

No. 20-15949

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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RON GIVENS and CHRISTINE BISH,  
Plaintiffs and Appellants,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF CALIFORNIA;  
XAVIER BECERRA, IN HIS CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA;  
WARREN STANLEY, IN HIS CAPACITY AS COMMISSIONER OF THE CALIFORNIA  
HIGHWAY PATROL; and SONIA ANGELL, IN HER CAPACITY AS STATE PUBLIC  
HEALTH OFFICER,  
Defendants and Appellees.

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On Appeal from an Order of the United States District Court  
for the Eastern District of California  
District Court Case Number: 2:20-cv-852-JAM-CKD  
The Honorable John A. Mendez, District Judge

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## TABLE OF CONTENTS

	<b>Page</b>
INTRODUCTION .....	1
RECENT DEVELOPMENTS .....	1
ARGUMENT .....	5
I.    THE COURT HAS JURISDICTION OVER THIS APPEAL. ....	5
II.   THE GOVERNMENT’S RECENT DECISION TO SUSPEND ITS PROHIBITION OF OUTDOOR PROTESTS DOES NOT MOOT THIS APPEAL.....	8
A.    The Challenged Executive Order Remains in Effect.....	9
B.    Even If the Government Rescinds Its Order, Established Mootness Exceptions Apply. ....	12
1. Voluntary cessation: the doctrine of mootness does not apply where the Government merely pauses its engagement in the challenged conduct. ....	12
2. The circumstances giving rise to this appeal are capable of repetition, yet evading review.....	14
C.    If This Court Nevertheless Dismisses this Appeal as Moot, It Should Also Vacate the District Court’s Order. ....	16
III.  THIS COURT SHOULD REVERSE THE DISTRICT COURT’S ORDER DENYING INTERLOCUTORY RELIEF.....	17
A.    Standard of Review.....	17
B.    Plaintiffs Are Likely to Succeed on the Merits.....	17
1. The Government’s self-made discretionary authority to prohibit outdoor protests violates the First Amendment’s viewpoint-neutrality mandate. ....	17
2. Other federal claims.....	22

C.	The Risk of the Government Exercising Its Unfettered Discretion to Ban Protests Selectively Existed at All Times...	23
D.	The Remaining <i>Winter</i> Factors Weigh in Favor of Reversal...	26
CONCLUSION.....		27
CERTIFICATE OF COMPLIANCE.....		28
CERTIFICATE OF SERVICE .....		29

## TABLE OF AUTHORITIES

Case	Page(s)
<b>CASES</b>	
<i>4805 Convoy, Inc. v. City of San Diego</i> , 183 F.3d 1108 (9th Cir. 1999).....	11
<i>A.D. ex rel. L.D. v. State of Hawaii Dept. of Ed.</i> , 727 F.3d 911 (9th Cir. 2013).....	14
<i>Alcoa, Inc. v. Bonneville Power Admin.</i> , 698 F.3d 774 (9th Cir. 2012).....	14, 15
<i>All. for the Wild Rockies v. Cottrell</i> , 632 F.3d 1127 (9th Cir. 2011).....	17
<i>Already, LLC v. Nike, Inc.</i> , 568 U.S. 85 (2013).....	12, 13
<i>Ashcroft v. Am. Civil Liberties Union</i> , 542 U.S. 656 (2004).....	26
<i>ASW v. State of Oregon</i> , 424 F.3d 970 (9th Cir. 2005).....	12
<i>Bell v. City of Boise</i> , 709 F.3d 890 (9th Cir. 2013).....	13
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975).....	11
<i>Bordell v. General Elec. Co.</i> , 922 F.2d 1057 (2d Cir. 1991).....	11
<i>Carroll v. Commissioners of Princess Anne</i> , 393 U.S. 175 (1968).....	22
<i>Chafin v. Chafin</i> , 568 U.S. 165 (2013).....	9
<i>Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.</i> , 457 F.3d 376 (4th Cir. 2006).....	18, 25



<i>Church of Scientology v. United States</i> , 506 U.S. 9 (1992). .....	8
<i>City of Erie v. Pap’s A.M.</i> , 529 U.S. 277 (2000). .....	8, 12
<i>Cnty. of Santa Clara v. Trump</i> , 275 F. Supp. 3d 1196 (N.D. Cal. 2017).....	24
<i>Deakins v. Monaghan</i> , 484 U.S. 193 (1988). .....	12
<i>Dream Palace v. Cnty. of Maricopa</i> , 384 F.3d 990 (9th Cir. 2004). .....	8
<i>E.E.O.C. v. Federal Express Corp.</i> , 558 F.3d 842 (9th Cir. 2009). .....	12
<i>Envtl. Defense Fund, Inc. v. Andrus</i> , 625 F.2d 861 (9th Cir. 1980). .....	6, 7
<i>Farris v. Seabrook</i> , 677 F.3d 858 (9th Cir. 2012). .....	14
<i>First Baptist Church v. Kelly</i> , No. 20-1102-JWB, 2020 WL 1910021 (D. Kan. Apr. 18, 2020). .....	21
<i>Forsyth County v. Nationalist Movement</i> , 505 U.S. 123 (1992). .....	10
<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.</i> , 528 U.S. 167 (2000). .....	12
<i>Heliotrope Gen., Inc. v. Ford Motor Co.</i> , 189 F.3d 971 (9th Cir. 1999). .....	24
<i>Hepting v. AT&amp;T Corp.</i> , 439 F. Supp. 2d 974 (N.D. Cal. 2006).....	24
<i>Hoye v. City of Oakland</i> , 653 F.3d 835 (9th Cir. 2011). .....	20

<i>Hunt v. National Broadcasting. Co.</i> , 872 F.2d 289 (9th Cir. 1989).	6
<i>In re Cellular 101, Inc.</i> , 539 F.3d 1150 (9th Cir. 2007).	23
<i>In re Pattullo</i> , 271 F.3d 898 (9th Cir. 2001).	8
<i>Jacobson v. Massachusetts</i> , 197 U.S. 11 (1905).	17
<i>Kaahumanu v. Hawaii</i> , 682 F.3d 789 (9th Cir. 2012).	18, 19, 25
<i>Legacy Church, Inc. v. Kunkel</i> , No. CV 20-0327 JBSCY, 2020 WL 3963764 (D.N.M. July 13, 2020).	16
<i>Moore v. Urquhart</i> , 899 F.3d 1094 (9th Cir. 2018).	15
<i>Reed v. Town of Gilbert, Ariz.</i> , 576 U.S. 155 (2015).	19
<i>Religious Tech. Ctr., Church of Scientology Int’l, Inc. v. Scott</i> , 869 F.2d 1306 (9th Cir. 1989).	6, 7
<i>Ritter v. Hughes Aircraft Co.</i> , 58 F. 3d 454 (9th Cir. 1995).	24
<i>Robinson v. Marshall</i> , No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020).	21
<i>Rosebrock v. Mathis</i> , 745 F.3d 963 (9th Cir. 2014).	13
<i>S. Bay United Pentecostal Church v. Newsom</i> , 959 F.3d 938 (9th Cir. 2020).	7, 21
<i>Soos v. Cuomo</i> , No. 1:20-cv-00651, 2020 WL 3488742 (N.D. N.Y. June 26, 2020).	20

<i>Sosna v. State of Iowa</i> , 419 U.S. 393 (1975).	14
<i>Southerworth v. Bd. Of Regents of Univ. of Wisc. Sys.</i> , 307 F.3d 566 (7th Cir. 2002).	18, 25
<i>Turner v. Rogers</i> , 564 U.S. 431 (2011).	14
<i>U.S. Parole Comm’n v. Geraghty</i> , 445 U.S. 388 (1980).	9
<i>United States v. Arkison</i> , 34 F.3d 756 (9th Cir. 1994).	8
<i>United States v. Munsingwear</i> , 340 U.S. 36 (1950).	16
<i>United States v. Orr Water Ditch Co.</i> , 391 F.3d 1077, 1080-1081 (9th Cir. 2004), <i>amended</i> 400 F.3d 1177 (9th Cir. 2005).	14
<i>Wildwest Institute v. Bull</i> , 472 F.3d 587 (9th Cir. 2006).	17

## STATUTES

28 U.S.C. § 1292(a).	5
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## RULES

Fed. R. Evid. 201.	23
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## **INTRODUCTION**

This appeal is not moot. The Government has repeatedly warned the public that its recent lifting of restrictions may be dialed-back at any time, and, in recent weeks, the Government has indeed reverted to its earlier severe restrictions in several counties with respect to religious worship and schools. Even if this were not the case, the exceptional likelihood that the Government may discriminatorily reinstate its orders criminalizing outdoor protests, impermissibly chills Appellants' speech and renders injunctive relief both timely and necessary. The rising number of COVID-19 cases in California coupled with the reduction in protest activities relating to the Government's preferred viewpoints, makes this risk particularly acute. For this same reason, Appellants will suffer irreparable harm absent injunctive relief. Under these circumstances, the Court should not hesitate to reverse the district court's order to prevent a further suppression of Appellants' fundamental rights.

## **RECENT DEVELOPMENTS**

On May 25, the State issued updated restrictions allowing limited in-person protests. RJN Ex. 17; FRE 111.<sup>1</sup> Under these restrictions, all protests were limited in size to 100 people or 25% of the relevant capacity, whichever results in fewer

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<sup>1</sup> Appellants' Excerpts of the Record are cited as "ER;" Appellees' Supplemental Excerpts of the Record are cited as "SER;" and Appellants' Further Excerpts of the Record are cited as "FER."

persons attending the protest, among other restrictions. *Id.* That same day, George Floyd was killed by police in Minneapolis, Minnesota, igniting dozens of large demonstrations against police brutality, several of which were held on and near State Capitol grounds and elsewhere in California. RJN Exs. 6-10, 14-16; FER 190-206. These demonstrations involved, at times, tens of thousands of protesters, clearly exceeding the State's 100-person limit. RJN Ex. 16; FER 190-206.

Defendants publicly encouraged the George Floyd protests, despite their apparent illegality under the Government's orders. FER 190-93, 223, 227. On June 3, 2020, Governor Newsom announced publicly via livestream video the following: "For those of you that are out there protesting, I want you to know you matter, and I want you to know I care, we care....and those who want to express themselves and have: thank you; God bless you; keep doing it; your rage is real, express it so that we can hear it." RJN Exs. 2, 6; *see also id.*, Ex. 7 (statement by Governor Newsom in support of peaceful protests); FER 190-93. On June 5, Governor Newsom published the following statement on Twitter: "Protestors have the right to protest peacefully – not be harassed. Not be shot at by rubber bullets or tear gas...." FER 225. On June 6, 2020, California Attorney General published the following statement on Twitter: "Many Californians are headed out this weekend to make their voices heard in the fight for racial justice. The CA Department of

Justice supports people’s rights to peaceful protest. Protesters should be treated with dignity and respect.” *Id.* at 227.

On June 9, 2020, Plaintiffs-Appellants filed with the district court their application for reconsideration of the court’s order denying a temporary restraining order and requested that the district court issue an injunction pending this appeal. *Id.* at 283. In their motion, Appellants asserted that the Government’s *de facto* selective enforcement of its orders amounts to content-based discrimination in violation of Appellants’ First Amendment rights. *Id.*

On June 12, 2020, shortly after Appellants’ filed their motion with the district court, the Government issued updated protest restrictions for a second time. *Id.* at 110-13. Under these new restrictions, there are no capacity limitations for outdoor protests, but indoor protests remain subject to the earlier limits. *Id.* The Government asserts that these most recent revisions were made possible because of certain “encouraging results in California’s ongoing fight to contain the COVID-19 threat.” *Id.* at 146. It informed this Court of the same in its Answering Brief, filed July 7, 2020. ABM 18.<sup>2</sup>

On June 16, 2020, the Government filed with the district court a motion to dismiss Appellants’ claims under Federal Rule of Civil Procedure 12(b)(1). FER

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<sup>2</sup> “ABM” refers to the Government’s Answering Brief on the Merits. Doc. 24.

141. The Government argued that the case had become moot as a result of the Government's decision to allow outdoor protesting. *Id.*

On July 14, the district court held a Zoom hearing on the Government's motion to dismiss and Appellants' motions for reconsideration and for injunction pending appeal. FER 1-20. The district court disagreed with the Government's position on mootness and largely denied the requested relief.<sup>3</sup> *Id.* Judge John A. Mendez summarized his reasoning on the record as follows:

“[Governor Newsom] can reinstate [the ban on outdoor protests] at any time. And given the direction that this pandemic is taking, I'm actually surprised that he didn't reinstitute the permit ban as well. But he can. Everybody knows he can do that simply by holding a press conference and saying, guess what, the order is back in effect. And that's what prevents this court from making a finding as a matter of law that this case is now moot. It's not.”

*Id.* at 15-16. Nevertheless, the district court denied Appellants' motions, stating that its earlier analysis “remains sound.” *Id.* at 12. Judge Mendez also repeatedly stated on the record that “we're all going to get some guidance from the Ninth Circuit” in relation to this appeal and words to similar effect. *Id.* at 19-20. The district court did not issue a written order on the motions. *Id.* at 20.

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<sup>3</sup> Appellants did not contest the Government's motion to dismiss the state law claims for reason of sovereign immunity, save on jurisdictional grounds. FER 12. Accordingly, the district court granted the Government's motion to dismiss the state law claims. *Id.* Similarly, here, Appellants do not contest the Government's assertion of sovereign immunity as to Appellants' state law claims.

In recent weeks, the Government issued stern warnings to the public that it may reimplement its severe restrictions on liberty as a result of the spread of COVID-19. *Id.* at 69 (June 29, 2020—“[w]e don’t like the trendline, that’s why again this mandatory mask requirement is in effect, that’s why we’re using this dimmer switch to start to pull back”), 73 (June 29, 2020—“Newsom said there was a 45 percent increase in positive tests, and a 43 percent increase in hospitalizations in the last two weeks. Over the last three days, Newsom said that new positive test numbers remained high, with 5,932 new cases on Friday, 4,810 new cases on Saturday and 5,307 new cases on Sunday.”), 78 (June 28, 2020—“COVID-19 is still circulating in California, and in some parts of the state, growing stronger.”), 81 (June 22, 2020—“[t]hose that suggest we’re out of the woods, those that suggest this somehow is going to disappear, these numbers tell a very, very different and sobering story”). The Government recently carried out its threats with respect to in-person worship services and public and private schooling in most counties across California. Supp. RJN Exs. 18-19.

## **ARGUMENT**

### **I. THE COURT HAS JURISDICTION OVER THIS APPEAL.**

For the purposes of 28 U.S.C. § 1292(a), a district court’s order denying an application for a temporary restraining order is immediately reviewable on appeal where the order 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)); see also *Hunt v. National Broadcasting. Co.*, 872 F.2d 289, 292 (9th Cir. 1989) (denial of a temporary restraining order is also appealable where it “effectively decides the merits of the case.”).

Here, the Government argues that this Court lacks jurisdiction because Appellants were not “effectively foreclosed” from “pursuing further interlocutory relief” at the district court. AMB pp. 21-24 (citing the district court’s remarks that it “will not set this for a hearing on a preliminary injunction motion, but that doesn’t obviously, preclude the plaintiffs from filing that motion as well, or again pursuing, if there is a means of doing so, their right to appeal....”). The Government’s effort to dismiss this appeal falls flat.

The district court’s remarks at the hearing, coupled with its order denying the TRO—which Appellants wholly ignore in their analysis of this issue—explicitly foreclosed the possibility of Appellants obtaining injunctive relief. ER 8, 11 (“Plaintiffs are not likely to succeed on their challenge to the State’s stay at home order as an impermissible exercise of emergency police powers”), 14 (“[t]he State’s stay at home order advances the only fool-proof way to prevent the virus from spreading at in-person gatherings: prohibiting in-person gatherings”), 78 (refusing to set a hearing for a preliminary injunction motion).

This Court’s sound jurisprudence does not require that the parties bog down the district court with ritualistic and redundant proceedings, where the outcome is a foregone conclusion. *See Religious Tech. Cr.*, 869 F.2d at fn. 6 (noting that pursuing an evidentiary hearing would have been “pointless”); *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020) (denying motion to dismiss appeal from order denying a temporary restraining order in a religious-liberty case). Indeed, the important public policy issues involved in this appeal counsel against requiring such procedural box-checking. *See Andrus*, 625 F.2d at 862 (“Because important public policy issues are involved and time is of the essence we exercise our option under Fed. R. App. 2 to suspend the normal requirements of appellate procedure and reach the merits of this appeal.”).

Even if the district court’s initial ruling was ambiguous as to whether preliminary injunctive relief remained a possibility—it was not—subsequent events prove that any such request for relief would be futile. On July 14, 2020, the district issued a ruling from the bench denying Appellants’ motion for reconsideration of the TRO Order and denying Appellants’ motion for an injunction pending appeal. FER 1-20. In doing so, the district court stated that it “sees no reason at this point to revisit its May 8th, 2020 denial of the application for the temporary restraining order....because the analysis remains sound.” FER 11-12. For this same reason, the court “[saw] no legal basis or reason to grant an

injunction pending appeal.” *Id.* As if to remove all doubt, the court continued on to state that “again, all these issues are before the Ninth Circuit and will be taken up by the Ninth Circuit,” indicating its understanding that “we’re all going to get some guidance from the Ninth Circuit...” *Id.* at. 19.

The district court has no intention of granting injunctive relief in this action. As such, this Court has jurisdiction to review the district court’s TRO Order in this appeal.

## **II. THE GOVERNMENT’S RECENT DECISION TO SUSPEND ITS PROHIBITION OF OUTDOOR PROTESTS DOES NOT MOOT THIS APPEAL.**

An appeal becomes moot “when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000) (internal quotes omitted). Where mootness is raised with respect to the pursuit of injunctive relief, the relevant issue becomes “whether relief against the [challenged actions] could meaningfully improve [the plaintiff’s] position.” *See Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1000 (9th Cir. 2004) (citing *In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001)); *United States v. Arkison*, 34 F.3d 756, 759 (9th Cir. 1994); *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992). A case is not moot if the court can fashion some relief for the claimant, even where there is no possibility of returning the parties to the “*status quo ante*.” *Church of Scientology of Calif.*, 506 U.S. at 12-13;

*Chafin v. Chafin*, 568 U.S. 165, 172-177 (2013); *see also U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 400 (1980) (describing the mootness doctrine’s “flexible character” that distinguishes it from other justiciability doctrines).

The Government’s claim that this appeal is moot fails on several grounds, including because: (1) Governor Newsom’s Executive Order N-33-20—the order challenged by Appellants in this action—remains in effect and the Government warns that it may reimplement its ban on outdoor protests at any time; (2) even if this were not the case, long-established exceptions to the mootness doctrine apply, as discussed below.

#### **A. The Challenged Executive Order Remains in Effect.**

The Government argues that “no injury or potential remedy remains.” AMB p. 26. It is wrong on both counts. Appellants seek injunctive relief prohibiting the Government from enforcing Governor Newsom’s Executive Order N-33-20, which directs all persons in California to “heed” all State public health directives. ER 173.<sup>4</sup> While the Government has changed the relevant public health directives to permit outdoor protests, the underlying order remains in effect. FER 15-16 (district court Judge John Mendez: “[Governor Newsom] can reinstate [the ban on outdoor protests] at any time . . . Everybody knows he can do that simply by holding a

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<sup>4</sup> On May 4, 2020, the Governor issued a supplementary order, EO N-60-20, requiring Californian’s to “continue to obey” all public health directives. FER 166. The order did not withdraw, supersede, or even amend the order challenged here.

press conference and saying, guess what, the order is back in effect.”). As a result, the Government may reinstate its ban on outdoor protests at any time.

The likelihood that the Government reinstates its ban on outdoor protests—particularly in the absence of a threatened injunction—is high. FER 15-16 (Judge John Mendez: “I’m actually surprised that [the Governor] didn’t reinstitute the permit ban as well.”). The Government has repeatedly warned the public that it may “pull back” on its recent loosening of restrictions. FER 69 (“[w]e don’t like the trendline, that’s why we’re using this dimmer switch to start to pull back”). It has already reinstated its ban on in-person religious services in several counties, and it did so mere days after securing dismissal of a separate lawsuit on religious liberty grounds based on the same mootness arguments it makes here. *Id.* at 22-31; Supp. RJN Exs. 18-19. Most recently, the Government has prohibited all in-person instruction and public and private schools across dozens of counties, affecting over 80% of California’s population. Supp. RJN Exs. 18-19.

Further, even if the protest ban were not reinstated, the mere *threat* that the Government may do so is worthy of injunctive relief in and of itself. “The very existence of some broadly written laws has the potential to chill the expressive activity of others not before the court.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129 (1992); *see also 4805 Convoy, Inc. v. City of San Diego*, 183

F.3d 1108, 1111 (9th Cir. 1999); *Bordell v. General Elec. Co.*, 922 F.2d 1057, 1061 (2d Cir. 1991)); *Bigelow v. Virginia*, 421 U.S. 809, 816–17 (1975).

Here, the Government wields abundant, court-sanctioned discretionary authority to adopt, alter, and eliminate policies suppressing Appellants’ free speech. ER 1-24 (TRO Order). It has exercised that broad power to ban Appellants’ organized protests with social distancing and mask-wearing against the Government, only to turn around days later to actively *encourage* large scale protests on matters which the Government supports. FER 187-227. The mere fact that the Government retains such discretionary authority, and that it wields it discriminatorily, acts to chill Appellants’ speech—and the speech of forty million other Californians.<sup>5</sup>

If Appellants attempt to protest against the Government again, will the Government’s “encouraging results” in California’s fight against COVID-19 suddenly evaporate, such that Defendants once again criminalize all outdoor protests (or at least, those with which they disagree)? The mere fact that this question may be asked renders injunctive relief both appropriate and necessary.

