, 2020 Amended Order of the Health Officer of Riverside County (hereinafter "Order").<sup>1</sup> For the reasons addressed in this letter, the Order is unconstitutional on numerous grounds. Accordingly, we ask that the County immediately rescind the Order and notify this office and the public of the same by **5:00 p.m. on April 9, 2020**. If the County fails to do so, our client is prepared to file a federal lawsuit in the immediate future, seeking immediate injunctive relief.

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<sup>1</sup> As of the date of this letter, the April 6, 2020 Amended Order is available online at:  
[https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/PHOrders/Riv-EOC\\_20200406\\_090004.pdf?ver=2020-04-06-102528-423&timestamp=1586193935186](https://www.rivcoph.org/Portals/0/Documents/CoronaVirus/April/PHOrders/Riv-EOC_20200406_090004.pdf?ver=2020-04-06-102528-423&timestamp=1586193935186)

## **I. The April 6<sup>th</sup> Order’s Ban on Religious Services Violates the First Amendment.**

The First Amendment to the U.S. Constitution prohibits government actors from enforcing any “law respecting an establishment of religion, or prohibiting the free exercise thereof.” U. S. Const. amend. I; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (applying the First Amendment to the States through the Fourteenth Amendment). The California Constitution similarly protects freedom of religion. Cal. Const., art. I, § 4. Accordingly, the County cannot ban “faith based services” taking place outside the home without first satisfying the most exacting standard of judicial review: strict scrutiny. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004).

Under strict scrutiny, the government cannot burden religious activity unless it first establishes (1) a compelling interest for imposing such burdens, and (2) that the burdens are the “least restrictive means” necessary to further that compelling interest. Federal courts routinely enjoin the enforcement of laws and policies under this standard. *See e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520, 524.

Here, the Order states that all public or private gatherings are prohibited regardless of venue or size. The April 6<sup>th</sup> Order makes no exceptions for upcoming major religious observances, including Easter, which is a very important religious observance day to most Christians. The April 6<sup>th</sup> Order also makes no exceptions for congregates taking extensive protective measures, such as drive-in services in which participants remain isolated in their cars, or in-person services in which participants are separated by more than six feet. Simply put, there was essentially *no* effort to narrowly tailor the Order so as not to violate individuals’ right to religious freedom. Instead, the County proclaimed its draconian restrictions, essentially blanket-banning participation in religious services for an indefinite period of time, while at the same time allowing other necessary and important movement. As the Order cannot withstand strict scrutiny—or any other form of scrutiny—it must be rescinded immediately.

## **II. The Order Is Overbroad and Chills Religious and Expressive Activity Protected by the First Amendment.**

A statute or regulation is overbroad if it “does not aim specifically at evils within the allowable area of [governmental] control, but ... sweeps within its ambit other activities in ordinary circumstances that constitute an exercise” of protected expression and conduct. *Thornhill v. State of Alabama* (1940) 310 U.S. 88, 97. In *Gatto v. Cty. of Sonoma* (2002) 98 Cal. App. 4th 744, 750, for example, the California Court of Appeal held that the Sonoma County Fair dress code was overbroad and void for vagueness. There, the county ejected the plaintiff from the fair for wearing a jacket adorned with a Hell’s Angel insignia because it was deemed “provocative.” *Id.* at 750. The Court of Appeal held the county’s dress code failed to pass constitutional muster.

Here, the Order broadly prohibits entire swaths of activities, including religious, travel, and speech comprising the majority of activities most Californians perform on a daily basis, without any effort to except constitutionally-protected activities. In addition to banning all out-of-home religious activities, the Order requires that all individuals “wear face

coverings, such as scarves (dense fabric, without holes,) bandanas, neck gaiters, or other fabric face coverings.” Basically, this order mandates people wear face coverings 24 hours a day, 7 days a week, regardless if they are in their home or car, and without regard to the health or expressive concerns implicated by this blanket, one-size-fits-all order.