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<sup>5</sup> In fact, in recent district court filings, the Government suggests that chilling speech is not merely a by-product of its orders, but the Government’s primary objective. D.C. Doc. 35, p. 8 (“CHP frequently declines . . . to take aggressive enforcement action against unpermitted protests even on the State Capitol grounds.”); *id.* at p. 9 (“there are good health and safety reasons for the State to have shown restraint in the face of recent protests.”); *see also* FER 83-113.

**B. Even If the Government Rescinds Its Order, Established Mootness Exceptions Apply.**

**1. Voluntary cessation: the doctrine of mootness does not apply where the Government merely pauses its engagement in the challenged conduct.**

Courts do not allow parties to artificially create mootness to insulate a favorable decision from appellate review. *City of Erie*, 529 U.S. at 288-289. A defendant's voluntary cessation of challenged conduct moots a case only if it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91-92 (2013) (internal quotes omitted); *ASW v. State of Oregon*, 424 F.3d 970, 974 (9th Cir. 2005). If it is not "absolutely clear," courts may grant appropriate relief to prevent the defendant from returning to his old ways. *See Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *E.E.O.C. v. Federal Express Corp.*, 558 F.3d 842, 847-848 (9th Cir. 2009).

The Government asks that this Court simply presume that its ban on outdoor protesting will not be reinstated, without any factual support for the truth of that presumption. AMB 28-29. Established Ninth Circuit case law counsels otherwise: "when the Government asserts mootness based on such a [policy] change it still must bear the heavy burden of showing that the challenged conduct cannot

reasonably be expected to start up again.”*Rosebrock v. Mathis*, 745 F.3d 963, 971-972 (9th Cir. 2014). The Government has failed to carry that “heavy burden” here.

Unlike statutory changes made through a legislative process, such as those discussed in cases cited by the Government, a policy change made through executive action is not necessarily entitled to a presumption that agency will not revert back to the challenged action.<sup>6</sup> *Id.* at 971. This is particularly true where, as here, the policy change is “not reflected in statutory changes or even in changes in ordinances or regulations,” because “the new policy ... could be easily abandoned or altered in the future.” *Id.* (citing *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013)).

Here, it is far from “absolutely clear” that the Government will not reinstate its ban on outdoor protesting. FER 187-227 (warning that the Government’s COVID-19 restrictions may be reimplemented at any time); Supp. RJN Exs. 18-19 (re-criminalizing in-person religious services and schooling in most of California).

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<sup>6</sup> The Government’s reliance on *Already, LLC v. Nike*, 568 U.S. 85, 91 (2013) is misguided. AB 28. In *Already*, the defendant, Nike, expressly promised to refrain from enforcing the disputed trademark by issuing a covenant not to sue the plaintiff. As a result, the plaintiff’s effort to invalidate Nike’s mark was rendered moot because enforcement of the mark against the plaintiff was not reasonably expected to recur. *Already*, 568 U.S. at 95. Here, however, not only does the Government refuse to promise that it will not reinstate its ban on outdoor protests, but it *expressly reserves* the right to do so at any time. See AMB 30 (conceding that changing circumstances may require the Government to adopt a “dynamic” approach to combating the spread of the virus).



Tellingly, the Government's Answering Brief fails to offer even a simple statement to that effect. Instead, the Government relies on inapposite case law to argue that the Court should simply presume the appeal is moot because the Government has temporarily suspended its restrictions. No such presumption is, or should be, afforded here. This appeal is not moot.

**2. The circumstances giving rise to this appeal are capable of repetition, yet evading review.**

This Court has jurisdiction over an otherwise mooted appeal where (a) the challenged order is of such short duration that it would be virtually impossible to litigate its validity before its expiration, and (b) the court reasonably expects the same complaining party will be subjected to the same kind of order in the future. *Turner v. Rogers*, 564 U.S. 431, 439-440 (2011); *Sosna v. State of Iowa*, 419 U.S. 393, 399-402 (1975); *Alcoa, Inc. v. Bonneville Power Admin.*, 698 F.3d 774, 786 (9th Cir. 2012); *Farris v. Seabrook*, 677 F.3d 858, 863 (9th Cir. 2012). This exception is most often invoked in cases like this one, where individuals have brought suit against a governmental entity where it is anticipated that the challenged action will be repeated. Because the governmental party is "constant," it can often be inferred that the same controversy will recur. *See United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1080-1081 (9th Cir. 2004), *amended* 400 F.3d 1177 (9th Cir. 2005); *A.D. ex rel. L.D. v. State of Hawaii Dept. of Ed.*, 727 F.3d 911, 914 (9th Cir. 2013). As such, even if the Court were to interpret

Appellants' claims as challenging merely the public health directives, and not the executive order giving effect to such directives, the appeal would not be moot because those directives are likely to revert to its earlier form.

By their very nature, public health directives may be, and are, changed frequently, often on a time frame in which full judicial review is impossible. *Alcoa, Inc.*, 698 F.3d at 787 (the duration component of this exception is satisfied where the underlying action will run its course before the Ninth Circuit or Supreme Court can give the case full consideration). Indeed, the health directives at issue in this case have changed twice during the pendency of this appeal, which has yet to be heard by this Court. FER 110-13 (the public health directives were changed on May 25 to allow limited outdoor protests, and again on June 12 to their current form).

Further, there is a substantial "likelihood of similar injury in the future." *Moore v. Urquhart*, 899 F.3d 1094, 1100 (9th Cir. 2018) (second prong satisfied where there exists a "credible threat" the plaintiff will be subjected to the particular injury again). Nowhere does the Government say that it will refrain from restricting the right to protest in the future. To the contrary, the Government admits that its future response will be "dynamic." AB 30. The Government has, and by all appearances will continue, to reimplement its restrictions as a result of an increase in the spread of the coronavirus. Any such renewed directives are, as was the case

with the first set of directives, likely to last for an indeterminate period and be subject to ongoing review and modifications by the Government. The Court need not grant the Government *carte blanche* to trammel Appellants' fundamental rights provided the Government temporarily suspends the challenged restrictions on the eve of every appeal.

**C. If This Court Nevertheless Dismisses this Appeal as Moot, It Should Also Vacate the District Court's Order.**

While Appellants strongly disagree with the Government's mootness assertion, if this Court does dismiss this appeal on mootness grounds, then the appropriate action would be to vacate the district court's TRO Order and allow litigation to proceed on the revised directives through amended pleadings or otherwise. *See United States v. Munsingwear*, 340 U.S. 36 (1950). The legal issues ruled on by the district court are a matter of first impression, yet the circumstances giving rise to this dispute afflict the entire nation. As a result, district courts across the country look to decisions issued by their sister courts for guidance and consistency in application of the law. *See, e.g., Legacy Church, Inc. v. Kunkel*, No. CV 20-0327 JB\SCY, 2020 WL 3963764, at \*107 (D.N.M. July 13, 2020) (citing the district court's TRO Order).

Here, the district court has expressed more than once that it awaits further guidance from this Court on the applicable legal standards. FER 19. If this Court does not provide that guidance in connection with this appeal, Appellants

respectfully request that the TRO Order be vacated to avoid the unintended consequences stemming from other's reliance on the district court's unreviewed reasoning.

### **III. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S ORDER DENYING INTERLOCUTORY RELIEF.**

#### **A. Standard of Review.**

The Government cites *Wildwest Institute v. Bull*, 472 F.3d 587 (9th Cir. 2006) for the proposition that the Court should adopt a "limited and deferential" standard when reviewing the district court's TRO Order. *Id.* at 589. Such deferential review, however, is premised on the district court applying the law correctly. *Id.* at 590; *see also All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (holding that the Court reviews conclusions of law *de novo* and findings of fact for clear error on appeal from a preliminary injunction ruling). For reasons set forth in Appellants' Opening Brief and below, the district court did not do so here.

#### **B. Plaintiffs Are Likely to Succeed on the Merits.**

##### **1. The Government's self-made discretionary authority to prohibit outdoor protests violates the First Amendment's viewpoint-neutrality mandate.**

Contrary to the Government's assertions, the district court misapplied established First Amendment law with respect to both its traditional scrutiny analysis and its analysis under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

With respect to traditional tiered scrutiny, the district court (as well as the Government) wholly ignored the threat posed by the Government’s virtually unchecked discretionary authority. “[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to protect against the improper exclusion of viewpoints.”

*Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 384 (4th Cir. 2006); *see also Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012) (adopting the view that “the viewpoint neutrality requirement includes the prohibition on a licensing authority’s unbridled discretion”); *Southerworth v. Bd. Of Regents of Univ. of Wisc. Sys.*, 307 F.3d 566, 579 (7th Cir. 2002) (“[W]e conclude that the prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement”). Thus, the First Amendment’s mandate of viewpoint and content-neutrality is not satisfied where the government maintains unbridled discretion to approve or reject requests to access a forum for free speech activities—regardless of whether the government actually harbors discriminatory intent. *See Kaahumanu*, 682 F.3d at 806.

Here, the Government wields nearly unchecked authority to suppress outdoor protests. It has held that discretionary authority from the outset of the current crisis. ER 1. Unfortunately, as if to illustrate the point, the Government has exercised that authority to engage in *de facto* content-based discrimination by first

disallowing Appellants' protests against the Government, only to temporarily suspend its directives weeks later in order encourage and allow protesters whose messages the Government supports. FER 187-227, 110-14.

While the district court may not have had these more recent facts at the time it issued its TRO Order, the Government's unbridled discretion to suppress speech has nevertheless been consistently present throughout this case. Indeed, the district court's TRO Order endorsed the exercise of such discretionary authority in light of public health concerns. ER 1. The district court has since repeated this endorsement even after reviewing evidence of the Government's content-based discrimination. FER 12 (stating that the district court's prior analysis "remains sound").

The Government's vast discretionary authority to suspend fundamental rights renders its actions, *per se*, in violation of the First Amendment's viewpoint-neutrality requirement. *See Kaahumanu*, 682 F.3d at 806. Yet, the district court applied legal standards regarding content-neutral time, place, and manner restrictions, which this case does not involve. In doing so, the district court gutted the First Amendment, erroneously holding that even where no public health emergency exists, a universal ban on protesting in public fora is somehow permissible under the First Amendment—plainly, it is not. *See, e.g., Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015) ("The vice of content-based legislation .

. . is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.”).

On a strikingly similar set of facts, the Northern District of New York recently concluded that New York’s shifting stance on outdoor protests was inconsistent with fundamental law. *Soos v. Cuomo*, No. 1:20-cv-00651, 2020 WL 3488742 (N.D. N.Y. June 26, 2020). In that case, as here, the government issued statements supporting the peaceful protests that erupted following the death of George Floyd. *Id.* at \*4. Noting the contrasting nature of the government’s support of those protests with the government’s restrictions on worship services, the court enjoined the government from restricting all indoor and outdoor gatherings at which participants adhere to social distancing guidelines. *Id.*

The same reasoning applies here. The Government cannot be allowed to pick and choose those who may exercise fundamental rights. This is true regardless of whether the Government does so in a purportedly “neutral” fashion, where that neutrality makes no appearance in the reality of the Government’s selectively exercised discretionary authority. *See Hoyer v. City of Oakland*, 653 F.3d 835, 849 (9th Cir. 2011) (finding a constitutional violation where the police only enforced an otherwise content neutral statute against one viewpoint).

The Government, like the district court, also errs in its analysis of *Jacobson*. *Jacobson* does not, as the Government argues, supplant traditional tiered scrutiny

analysis. *See* AMB p. 36 (citing *S. Bay United Pentecostal Church*, 140 S. Ct. at 1613). Indeed, the Supreme Court, when reviewing an emergency request for injunctive relief in *S. Bay United Pentecostal Church*, cited *Jacobson* for the general purpose of counseling deference to the political branches in times of crises—it did not hold that traditional scrutiny was altogether inapplicable. 140 S. Ct. at 1613 (“[the challenged] restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings....”); *see also* *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at \*6 (D. Kan. Apr. 18, 2020) (applying traditional scrutiny when analyzing whether the government’s actions violated fundamental law under *Jacobson*); *Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128, at \*10 (M.D. Ala. Apr. 12, 2020) (holding that the *Jacobson* standard was not dispositive because abortions concern fundamental rights).

Furthermore, in *S. Bay United Pentecostal Church*, Justice Kavanaugh, joined by Justices Thomas and Gorsuch, wrote in dissent in *S. Bay Pentecostal Church* expressly applying traditional scrutiny to the church’s request. The dissent concluded that the Government’s restrictions on houses of worship violate the Free Exercise Clause under those standards. 140 S. Ct. at 1614-15. At a minimum, the Supreme Court’s analysis confirms that serious questions arise as to the merits of Appellants’ claims here, such that the issuance of immediate injunctive relief is



proper to prevent the imposition of additional speech restrictions that cannot be timely reviewed by this Court before Appellants suffer irreparable harm. *See, e.g., Carroll v. Commissioners of Princess Anne*, 393 U.S. 175, 182 (1968) (A delay “of even a day or two” may be intolerable when applied to “political speech in which the element of timeliness may be important.”).

## **2. Other federal claims.**

The Government fails to raise any arguments unique to Appellants’ claims of associational freedom and the right to petition the government under the First Amendment. Instead, the Government argues generally that the claims fail because such rights are coextensive with the rights secured under the Free Speech Clause. AB 43-44. Even if true in this instance, because strict scrutiny applies to each of Appellants’ claims, the claims nevertheless serve as additional grounds by which injunctive relief is proper. Appellants’ desired speech was to be directed toward the Government itself and was to be delivered alongside hundreds of others sharing similar views. Accordingly, ample grounds exist on which this Court may reverse the district court’s decision to deny injunctive relief.

With respect to Appellants’ due process claim, the Government argues that its order directing Californians to “heed” all public health directives is sufficiently clear to order actual compliance with those directives. The Government makes no effort to distinguish the dictionary definition of “heed,” which does not equate the

word with an “order,” but rather a request for acknowledgement. In any event, the Government has since issued a supplemental order, EO N-60-20, clarifying that the public must “continue to obey” all State public health directives. FER 166.

**C. The Risk of the Government Exercising Its Unfettered Discretion to Ban Protests Selectively Existed at All Times.**

The Government argues, incorrectly, that this Court should ignore recent developments referenced by Appellants in their Opening Brief, which events the district court had not considered before issuing its TRO Order. AMB 46-49. The Government’s logic is flawed in multiple respects.

First, Appellants filed their Opening Brief mere days after significant changes in the Government’s treatment of outdoor protests. This Court is always obligated to address jurisdiction issues, including mootness, and Appellants’ counsel are similarly obligated to inform the Court of developments potentially affecting the Court’s jurisdiction. *In re Cellular 101, Inc.*, 539 F.3d 1150, 1154-1155 (9th Cir. 2007) (acknowledging counsel’s duty to inform the Court of events that may moot the appeal, even in part). Appellants appropriately—and correctly—anticipated that the Government would contend that this appeal was mooted by intervening events. Their submission of materials implicating whether the Court maintains jurisdiction over this appeal is therefore not only permissible but required.

Second, Appellants' request for judicial notice of the relevant materials is appropriate under Rule 201 of the Federal Rules of Evidence. Under Rule 201(b), courts may judicially notice a fact that is not subject to reasonable dispute because it is generally known within the court's territorial jurisdiction or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Such notice may be taken at any stage of the proceedings, including on appeal. Fed. R. Evid. 201(f).

Here, the materials for which Appellants seek judicial notice are easily verifiable, and they contain relevant factual admissions and other official government actions not reasonably subject to any dispute by the parties. *See e.g., Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 (9th Cir. 1999) (taking judicial notice that the market was aware of information contained in certain news articles); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974 (N.D. Cal. 2006) (taking judicial notice of company's news releases and press releases of government official); *Ritter v. Hughes Aircraft Co.*, 58 F. 3d 454, 458-59 (9th Cir. 1995) (judicial notice of layoffs in a newspaper article was "a fact which would be generally known in Southern California and which would be capable of sufficiently accurate and ready determination."); *Cnty. of Santa Clara v. Trump*, 275 F. Supp. 3d 1196 (N.D. Cal. 2017) (judicial notice of statements made by President and

Attorney General in op-eds and news interviews). Indeed, the Government does not dispute the authenticity of the relevant materials.

As discussed above, the Government has maintained unfettered discretion to impose, retract, or revise its restrictions on fundamental liberties, including the right to protest government action, since the outset of this case. The existence of such discretion does not comport with this Court's viewpoint-neutrality requirements. *See Child Evangelism Fellowship of Md., Inc.*, 457 F.3d at 384; *Kaahumanu v. Hawaii*, 682 F.3d at 806; *Southerworth*, 307 F.3d at 579. Accordingly, it is amply proper that the Court take judicial notice of Government acts indicative of its exercise of that discretion pending this appeal.

Lastly, the district court has had an opportunity to evaluate this evidence in reviewing Appellants' motions for reconsideration of the court's TRO Order and for an injunction pending appeal, as well as in connection with the Government's motion to dismiss the case on mootness grounds. *See generally* FER. Despite reviewing the evidence, which is also submitted to this Court in the form of "Further Excerpts of the Record," the evidence did not persuade the district court to reverse its earlier conclusion. FER 12. Accordingly, the Government's concerns regarding the district court's purported inability to consider this material is unfounded, and the Court should consider all recent events in ruling on this appeal.

**D. The Remaining *Winter* Factors Weigh in Favor of Reversal.**

The Government fails to raise any credible argument that public policy or a balancing of the equities weighs against injunctive relief; nor could it. *See* AMB 50-52. The Government has, at least for now, suspended its prohibition on outdoor protests, accepting any risk outdoor protests may pose to public health as tolerable in light of the important considerations under the First Amendment. This Court should not come to any different conclusion: outdoor protests should be permitted.

Further, as discussed above, Appellants face ongoing irreparable harm in the form of chilled speech coupled with a clear threat from the Government that it may reinstate its ban on outdoor protests at any time. The Government has ample discretionary emergency power to suppress Appellants' speech, as it did very recently with respect to houses of worship and schools in dozens of counties across the State. Supp. RJN Exs. 18-19. The mere risk that the Government will utilize its effectively unfettered discretion to reinstate its directives acts to chill Appellants' and others' speech. This alone constitutes irreparable harm, and the Court should act swiftly to enjoin the Government from further suppressing outdoor protests without first seeking consent from the Court. *See, e.g., Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004) (affirming injunction to prevent chilling of speech).

## CONCLUSION

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

July 28, 2020

Respectfully submitted,

/s/ Harmeet K. Dhillon

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### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing Appellants' Reply Brief complies with the requirements of Ninth Circuit Rule 32-1. The brief was prepared in 14-point font and, other than the portions exempted by Federal Rule of Appellate Procedure 32(f), contains 6,242 words, as counted by Microsoft Word.

July 28, 2020

/s/ Harmeet K. Dhillon

Harmeet K. Dhillon

### **CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 2020, I filed the foregoing Appellants' Reply 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.

July 28, 2020

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15 **UNITED STATES DISTRICT COURT**  
16 **EASTERN DISTRICT OF CALIFORNIA**  
17

18 **RON GIVENS**, an individual; **CHRISTINE**  
19 **BISH**, an individual,

20 Plaintiffs,

21 v.

22 **GAVIN NEWSOM**, in his official capacity as  
the Governor of California; **XAVIER**  
23 **BECERRA**, in his official capacity as the  
Attorney General of California; **WARREN**  
24 **STANLEY**, in his official capacity as the  
Commissioner of the California Highway Patrol;  
25 **SONIA Y. ANGELL**, in her official capacity as  
the State Public Health Officer,  
26 Defendants.

Case Number: 2:20-CV-00852-JAM-CKD

**APPLICATION FOR TEMPORARY  
RESTRAINING ORDER AND FOR  
ORDER TO SHOW CAUSE WHY  
PRELIMINARY INJUNCTION  
SHOULD NOT ISSUE;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

Judge: Hon. John A. Mendez  
Date Filed: April 27, 2020

1                   **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2                   PLEASE TAKE NOTICE that Plaintiffs Ron Givens and Christine Bish, through counsel,  
3 will and hereby do apply to this Court pursuant to Fed. R. Civ. P. 65(b) and Local Rule 231 for a  
4 temporary restraining order against Defendants Gavin Newsom, in his official capacity as Governor  
5 of California; Xavier Becerra, in his official capacity as Attorney General of California; Warren  
6 Stanley, in his official capacity as the Commissioner of the California Highway Patrol; and Sonia Y.  
7 Angell, in her official capacity as the State Public Health Officer (“Defendants”), and for the  
8 issuance of an order to show cause why a preliminary injunction should not issue, as follows:

9                   1.       Defendants shall issue permits to Plaintiffs so that they may proceed with their  
10 requested use of the State Capitol grounds.

11                  2.       Defendants, as well as their agents, employees, and successors in office, shall be  
12 restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise  
13 requiring compliance with any prohibition on Plaintiffs’ engagement in First Amendment protected  
14 activities including gathering for the purpose of political demonstrations, rallies, and protests  
15 religious services, practices, or activities at which the Center for Disease Control’s social distancing  
16 guidelines are followed.

17                  3.       Defendants shall show cause, at a time and place to be directed by the Court, why a  
18 preliminary injunction should not issue requiring Defendants to act as described in above; the  
19 temporary restraining order shall remain effective until such time as the Court has ruled on whether a  
20 preliminary injunction should issue. Such relief is necessary to prevent Defendants from further  
21 violating Plaintiffs’ constitutional rights, pending trial on the merits of Plaintiffs’ claims.

22                  This Application is made on the grounds that Plaintiffs are likely to succeed on the merits of  
23 this case, they will suffer irreparable harm without injunctive relief, the balance of equities tips  
24 sharply in their favor, and the relief sought is in the public interest.

25                  Good cause exists to issue the requested Order to preserve Plaintiffs’ rights under the  
26 Constitution of the United States and the Constitution of the State of California, and to avoid  
27 irreparable harm to those rights. This Application is supported by the accompanying Memorandum  
28

1 of Points and Authorities, by Plaintiffs' Complaint, and all exhibits attached thereto, by the  
2 declarations of Plaintiffs and their counsel, Mark P. Meuser, and by such further argument and  
3 evidence that may be adduced at any hearing on this matter or of which the Court may take judicial  
4 notice.

5 The Complaint in this action was filed concurrently with this Application. All papers relating  
6 to this Application will be delivered by email to counsel for the California Attorney General by 4:00  
7 p.m. on April 27. As reflected in the accompanying declaration of Mark P. Meuser, Plaintiffs have  
8 notified the Office of the California Attorney General of Plaintiffs' intention to file this Application  
9 and to seek a temporary restraining order of the nature described above.

10 Plaintiffs request that the Court waive any bond requirement, because enjoining Defendants  
11 from unconstitutionally prohibiting religious practices will not financially affect Defendants.

12 Date: April 27, 2020 Respectfully submitted,  
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## TABLE OF CONTENTS

INTRODUCTION .....	1
RELEVANT FACTUAL BACKGROUND.....	2
LEGAL STANDARD.....	6
ARGUMENT.....	8
I.    PLAINTIFFS ARE ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF. ....	8
A.    There Is a Strong Likelihood Plaintiffs’ Will Succeed in Proving Their Claims on Multiple Constitutional Grounds. ....	8
1.    Defendants Violate Plaintiffs’ Free Speech Rights in Violation of the First Amendment to the U.S. Constitution and Article 1, Section 2 of the California Constitution.....	8
2.    The Orders Ban All Public Assembly in Violation of the First Amendment to the U.S. Constitution and Article 1, Section 3 California Constitution. ....	10
3.    The Orders Violate the Plaintiffs’ Right to Petition in violation of the First Amendment to the U.S. Constitution and California Constitution. ....	12
4.    Defendants’ Orders Are Void for Reasons of Vagueness. ....	13
5.    The Orders Violate Article 1, Section 1 of the California Constitution. ....	14
B.    Plaintiffs Face Imminent Irreparable Harm Absent Immediate Injunctive Relief.....	15
C.    The Balance of Hardships Tips Decidedly in Plaintiffs’ Favor. ....	16
D.    Injunctive Relief Is in the Public Interest .....	17
II.    THE COURT SHOULD DISPENSE WITH ANY BOND REQUIREMENT .....	17
CONCLUSION.....	18

## TABLE OF AUTHORITIES

Case	Page(s)
<b>UNITED STATES CONSTITUTION</b>	
U.S. Const. amend. I .....	8
<b>CALIFORNIA CONSTITUTION</b>	
Cal. Const. art. 1, § 1. ....	14
Cal. Const. art. 1, § 2. ....	8, 11
Cal. Const. art. 1, § 3. ....	11
<b>CASES</b>	
<i>Alexander v. United States</i> , 509 U.S. 544 (1993).....	9
<i>Americans for Prosperity Foundation v. Harris</i> , 182 F. Supp. 3d 1049 (C.D. Cal. 2016). ....	16, 17
<i>Bible Club v. Placentia-Yorba Linda School Dist.</i> , 573 F. Supp. 2d 1291 (C.D. Cal. 2008). ....	18
<i>Borough of Duryea v. Guarnieri</i> , 564 U.S. 379 (2011).....	12
<i>Clark v. Cmty. for Creative Non-Violence</i> , 468 U.S. 288 (1984).....	10
<i>College Republicans at San Francisco State University v. Reed</i> , 523 F. Supp. 2d 1005 (N.D. Cal. 2007). ....	15, 16, 17
<i>Connally v. General Const. Co.</i> , 269 U.S. 385 (1926).....	13
<i>De Jonge v. Oregon</i> , 299 U.S. 353 (1937).....	1, 7, 11
<i>Doctor John's, Inc. v. Sioux City</i> , 305 F. Supp. 2d 1022 (N.D. Iowa 2004).....	18
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972).....	11, 12
<i>Earth Island Inst. v. United States Forest Serv.</i> , 351 F.3d 1291 (9th Cir. 2003). ....	6

1	<i>Edwards v. South Carolina</i> ,	
2	372 U.S. 229 (1963).....	7, 12
3	<i>Elrod v. Burns</i> ,	
4	427 U.S. 347 (1976).....	16
5	<i>Ex parte Arta</i> ,	
6	52 Cal. App. 380 (1921). ....	15
7	<i>Ex parte Martin</i> ,	
8	83 Cal. App. 2d 164 (1948). ....	14
9	<i>Fantasyland Video, Inc. v. Cty. of San Diego</i> ,	
10	496 F.3d 1040 (9th Cir. 2007). ....	8
11	<i>FEC v. Wis. Right to Life, Inc.</i> ,	
12	551 U.S. 449 (2007).....	8
13	<i>Frisby v. Schultz</i> ,	
14	487 U.S. 474 (1988).....	10
15	<i>Gitlow v. New York</i> ,	
16	268 U.S. 652 (1925).....	7
17	<i>Granny Goose Foods, Inc. v. Brotherhood of Teamsters &amp; Auto Truck Drivers</i> ,	
18	415 U.S. 423 (1974).....	6
19	<i>Grayned v. City of Rockford</i> ,	
20	408 U.S. 104 (1972).....	13
21	<i>Hines v. Gomez</i> ,	
22	853 F. Supp. 329 (N.D. Cal. 1994) .....	12
23	<i>Houston v. Hill</i> ,	
24	482 U.S. 451 (1987).....	9
25	<i>IDK, Inc. v. Clark Cnty.</i> ,	
26	836 F.2d 1185 (9th Cir. 1988). ....	8, 9
27	<i>In re J.M.</i> ,	
28	36 Cal. App. 5th 668 (2019). ....	8
	<i>Jew Ho v. Williamson</i> ,	
	103 F. 10 (C.C. Cal. 1900).....	14
	<i>Jorgensen v. Cassidy</i> ,	
	320 F.3d 906 (9th Cir. 2003). ....	17
	<i>Long Beach Area Peace Network v. City of Long Beach</i> ,	
	574 F.3d 1011 (9th Cir. 2009). ....	9

1	<i>Los Angeles All. For Survival v. City of Los Angeles</i> ,	8
2	22 Cal. 4th 352 (2000). .....	
3	<i>Lovell v. Griffin</i> ,	10
4	303 U.S. 444 (1938). .....	
5	<i>McDonald v. Smith</i> ,	12
6	472 U.S. 479 (1985). .....	
7	<i>People ex rel. Gallo v. Acuna</i> ,	13
8	14 Cal.4th 1090 (1997). .....	
9	<i>People v. Chambers</i> ,	11
10	22 Cal. App 2d 687 (1937). .....	
11	<i>Renton v. Playtime Theatres</i> ,	10
12	475 U.S. 41 (1986). .....	
13	<i>Robinson v. Marshall</i> ,	7
14	No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020). .....	
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22	138 S. Ct. 1204 (2018). .....	
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24	14 Cal. App. 3d 591 (1971). .....	
25	<i>Stormans, Inc. v. Selecky</i> ,	16
26	586 F.3d 1109 (9th Cir. 2009). .....	
27	<i>Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush &amp; Co., Inc.</i> ,	6
28	240 F.3d 832 (9th Cir. 2001). .....	
	<i>United States v. Cruikshank</i> ,	12
	92 U.S. 542 (1876). .....	
	<i>United States v. O'Brien</i> ,	10
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	<i>Ward v. Rock Against Racism</i> ,	10
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555 U.S. 7 (2008)..... 6

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103 F. 1 (C.C. Cal. 1900)..... 14

**STATUTES**

42 U.S.C. § 1983..... 8, 10

**RULES**

Fed. R. Civ. P. 65.....6

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 “[C]onsistently with the Federal Constitution, peaceable assembly for lawful discussion  
3 cannot be made a crime.” Justice Charles Even Hughes, *De Jonge v. Oregon*, 299 U.S. 353, 365  
4 (1937).

5 **INTRODUCTION**

6 The United States and California Constitutions do not contain blanket exceptions for  
7 pandemics, and neither may California’s lawmakers ignore fundamental Constitutional norms on  
8 the basis of a health crisis. In an overreaching response to the coronavirus pandemic, at a time  
9 when people of conscience around the world have a greater need than ever to oversee, comment  
10 on, and speak out against governing bodies, Defendants have criminalized public demonstrations,  
11 rallies, and protests across California. While protecting the health and safety of the public during  
12 this crisis is certainly critically important—to Plaintiffs also—that interest may not be secured by  
13 abrogating the rights and liberties enshrined by the U.S. and California Constitutions.

14 Despite declarations of national, state, and local emergencies surrounding the coronavirus  
15 outbreak, Defendants have decided to allow “essential” businesses (as determined by Defendants  
16 on an *ad hoc* basis) to continue operations provided that certain social distancing guidelines are  
17 followed. For example, Defendants permit marijuana dispensaries, take-out restaurants, hardware  
18 stores, and laundromats to continue operations, subject to these restrictions. Statewide, the news  
19 media have been permitted to continue operations since the outset of the stay-at-home orders.

20 Gatherings to engage in core First Amendment protected activities such as demonstrations,  
21 rallies, and protests, however, have not made Defendants’ cut, even if socially distant. Instead,  
22 Defendants have implemented a complete and total ban on these activities, closing all avenues of  
23 public protest. The United States and California Constitutions simply do not tolerate such total  
24 and arbitrary restrictions thrust upon fundamental rights while less restrictive measures are  
25 available and are being allowed for entities the Government deems “essential.”

26 To be sure, the world faces a far-reaching health crisis with enormous implications. The  
27 decision as to when to reopen the economy is perhaps one of the most consequential decisions  
28 governmental bodies will make for years to come. Politicians, health officials, and commentators

1 disagree as to when the reopening should occur. The government's actions banning all public  
2 demonstrations, rallies, and protests, will deny its citizens the right to effectively voice their opinions  
3 on this critical issue. If the people are only permitted to protest after the decision to open the  
4 economy has been made, their voices will be rendered moot at the precise time they are most needed  
5 and most justified.

6 Defendants' actions violate the First and Fourteenth Amendments of the U.S. Constitution  
7 and the corresponding articles of the California Constitution. This Court should immediately  
8 enjoin Defendants from further violating Plaintiffs' First Amendment protected core liberties.

### 9 **RELEVANT FACTUAL BACKGROUND**

10 On March 13, 2020, President Donald J. Trump proclaimed a National State of Emergency as  
11 a result of the threat of the emergence of a novel coronavirus, COVID-19. Complaint [dkt. #1]  
12 ("Compl."), ¶ 14. Since the initial outbreak of COVID-19 in the United States in February and  
13 March 2020, the federal government's projections of the anticipated national death toll related to the  
14 virus has decreased substantially, by an order of magnitude. Despite such revisions, Defendants have  
15 increasingly restricted—where not outright banned—Plaintiffs' engagement in constitutionally-  
16 protected activities. Compl., ¶ 15.

17 On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency as  
18 a result of the threat of COVID-19. Compl., ¶ 16. On March 19, 2020, California Governor Newsom  
19 issued Executive Order N-33-20 in which he ordered "all residents are directed to immediately heed  
20 the current State public health directives." Compl., ¶ 17. The state public health directive requires  
21 "all individuals living in the State of California to stay home or at their place of residence except as  
22 needed to maintain continuity of operations of the federal critical infrastructure sectors ...". Compl.,  
23 ¶ 18. The public health directive provides that its directives "shall stay in effect until further notice."  
24 Compl., ¶ 21.<sup>1</sup>

25  
26 <sup>1</sup> There is significant scientific and policy debate concerning the effectiveness and advisability of  
27 lockdowns as an effective means to combat the spread of the coronavirus; the government's  
28 continued justification for the shutdowns is far from clear. *See, e.g.*, Stanford Medical Professor and  
epidemiology expert John Ioannadis' analysis last month: <https://www.statnews.com/2020/03/17/a-fiasco-in-the-making-as-the-coronavirus-pandemic-takes-hold-we-are-making-decisions-without->

1 On March 22, 2020, the California Public Health Officer designated a list of “Essential  
2 Critical Infrastructure Workers.” The directive does not designate protestors, demonstrators, or  
3 individuals engaged in other First Amendment protected activities as “Essential Critical Infrastructure  
4 Workers.” Compl., ¶ 20.

5 Thus, the California state decree amounts to a total ban on public gatherings for the purpose  
6 of engaging in First Amendment by means of demonstrations, rallies, or protests, regardless of  
7 measures taken to reduce or eliminate the risk of the virus spreading, such as designating larger  
8 spaces for gatherings so that a six-foot distance can be maintained between participants, directing  
9 participants to wear masks, encouraging participants to bring personal supplies of sanitizer, and/or  
10 designating volunteers to help maintain distancing. Meanwhile, the list deems the continuity of  
11 services provided by coffee baristas, restaurant workers, and laundromat technicians to be so  
12 necessary for society that these activities are permitted to continue under the State Order, despite the  
13 existence of the very same risk Defendants rely on to inhibit the exercise of fundamental First  
14 Amendment rights. Compl., ¶ 20. Plaintiffs are permitted to peruse the aisles of their local grocery  
15 store alongside their neighbors, yet, under the Orders, it is criminal for Plaintiffs to engage in that  
16 same activity outside, simply because it is for the purpose of protesting the government.

17 Plaintiff Ron Givens is Chief Firearms Instructor and Director of Training Operations at the  
18 Sacramento Gun Club. Compl., ¶ 8. Givens has exercised his rights to free speech and peaceful  
19 assembly under the First Amendment numerous times in the past decades through public protests in  
20 front of the California State Capitol Building and has participated in and/or organized at least five  
21 permitted protests from 2010 to 2015. Givens sought to hold a protest on the State Capitol Building  
22 grounds, decrying the delay of background checks for gun purchasers by the DOJ under the guise of  
23 a public health emergency. Seeking to hold a protest on this matter, Plaintiff Givens submitted a  
24 permit application to the State Capitol Permit Office of the California Highway Patrol on April 22,  
25 2020. Compl. ¶¶22-31.

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28 [reliable data/; https://www.wsj.com/articles/do-lockdowns-save-many-lives-is-most-places-the-data-say-no-11587930911](https://www.wsj.com/articles/do-lockdowns-save-many-lives-is-most-places-the-data-say-no-11587930911).

1 On April 24, 2020, a CHP officer reached out to Givens inquiring as to why Givens required  
2 the entirety of the State Capitol Building grounds for his protest. Givens explained that he required  
3 sufficient space for all of his fellow protestors to maintain social distancing. The officer agreed with  
4 Givens that upon that basis, the request was a good idea. Givens Decl. ¶11. However, the officer  
5 reached out again later in the afternoon to inform Givens that his permit had been denied. Givens  
6 received an email stating the same after the call. Givens Decl. ¶13. The CHP officer informed  
7 Givens that the basis for his application's denial was that the Governor had instructed the CHP that  
8 no permits should be issued for protests, as they were not allowed under the State order. Givens  
9 Decl. ¶13.

10 The State Capitol Building grounds have sufficient space for Givens' planned protest, even  
11 with social distancing and a large number of people. Assuming a 12 feet by 12 feet square of space  
12 centered around each person, this would mean that each protestor would at most, require 144 sq. ft.  
13 of space for themselves. Givens estimates that around one-thousand protestors had planned to attend  
14 his event, which would require 144,000 sq. ft. of land. Compl. ¶ 36. The State Capitol Grounds is at  
15 least forty (40) acres of land, or 1,742,400 sq. ft. Accordingly, more than ten thousand protestors, let  
16 alone a thousand, would be able to fit within the State Capitol grounds. Givens not only planned to  
17 instruct his fellow attendees to follow social distancing and wear masks, but also to have volunteers  
18 ensure mask-wear and social distancing by acting as guides and marking places with tape. Givens  
19 Decl. ¶ 37.

20 To his knowledge, Plaintiff Givens has never had or contracted the coronavirus, nor does he  
21 exhibit any symptoms. Givens Decl. ¶ 14. As a result of not being able to protest, Plaintiff Givens  
22 has been deprived of the opportunity for airing his grievances against the government, including  
23 speech activities pertaining to the coronavirus outbreak and the government's response, especially as  
24 to Second Amendment rights.

25 Plaintiff Chris Bish, a resident of Sacramento County, is a firm believer and practitioner of  
26 her First Amendment rights to free speech and peaceful assembly. She often participates in public  
27 demonstrations against governmental overreach. On April 20, 2020, Plaintiff Bish attended a rally,  
28

1 which advocated the lifting of the State Order and restarting the economy. Of all the CHP officers  
2 Plaintiff Bish observed around the rally, none were wearing masks. Bish Decl. ¶ 3.

3 On or around April 20, 2020, Plaintiff Bish applied to the CHP for a permit to hold a rally in  
4 front of the State Capitol Building. The purpose of the rally was to encourage the state to lift its  
5 coronavirus-related restrictions. Bish Decl. ¶ 4. The CHP denied this application “due to the State  
6 and County Health Order and our inability to ensure proper social distancing to keep demonstrators  
7 safe.” Bish Decl. ¶ 6. The CHP then inquired whether she would still hold the protest despite the  
8 denial. Bish Decl. ¶ 7. Surprised by the question, Plaintiff Bish replied that she did not plan to, as  
9 CHP had denied her permit. Bish Decl. ¶ 8. The CHP then informed her that many groups planned to  
10 hold their demonstrations despite the blanket denials of permits. Bish Decl. ¶ 9.

11 The grounds of the State Capitol Building are the most important and widely-used public  
12 forum in California. It is where legislators meet, and therefore, the closest that protestors can  
13 physically get to having their grievances actually heard by high-level government officials. One  
14 California court described the west plaza as “the frequent site of civic and ceremonial occasions, of  
15 concerts, receptions for visiting dignitaries, public meetings and demonstrations. Pickets urging a  
16 wide variety of viewpoints often stand or walk outside the west entrance and, less frequently, at the  
17 building’s other entrances. Distribution of handbills and solicitation of petition signatures are  
18 customary activities outside the Capitol entrances, particularly at the west plaza.” *Simpson v. Mun.*  
19 *Court*, 14 Cal. App. 3d 591, 597 (1971). Countless watershed protests have been held here, including  
20 the 2011-12 Occupy Wall Street protests in Sacramento,<sup>2</sup> the 2018 protests against the police  
21 shooting of Stephon Clark,<sup>3</sup> the 1991 protests in reaction to Governor Pete Wilson’s veto of gay  
22 rights,<sup>4</sup> and the famous May 2, 1967 Black Panther Open Carry March (protesting the anti-gun  
23 Mulford Bill).<sup>5</sup>

24 <sup>2</sup> <https://www.rt.com/usa/occupy-protest-california-sacramento-979/>.

25 <sup>3</sup> <https://abc7news.com/stephon-clark-shooting-sacramento-officer-involved/3252401/>.

26 <sup>4</sup> <https://www.latimes.com/archives/la-xpm-1991-10-12-mn-153-story.html>.

27 <sup>5</sup> [https://www.pbs.org/hueypnewton/actions/actions\\_capitolmarch.html](https://www.pbs.org/hueypnewton/actions/actions_capitolmarch.html).

1 Based on the Order, and at the direction of Governor Newsom, the California Highway Patrol  
2 has refused to allow any gatherings on the grounds of the state capitol for the purpose of protesting  
3 or petitioning the government.

#### 4 **LEGAL STANDARD**

5 A temporary restraining order preserves the status quo and prevents irreparable harm until a  
6 hearing can be held on a preliminary injunction application. *See Granny Goose Foods, Inc. v.*  
7 *Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 439 (1974). A temporary restraining  
8 order may be issued without providing the opposing party an opportunity to be heard where “specific  
9 facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss,  
10 or damage will result to the movant before the adverse party can be heard in opposition,” and “the  
11 movant’s attorney certifies in writing any efforts made to give notice and the reasons why it should  
12 not be required.” Fed. R. Civ. P. 65(b)(1).

13 The standards for issuing a temporary restraining order and a preliminary injunction are the  
14 same. *See, e.g., Stuhlberg Int’l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7  
15 (9th Cir. 2001). The Ninth Circuit has established two sets of criteria for evaluating a request for  
16 injunctive relief. *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir.  
17 2003). Under the “traditional” criteria, a plaintiff must show (1) a strong likelihood of success on the  
18 merits, (2) a likelihood of irreparable injury to plaintiff if preliminary relief is not granted, (3) a  
19 balance of hardships favoring the plaintiff, and (4) advancement of the public interest. *See, e.g.,*  
20 *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Alternatively, a temporary  
21 restraining order or preliminary injunction may be appropriate when a movant raises “serious  
22 questions going to the merits” and the “balance of hardships tips sharply in the plaintiff’s favor,”  
23 provided that the plaintiff is able to show there is a likelihood of irreparable injury and that the  
24 injunction is in the public interest. *All. for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.  
25 2011).

26 In recent weeks, some Courts have relied on *Jacobson v. Commonwealth of Massachusetts*,  
27 197 U.S. 11 (1905) when reviewing government actions during the coronavirus pandemic, arguing  
28 that during a state of emergency substantial deference is owed to executive actions. *See In re Abbott*,

1 No. 20-50264, 2020 WL 1685929, at \*1 (5th Cir. Apr. 7, 2020) (holding that the district court erred  
2 by failing to consider *Jacobson* when issuing a temporary restraining order to ensure access to  
3 abortion).

4 Here, *Jacobson* is inapposite to the protest context. In *Jacobson*, the Supreme Court upheld a  
5 conviction under a Massachusetts statute that criminalized the defendant's failure to vaccinate  
6 himself from smallpox, despite the defendant's assertion that the statute violated his Fourteenth  
7 Amendment rights. *Jacobson*, 197 U.S. at 12. *Jacobson* was decided *decades* before the First  
8 Amendment was held to apply to the States by incorporation. *Gitlow v. New York*, 268 U.S. 652  
9 (1925) (Free Speech Clause); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (Free Assembly  
10 Clause); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (Right to Petition). As such, *Jacobson*  
11 does not, and could not, control this Court's analysis of Plaintiffs' First Amendment claims.