Courts consistently recognize that clothing may give rise to protected, speech activities. *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.* (1969) 393 U.S. 503. The County’s compulsory wearing of face coverings necessarily inhibits—through prior restraint no less—all expressive conduct related to facial adornments, and may even compel citizens to speak when they would otherwise not. *Janus v. Am. Fed’n of State, Cty., & Mun. Employees, Council 31* (2018) 138 S. Ct. 2448, 2464 [“Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding “involuntary affirmation” of objected-to beliefs would require “even more immediate and urgent grounds” than a law demanding silence.”]. Even where such clothing is not expressive *per se*, the forced dress still violates citizen’s protected liberty interest in choosing their own attire. *See Karr v. Schmidt* (5th Cir.1972) 460 F.2d 609, 621 (dis. opn. of Wisdom, J.) [“[f]orced dress ... humiliates the unwilling complier, forces him to submerge his individuality in the ‘undistracting’ mass, and in general, smacks of the exaltation of organization over member, unit over component, and state over individual.”]. Accordingly, the Order runs afoul of the overbreadth doctrine and is wholly unconstitutional.

### **III. The Order Is Void for Vagueness.**

A regulation is constitutionally void on its face when, as matter of due process, it is so vague that persons “of common intelligence must necessarily guess at its meaning and differ as to its application” *Connally v. General Const. Co.* (1926) 269 U.S. 385, 391; *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1115. The void for vagueness doctrine is designed to prevent arbitrary and discriminatory enforcement. *Ketchens v. Reiner* (1987) 194 Cal.App.3d 470, 477. The problem with a vague regulation is that it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis....” *Grayned v. City of Rockford* (1972) 408 U.S. 104, 108–109.

Here, the Order is vague for several reasons, including but not limited to those addressed below.

#### **A. The Order Relies on Inapplicable Authority.**

The County states that the Order is authorized by California Health and Safety Code Sections 101085. This is simply incorrect. Emergency powers exercised pursuant to Section 101085 require that an emergency be declared pursuant to Section 101080, which in turn applies only when “a release, spill, escape, or entry of waste occurs as described in paragraph (2) of subdivision (b) of Section 101075.” Since there is no “release, spill, escape, or entry of waste,” Section 101085 is not applicable, and the Order is void.

**B. Governor Newsom's Order Requires Only that Persons "Heed" the Public Health Official's "Stay-at-Home" Notice.**

The County brazenly mischaracterizes Governor Newsom's March 19, 2020 Executive Order N-33-20

Contrary to the County's assertions in the Order, Governor Newsom's order does *not* state that "all individuals living in the State of California [are] to stay home or at their place of residence ...". A careful reading of the Governor's order reveals that residents are only instructed to "heed" State public health directives ...". According to Meriam-Webster, the plain meaning of the word "heed" is "to give consideration or attention to"—not to submit or comply with, as suggested by the County's interpretation. Governor Newsom's order that California residents give careful thought to the directives of the Department of Public Health does not equate to an order to comply with those directives.

The Public Health directive itself carries no legal weight, despite nominally "ordering" that all persons not engaging in essential activities stay at home. Under established California law, the Public Health Department cannot forcibly quarantine persons unless there is probable cause that such persons are actually infected. *Ex parte Martin* (1948) 83 Ca.App.2d 164, 167; *Jew Ho v. Williamson* (C.C. Cal. 1900) 103 F. 10 [San Francisco's quarantine to contain bubonic plague in May 1900 found to be unreasonable]; *Wong Wai v. Williamson* (CC Cal. 1900) 103 F. 1 [holding that San Francisco's May 1900 quarantine violated rights secured by the Equal Protection Clause]; see also *Ex parte Arta* (1921) 52 Cal.App. 380, 383 ["a mere suspicion, unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine."]. As such, directives from California public health officials are enforceable only to the extent there exists probable cause that *each* such non-essential worker has contracted Covid-19—which is clearly not the case. Absent such probable cause, the directive has no legally enforceable effect as to any person not shown to be exposed within the meaning of the statute and precedent.

**IV. The Order Violates the Fundamental Right to Travel.**

The United States Supreme Court has held that the "right to travel is a part of the liberty of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." *Kent v. Dulles* (1958) 357 U.S. 116, 126. The Court found that "[t]ravel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Id* at 126. They have also ruled that the "right to travel is an unconditional personal right, a right whose exercise may not be conditioned." *Dunn v. Blumstein* (1972) 405 U.S. 330, 341.

Court's apply the compelling state interest test to assess the constitutionality of the government's action when that action implicates the fundamental right to travel. *See, e.g., Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250; *Dunn v. Blumstein* (1972) 405 U.S. 330; and *Shapiro v. Thompson*, (1969) 394 U.S. 618. Under the compelling state interest test, the government must prove that there is a "clear showing that the burden imposed is



necessary to protect a compelling and substantial governmental interest.” *Dunn* at 341. The *Dunn* Court continued by finding that in order to prove that there is a substantial government interest, the government “cannot choose means that unnecessarily burden or restrict constitutionally protected activity”, that the statute must be “drawn with precision”, and “must be tailored to serve their legitimate objectives.” *Dunn* at 343.

The County fails to satisfy this standard. The County is picking and choosing who can be open and who cannot be open. As such, the Order is not narrowly tailored and the fact that the County is not allowing businesses or churches to attempt to practice social distancing clearly shows that the government is not executing a plan that is the least restrictive one possible – in fact it has imposed the *most* restrictive possible means of accomplishing its ends.

#### **V. The Mandate to Wear a Mask has a Disproportionate Impact Upon the Poor.**

The April 6<sup>th</sup> Order also violates the Equal Protection Clause, by mandating that all persons must wear a face covering, disproportionately affecting indigent residents of the County. Indeed, those without facial coverings cannot exercise fundamental constitutional rights – including leaving their home for essential goods and services – while more affluent individuals may be able to comply. This Order does not provide for the provision to purchase such face coverings for those who do not already have suitable masks and are not able to afford them.<sup>2</sup>

The Order mandates that everyone use or purchase suitable masks in order to comply with the Order. As such, at a minimum, the County needs to have provisions in place to fund the purchase of the applicable masks for those who cannot afford them. It fails to provide for this, and therefore cannot rest the exercise of fundamental rights on people’s ability to afford those rights. Furthermore, this order offers no exception for those people who comfortably cannot wear a mask due to other medical conditions.

#### **VI. The Order Fails to Properly Educate the Public on Proper Use of the Mask.**

Finally, the April 6<sup>th</sup> Order seems to be grossly negligent in that it mandates the wearing of cloth masks without any instruction to the public as to how to properly maintain the mask or how often it is to be changed. In light of all the contradictory evidence being presented on mask use, if the County is going to mandate it, they owe a duty to the general public to ensure that along with the order, proper instructions are given as to how to use and maintain the mask for public health. For example, instructions on washing, re-use – and the real risk of re-infection through the use of a mask.

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<sup>2</sup> In other contexts, for example, California law prohibits schools from imposing a dress code on children unless there are adequate provisions to “assist economically disadvantaged pupils”. Educ. Code § 35183(d). Likewise, employers who mandate that an employee must wear a uniform are required to pay for that uniform. Labor Code § 2802.

Riverside County

April 8, 2020

Page 6 of 6

In conclusion, for the foregoing reasons, we feel that the Order is defective and must be immediately rescinded in order to limit the County's liability for violations to residents' constitutional rights. Our firm is preparing the necessary paperwork to file a suit seeking immediate relief. Failure to rescind this order by the end of business on April 9<sup>th</sup> will result in a lawsuit being filed.

Regards,



Harmeet K. Dhillon