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

19 Even under *Jacobson*, however, government action is still rendered unconstitutional if it "has  
20 no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion  
21 of rights secured by the fundamental law." *Jacobson*, 197 U.S. at 31; *see also Robinson v. Marshall*,  
22 No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020) (granting temporary  
23 restraining order to abortion providers) (appeal pending). For the reasons set forth below,  
24 Defendants cannot meet even the more deferential standard applied in *Jacobson*; their indefinite and  
25 total ban on protesting on California Capital grounds is beyond all question, a plain, palpable  
26 invasion of fundamental rights protected by the First and Fourteenth Amendments.

27  
28 //



## 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 Violate Plaintiffs' Free Speech Rights in Violation of the First Amendment to the U.S. Constitution and Article 1, Section 2 of the California Constitution.

As Plaintiffs' first and sixth 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). However, in some areas, the protection afforded by the California liberty of speech clause is coterminous with that provided by the federal Constitution. *Los Angeles All. For Survival v. City of Los Angeles*, 22 Cal. 4th 352, 367, n.12 (2000). 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).

The First Amendment requires the government to err on the side of protecting political speech, rather than suppressing it. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 457 (2007).

The Orders—by acting as a prior restraint to protected speech—are unconstitutional facially and as-applied because they impermissibly burden Plaintiffs' right to freedom of speech under the First Amendment and California Constitution, Article 1, Section 2. *See IDK, Inc. v. Clark Cnty.*, 836 F.2d 1185, 1191 (9th Cir. 1988) (stating that a law is facially unconstitutional if it impermissibly burdened the plaintiff's rights, such as in the case of a prior restraint); U.S. Const., amend. I; Cal. Const., art. I, § 2. The term prior restraint is used "to describe administrative and judicial orders

1 forbidding certain communications when issued in advance of the time that such communications  
2 are to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation omitted).

3 The Orders were issued before the protected speech was to occur because they prohibit  
4 congregating to engage in protected speech for the foreseeable future. Accordingly, the Orders are  
5 facially unconstitutional because they act as a prior restraint to protected speech.

6 The Orders are also facially unconstitutional on the separate basis that they are substantially  
7 overbroad. *See IDK, Inc.*, 836 F.2d at 1191 (stating that a law is facially unconstitutional if it  
8 impermissibly burdens the rights of third parties, such as in the case of an unconstitutionally  
9 overbroad law). “Substantial overbreadth” is shown not where one shows that he can conceive of  
10 some impermissible applications of the order, but where one can show a significant number of  
11 situations where an order could be applied to prohibit constitutionally protected speech. *Houston v.*  
12 *Hill* (“*Houston*”), 482 U.S. 451 (1987) (ordinance—outlawing interruption of police officers while  
13 carrying out their duties—was unconstitutionally overbroad because it criminalized substantial  
14 amount of constitutionally protected speech and allowed police unfettered discretion in enforcement  
15 of the ordinance).

16 Here, the purpose of the Orders is to slow the transmission rate of the COVID-19 pandemic  
17 in California and its counties. However, it eliminates all public protests, rallies, and demonstrations  
18 (Compl. ¶ 22), the quintessential form of First Amendment protected speech, despite the fact that  
19 alternatives, such as gatherings with CDC guidelines in place, would allow such First Amendment  
20 protected political speech with no more risk than other activities, including activities that enjoy no  
21 constitutional protection, which are allowed. *See Long Beach Area Peace Network v. City of Long*  
22 *Beach*, 574 F.3d 1011 (9th Cir. 2009) (“Political speech is core First Amendment speech, critical to  
23 the functioning of our democratic system.”).

24 In their current form, the Orders do not allow *any* demonstrations, rallies, and protests, even  
25 those that can take place while maintaining CDC guidelines on social distancing. Compl. ¶¶ 22-48.  
26 This is a substantial burden because it covers the protected speech that every Californian who desires  
27 to attend public demonstrations, rallies, and protests in a time of critical government engagement.  
28

1 Not only this, but here, akin to *Houston*, law enforcement officers have unfettered discretion  
2 in enforcing the law because they are provided no standards as to when to enforce, or exempt some  
3 event from, the law. Bish Decl., Ex. 9 (CHP officer indicated that several demonstrations were likely  
4 to proceed absent a permit). Furthermore, violators of the Orders are liable for criminal penalties.  
5 Compl. ¶ 1, Ex. 1. Because the Orders criminalize a substantial amount of protected speech that is  
6 unnecessary for their underlying purpose, and provide law enforcement officers no guidance as to  
7 enforcement, the Orders are unconstitutionally overbroad, and this Court should grant injunctive  
8 relief.

9 Defendants' actions also fail constitutional muster under a time, place and manner analysis.  
10 Governmental action that completely bans a form of First Amendment activity is unconstitutional on  
11 its face. *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). It has long been a fundamental principle of First  
12 Amendment jurisprudence that restrictions on speech must leave open alternative channels. *Ward v.*  
13 *Rock Against Racism*, 491 U.S. 781, 802 (1989) (time place and manner restrictions regarding sound  
14 levels at a publicly owned bandshell); *Frisby v. Schultz*, 487 U.S. 474, 482 (1988) (ordinance  
15 prohibiting picketing in front of residential homes); *Renton v. Playtime Theatres*, 475 U.S. 41, 53  
16 (1986) (zoning ordinance regulating location of adult theater.); *Clark v. Cmty. for Creative Non-*  
17 *Violence*, 468 U.S. 288, 293 (1984) (regulation banning overnight sleeping in a park even if related  
18 to protests). Even where a statute is directed at conduct and only incidentally effects speech, the  
19 restriction on First Amendment freedom must be no greater than the interest being advanced by the  
20 government. *United States v. O'Brien*, 391 U.S. 367, 369 (1968) (restriction of draft card burning).

21 Here, the Orders, by excluding all public gatherings other than those of which unelected  
22 officials deem by fiat to be "Essential Critical Infrastructure Workers" *entirely* ban *all* public  
23 protests, rallies, and demonstrations. Compl., ¶ 20. This, the First Amendment does not abide.

24 **2. The Orders Ban All Public Assembly in Violation of the First Amendment to**  
25 **the U.S. Constitution and Article 1, Section 3 California Constitution.**

26 As Plaintiffs' second and seventh causes of action, they assert facial and as-applied  
27 challenges pursuant to (1) 42 U.S.C. Section 1983 on the grounds that Defendants' Orders violate  
28

1 the Freedom of Assembly Clause of the First Amendment to the U.S. Constitution, and (2) state law  
2 on the grounds that the Orders violate Article 1, Section 3 of the California Constitution.

3 “The right of free speech, the right to teach, and the right of assembly are, of course,  
4 fundamental rights.” *Whitney v. California*, 274 U.S. 357, 373 (1927). The First Amendment of the  
5 Constitution protects the “right of the people peaceably to assemble.” The Freedom of Assembly  
6 Clause was incorporated against the states in *De Jonge v. Oregon*, 299 U.S. 353 (1937). The  
7 California Constitution also protects the right to freely assemble. *See, e.g.*, Cal. Const. art. 1, § 3;  
8 *People v. Chambers*, 22 Cal. App 2d 687, 706 (1937) (“laws should not infringe upon our  
9 guaranteed freedom of speech and lawful assembly.”). When a government practice restricts  
10 fundamental rights, it is subject to “strict scrutiny” and can be justified only if it furthers a  
11 compelling government purpose and, even then, only if no less restrictive alternative is available.  
12 *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*,  
13 405 U.S. 330 (1972).

14 The Orders and Defendants’ enforcement thereof violate the First Amendment, both facially  
15 and as-applied to Plaintiffs. By denying Plaintiffs the ability to organize and attend political  
16 demonstrations, rallies, and protests that comply with the CDC guidelines for social distancing,  
17 Defendants are in violation of the Freedom of Assembly Clause. Defendants cannot meet the no-  
18 less-restrictive-alternative test. The CDC’s social distancing guidelines are appropriate to limit the  
19 spread of COVID-19. An outright ban on public gatherings for the purpose political demonstration,  
20 rally, or protest, while at the same time allowing a myriad of activities that are deemed critical by the  
21 State Health Officer, but which do possess the special constitutional protections conferred by the  
22 First Amendment, by definition cannot be deemed the least restrictive means of achieving  
23 Defendants’ public safety goals.

24 The ban on public protests is not limited to the State Capitol environs. Notwithstanding its  
25 vague language as discussed herein, the CHP has interpreted the Order to ban *all* public  
26 demonstrations, rallies, and protests. Thus, the Order leaves no alternative avenues for engaging in  
27 these core First Amendment protected activities.  
28

1 Requiring Plaintiffs to abstain from political demonstrations, rallies, and protests, despite  
2 substantial modifications to satisfy the public health interests at stake (modifications that have been  
3 deemed acceptable in the cases of operations deemed “essential” by government decree, with no due  
4 process), violates Plaintiffs’ Constitutional right to peaceably assemble.

5 **3. The Orders Violate the Plaintiffs’ Right to Petition in violation of the First**  
6 **Amendment to the U.S. Constitution and California Constitution.**

7 The First Amendment guarantees “the right of the people . . . to petition the Government for  
8 a redress of grievances.” U.S. Const. amend. I. The Ninth Circuit has interpreted the right to petition  
9 broadly in a number of situations. *See Hines v. Gomez*, 853 F. Supp. 329, 332 n.7 (N.D. Cal. 1994)  
10 (collecting cases).

11 Like other First Amendment rights, the right to petition is fundamental. The right is implicit  
12 in “[the] very idea of government, republican in form.” *United States v. Cruikshank*, 92 U.S. 542  
13 (1876). “The right to petition is cut from the same cloth as the other guarantees of that Amendment,  
14 and is an assurance of a particular freedom of expression.” *McDonald v. Smith*, 472 U.S. 479, 482  
15 (1985). In fact, “[t]he right to petition is in some sense the source of other fundamental rights, for  
16 petitions have provided a vital means for citizens to request recognition of new rights and to assert  
17 existing rights against the sovereign.” *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397 (2011).  
18 The Petition Clause was incorporated against the states in *Edwards v. South Carolina*, 372 U.S. 229  
19 (1963).

20 When a government practice restricts fundamental rights, it is subject to “strict scrutiny” and  
21 can be justified only if it furthers a compelling government purpose and, even then, only if no less  
22 restrictive alternative is available. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1,  
23 16-17 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

24 Prohibiting Plaintiffs from gathering to petition the state government on the state capitol  
25 grounds or anywhere else, despite substantial modifications to satisfy the public health interests at  
26 stake (modifications that have been deemed acceptable in the cases of operations deemed “essential”  
27 by government decree), violates Plaintiffs’ Constitutional right to peaceably petition the government.  
28

1                   **4. Defendants’ Orders Are Void for Reasons of Vagueness.**

2                   A regulation is constitutionally void on its face when, as matter of due process, it is so vague  
3 that persons “of common intelligence must necessarily guess at its meaning and differ as to its  
4 application.” *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *People ex rel. Gallo v.*  
5 *Acuna*, 14 Cal.4th 1090, 1115 (1997). Vague laws “trap the innocent by not providing fair warning.”  
6 *Grayned v. City of Rockford*, 408 U.S. 104, 108–109 (1972). If “arbitrary and discriminatory  
7 enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Id.*  
8 The problem with a vague regulation is that it “impermissibly delegates basic policy matters to  
9 policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant  
10 dangers of arbitrary and discriminatory application.” *Id.*; *see also Sessions v. Dimaya*, 138 S. Ct.  
11 1204, 1212 (2018).

12                  The State Order at issue in this case is so vague as to its scope and application as to run afoul  
13 of the Due Process Clause of the Fourteenth Amendment. Embedded within the State Order is a  
14 public health directive to shelter in place. The State Order itself merely orders the public to “heed”  
15 the public health directive, it does not appear to order compliance therewith; Webster’s Dictionary  
16 defines the word “heed” to mean “to give consideration or attention to”—not to “adhere” or comply.  
17 Despite this, state and local officials and the media have widely reported the State Order to require  
18 compliance with the public health directive by sheltering in place.<sup>6</sup>

19                  Despite this ambiguity, The CHP has interpreted the order to require it to deny applications  
20 to peacefully assemble for the purpose of political demonstrations, rallies, and protests on the  
21 grounds of the State Capitol. In light of that denial, Plaintiffs would consider holding their  
22 gatherings on locations not requiring a permit. However, given the ambiguity of the order, neither  
23 Plaintiffs nor any other reasonable person may understand precisely what is being ordered, and what  
24 actions may result in criminal penalties, fines, or imprisonment. Accordingly, the State Order is void  
25 for vagueness.

26  
27 <sup>6</sup> The New York Times, for example, reported that “Gov. Gavin Newsom of California on Thursday  
28 ordered Californians—all 40 million of them—to stay in their 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                   **5. The Orders Violate Article 1, Section 1 of the California Constitution.**

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

10                  In a case that is somewhat analogous to what Californians are facing with the coronavirus  
11 pandemic of 2020, California courts found that Public Health Officials could not quarantine 12  
12 blocks of San Francisco Chinatown because of nine deaths due to bubonic plague. *See Jew Ho v.*  
13 *Williamson*, 103 F. 10 (C.C. Cal. 1900); *Wong Wai v. Williamson*, 103 F. 1 (C.C. Cal. 1900). These  
14 courts found it “purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference  
15 with the personal liberty of complainant” who had “never had or contracted said bubonic plague;  
16 that he has never been at any time exposed to the danger of contracting it, and has never been in any  
17 locality where said bubonic plague, or any germs of bacteria thereof, has or have existed.” *Jew Ho*,  
18 103 F. at 10.

19                  In *Jew Ho* and *Wong Wai*, the courts found that there were more than 15,000 people living in  
20 the twelve blocks of San Francisco Chinatown who were to be quarantined. The courts found it  
21 unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths.  
22 This was one death for every 1,666 inhabitants of Chinatown. As of April 26, 2020, Sacramento  
23 County has one thousand and forty-five (1,045) cases and forty-one (41) deaths associated with  
24 COVID-19, according to information posted on the county’s website.<sup>7</sup> The United States Census  
25  
26

27 <sup>7</sup> Per Sacramento County Department of Public Health’s web page visited on April 27, 2020  
28 <https://www.saccounty.net/COVID-19/Pages/default.aspx>.

1 estimates that as of July 1, 2019, Sacramento County's population is 1,552,058 people.<sup>8</sup>  
2 Accordingly, less than seven hundredths of one *percent* (0.07%) of Sacramento County's population  
3 is known to have contracted the virus as of April 25, 2020, despite the April 20, 2020 protest on the  
4 State Capitol grounds and the many other unpermitted demonstrations CHP referred to in its call  
5 with Bish.

6 California courts have found that "a mere suspicion [of a contagious disease], unsupported by  
7 facts giving rise to reasonable or probable cause, will afford no justification at all *for depriving*  
8 *persons of their liberty* and subjecting them to virtual imprisonment under a purported order of  
9 quarantine." *Ex parte Arta*, 52 Cal. App. 380, 383 (1921) (emphasis added). Plaintiffs have never  
10 had or contracted said coronavirus; they have never been at any time exposed to the danger of  
11 contracting it, and have never been in any locality where said coronavirus, or any germs of bacteria  
12 thereof, are known to have existed. Citizens are not presumed to be ill, or to be carriers of a  
13 communicable disease, and indeed the government has no good faith basis whatsoever for so  
14 arguing. On the contrary, as each day passes, public health officials and noted epidemiologists are  
15 undermining the very basis for the sweeping orders banning fundamental protected speech and other  
16 activities in California. The government could not possibly meet its burden of justifying its position,  
17 which grows less tenable by the hour.

18 Requiring Plaintiffs to abstain from all protest gatherings, public protest speech, and public  
19 petition activities, despite substantial modifications to satisfy the public health interests at stake,  
20 violates their California Constitutional liberty rights.

21 **B. Plaintiffs Face Imminent Irreparable Harm Absent Immediate Injunctive Relief**

22 "In a case like the one at bar, where the First Amendment is implicated, the Supreme Court  
23 has made clear that '[t]he loss of First Amendment freedoms, for even minimal periods of time,  
24 unquestionably constitutes irreparable injury' for purposes of the issuance of a preliminary  
25 injunction." *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005,  
26 1011 (N.D. Cal. 2007) (citing *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir.

27  
28 <sup>8</sup>United States Census Bureau statistics for Sacramento County can be found online at:  
<https://www.census.gov/quickfacts/fact/table/sacramentocountycalifornia,CA/PST045218>.



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, Plaintiffs 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 all protests, even socially distanced and with masks, will deprive Plaintiffs, and innumerable other Californians, of their ability to exercise their rights to speech, petition, and assembly as secured by the First and Fourteenth Amendments and Article 1 of the California Constitution.

1 By contrast, temporarily enjoining Defendants’ enforcement of the Orders will not result in  
2 hardship to Defendants, who are in a position to adopt, at least on an interim basis, a more narrowly  
3 crafted set of equally applied provisions that enable the government to achieve any legitimate ends  
4 without unjustifiably invading First and Fourteenth Amendment freedoms. *See id.* In addition,  
5 Defendants will suffer no legitimate harm by accommodating a Plaintiffs’ exercise of fundamental  
6 rights in the same manner Defendants are accommodating thousands—and millions—of others  
7 engaged in non-First Amendment protected activities. The Constitution demands no less.

#### 8 **D. Injunctive Relief Is in the Public Interest**

9 “As the Ninth Circuit has consistently recognized, there is a significant public interest in  
10 upholding First Amendment principles.” *Americans for Prosperity Foundation*, 182 F. Supp. 3d at  
11 1059 (internal citations omitted); *see also Doe v. Harris*, 772 F.3d 563, 683 (9th Cir.2014);  
12 *Sammartano*, 303 F.3d at 974. As such, the requirement that issuance of a preliminary injunction be  
13 in the “public interest” usually is deemed satisfied when it is clear that core constitutional rights  
14 would remain in jeopardy unless the court intervened. *Reed*, 523 F. Supp. 2d at 1101. The public is  
15 best served by preserving a foundational tenet of this American democracy: religious liberty. *See*  
16 *Sammartano*, 303 F.3d at 974 (“Courts considering requests for preliminary injunctions have  
17 consistently recognized the significant public interest in upholding First Amendment principles.”).

18 As discussed above, Plaintiffs’ core constitutional rights to free speech, free assembly,  
19 petition, due process, and equal protection, will remain in jeopardy so long as Defendants remain  
20 free to enforce their Orders. Accordingly, issuance of injunctive relief is proper, and the Court  
21 should grant this Application.

#### 22 **II. THE COURT SHOULD DISPENSE WITH ANY BOND REQUIREMENT**

23 Rule 65(c) of the Federal Rules of Civil Procedure provides that a TRO or preliminary  
24 injunction may be issued “only if the movant gives security in an amount that the court considers  
25 proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined  
26 or restrained.” Fed. R. Civ. P. 65(c). However, the Court has discretion as to whether any security is  
27 required and, if so, the amount thereof. *See, e.g., Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir.  
28 2003).

1 Plaintiffs request that the Court waive any bond requirement, because enjoining Defendants  
2 from unconstitutionally enforcing the orders as to First Amendment protected activities will not  
3 financially affect Defendants, who already categorically exempt specified non-First Amendment  
4 activities from compliance. A bond would, however, be burdensome on already burdened Plaintiffs  
5 under these circumstances. *See, e.g., Bible Club v. Placentia-Yorba Linda School Dist.*, 573 F. Supp.  
6 2d 1291, fn. 6 (C.D. Cal. 2008) (waiving requirement of student group to post a bond where case  
7 involved “the probable violation of [the club’s] First Amendment rights” and minimal damages to  
8 the District of issuing injunction); *citing Doctor John’s, Inc. v. Sioux City*, 305 F. Supp. 2d 1022,  
9 1043-44 (N.D. Iowa 2004) (“requiring a bond to issue before enjoining potentially unconstitutional  
10 conduct by a governmental entity simply seems inappropriate, because the rights potentially  
11 impinged by the governmental entity’s actions are of such gravity that protection of those rights  
12 should not be contingent upon an ability to pay.”).

### 13 CONCLUSION

14 Plaintiffs respectfully request that the Court grant Plaintiffs’ motion for a temporary  
15 restraining order, and issue an order to show cause why a preliminary injunction should not be  
16 issued, as follows:

- 17 1. Defendants shall issue permits to Plaintiffs so that they may proceed with their  
18 requested use of the State Capitol grounds.
- 19 2. Defendants, as well as their agents, employees, and successors in office, shall be  
20 restrained and enjoined from enforcing, attempting to enforce, threatening to enforce, or otherwise  
21 requiring compliance with any prohibition on Plaintiffs’ engagement in First Amendment protected  
22 activities including gathering for the purpose of political demonstrations, rallies, and protests  
23 religious services, practices, or activities at which the Center for Disease Control’s social distancing  
24 guidelines are followed.
- 25 3. Defendants shall show cause, at a time and place to be directed by the Court, why a  
26 preliminary injunction should not issue requiring Defendants to act as described above; the  
27 temporary restraining order shall remain effective until such time as the Court has ruled on whether a  
28 preliminary injunction should issue.

Such relief is necessary to prevent Defendants from further violating Plaintiffs' constitutional rights, pending trial on the merits of Plaintiffs' claims.

Respectfully submitted,

Date: April 27, 2020

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

RON GIVENS AND CHRISTINE BISH,  
*Plaintiffs and Appellants,*

v.

GAVIN NEWSOM, IN HIS CAPACITY AS GOVERNOR OF CALIFORNIA; XAVIER  
BECERRA, IN HIS CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA; WARREN  
STANLEY, IN HIS CAPACITY AS COMMISSIONER OF THE CALIFORNIA HIGHWAY  
PATROL; SONIA ANGELL, IN HER CAPACITY AS STATE PUBLIC HEALTH OFFICER,  
*Defendants and Appellees.*

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**On Appeal from an Order of the U.S. District Court  
for the Eastern District of California**

No. 2:20-cv-852-JAM-CKD

Hon. John A. Mendez, District Judge

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**ANSWERING BRIEF ON THE MERITS**

---

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## TABLE OF CONTENTS

	<b>Page</b>
Jurisdictional statement.....	1
Issues presented .....	1
Pertinent statutes and regulations .....	2
Introduction.....	3
Statement of the case .....	5
A.    The COVID-19 pandemic and California’s response.....	5
B.    This case.....	8
1.    Plaintiffs’ complaint .....	8
2.    The TRO motion and supporting evidence .....	10
3.    The district court’s denial of the TRO and statements about further proceedings .....	13
4.    Later district court proceedings and state directives.....	18
Summary of argument .....	19
Argument .....	21
I.    The appeal should be dismissed.....	21
A.    The TRO denial is not an appealable order .....	21
B.    This appeal is moot.....	25
1.    No injury or potential remedy remains .....	26
2.    No exception to mootness applies .....	27
3.    No advisory opinion or vacatur is needed.....	30
C.    The district court lacked jurisdiction to restrain these defendants based on state-law claims.....	32
II.   If this Court reaches the merits, it should affirm .....	33
A.    Standard of review .....	33

**TABLE OF CONTENTS**  
**(continued)**

	<b>Page</b>
B. Plaintiffs did not establish a likelihood of success on the merits.....	34
1. Speech claims .....	34
2. Other federal claims .....	43
3. State law claims .....	45
C. Events after the district court’s decision provide no basis to reverse.....	46
D. Other <i>Winter</i> requirements support affirmance .....	50
Conclusion .....	53
Statement of related cases.....	54



## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Allen v. Minnstar, Inc.</i> 8 F.3d 1470 (10th Cir. 1993) .....	48
<i>Alliance for the Wild Rockies v. Cottrell</i> 632 F.3d 1127 (9th Cir. 2011) .....	34
<i>Already, LLC v. Nike, Inc.</i> 568 U.S. 85 (2013).....	28, 29
<i>Ashwander v. Tenn. Valley Auth.</i> 297 U.S. 288 (1936).....	25
<i>Bd. of Trustees of Glazing Health &amp; Welfare Trust v. Chambers</i> 941 F.3d 1195 (9th Cir. 2019) .....	29
<i>Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.</i> 868 F.2d 1085 (9th Cir. 1989) .....	49, 50
<i>BNSF Ry. Co. v. California Dep’t of Tax &amp; Fee Admin.</i> 904 F.3d 755 (9th Cir. 2018) .....	34
<i>Clark v. Community for Creative Nonviolence</i> 468 U.S. 288 (1984).....	40
<i>County Mun. Empl. Supervisors’ and Foremen’s Union Local 1001 v. Laborers’ Int’l Union of N. Am.</i> 365 F.3d 576 (7th Cir. 2004) .....	25
<i>Doe v. Regents of the Univ. of Cal.</i> 891 F.3d 1147 (9th Cir. 2018) .....	32
<i>Elim Romanian Pentecostal Church v. Pritzker</i> --- F.3d ---, 2020 WL 3249062 (7th Cir. 2020).....	36
<i>Env’t Defense Fund, Inc. v. Andrus</i> 625 F.2d 861 (9th Cir. 1980) .....	22

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

	<b>Page</b>
<i>Friends of the Earth, Inc. v. Laidlaw Envt’l Serv., TOC, Inc.</i> 528 U.S. 167 (2000).....	28
<i>Gill v. Whitford</i> 138 S. Ct. 1916 (2018).....	27
<i>Haskell v. Harris</i> 745 F.3d 1269 (9th Cir. 2014) .....	48
<i>Holder v. Humanitarian Law Project</i> 561 U.S. 1 (2010).....	43
<i>In re Arata</i> 52 Cal. App. 380 (Cal. Ct. App. 1921).....	46
<i>In re Martin</i> 83 Cal. App. 2d 164 (Cal. Ct. App. 1948).....	46
<i>Int’l Union of Bricklayers &amp; Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.</i> 752 F.2d 1401 (9th Cir. 1985) .....	48
<i>Jacobson v. Massachusetts</i> 197 U.S. 11 (1905).....	14, 15, 35, 36, 37
<i>Jew Ho v. Williamson</i> 103 F. 10 (C.C.N.D. Cal. 1900).....	46
<i>Kingdomware Techs., Inc. v. United States</i> 136 S. Ct. 1969 (2016).....	30
<i>Lincoln Club of Orange County v. City of Irvine</i> 292 F.3d 934 (9th Cir. 2002) .....	44
<i>Lofton v. Verizon Wireless (VAW) LLC</i> 586 F. App’x 420 (9th Cir. 2014).....	51
<i>Mallard v. U.S. Dist. Court for S. Dist. of Iowa</i> 490 U.S. 296 (1989).....	45

# TABLE OF AUTHORITIES

## (continued)

	Page
<i>Pom Wonderful LLC v. Hubbard</i> 775 F.3d 1118 (9th Cir. 2014) .....	34
<i>Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp.</i> 711 F.2d 902 (9th Cir. 1983) .....	47
<i>Religious Tech. Ctr., Church of Scientology Int’l, Inc. v. Scott</i> 869 F.2d 1306 (9th Cir. 1989) .....	21, 22
<i>Roberts v. United States Jaycees</i> 468 U.S. 609 (1984).....	43, 44
<i>Rosebrock v. Mathis</i> 745 F.3d 963 (9th Cir. 2014) .....	29
<i>S. Bay United Pentecostal Church v. Newsom</i> 140 S. Ct. 1613 (2020).....	<i>passim</i>
<i>S. Bay United Pentecostal Church v. Newsom</i> 959 F.3d 938 (9th Cir. 2020) .....	25
<i>S. Bay United Pentecostal Church v. Newsom</i> 2020 WL 2814636 (S.D. Cal. May 15, 2020) .....	25
<i>Singleton v. Wulff</i> 428 U.S. 106 (1976).....	48
<i>Spencer v. Kemna</i> 523 U.S. 1 (1998).....	26, 27, 30
<i>Steel Co. v. Citizens for a Better Environment</i> 523 U.S. 83 (1998).....	31
<i>Stuhlbarg Int’l Sales Co. v. John D. Brush &amp; Co.</i> 240 F.3d 832 (9th Cir. 2001) .....	33
<i>Summers v. Earth Island Institute</i> 555 U.S. 488 (2009).....	27

# TABLE OF AUTHORITIES

## (continued)

	Page
<i>Super Tire Eng'g Co. v. McCorkle</i> 416 U.S. 115 (1974).....	28
<i>TRW, Inc. v. FTC</i> 647 F.2d 942 (9th Cir. 1981) .....	52
<i>Turner Broad. Sys., Inc. v. FCC</i> 520 U.S. 180 (1997).....	39
<i>U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship</i> 513 U.S. 18 (1994).....	30, 31
<i>United States v. Dixon</i> 509 U.S. 688 (1993).....	45
<i>United States v. Munsingwear</i> 340 U.S. 36 (1950).....	31
<i>United States v. Sanchez-Gomez</i> 138 S. Ct. 1532 (2018).....	26
<i>United States v. Stevens</i> 559 U.S. 460 (2010).....	41
<i>United States v. Williams</i> 553 U.S. 285 (2008).....	45
<i>Ward v. Rock Against Racism</i> 491 U.S. 781 (1989).....	17, 37, 38, 39
<i>Washington v. Trump</i> 847 F.3d 1151 (9th Cir. 2017) .....	24
<i>Wayte v. United States</i> 470 U.S. 598 (1985).....	44
<i>Weinstein v. Bradford</i> 423 U.S. 147 (1975).....	29, 30

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

	<b>Page</b>
<i>Wildwest Inst. v. Bull</i> 472 F.3d 587 .....	34, 37, 40
<i>Wilson v. Shaw</i> 204 U.S. 24 (1907).....	48
<i>Winter v. Nat. Res. Defense Council, Inc.</i> 555 U.S. 7 (2008).....	33, 50, 51
<i>Wong Wai v. Williamson</i> 103 F. 1 (C.C.N.D. Cal. 1900).....	46
<i>Woratzek v. Ariz. Bd. of Executive Clemency</i> 117 F.3d 400 (9th Cir. 1997) .....	24
<i>Ex parte Young</i> 209 U.S. 123 (1908).....	32
 <b>STATUTES AND REGULATIONS</b>	
28 U.S.C. § 1292.....	passim
§ 1331.....	1
§ 1343.....	1
42 U.S.C. § 1983 .....	1, 9
Cal. Gov. Code § 8567 .....	29
Cal. Labor Code § 6409.1 .....	42
Cal. Code Regs., tit. 8, § 340 .....	42
Cal. Code Regs., tit. 8, § 342 .....	42

# TABLE OF AUTHORITIES

## (continued)

Page

### COURT RULES

#### Federal Rules of Appellate Procedure

Rule 4 .....	1
Rule 10 .....	48

#### Federal Rules of Civil Procedure

Rule 62.1 .....	19
Rule 65 .....	24

#### Federal Rules of Evidence

Rule 106 .....	49
Rule 201 .....	48, 49

### OTHER AUTHORITIES

#### California Department of Public Health, Guidance for the Prevention of COVID-19 Transmission for Gatherings .....

7

#### Executive Order N-33-20.....

6

#### <https://covid19.ca.gov/img/EssentialCritical>

InfrastructureWorkers.pdf.....	7
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13

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42

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24

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41

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31

## **JURISDICTIONAL STATEMENT**

Plaintiffs brought this action under 42 U.S.C. § 1983 and state law. ER 181-189.<sup>1</sup> The district court had subject matter jurisdiction over plaintiffs' application for a temporary restraining order with respect to the federal claims under 28 U.S.C. §§ 1331, 1343(a), but had no jurisdiction with respect to the state-law claims because of the Eleventh Amendment, *see infra* p. 32.

The district court denied plaintiffs' request for a temporary restraining order on May 8, 2020, and plaintiffs filed a timely notice of appeal on May 17, 2020. *See* ER 1, 81; Fed. R. App. P. 4(a)(1)(A). This Court lacks jurisdiction for two reasons. First, as explained below at pages 21-25, jurisdiction is improper under 28 U.S.C. § 1292(a). Second, as explained at pages 25-31, the appeal is moot.

## **ISSUES PRESENTED**

1. Whether this Court lacks jurisdiction over plaintiffs' appeal:

(a) under 28 U.S.C. § 1292, because the district court's denial of a temporary restraining order was not tantamount to the denial of a preliminary injunction;

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<sup>1</sup> Plaintiffs-appellants' Excerpts of Record are cited as ER; defendants-appellees' Supplemental Excerpts of Record are cited as SER. District Court documents are cited by docket number as D.C. Doc. OBM refers to plaintiffs-appellants' Opening Brief on the Merits, and U.S. Br. refers to the United States' Brief as Amicus Curiae. RJN refers to plaintiffs-appellants' motion requesting judicial notice.

(b) under the doctrine of mootness, because state policies no longer pose any impediment to plaintiffs' conducting the activities for which they filed the TRO motion giving rise to this appeal; and

(c) with respect to plaintiffs' state-law claims, under the Eleventh Amendment.

2. Whether, if jurisdiction exists, the district court committed reversible error when it denied plaintiffs' request to forbid application of the State's then-existing emergency restrictions in May 2020 on the limited record of plaintiffs' temporary restraining order proceeding.

## **PERTINENT STATUTES AND REGULATIONS**

### **U.S. Const., Amend. I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

### **28 U.S. Code § 1292. Interlocutory decisions**

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court[.]



## INTRODUCTION

This appeal is an unnecessary and jurisdictionally improper distraction from the district court proceedings that should be the focus of plaintiffs' efforts. Plaintiffs wished to gather 500 to 1,000 people for in-person outdoor political demonstrations on the grounds of the California State Capitol over the weekend of May 2 and 3, 2020. They were denied permits because of temporary emergency orders then in effect. The orders required Californians to stay at home, and forbade large gatherings, to help stem the advance of the COVID epidemic that had recently overwhelmed the healthcare system in other parts of the country and threatened to do the same in California. Plaintiffs sued in federal court and requested a temporary restraining order to permit the demonstrations. As with many TRO proceedings, the record was necessarily limited in light of the timing. And when the district court denied the request, it invited plaintiffs to contact chambers if they wished to seek a preliminary injunction on a more fully developed record. Plaintiffs chose not to do so, and filed this appeal instead. In the meantime, the evolving pandemic has required a dynamic response from the State. California has been able to relax some of its restrictions in stages, and plaintiffs could now apply for a permit and hold the kind of outdoor political protest they asked for in their TRO motion.

Congress deliberately chose to allow appeals from only a limited set of interlocutory orders—including injunctive orders but not TROs. If plaintiffs had chosen to follow-up with a preliminary injunction proceeding, the district court, with a fuller record and less extreme time-pressure, could have made the type of interim decision that Congress considered fit for appellate review. Such a proceeding would also have allowed plaintiffs to explain how—if at all—they continue to be injured despite the considerable scope for outdoor political gatherings provided in the newer state directives. If there were no such injury, then plaintiffs’ requests for injunctive relief might not have been successful. But lack of injury makes the appeal here moot as well: The mandate that plaintiffs seek from this Court would change nothing about plaintiffs’ current ability to gather and to protest, and no exception to mootness applies. Because the TRO denial presents no case or controversy to review, the appeal should be dismissed.

The appeal is misguided in another sense as well. Plaintiffs’ main contention is that the district court erred by denying their request under a special test for emergency measures instead of applying the standards of review that generally govern First Amendment claims. But the district court in fact applied both kinds of review, finding plaintiffs’ claims lacking under each. Indeed, any standard of review would recognize the State’s extraordinarily compelling need to prevent COVID’s spread, and would defer to the expert medical judgment that California’s

public health officials exercised and which plaintiffs’ sparse evidence did not controvert. Plaintiffs present to this Court new documents that postdate the district court’s decision, arguing that later events show California’s past policies to have been viewpoint discriminatory or raise concerns about future unequal enforcement. In addition to being without merit, that argument contradicts fundamental principles relating to the record on appellate review; the need to judge only actual, ripe controversies instead of hypothetical ones; and the limits of judicial notice. And while plaintiffs continue to argue about purported state-law violations, the Eleventh Amendment barred their request for a TRO on such grounds.

## **STATEMENT OF THE CASE**

### **A. The COVID-19 Pandemic and California’s Response**

COVID–19 is “a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide.” *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C.J., concurring in denial of injunctive relief). “At this time, there is no known cure, no effective treatment, and no vaccine.” *Id.* By April 30, California had had almost 50,000 confirmed COVID cases, 3,500 hospitalized patients, and 2,000 deaths. SER 85. And those figures involved only confirmed cases; they understated the risk that a particular Californian could unknowingly carry the virus and transmit the disease. *See S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring

in denial of injunctive relief) (“Because people may be infected but asymptomatic, they may unwittingly infect others.”).

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 disease. ER 9. The Governor proclaimed a State of Emergency on March 4, 2020. *Id.* at 193. The State’s efforts have been coordinated with and responsive to federal efforts. President Trump proclaimed a State of Emergency on March 13. *Id.* at 176. And California has learned from the actions and reports of federal authorities, *id.* at 9, incorporating federal guidance into its own guidance and operative requirements as appropriate, *see e.g., id.* at 193-194.

On March 19, the Governor issued Executive Order N-33-20. ER 193. Its purpose was to “preserve the public health and safety, and to ensure the healthcare delivery system is capable of serving all, and prioritizing those at highest risk and vulnerability.” *Id.* It ordered California residents to “immediately heed the current State public health directives.” *Id.* And it reprinted relevant directives as part of the Governor’s order. *Id.* In the reprinted “Order of the State Public Health Officer” dated March 19, the State Public Health Officer and Director of the California Department of Public Health “order[ed] all individuals living in the State of California to stay home ... except as needed to maintain continuity of

operations of [federally specified] critical infrastructure sectors.” *Id.*

(capitalization altered). Critical infrastructure workers were authorized to leave home to accomplish their critical labor. *See id.* at 193-194.<sup>2</sup> Those not designated “Essential Critical Infrastructure Workers” were allowed to leave home to “access such necessities as food, prescriptions, and health care” or to “facilitate authorized necessary activities.” *Id.* at 194. The purpose of these commands was “to protect the public health of Californians” and “establish consistency across the state in order to ensure that we mitigate the impact of COVID-19.” *Id.* “Our goal is simple, we want to bend the curve, and disrupt the spread of the virus.” *Id.*

Other directives specifically addressed public gatherings. On March 16, the California Department of Public Health had determined that “‘all gatherings’” of any size—in any “‘indoor or outdoor space’”—“‘should be postponed or canceled’” to combat the spread of COVID-19. ER 3 (quoting Cal. Dep’t of Pub. Health, Guidance for the Prevention of COVID-19 Transmission for Gatherings, March 16, 2020).<sup>3</sup> Consistent with this public health determination, the California

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<sup>2</sup> The State’s April 28 list of critical infrastructure workers can be found at <https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf>. *See* ER 176 n.7.

<sup>3</sup> The March 16 guidance is available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/CDPHGuidanceforthePreventionofCOVID19TransmissionforGatherings.aspx>. It explained that “aggressive strategies ... that reduce close contact of people not regularly together, including limiting gatherings,

Highway Patrol (CHP)—which issues permits for events on the grounds of the State Capitol—decided not to issue permits for such gatherings. *See* SER 70.

**B. This Case**

**1. Plaintiffs’ Complaint**

On April 27, plaintiffs Ron Givens and Christine Bish filed a complaint in the U.S. District Court for the Eastern District of California, naming Governor Gavin Newsom, Attorney General Xavier Becerra, Public Health Officer Sonia Angell, and CHP Commissioner Warren Stanley as defendants. ER 172.

According to the complaint, Givens sought to convene a large outdoor “protest” at the State Capitol on May 3 to protest delays in processing background checks for firearms purchasers. ER 178-179; *see id.* at 167. On April 22, he had submitted a permit application to the CHP, forecasting that the event would draw 1,000 attendees and requesting permission to use the Capitol Building’s “entire grounds.” *Id.* at 179; *see id.* at 168. The application was denied on April 24. *Id.* The complaint asserted that “Givens intend[ed] to instruct his fellow attendees to

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has proven effective in prior pandemics at delaying rates of transmission and reducing illness and death.” *Id.* It defines a “‘gathering’” as “any event or convening that brings together people 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.” *Id.*; *see id.* (“[t]his includes gatherings such as concerts, conferences, and ... sporting events,” and “applies regardless of [the] sponsor”). And it stated that “authorities will revisit this guidance on a regular basis to evaluate the continued public health need” and “evaluate if any elements need to be changed.” *Id.*

follow social distancing and wear masks,” and that Givens had not personally contracted coronavirus. *Id.* at 179.

The complaint alleged that on April 23, Bish had submitted an application for a permit to hold a May 2 “rally” in front of the State Capitol Building. ER 180. The purpose was to “encourage the state to lift its coronavirus-related restrictions, and to raise voter awareness about civil rights issues pertaining to the stay-at-home orders.” *Id.* Bish was told on April 24 that the CHP had denied her application. *Id.* The complaint states that Bish personally does not have coronavirus, and that “Bish and her fellow protestors intend to practice social distancing and wear masks.” *Id.* at 180-181.

Givens and Bish raised four federal claims under 42 U.S.C. § 1983, alleging that the order violated the First Amendment’s Free Speech Clause, Freedom of Assembly Clause, and Right to Petition Clause, and the Fourteenth Amendment’s Due Process Clause. ER 181-185. The complaint also raises four claims under the California Constitution, alleging violations of the state constitutional Right to Liberty Clause, Freedom of Speech Clause, Freedom of Assembly Clause, and Right to Petition Clause. *Id.* at 186-189; *see* Cal. Const., art. I, §§ 1, 2, 3. The complaint seeks “an order and judgment declaring that the State Order, facially and as-applied to plaintiffs, violates” each relevant provision of the state and federal constitutions; an order “enjoining ... defendants from enforcing the State Order or

otherwise interfering with Plaintiffs['] ability to exercise constitutionally protected rights”; and attorneys’ fees and costs. ER 190. The complaint does not seek damages.

## **2. The TRO Motion and Supporting Evidence**

Together with the complaint, plaintiffs moved on April 27 for a temporary restraining order and an order to show cause why a preliminary injunction should not issue. ER 160-162. Plaintiffs requested that defendants be required to “issue permits to Plaintiffs so that they may proceed with their requested use of the State Capitol grounds.” *Id.* at 161. They also requested that defendants be prohibited “from enforcing, ... or otherwise requiring compliance with any prohibition on Plaintiffs’ engagement in First Amendment protected activities including gathering for the purpose of political demonstrations, ... religious services, practices, or activities at which the Center for Disease Control’s social distancing guidelines are followed.” *Id.* Plaintiffs’ application was accompanied by brief declarations from Givens and Bish stating their plans for the gatherings on May 2 and 3 and reiterating some of the allegations from their complaint. ER 166-171.<sup>4</sup> Plaintiffs

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<sup>4</sup> With their May 5 reply brief, two days before the hearing, plaintiffs submitted additional materials. *See* ER 110-157. Most were newspaper and Internet articles. *Id.* at 113-124, 138-158. The submission also included a CDC report covering the week of April 19-25. ER 126-137. That report noted, among other things, that the percentage of death certificates attributing death to pneumonia, influenza or COVID-19 had decreased to 14.6% but remained



did not submit evidence from any physician or public health expert on the relative risks of large gatherings as compared to other activities, or the ability to mitigate that risk while still gathering in large numbers.

The State's opposition, filed four days later, relied partly on declarations from a public health expert and a CHP captain. SER 68-90. The declaration of James Watt, M.D., M.P.H., provided California's then-current statistics for known COVID diagnoses (almost 50,000), hospitalizations (almost 3,500) and deaths (almost 2,000). *Id.* at 85. Dr. Watt explained that a "large number of people with COVID-19 have no symptoms," but could nonetheless spread the disease. *Id.* The exponential nature of COVID transmission meant that, at average infection rates, a single carrier could be responsible for over 1,000 transmissions over 10 cycles. *Id.* at 84. Dr. Watt explained that the purpose of the State's health and safety rules was to "reduc[e] community spread," thereby "protect[ing] vulnerable people" and "prevent[ing] ... health care facilities[] from being overwhelmed." *Id.* at 85.

Dr. Watt stated that any interaction by "a large group of people" carried "increased risk that COVID-19 may be transmitted," and that avoidance of large gatherings was an important supplement to—rather than substitute for—measures such as masks and social distancing. SER 85-86; *see id.* at 86 ("This is why the

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"significantly above baseline" and could change as more death certificates were processed. *Id.* at 128.

CDC recommends that large gatherings be cancelled.”). He recounted his education and experience, including postgraduate degrees in both medicine and public health, and over two decades as a professional dealing with epidemiology and communicable diseases. *Id.* at 83. “Based on my experience with infectious disease prevention measures that depend on individual behavior,” he stated, “it will be very difficult for organizers to conduct safely [the] rallies with hundreds of people that [are] the subject of this litigation.” *Id.* at 85.

Moreover, a gathering at the capitol of people from other parts of the State presented a geographic risk: those who caught COVID at the event and returned to their home communities “will likely spread COVID-19” to others; the “spread could fan out into different parts of the state jeopardizing the hard work to contain COVID-19 that is going on in many communities.” ER 86. And such rallies would be especially risky because “chanting and yelling could generate respiratory droplets and spread them more widely than in normal circumstances.” *Id.*

CHP Captain Douglas Lyons’s declaration noted CHP’s “longstanding requirement that permitted events be consistent with public health and safety.” ER 70. In light of the state orders, CHP had determined not to issue permits for any gatherings “for a temporary period,” because gatherings would not currently be consistent with that requirement. *Id.* at 69-70. Captain Lyons explained that “CHP applies this temporary policy to all permit applications for gatherings regardless of

the sponsor of the gathering, that sponsor's viewpoint, or anything else connected to the content of the gathering. *Id.* at 70.

Captain Lyons further noted a recent experience shedding light on that judgment. An April 20 gathering at the State Capitol had featured “hundreds of demonstrators ... from all over California.” ER 69. During the permit application process, CHP had been told “that most of the participants would demonstrate from their cars, and ... that those who chose to congregate in person would self-police” to “wear[] protective masks, and practice physical distancing by maintaining a minimum of six feet between each other.” *Id.* “[M]ost of these protesters,” however, ended up “not maintaining physical distanc[e].” *Id.* Instead, “they stood shoulder to shoulder” while cheering. *Id.* “[M]any were not wearing protective masks and gloves.” *Id.* The organizers “made no apparent effort to correct these failures.” *Id.*

### **3. The District Court's Denial of the TRO and Statements About Further Proceedings**

The district court conducted oral argument by video conference on May 7, applying its own measures to prevent in-person gatherings. ER 25-78.<sup>5</sup> There was

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<sup>5</sup> See *In re Extending Temporary Restrictions on Courthouse Access and In Court Hearings*, General Order 617 (E.D. Cal. Apr. 17, 2020) (“[I]f the assigned Judge believes a hearing is necessary, the hearing will be by telephone or videoconference.”), available at <http://www.caed.uscourts.gov/caednew/assets/File/GO%20617.pdf>.

no testimony. At the end, the court stated that, “[u]nder the facts and circumstances of this specific case, what they’re asking for, and the evidence before this Court on a limited record I don’t believe ... that a temporary restraining order at this time is appropriate.” ER 77. “So where we go from here is really up to all of you,” the court continued. *Id.* at 78. “If you want to continue or initiate discussions that may change the Court’s view or impact this case, please notify me right away.” *Id.* “Given that I’m likely to deny the temporary restraining order, I will not set this for a hearing on a preliminary injunction motion, but that doesn’t obviously, preclude the plaintiffs from filing that motion as well, or [from] pursuing, if there is a means of doing so, their right to appeal any decision by this Court to the Ninth Circuit.” *Id.*

The court issued its order and opinion the next day. ER 1-24. As previewed at the hearing, the court denied the requested TRO because plaintiffs had failed to demonstrate a likelihood of success or serious question on the merits of their claims. *Id.* at 7. The court noted that its conclusion would be the same under either of two analyses: a special test for emergency health measures, or the traditional test applicable to time, place, and manner restrictions on speech. *Id.*

The first mode of analysis focused on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). ER 7-11. Under that precedent, the court explained, when a State “enact[s] an emergency public health measure, courts will uphold it unless

(1) there is no real or substantial relation to public health,” or (2) the measure is “‘beyond all question’ a ‘plain, palpable invasion of rights secured by [] fundamental law.’” *Id.* at 8 (quoting *Jacobson*, 197 U.S. at 30).

The court viewed the *Jacobson* standard as unlikely to support plaintiffs’ requested relief. The restrictions’ relation to public health was “uncontroverted.” ER 9; *see id.* at 2-3 (noting that COVID had infected millions of people and killed over 250,000 worldwide); *id.* at 9 (COVID had already infected over 58,000 Californians and killed almost 2,500). California had “‘work[ed] closely with the national Centers for Disease Control and Prevention, the United States Health and Human Services Agency, and local health departments’” to plan its response. *Id.* at 9. The virus “is known to quickly spread from person to person,” and if “[u]nchecked, it can spread exponentially.” *Id.* “Many who are infected show no symptoms but still contribute to COVID-19’s spread.” *Id.* Under *Jacobson*, the court would not “question expert determinations on the efficacy of reducing gatherings in lowering the number of new infections.” *Id.* (citing *Jacobson*, 197 U.S. at 30); *see supra* pp. 11-12 (discussing declaration of James Watt, M.D., M.P.H.). For these reasons, the court found that the emergency restrictions bore a “‘real and substantial relationship’ to preventing widespread transmission of COVID-19”; moreover, based on the constitutional analysis discussed below, plaintiffs did not show a “‘plain, palpable invasion’” of their rights. ER 10-11.

The court next determined that plaintiffs would be unlikely to succeed “under traditional constitutional analysis.” ER 7; *see id.* at 11-16. Analyzing plaintiffs’ free speech claims under traditional standards, the court treated the State Capitol grounds as a traditional public forum, and asked whether the state’s restrictions passed the Supreme Court’s time, place, and manner test. *Id.* at 11. Because the State’s order was “‘applicable to all speakers’” and CHP was applying its temporary moratorium on permits to all applicants, the State was acting in a content-neutral way. *Id.* at 12. Given the record, the court also concluded, the ban on in-person gatherings met the narrow-tailoring requirement for time, place, and manner restrictions. *Id.* at 13. Although plaintiffs maintained that they should be allowed to gather in the hundreds and rely on other methods of preventing transmission, the court found, the parties’ evidence “clearly demonstrates that in-person gatherings increase the spread of COVID-19 ... even when people attempt to comply with the CDC’s recommendations.” *Id.* The “only fool-proof way to prevent the virus from spreading at in-person gatherings” was to “prohibit[] in-person gatherings,” as the State had done. *Id.* at 14. Nor did the State’s allowance for people to come together in other, limited contexts undercut that conclusion. “[T]he record demonstrates that [plaintiffs’ proposed] gatherings put Plaintiffs and others at significantly *higher* risk than many other prohibited activities.” *Id.*; *see*

*also id.* (referring to the court’s “close examination of the evidence before this Court, including Plaintiffs’ permit applications”).

In examining whether the State’s orders left adequate alternative means for plaintiffs’ speech, the court noted a variety of protests methods that remained open. *See, e.g.*, ER 14 (“Defendants have conceded that Plaintiffs may plan in-car protests, ‘filling streets and honking horns as other groups have done ....’”); *id.* at 16 (plaintiffs could stage rallies and protests via electronic media). The court found that such options might be more effective than in-person protests, given the stay-at-home order. *Id.* at 16. In any event, the court reasoned, narrow tailoring “does not require the ‘least restrictive means’ possible,” and “[p]laintiffs have not proposed a more tailored option that would ensure comparable levels of safety.” *Id.* at 15 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)).

Applying a traditional analysis with respect to plaintiffs’ other claims, the court determined that those claims were also unlikely to succeed. The right-to-assemble claims were unlikely to succeed, because the challenged policy did not appear to “prohibit substantially more expressive association” than was necessary to advance the “compelling” interest in “protecting California’s residents from ‘[a] global pandemic and its local outbreak.’” ER 17. The right-to-petition claims were unlikely to succeed for essentially the same reasons as the speech and assembly claims. *Id.* at 18-19. Plaintiffs’ due-process claim was unlikely to

succeed because the Governor’s order was sufficiently clear. *Id.* at 20-22. And plaintiffs’ remaining state constitutional claim was unlikely to succeed because the alternative—requiring public health officials to “‘identify specific individuals who carry the virus and order only them to stay home’”—“would not be feasible.” *Id.* at 22.

Plaintiffs filed a notice of appeal on May 17. ER 81.

#### **4. Later District Court Proceedings and State Directives**

Shortly after plaintiffs appealed, events overtook their claims. On May 25, in light of the State’s progress in slowing the spread of COVID-19, California issued a directive allowing for in-person protests and rallies, subject to an attendance cap. *See* OBM 14. On June 12, the State removed that cap for outdoor protests. *See* <https://covid19.ca.gov/stay-home-except-for-essential-needs/>; *see also infra* pp. 48-49 nn. 21 & 22. In short, there is not presently any statewide prohibition against outdoor rallies and protests in California.<sup>6</sup>

Litigation at the district court has also continued. Plaintiffs filed a motion for reconsideration on June 9. D.C. Doc. 28. The motion alleges newly discovered evidence that defendants are “selectively enforcing” the stay-at-home requirements based on speakers’ viewpoints. *Id.* at 1. In support, plaintiffs cited statements of

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<sup>6</sup> The May 25 numerical limits continue to govern indoor protests. In addition, the state guidelines do not prohibit county health officials from imposing numerical limitations on outdoor gatherings, should local conditions warrant.



state officials during May 30 through June 6, concerning protests regarding police misconduct. *Id.* at 3. Plaintiffs requested that the court grant “an indicative ruling granting the application for reconsideration.” *Id.* at 1; *see* Fed. R. Civ. P. 62.1. Defendants, in the meantime, have filed a motion to dismiss plaintiffs’ complaint. D.C. Doc. 33. Plaintiffs’ response argues that district court proceedings must be delayed pending this appeal. D.C. Doc. 36, at 5-6. A hearing on both motions is scheduled for July 14. D.C. Doc. 34.

### **SUMMARY OF ARGUMENT**

The Court should dismiss this appeal for lack of jurisdiction. As a statutory matter, this Court has no jurisdiction to review the denial of plaintiffs’ requested temporary restraining order. The district court’s decision was not tantamount to the denial of a preliminary injunction, because the court made clear its willingness to consider preliminary injunctive relief if asked. By attempting to pursue this appeal instead, plaintiffs have created the sort of needless, piecemeal multiplication of proceedings that Congress intended 28 U.S.C. § 1292(a) to prevent. As a constitutional matter, moreover, this Court has no jurisdiction because the order plaintiffs challenge has been superseded, and the dispute is now moot. Current health orders allow gatherings of the type plaintiffs sought to organize, and no exception to mootness applies that would allow the litigation of this appeal to continue. Finally, plaintiffs’ attempt to secure a restraining order

against state officials based on purported violations of state law is barred by the Eleventh Amendment. This appeal should be dismissed; plaintiffs should pursue any viable claims in the district court, amending their complaint if necessary.

On the merits, should they be reached, the operative issues substantially differ from what plaintiffs describe. This case does not feature some grand dispute between traditional First Amendment analysis and a special, extraordinarily deferential standard applicable to health regulations. As the district court concluded, plaintiffs' assertions of constitutional violations at this stage of the case failed under any standard of review. That conclusion was virtually compelled by plaintiffs' failure to adduce competent evidence casting doubt on the State's evidence about the measures needed at the time to prevent catastrophic risks to large numbers of the State's inhabitants.

Plaintiffs attempt to make up for this failure by introducing to this Court new evidence that purportedly shows later governmental favoritism towards certain protesters. In addition to being unpersuasive—the State has in fact remained content- and viewpoint-neutral from the beginning of this crisis through the present—plaintiffs' assertion is beside the point. Fundamental principles of appellate procedure do not permit the introduction on appeal of purported evidence that was not part of the record on which the district court ruled. Nor do the rules of evidence permit plaintiffs to belatedly “prove,” without adversarial testing,

contested and contestable facts and inferences. The district court’s ruling was correct on the record before it, and any new allegations or evidence should be brought to that court for adversarial testing and initial resolution.

## **ARGUMENT**

### **I. THE APPEAL SHOULD BE DISMISSED**

This Court lacks jurisdiction over this appeal for two reasons: The denial of the TRO was not an appealable order under 28 U.S.C. § 1292; and intervening events have rendered the appeal from that order moot. Moreover, the Eleventh Amendment does not permit plaintiffs’ attempt to restrain state officials based on purported violations of state law. The appeal should be dismissed.

#### **A. The TRO Denial Is Not an Appealable Order**

Jurisdiction over interlocutory appeals is governed by 28 U.S.C. § 1292. Appeal ordinarily “does not lie from the denial of an application for a temporary restraining order.” *Religious Tech. Ctr., Church of Scientology Int’l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989). Such appeals “are considered premature.” *Id.* They are “disallowed ‘[i]n the interests of avoiding uneconomical piecemeal appellate review.’” *Id.* Instead, for an interlocutory decision to be appealable, it must “grant[], continu[e], modify[], refus[e], or dissolv[e]” an “injunction[.]” 28 U.S.C. § 1292(a)(1). The TRO denial here did none of those things.

Plaintiffs assert, however, that the TRO denial here is appealable because it was “tantamount to the denial of a preliminary injunction.” OBM 5 (citing

*Religious Tech. Ctr.*, 869 F.2d at 1308). It met that requirement, they contend, because the denial “followed a ‘full adversary hearing’” and “‘in the absence of review, the appellant would effectively be foreclosed from pursuing further interlocutory relief.’” *Id.* (quoting *Env’tl Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)). That is incorrect.

A district court’s TRO denial “effectively foreclose[s]” a party from “pursuing further interlocutory relief” and permits appeal when it makes clear that any request for injunctive relief would be rejected. *See, e.g., Religious Tech.*, 869 F.2d at 1308-1309 (appeal allowed where district court “emphatic[ally]” stated that precedent “foreclosed any interlocutory relief,” and that “‘I don’t believe that the appellate court feels that in this case an injunction is appropriate .... I would say that we don’t have anything much to talk about.’”). In such a case, the court has effectively “refus[ed]” to grant an “injunction” as Section 1292(a)(1) requires.

That was not the case here. The district judge did not state that plaintiffs could not gain preliminary relief. Instead, he stressed that he did not “believe[] that a *temporary restraining order at this time* is appropriate,” given “*the evidence before this court on a limited record.*” ER 77 (emphasis added). He refused to interfere with defendants’ enforcement of the state order “unless something changes and more facts are presented to the Court that convinces this Court that perhaps this order is unconstitutional.” *Id.* at 78. Those words reflected the limits

of the expedited TRO context: Plaintiffs’ evidence consisted mainly of their own, insertions that the restrictions at issue were unnecessary, *see* pp. 10-11, *infra*, and the parties’ briefing and the court’s consideration were necessarily abbreviated. *See* ER 75 (“we’re at a very, very early stage of this lawsuit”). But the judge declared himself open to more developed arguments and a fuller record in subsequent preliminary injunction proceedings: “If you want to continue or initiate discussions that may change the Court’s view or impact this case, please notify me right away.” *Id.* at 78.

Plaintiffs argue that their effort to gain a preliminary injunction was effectively denied, because the judge “stated he would not set a hearing for a preliminary injunction motion” and “offered that Givens and Bish were free to pursue ‘their right to appeal any decision by this Court to the Ninth Circuit.’”

OBM 6. That paraphrase and partial quotation, however, is highly selective. The full statement was:

Given that I’m likely to deny the temporary restraining order, I will not set this for a hearing on a preliminary injunction motion, but that doesn’t, obviously, preclude the plaintiffs from filing that motion as well, or again pursuing, if there is a means of doing so, their right to appeal any decision by this Court to the Ninth Circuit.

ER 78.

The introductory phrase (“[g]iven that I’m likely to deny the temporary injunction order”) makes clear why the court indicated that a preliminary

injunction hearing would be scheduled only at the plaintiff's request rather than automatically. "Where a TRO issues, the court normally also issues an order to show cause setting a hearing date on the application for a preliminary injunction." Rutter Group, Federal Civil Procedure Before Trial § 13:146 (Apr. 2020 update); *see also* Fed. R. Civ. P. 65(b)(2) (requiring TROs to expire after 14 days).

Because the TRO here was denied, those requirements were not in play.<sup>7</sup> The court also made clear that it would decide a preliminary injunction motion if asked—the judge's decision not to schedule the hearing *sua sponte* did not "foreclose the plaintiffs" from requesting such an injunction and hearing.

Plaintiffs could have submitted additional argument or evidence in support of a preliminary injunction motion. They simply chose not to. Finally, the court did not say that its decision gave plaintiffs a "right to appeal." OBM 6. Instead, the court said plaintiffs could pursue such an appeal "*if there is a means of doing so.*" ER 78 (emphasis added).

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<sup>7</sup> Because of Rule 65(b)(2), the *grant* of a purported TRO that exceeds 14 days is treated as tantamount to a grant of a preliminary injunction. *See, e.g., Washington v. Trump*, 847 F.3d 1151, 1158 (9th Cir. 2017). But such reasoning does not apply to TRO denials. Plaintiffs also do not argue that their appeal is justified because of deadlines that would allow appellate review of the TRO but not of a later preliminary injunction motion. *Cf., e.g., Woratzeck v. Ariz. Bd. of Executive Clemency*, 117 F.3d 400, 401 (9th Cir. 1997) (per curiam) (allowing appeal from TRO denial regarding execution set for the next day).

Plaintiffs may have preferred an immediate appeal, but they cannot circumvent Section 1292's requirements. *See County Mun. Empl. Supervisors' & Foremen's Union Local 1001 v. Laborers' Int'l Union of N. Am.*, 365 F.3d 576, 578 (7th Cir. 2004) (Easterbrook, J.) (“[R]ather than asking for a preliminary injunction, [plaintiffs] immediately appealed. That maneuver cannot be allowed to work.”). The purpose of Section 1292(a)(1) is to foreclose appeals based on the limited record and rushed consideration of TROs, in favor of the fuller record and more complete consideration of preliminary injunctions. Adherence to that limit is especially appropriate here: Plaintiffs suffer no present injury, *see supra* p. 18; *infra* pp. 26-27, and courts should not “‘anticipate a question of constitutional law in advance of the necessity of deciding it,’” *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).<sup>8</sup>

## **B. This Appeal Is Moot**

Appellate jurisdiction is lacking for another reason: The health directives plaintiffs wanted relief from are no longer in effect, and the present directives

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<sup>8</sup> This Court recently held that a TRO denial was tantamount to the denial of a preliminary injunction in *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020). But the *South Bay* district court allowed no possibility of a later, more extensive preliminary injunction proceeding. *Compare S. Bay United Pentecostal Church v. Newsom*, 2020 WL 2814636 (S.D. Cal. May 15, 2020) (denying both TRO and order to show cause regarding preliminary injunction), *with* ER 199 (minute order here, denying only “Motion for TRO”), *and* ER 2 (written order here, denying the “Application for a Temporary Restraining Order”).

leave plaintiffs free to convene the kind of gathering they want. That makes any dispute over the decision below moot.

For a federal court to act, an “actual and concrete dispute[.]” must be “‘extant at all stages of review, not merely at the time the complaint is filed.’” *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018). “[T]hroughout the litigation, the plaintiff ‘must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.’” *Spencer v. Kemna*, 523 U.S. 1, 7 (1998). “A case that becomes moot at any point during the proceedings is no longer a Case or Controversy for purposes of Article III,” and must be dismissed. *Sanchez-Gomez*, 138 S. Ct. at 1537 (internal quotation marks omitted). That is true here.

### **1. No Injury or Potential Remedy Remains**

Plaintiffs’ original motion alleged an injury that could be redressed by the district court: Plaintiffs sought an order forbidding the application of operative state directives, to allow plaintiffs to convene outdoor political protests. But the directives that plaintiffs challenged have been superseded and, as of today, plaintiffs can convene such protests regardless of any judicial decision. *See supra* p. 18. This Court is without a case or controversy to judge.

Plaintiffs cannot create a justiciable controversy through passing references to COVID-related restrictions that continue to affect other kinds of activities. *See ER*



161 (requesting order barring enforcement of prohibitions on “religious services, practices, or activities at which the Center for Disease Control’s social distancing guidelines are followed”). Plaintiffs’ only “specific and concrete plan[s]” concerned outdoor political demonstrations. *Summers v. Earth Island Institute*, 555 U.S. 488, 495 (2009); *see also Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (“a plaintiff’s remedy must be ‘limited to the inadequacy that produced [his] injury in fact.’”). With such demonstrations now allowed, plaintiff is neither “suffer[ing], [n]or threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision” from this Court or the court below. *Spencer*, 523 U.S. at 7. The appeal is moot.

## **2. No Exception to Mootness Applies**

Plaintiffs acknowledge the May 25 executive order, which became effective before they filed their opening brief. OBM 14. But they address mootness only in a cursory footnote (OBM 36 n.15), which cites various mootness exceptions but says little about how each applies to this appeal. Plaintiffs’ overall contention—that this appeal is not moot “even if Appellants may no longer receive injunctive relief” (OBM 36 n.15)—severely misunderstands what is before this Court. This appeal concerns only plaintiffs’ TRO motion, and the only relief that could be granted is to require the district court to issue an order prohibiting defendants from enforcing the directives against plaintiffs’ planned protests. If intervening facts

mean that the district court could not provide such an order on remand, then there is no remedy for this Court to provide either and the appeal is moot regardless of other relief that could be contained in a final judgment in the underlying case.

Each of plaintiffs' individual defenses to mootness fail as well. Plaintiffs' first defense is that "declaratory relief would still be justified." OBM 36 n.15; *see Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 121 (1974). That claim lacks any plausible relevance here, since declaratory relief was not and could not have been at issue in the TRO proceeding that is the subject of this appeal.

Plaintiffs also assert that their appeal fits within the mootness exception for cases where defendants voluntarily cease the challenged conduct. OBM 36 n.15. That exception does not obviate the constitutional requirement of an actual case or controversy. *See Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). It addresses, however, the concern that "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends." *Id.* To prevent such manipulation, courts have said that a party who asserts mootness based on its voluntary cessation of challenged conduct faces a "'heavy burden'" to persuade the court that "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envt'l Serv., TOC, Inc.*, 528 U.S. 167, 189 (2000).

But changes to governmental requirements that carry the force of law are treated quite differently than a private party's changes in its practice. *See Bd. of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019). Courts “should assume that a legislative body is acting in good faith in repealing or amending a challenged legislative provision, or in allowing it to expire[.]” *Id.* Accordingly, a statutory change renders the case moot “even if the legislature possesses the power to reenact the statute after the lawsuit is dismissed.” *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014). Here, the Governor's orders and incorporated directives have statewide application and operate with “the force and effect of law.” Cal. Gov. Code § 8567(a). The orders that previously prohibited outdoor protests are no longer in place. They have been replaced by orders that, with the force of law, expressly permit such protests. The Court should assume that the replacement was taken “in good faith,” *Bd. of Trustees*, 941 F.3d at 1199—not as part of the sort of manipulative “cycle” that the voluntary cessation exception addresses, *Already*, 568 U.S. at 91.

Finally, plaintiffs claim an exception under *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975), because “there is a reasonable likelihood that [they] will be subject to the injury again.” OBM 36 n.15. But the prerequisites for *Weinstein's* “‘capable of repetition, yet evading review’” exception are not satisfied here. *See* 423 U.S. at 149. The exception applies only in “exceptional situations” where

(1) the challenged action cannot be fully litigated before its cessation or expiration; and (2) there is a reasonable expectation that the challenger will again be subject to the same action. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016). Plaintiffs offer nothing beyond speculation that the State will again prevent events that plaintiffs might plan. Granted, COVID risk factors are subject to fluctuation, and the State’s response must be similarly “dynamic” and “fact intensive.” *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of injunctive relief). But future changes will respond to future conditions and developments in medical knowledge and treatments. This is not the type of recurring event contemplated by the *Weinstein* exception.<sup>9</sup>

### 3. No Advisory Opinion or Vacatur Is Needed

The United States, as amicus curiae, agrees that this appeal is “moot.” U.S. Br. 9. Although “the ultimate merits of California’s original policy are not currently suitable for appellate review,” *id.* at 8, however, the United States suggests this Court “may wish” to pronounce upon the underlying constitutional issues, *id.* at 13. But “[i]f a judgment has become moot [while awaiting review], this Court may not consider its merits ....” *U.S. Bancorp Mortg. Co. v. Bonner*

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<sup>9</sup> Moreover, this exception requires a challenged action that is “in its duration too short to be fully litigated prior to its cessation or expiration.” *Spencer*, 523 U.S. at 17. That requirement cannot be met here without contradicting plaintiffs’ argument on the merits. *See* ER 173 (alleging restrictions in place “for an indefinite period of time, potentially months or years”).

*Mall P'ship*, 513 U.S. 18, 21 (1994); *see also Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 101 (1998) (when jurisdiction “‘ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause’”; advisory opinions been “disapproved by [the Supreme Court] from the beginning”).

In contrast, this Court does have jurisdiction to vacate a district court ruling that mootness has made it impossible to review. *U.S. Bancorp*, 513 U.S. at 21; *see* U.S. Br. 11-13 (recommending vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950)). But while vacatur is not objectionable to the State, it is not clear what purpose it would serve here. The procedure is designed to “prevent[]” the “hardship” of a party suffering claim or issue preclusion from a judgment that it was unable to appeal. *Munsingwear*, 340 U.S. at 39. An interlocutory order, however, has no preclusive effect and leaves the parties free to litigate the merits of a dispute to conclusion. “[I]f the case remains alive in the district court, it is sufficient to dismiss the appeal without directing that the injunction order be vacated.” 13A Wright & Miller, Federal Practice & Procedure § 3533.10.3 (3d ed. & 2020 Supp).<sup>10</sup> Plaintiffs may “litigate” any claim they “may have ... with

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<sup>10</sup> *U.S. Bancorp*, 513 U.S. at 29, *denied* a request for *Munsingwear* vacatur. The United States’ other cited cases (U.S. Br. 12) all involved final judgments.

respect to the revised provision” (U.S. Br. 12) with or without vacatur, by amending their complaint and filing a new motion for preliminary injunction.

**C. The District Court Lacked Jurisdiction To Restrain These Defendants Based on State-Law Claims**

Finally, the district court was without jurisdiction to grant plaintiffs a restraining order based on the state-law claims, and this Court thus lacks jurisdiction over those claims too. All defendants are state officers, and plaintiffs sued them only in their official capacities. ER 175. The Eleventh Amendment generally bars federal courts from hearing cases brought by private parties against States and their instrumentalities. *See Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147, 1153 (9th Cir. 2018). Under *Ex parte Young*, 209 U.S. 123 (1908), “a party may seek prospective injunctive relief against an individual state officer in her official capacity.” *Doe*, 891 F.3d at 1153. But “the *Young* exception does not apply when a suit seeks relief under state law, even if the plaintiff names an individual state official rather than a state instrumentality as the defendant.” *Id.* Because the district court would not have had jurisdiction to restrain the defendants based on alleged state-law violations, plaintiffs’ discussion of the merits of those claims (*e.g.*, OBM 44-48) is beside the point. The claims were jurisdictionally barred as a basis for the order plaintiffs sought, and are not a proper subject for decision here.

## **II. IF THIS COURT REACHES THE MERITS, IT SHOULD AFFIRM**

If this Court finds that it has jurisdiction and reaches the merits, it should affirm. Plaintiffs erroneously portray this case as a duel between two standards of review, with the district court choosing to rest its decision on an unusually forgiving standard for emergencies instead of the “traditional” standard plaintiffs say should apply. *E.g.*, OBM 4, 19, 22, 24, 25, 27. But the district court did apply the traditional analysis plaintiffs propose. *See* ER 11-16. Plaintiffs did not prevail because under *any* relevant standard of review, analysis of the governmental action must be based on the record evidence. Here, the essentially unrebutted record evidence supported the State’s judgment that restrictions on public gatherings were necessary at that time.

### **A. Standard of Review**

The standard for a district court to grant a temporary restraining order is “substantially identical” to that governing preliminary injunctions. *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). Such relief is “an extraordinary remedy that may only be awarded upon a clear showing” of entitlement. *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 22 (2008). The plaintiff 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.”

*Id.* at 20.<sup>11</sup>

This Court’s review of the district court’s determination is “‘limited and deferential.’” *Wildwest Inst. v. Bull*, 472 F.3d 587, 589 (9th Cir. 2006). Factual findings are reviewed for clear error. *Pom Wonderful LLC v. Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014). The “‘underlying legal principles’” are reviewed de novo. *BNSF Ry. Co. v. Cal. Dep’t of Tax & Fee Admin.*, 904 F.3d 755, 760 (9th Cir. 2018). But this Court “‘will not second guess whether the court correctly applied the law to the facts of the case, which may be largely undeveloped at the early stages of litigation.’” *Wildwest*, 472 F.3d at 590.

## **B. Plaintiffs Did Not Establish a Likelihood of Success on the Merits**

### **1. Speech Claims**

Plaintiffs primarily argue that the district court simply “fail[ed] to apply the Supreme Court’s traditional tiered scrutiny analysis.” OBM 25; *see id.* at, 16-17, 19-25 . Instead, plaintiffs argue, the district court viewed the emergency health circumstances of this case as requiring the application of a special “tier of scrutiny”

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<sup>11</sup> This Court has also stated that injunctive relief may be proper when a plaintiff demonstrates that “‘serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.’” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-1135 (9th Cir. 2011). After *Winter*, however, plaintiffs who establish those factors must also show “a likelihood of irreparable injury and that the injunction is in the public interest.” *Id.* at 1135.



purportedly “below rational basis” under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). OBM 19 (capitalization altered). In fact, the court followed its *Jacobson* analysis with a lengthy “traditional tiered scrutiny analysis” (OBM 25) of the type plaintiffs propose. *See* ER 11-27. The court determined that California’s restrictions were constitutional under either test. *Id.* at 7. There is no ground to reverse.

a. *Jacobson* upheld a local health board’s order for mandatory vaccinations. The board issued its order under a Massachusetts law requiring vaccination “when, in the opinion of the board of health, that was necessary for the public health or the public safety.” 197 U.S. at 27. The Court reasoned that, “of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Id.*; *see id.* at 29 (individual liberties “may at times, under the pressure of great dangers, be subjected to such ... reasonable regulations[] as the safety of the general public may demand”). The necessity of particular measures was appropriately referred “in the first instance, to a board of health composed of persons ... appointed, presumably, because of their fitness to determine such questions.” *Id.* at 27. With smallpox “prevalent and increasing” in the vicinity, the court would not “adjudge[], as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case.” *Id.* at 28. The Court allowed that a

health order could “go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere.” *Id.* But such review would be limited: If a statute that purportedly protects the public health has “no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.” *Id.* at 31.

Although plaintiffs portray *Jacobson* as an anachronism that cannot apply to the First Amendment (OBM 23-24), it has in fact been applied to such claims—including by the Chief Justice during this epidemic. *See S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct 1613, 1613 (2020) (Roberts, C.J., concurring in denial of injunctive relief).<sup>12</sup> If the analysis starts and stops with *Jacobson*, then plaintiffs here lacked any likelihood of success, given the limited record they adduced at the TRO stage. COVID is “an epidemic of disease which threatens the safety of” the State’s residents to a degree far graver than that in *Jacobson*. 197 U.S. at 27. California’s restrictions were put in place by the State’s Public Health Officer, whose education, training, and experience rendered her “fit[] to determine” the necessity of particular health measures and the inadequacy of

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<sup>12</sup> *See also, e.g., Elim Romanian Pentecostal Church v. Pritzker*, --- F.3d ---, 2020 WL 3249062, at \*2, 5 (7th Cir. 2020).

potential alternatives, *id.*—and plaintiffs identified nothing casting doubt on her conclusions. *See supra* pp. 10-11, 16.

b. But the district court did not stop its analysis with *Jacobson*. It went on to analyze whether the temporary moratorium was permissible under the First Amendment test that traditionally applies to time, place, and manner restrictions. ER 11-16. That is the same standard that the United States assumes applies (U.S. Br. 18), and one of two standards plaintiffs urge (OBM 30, 32-33). Plaintiffs and the United States do not maintain that the district court erred in identifying the elements of that test. At most, their objection is about how the court applied that law to its preliminary assessment of facts that were “‘largely undeveloped at the [case’s] early stage[.]’” *Wildwest*, 472 F.3d at 590.

Given the record before it at this “very, very early stage,” ER 75, the district court correctly determined that the facts of this case were likely to satisfy the two traditional requirements for time, place, and manner restrictions. The first requirement is that the restriction must be “narrowly tailored to serve the government’s legitimate content-neutral interests”—that is it must “‘promote[] a substantial government interest that would be achieved less effectively absent the regulation.’” *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989). This requires only that the regulation not “burden *substantially* more speech than is necessary”—not that the government employ “the least-restrictive or least-

intrusive means.” *Id.* Here, the State’s evidence established the necessity of its measures and the inadequacy of alternatives. Dr. Watt observed that large gatherings enlarge the risk of COVID transmission, and that gatherings of individuals from diverse geographic areas create additional risks. *See supra* pp. 11-12. Alternatives such as masks and physical distancing were unlikely to be effective in stopping transmission, and masks should be seen as a supplement to prohibitions on such gatherings in times of high transmission risk, rather than as a substitute. *Id.* Those conclusions were bolstered by a CHP captain’s evidence of recent crowd behavior at events at the capitol, including failures to wear masks and to physically distance notwithstanding organizers’ promises. *See supra* p. 13.

Plaintiffs’ contrary evidence, in contrast, rested mainly on two things: Bish’s and Givens’ statements of intent to personally comply with certain restrictions, and their unsupported (and unsupportable) assertion that the unnamed and unknown attendees would do so as well. The first point could not eliminate the risk posed by the hundreds of attendees besides the plaintiffs; and Dr. Watt’s and Captain Lyon’s evidence showed that the second could not be relied on either.<sup>13</sup> The district court

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<sup>13</sup> Bish’s permit application described an event with food trucks, chairs and tables, and tents, and made “no reference to physical distancing, protective gear, handwashing, or other public health measures.” SER 70. Givens’s application stated that attendees would “‘have the *opportunity* to maintain social distancing’ and wear protective gear.” *Id.* (emphasis added). But the application did not

did not clearly err or abuse its discretion in finding plaintiffs' blasé assertions less convincing than the States' expert assessment of the health risks posed by the proposed rallies. *E.g.*, ER 14.<sup>14</sup> The State thus established that the restrictions at issue promoted compelling goals of public safety and did not burden substantially more speech than necessary.

Second, a time, place, and manner restriction must “leave open ample alternative channels of communication.” *Ward*, 491 U.S. at 802. Here, too, the limited record of the TRO proceeding and the unusual circumstances at the time of plaintiffs' proposed events supported the district court's conclusions. The state orders left plaintiffs free to press their message through mailings, broadcasting, and Internet messages. Such messaging might ordinarily be less effective than in-person demonstrations at reaching the public. However, the district court found, these alternative methods of communication might be as effective or even more

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explain whether and how participants would actually take those steps, whether they would undertake other steps to protect public health, and whether any such steps could reasonably be expected to be effective in a large-crowd setting. *Id.*

<sup>14</sup> Moreover, intermediate scrutiny under the First Amendment must leave room for appropriate deference to governmental expertise in technical matters. *See, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-196 (1997). Such deference was certainly appropriate here. When public health officials “‘undertake[] to act in areas fraught with medical and scientific uncertainties,’ their latitude ‘must be especially broad,’” and “should not be subject to second-guessing” by judges, who “lack[] the background, competence, and expertise to assess public health.” *S. Bay*, 140 S. Ct. at 1613, 1614 (Roberts, C.J., concurring in denial of injunctive relief); *cf. supra* pp. 35-36.

effective than in-person demonstrations during the state-wide shutdown order—because most Californians were staying at home instead of doing things that would take them near a protest. *See* ER 16. That factual finding was not clearly erroneous, and the court’s reliance on it abused no discretion. In addition, plaintiffs had an available way to protest in-person through car assemblies and caravans. *Id.* Plaintiffs pointed to no specific facts undercutting the court’s reasoning on the record of this case’s “‘early stage[.]’” *Wildwest*, 472 F.3d at 590.

3. The remaining arguments against the district court’s conclusion are unconvincing. The United States suggests that alternative avenues for plaintiffs’ message are inadequate because none would carry “the symbolic importance” of gathering at the State Capitol. U.S. Br. 22. In *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), protestors similarly argued that their message about homelessness would be most effectively symbolized by sleeping on park land near the White House. *See* 468 U.S. at 303-304 (Marshall, J., dissenting) (organizers wanted to “‘re-enact the central reality of homelessness,’” and demonstrate the problem “‘in as dramatic a way as possible’”). The Court nevertheless held a complete ban on sleeping in the park consistent with the First Amendment, whether analyzed as a time, place, and manner restriction or as a regulation of expressive conduct. *Id.* at 293-299. Indeed, to require exemptions from generally applicable time, place, and manner restrictions based on the content

of a message would be neither administrable, nor consistent with other demands of the First Amendment.

Plaintiffs—but not the United States—argue that strict scrutiny should apply because the state regulations are not content-neutral. In their view, the stay-at-home order’s exemptions for “‘news reporters’ and other workers supporting ‘newsgathering, reporting, and publishing news,’” meant the State was choosing among speakers and kinds of speech. OBM 30-32.<sup>15</sup>

But the state directives distinguished among *activities* according to their risk, not speech according to its content or speaker. Plaintiffs sought permits for in-person demonstrations of 500 to 1,000 people.<sup>16</sup> That would necessarily involve conduct that the evidence in the record identified as heightening risks of

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<sup>15</sup> In fact, the State’s judgment reflected federal authorities’ advice to classify as essential those in broadcast, news, and media services. *See* U.S. Dep’t of Homeland Security, Cybersecurity and Infrastructure Security Agency, Advisory Memorandum on Identification of Essential Critical Infrastructure Workers During Covid-19 Response (May 19, 2020), at 16, available at [https://www.cisa.gov/sites/default/files/publications/Version\\_3.1\\_CISA\\_Guidance\\_on\\_Essential\\_Critical\\_Infrastructure\\_Workers\\_0.pdf](https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers_0.pdf).

<sup>16</sup> Plaintiffs alleged harm only from their inability to hold 500- to 1,000-attendee in-person gatherings with unknown attendees. They do not argue that the orders were overbroad in the sense of having a “‘substantial number’” of unconstitutional applications “‘judged in relation to [the orders’] plainly legitimate sweep.’” *United States v. Stevens*, 559 U.S. 460, 473 (2010). They therefore could not prevail without showing that the application *to their protests* was itself unconstitutional.

transmission. *See supra* pp. 11-12. Such gatherings cannot be compared to activities “in which people neither congregate in large groups nor remain in close proximity for extended periods.” *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of injunctive relief).<sup>17</sup> The activities which do compare to plaintiffs’ protests—namely, other large in-person gatherings, such as lectures, concerts, sporting events, and movies—were treated the same.<sup>18</sup> There was no error in the district court’s finding that the object of the state’s directives was “‘not to exclude communication of particular content, but to ... prevent uses that are dangerous.’” ER 14. Strict scrutiny was not required.

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<sup>17</sup> News reporting often involves solitary activity or one-on-one visits, and reporting, broadcasting, and publishing allow communication with large numbers of separate listeners from a distance. Large groups, in contrast, present special risks, as other authorities recognize. *See, e.g.*, U.S. Court of Appeals for the Ninth Circuit, COVID-19 Update (June 29, 2020) (“our courthouses remain closed to the public,” with oral arguments occurring by video and telephone and “live streamed to facilitate public access”); National Park Service, Temporary Facilities Closure Advisory, June 26, 2020 (“[a]ll permits and reservations for events scheduled through May 15 [at the National Mall] have been cancelled[, and n]ew applications will not be accepted for demonstrations ... through June 22”), available at <https://www.nps.gov/nama/planyourvisit/temporary-facilities-closure-advisory.htm>.

<sup>18</sup> *See supra* p. 7 n.3. Plaintiffs also gain little by their attempt (OBM 9) to compare a four-hour 1,000-person protest to brief commercial transactions in smaller settings. Nor are gatherings of hundreds of unknown strangers from across the State similar to workplaces, where employers know those present and regulations make it possible for authorities to quickly follow up with potentially exposed individuals. *See* Cal. Labor Code § 6409.1(b) (requiring employers to “immediately” report cases of serious illness to authorities). *See also* Cal. Code Regs., tit. 8, § 342 (similar); *id.* § 340 (requiring employers to inform employees how they may report dangerous conditions and request state inspection).



Moreover, COVID judgments are “‘fraught with medical and scientific uncertainties.’” *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of injunctive relief). Even strict scrutiny requires respect for governmental authorities’ “informed judgment” when they have special expertise, life and death is at stake, and action must precede complete information. *See, e.g., Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010). Under strict scrutiny, review of California’s distinctions as to COVID-related “restrictions on particular social activities” would still take into account the judiciary’s comparative lack of the “background, competence, and expertise to assess public health” needs and health officials’ need for “broad” latitude. *S. Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring in denial of injunctive relief); *cf. supra* pp. 35-36. Plaintiffs would be unlikely to succeed on their speech claims under any standard of review.

## **2. Other Federal Claims**

Plaintiffs’ arguments with respect to their other federal claims were similarly lacking. Plaintiffs’ right-to-assemble argument presumes that restrictions that impede physical assembly for speech require more stringent scrutiny than restrictions on speech itself. OBM 37-38. That proposition would implausibly grant conduct more protection than speech. It is not supported by plaintiffs’ cited cases. In *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), the Court addressed the right to “expressive association” through membership in an

organization for purposes of speech. *Id.* at 618. Such association is not implicated by the restrictions here, which do not “impose penalties or withhold benefits from individuals” based on membership in a group, “require disclosure of ... membership in a group seeking anonymity,” or “interfere with the [group’s] internal organization or affairs.” *Id.* at 622-623.<sup>19</sup> The constitutional standards applicable to the restrictions affecting assembly here are the ones applicable to the related speech.

The same is true of plaintiffs’ right to petition claim. “Although the right to petition and the right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis.” *Wayte v. United States*, 470 U.S. 598, 610 n.11 (1985). The State is not obstructing plaintiffs from urging those in state government to change the policies plaintiffs find objectionable; plaintiffs’ objection is simply that they cannot engage in speech in a particular manner at a particular place.

Plaintiffs’ argument as to vagueness (OBM 43) is that a single word in the Governor’s order—his command to “heed” public health directives—could be interpreted as meaning that Californians must merely ““give consideration or

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<sup>19</sup> Even further afield is *Lincoln Club of Orange County v. City of Irvine*, 292 F.3d 934, 938 (9th Cir. 2002), which involved association through the contribution of speech-supporting campaign donations.

attention’” to a directive before acting against it if they wish. *Id.* The district court rightly rejected that argument. In context, the word “heed” is clear. As the district court noted, what the Governor ordered Californians to “heed” was itself an “order.” ER 21; *id.* (noting additionally that the incorporated order itself “‘*order[ed]*’” all Californians to stay home) (emphasis added). A requirement to heed an *order* means something quite different than an admonition to heed advice, warnings, maxims, and the like. One “heeds an order” by *obeying* it. *See, e.g., United States v. Dixon*, 509 U.S. 688, 698 n.2 (1993) (plurality opinion) (discussing “obligation to ... heed” a “command to ‘Freeze!’”); *Mallard v. U.S. Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 308 n.8 (1989) (discussing theory about statutory authority to “sanction lawyers for failing to heed the courts’ orders” on a particular subject). Such examples make no sense if one can “heed an order” by merely considering and then acting contrary to the order. “[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *United States v. Williams*, 553 U.S. 285, 304 (2008). The word “heed” was clear in context.

### 3. State Law Claims

Plaintiffs’ state-law claims had no possibility of success because, as explained above (at p. 32), federal courts lack the power to order state officials to act based on state-law claims. Moreover, plaintiffs do not propose any respect in which their

state-law speech, petition, and assembly rights would exceed the federal rights discussed above. *Cf.* OBM 29 n.11.

Plaintiffs’ state-constitutional “right to liberty” claim fails for other reasons. The cases plaintiffs cite are not “Binding California Supreme Court Precedent[s]” as plaintiffs contend. OBM 44; *see also id.* at 17, 46, 48. Instead, they are decisions by intermediate state appellate courts and federal trial courts. *In re Martin*, 83 Cal. App. 2d 164 (Cal. Ct. App. 1948); *In re Arata*, 52 Cal. App. 380 (Cal. Ct. App. 1921); *Jew Ho v. Williamson*, 103 F. 10 (C.C.N.D. Cal. 1900); *Wong Wai v. Williamson*, 103 F. 1 (C.C.N.D. Cal. 1900). And the district court did not err in finding them inapposite. *Jew Ho* and *Wong Wai* involved abuses of quarantine and inoculation requirements to target a racial minority. *See* ER 22. *Martin* and *Arata* involved the abuse of quarantine orders to hold in custody otherwise bailable criminal defendants connected with prostitution. *See id.*; *Martin*, 83 Cal. App. 2d at 165; *Arata*, 52 Cal. App. at 381. Those cases bear little resemblance to the one here. Nor did the court clearly err in finding it infeasible for the State to “‘identify specific individuals who carry the virus and order only them to stay home.’” ER 23.

**C. Events After the District Court’s Decision Provide No Basis To Reverse**

Plaintiffs, through their motion for judicial notice, seek reversal of the district court decision that they challenge by raising events that occurred after the district

court made that decision. In particular, plaintiffs direct the Court to reports of state officials making statements in sympathy with people protesting racially directed abuse by police in June 2020, and articles about how authorities have reacted to certain protests. OBM 14-15, 35. Based on those, plaintiffs argue that the prohibitions enforced against plaintiffs were not viewpoint-neutral, and that there is a risk of future discrimination in the enforcement of current restrictions and the promulgation of new ones. The State has demonstrated in recent evidentiary submissions to the district court that its treatment of protests—both through generally applicable directives and in individual enforcement and permitting activities, including the denial of a permit requested by the NAACP—is in fact viewpoint-neutral. *See* D.C. Doc. 35, at 6-10; D.C. Doc. 35-2, at 2-5. But more fundamentally, plaintiffs’ effort to create a factual dispute is inappropriate in this appeal.

This Court’s “‘action on appeal can properly be based only upon a record considered by the trial court,’” and “‘[i]t would be inappropriate ... to reverse the trial court on the basis of facts not incorporated in the record which the trial court considered at the time of its decision.’” *Rainbow Pioneer No. 44-18-04A v.*

*Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983).<sup>20</sup> That is because “the only proper function of a court of appeals is to review the decision below on the basis of the record that was made before the district court.” *Allen v. Minnstar, Inc.*, 8 F.3d 1470, 1474 (10th Cir. 1993) (internal quotation marks omitted). The facts plaintiffs now allege were not before the district court because they did not exist when the district court made its decision. Plaintiffs could have made use of the information had they filed a motion for a preliminary injunction, *see supra* pp. 23-24, and they might do so now by amending their complaint. But evidence to which the district court had no access is irrelevant in this appeal. *See generally Haskell v. Harris*, 745 F.3d 1269, 1271 (9th Cir. 2014) (en banc) (per curiam) (“we are a court of review, not first view”).<sup>21</sup>

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<sup>20</sup> Courts may add to the appellate record material that was “omitted from or misstated in the record *by error or accident*.” Fed. R. App. P. 10(e) (emphasis added). As the italicized words indicate, evidence post-dating the decision under review would not qualify.

<sup>21</sup> The one clear exception is for new information affecting the appellate court’s obligation to assure itself of jurisdiction. *See, e.g., Wilson v. Shaw*, 204 U.S. 24, 30 (1907). Plaintiffs’ cited cases (OBM 33-34 n.12) do not demonstrate that a broader exception applies here. Those cases discussed when courts of appeal should resolve a legal issue for the first time on appeal—not when they should go beyond the record the district court had. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976); *Int’l Union of Bricklayers & Allied Craftsmen Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

The need to adhere to ordinary processes is especially acute given the inappropriateness of plaintiffs' submissions under the rules of evidence. Most of the items for which plaintiffs seek judicial notice are newspaper articles and news broadcasts. RJN Exs. 7-16. But judicial notice requires a "high degree of indisputability." Fed. R. Evid. 201, adv. comm. note. Attempts to establish improper motive through unauthenticated photographs and through news reports based on hearsay are insufficient. *See* Fed. R. Evid. 201(b).<sup>22</sup> Nor could reports conveying parts of various speakers' statements establish certainty with respect to any particular inference; such statements cannot necessarily be assessed without the context of the whole statement. *Cf.* Fed. R. Evid. 106, adv. comm. note (noting "the misleading impression created by taking matters out of context"). The trial court may receive competing submissions, evaluate potential inferences, and make factual findings; those tasks are not for this Court in the first instance.

In any event, plaintiffs' new submissions, if considered, support the outcome below. The State's superseding orders reduced, and then eliminated, restrictions on outdoor protests, confirming the tailored nature of the State's approach. And as

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<sup>22</sup> In contrast, the provision of orders issued by public authorities does not violate the rules of evidence. *See* Fed. R. Evid. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact.").

shown below, the relaxation of restrictions shows that the temporary moratorium caused only limited injury. *See infra* pp. 51-52.

**D. Other *Winter* Requirements Support Affirmance**

The district court found it unnecessary to consider the other *Winter* factors, given its determination that plaintiffs were unlikely to succeed on the merits. ER 23. But those factors provide a basis to affirm as well. *See Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 868 F.2d 1085, 1088 (9th Cir. 1989) (“Although the district court did not find that Big Country failed to show irreparable injury, we may affirm on any ground supported by the record.”).

Plaintiffs fail even to acknowledge the severe hardship and public harm that could have resulted from allowing dangerous gatherings to proceed. The State—indeed the world—is facing an unprecedented public health emergency. At the time of the district court’s decision, testing rates left it uncertain how far COVID was prevalent in the population. The risk of allowing large gatherings of individuals from potentially different locales was that they could turn into superspreader events: The only expert opinion in the record warned of a risk of causing exponential spread to vulnerable populations across the State. *See supra* pp. 11-12.

In response to these grave public health concerns, plaintiffs offered assertions that they did not believe themselves to be infected (a statement not backed up by



any assertion of actually being tested, and irrelevant to the status of other attendees), that attendees would socially distance and obey safe practices (an assumption without support), and, for Givens's protest (but not Bish's), that the applicant would employ volunteers to seek to promote safe practices. In contrast, defendants could point to then-recent large-crowd experience during the COVID epidemic itself, as well as a public health expert's experience concerning individual compliance with anti-epidemic health measures more broadly. *See supra* pp. 11-13. Given expert evidence of the risk to California's people and healthcare system, the balance of hardships severely tilted in favor of the State's reasonable, temporary restrictions.

Once again, plaintiffs' attempt to go beyond the district court record only strengthens these conclusions. Plaintiffs seeking preliminary relief must demonstrate that "irreparable injury is *likely*," not merely "possible." *Winter*, 555 U.S. at 22. Plaintiffs' concern about being unable to protest for "potentially months or years," ER 173, is of little weight given more recent orders. *See also* ER 72 (plaintiffs' counsel's comment that plaintiffs would be "satisfied with a manner of protest that is less than what they were seeking in their initial application"). The balance of hardships and lack of continuing harm to the plaintiffs would therefore weigh against the district court granting the TRO on remand. *See, e.g., Lofton v. Verizon Wireless (VAW) LLC*, 586 F. App'x 420, 421-

422 (9th Cir. 2014) (mere fact of past practice to which plaintiffs objected did not demonstrate likelihood of future irreparable harm where defendant had changed its written policy); *cf.*, *e.g.*, *TRW, Inc. v. FTC*, 647 F.2d 942, 954 (9th Cir. 1981) (although there was sufficient possibility of recurrence to survive mootness, there was not sufficient “‘danger’” to justify a cease-and-desist order).<sup>23</sup> They weigh against reversal here as well.

\* \* \*

An unprecedented epidemic is affecting countless spheres of activity throughout the State and nation, leading governments to temporarily restrict activities that, in normal times, occur freely and are even encouraged. Political speech and demonstration have been affected by the State’s past public health orders limiting large gatherings. These are, of course, particularly important activities in our democracy. In recognition of such values, the State moved swiftly to relax restrictions on certain types of public gatherings as circumstances on the ground evolved. This relaxation occurred even as countless other activities that many Californians view as equally important to their lives remain restricted. The

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<sup>23</sup> There is no dispute that California must adopt and enforce its directives “in a viewpoint-neutral way.” U.S. Br. 23-24. The State agrees with that requirement and has followed it. To the extent plaintiffs wish to contest that, the procedure to do so would be through an amended complaint and related motion for preliminary injunction in the district court.

district court's denial of plaintiffs' request for a TRO to lift now-superseded restrictions on public gatherings was proper—judged under any standard of review—given the circumstances and state of knowledge at the time.

### CONCLUSION

The appeal should be dismissed, or the district court's denial of the temporary restraining order affirmed.

Dated: July 7, 2020

Respectfully submitted,

*s/ Joshua A. Klein*

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### STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases within the meaning of Ninth Circuit Rule 28-2.6 currently pending before this Court.

We are aware of three pending cases which concern religious organizations' challenges to restrictions affecting religious services, rather than challenges to restrictions on political demonstrations:

*Gish v. Newsom*, No. 20-55445;

*South Bay United Pentecostal Church v. Newsom*, No. 20-55533; and

*Cross Culture Christian Ctr. v. Newsom*, No. 20-15977.

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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

**RON GIVENS**, an individual; **CHRISTINE  
BISH**, an individual,  
Plaintiffs,  
v.

**GAVIN NEWSOM**, in his official capacity as  
the Governor of California; **XAVIER  
BECERRA**, in his official capacity as the  
Attorney General of California; **WARREN  
STANLEY**, in his official capacity as the  
Commissioner of the California Highway Patrol;  
**SONIA Y. ANGELL**, in her official capacity as  
the State Public Health Officer,  
Defendants.

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

**COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF**

1 Plaintiffs Ron Givens and Christine (“Chris”) Bish, through their attorneys, D. Gill Sperlein  
 2 and the Dhillon Law Group, Inc., for claims against the above-named Defendants Gavin Newsom, in  
 3 his official capacity as Governor of California; Xavier Becerra, in his official capacity as Attorney  
 4 General of California; Warren Stanley, in his official capacity as the Commissioner of the California  
 5 Highway Patrol; and Sonia Y. Angell, in her official capacity as the State Public Health Officer, allege  
 6 the Court as follows (this “Complaint”).

### 7 NATURE OF ACTION

8 1. Defendants, in a gross abuse of their power, have seized the Coronavirus pandemic to  
 9 expand their authority by unprecedented lengths. On March 19, 2020, Governor Gavin Newsom issued  
 10 Executive Order N-33-20 (the “State Order”), which criminalizes the engagement in all “non-  
 11 essential” activities, and orders those engaging in “essential” activities to comply with certain social-  
 12 distancing protocols.<sup>1</sup> This far-reaching mandate prohibits all protesting in California for an indefinite  
 13 period of time, potentially months or years, until the threat of the pandemic has subsided as  
 14 determined exclusively by the governor.

15 2. Plaintiffs bring this Action to assert facial and as-applied challenges to the State Order  
 16 because they seek to protest Defendants’ handling of the pandemic. In particular, Plaintiff Givens  
 17 intends to protest the State’s failure to process background checks for those purchasing firearms in  
 18 California, which effectively denies Californians their Second Amendment right to keep and bear  
 19 arms. Plaintiff Bish seeks to protest the extent and duration of the state’s extended stay-in-place  
 20 orders, in light of mounting evidence that they are overbroad, and factually and legally unwarranted.  
 21 Plaintiffs intend to hold their protest outside, on State Capitol grounds, in a safe and socially-distant  
 22 manner, staffed by volunteers to ensure the same.

23 3. By depriving Plaintiffs of their ability to hold these protests—which, due to its nature,  
 24 cannot be delayed until after the pandemic without losing their purpose—Defendants violate  
 25 fundamental rights protected by the U.S. and California Constitutions, including freedom of speech

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26  
 27 <sup>1</sup> A copy of the State Order is attached here as Exhibit 1, and, as of the date of this filing, may be  
 28 accessed online at the following URL: <https://covid19.ca.gov/img/Executive-Order-N-33-20.pdf>.



1 and assembly, the right to petition the government, and due process and equal protection under the  
2 law. It is this Court's duty to defend these constitutional principles, by safeguarding the many rights  
3 and liberties of Californians that Defendants violate.

4 4. The California Highway Patrol denied applications made by Plaintiffs and others to use  
5 the California State Capitol grounds for demonstrations, rallies, and protests.<sup>2</sup>

6 5. The Orders and Defendants' enforcement thereof violate (I) the Free Speech Clause of  
7 the First Amendment; (II) the Freedom of Assembly Clause of the First Amendment; (III) the Right to  
8 Petition guaranteed by the First Amendment; (IV) the Due Process of Clause of the Fourteenth  
9 Amendment; (V) California Constitution Article 1, Section 1's right to liberty; (VI) California  
10 Constitution Article 1, Section 2's right to free speech; (VII) California Constitution Article 1, Section  
11 3's right to assemble freely; and (VIII) California Constitution Article 1, Section 3's right to petition.

#### 12 JURISDICTION AND VENUE

13 6. This Action arises under 42 U.S.C. § 1983 in relation to Defendants' deprivation of  
14 Plaintiffs' constitutional rights to freedom of speech and assembly, due process, petition, and equal  
15 protection rights under the First and Fourteenth Amendments to the U.S. Constitution. Accordingly,  
16 this Court has federal question jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has  
17 authority to award the requested declaratory relief under 28 U.S.C. § 2201; the requested injunctive  
18 relief and damages under 28 U.S.C. § 1343(a); and attorneys' fees and costs under 42 U.S.C. § 1988.

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

#### 23 PARTIES

24 8. Plaintiff Ron Givens is a resident of Sacramento County. He is employed by the  
25 Sacramento Gun Club, located at 3443 Routier Road, Sacramento, CA, 95827, as the Chief Firearms  
26

27 \_\_\_\_\_  
28 <sup>2</sup> The State Order and the CHP's denial of Plaintiffs' applications may be referred to jointly as "the Orders."

1 Instructor and Director of Training Operations. Givens has exercised his rights to free speech and  
2 peaceful assembly under the First Amendment numerous times in the past decades through public  
3 protests in front of the California State Capitol Building. He has participated in and/or organized at  
4 least five permitted protests from 2010 to 2015.

5 9. Plaintiff Chris Bish is a resident of Sacramento County. She is a firm believer and  
6 frequent practitioner of her First Amendment rights to free speech and peaceful assembly; she often  
7 participates in public demonstrations against governmental overreach, such as one permitted protest in  
8 support of personal liberty on April 20, 2020.

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

13 11. Defendant Xavier Becerra is made a party to this Action in his official capacity as the  
14 Attorney General of California. Under California law he is the chief law enforcement officer in the  
15 State. Cal. Const. Art. V, § 13.

16 12. Defendant Warren Stanley is made a party to this Action in his official capacity as the  
17 Commissioner of the California Highway Patrol. Under California law, he is the chief law  
18 enforcement officer with supervision over California Highway Patrol (“CHP”). Cal. Veh. Code §  
19 2107. The California Highway Patrol is the government agency responsible for the intake and  
20 approval of permit applications for protests on state property. 13 Cal. Code Regs. § 1855.

21 13. Defendant Dr. Sonia Y. Angell is made a party to this Action in her official capacity as  
22 the State Public Health Officer. She signed the public health directive referred to and incorporated  
23 within Governor Newsom’s Executive Order N-33-20.<sup>3</sup>

24  
25  
26  
27 <sup>3</sup> The March 19, 2020 Order of the State Public Health Officer was accessible as of April 25, 2020 at:  
28 <https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Health%20Order%203.19.2020.pdf>.

**FACTUAL ALLEGATIONS**

14. On or about March 13, 2020, President Donald J. Trump proclaimed a National State of Emergency as a result of the threat of the emergence of a novel coronavirus, COVID-19.<sup>4</sup>

15. Since the initial outbreak of COVID-19 in the United States in February and March 2020, the federal government's projections of the anticipated national death toll related to the virus has decreased substantially, by an order of magnitude. Despite such revisions, Defendants have increasingly restricted—where not outright banned—Plaintiffs' engagement in constitutionally-protected activities.

**FACTUAL ALLEGATIONS AS TO CALIFORNIA**

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

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

18. The State public health directive requires that "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 ...".<sup>6</sup>

19. On or about March 22, 2020, the California Public Health Officer designated a list of "Essential Critical Infrastructure Workers."<sup>7</sup> Neither the State Order, the state public health directive, nor any subsequent communication from the Office of Governor Newsom or Public Health Officer

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<sup>4</sup> As of the date of this filing, the Proclamation of a National Emergency can be found online at: <https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/>.

<sup>5</sup> As of the date of this filing, the Proclamation of a State of Emergency can be found online at: <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

<sup>6</sup> The State Public Health Directive was included in the text of Executive Order N-33-20.

<sup>7</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 Angell make any exceptions for First Amendment activities such as in-person gatherings for the  
2 purpose of peaceful protest.

3 20. The Order provides no exception for demonstrations, protests, or other First  
4 Amendment protected activities, thereby effectively banning all gatherings of any size for the purpose  
5 of protesting or petitioning the government. Meanwhile, the list deems the continuity of services  
6 provided by coffee baristas, restaurant workers, and laundromat technicians to be so necessary for  
7 society that these activities are permitted to continue under the State Order, despite the existence of the  
8 very same risk Defendants rely on to stymie the exercise of fundamental rights.

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

### 11 **GIVENS’ PLANNED PROTEST**

12 22. Based on the State Order, and at the direction of Governor Newsom, the California  
13 Highway Patrol has refused to allow any gatherings on the grounds of the state capitol for the purpose  
14 of protesting or petitioning the government.

15 23. The grounds of the State Capitol Building are the most important and widely used  
16 public forum in California. It is where legislators meet, and therefore, the closest that protestors may  
17 physically get to having their grievances actually heard by high-level government officials. One  
18 California court described the west plaza as “the frequent site of civic and ceremonial occasions, of  
19 concerts, receptions for visiting dignitaries, public meetings and demonstrations. Pickets urging a wide  
20 variety of viewpoints often stand or walk outside the west entrance and, less frequently, at the  
21 building's other entrances. Distribution of handbills and solicitation of petition signatures are  
22 customary activities outside the Capitol entrances, particularly at the west plaza.” *Simpson v. Mun.*  
23 *Court*, 14 Cal. App. 3d 591, 597 (1971). Countless watershed protests have been held here, including  
24 the 2011-12 Occupy protests in Sacramento,<sup>8</sup> the 2018 protests against the police shooting of Stephon  
25  
26

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27 <sup>8</sup> <https://www.rt.com/usa/occupy-protest-california-sacramento-979/>.  
28

Clark,<sup>9</sup> the 1991 protests in reaction to Governor Pete Wilson's veto of gay rights,<sup>10</sup> and the famous May 2, 1967 Black Panther Open Carry March (protesting the anti-gun Mulford Bill).<sup>11</sup>

24. Plaintiff Givens sought to hold a protest on the State Capitol Building grounds, decrying the delay of background checks for gun purchasers by the DOJ under the guise of a public health emergency.

25. The California Department of Justice ("CADOJ") is required to complete a background check within 30 days; if not, the seller may transfer the firearm to the purchaser. 11 Cal Code Regs. § 4230(b)(1)(C).

26. The CADOJ traditionally completes these within 10 days.<sup>12</sup>

27. During the COVID-19 outbreak, many customers purchased firearms from Given's place of employment, The Sacramento Gun Club. Many of the firearm purchases by customers were motivated by heightened need for personal safety during a pandemic and concerns that county sheriffs, such as the Los Angeles County Sheriff, might shut down gun stores during the pandemic.

28. Since the outbreak, the CADOJ has failed to conduct background checks within 10 days, blaming the delay on the COVID-19 outbreak.

29. This slowdown of background checks was not limited to purchasers, but also gun store employees.

30. Alarmed by the CADOJ's failure to timely process background checks during the coronavirus outbreak, Givens decided to hold a protest on the matter. Givens intends for all protesters to abide by Center for Disease Control guidelines for social distancing and the wearing of face masks.

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<sup>9</sup> <https://abc7news.com/stephon-clark-shooting-sacramento-officer-involved/3252401/>.

<sup>10</sup> <https://www.latimes.com/archives/la-xpm-1991-10-12-mn-153-story.html>.

<sup>11</sup> [https://www.pbs.org/hueypnewton/actions/actions\\_capitolmarch.html](https://www.pbs.org/hueypnewton/actions/actions_capitolmarch.html).

<sup>12</sup> The Attorney General's website, as of April 25, 2020 at <https://oag.ca.gov/firearms>, stated that "[the] DOJ typically completed these checks within Penal Code Section 26815(a)'s 10-day waiting period."

1           31.     Givens submitted a permit application to the State Capitol Permit Office of the  
2 California Highway Patrol on April 22, 2020.

3           32.     In Givens' permit application, he stated his plans to abide by the Center for Disease  
4 Control's guidelines, and designated the entire grounds for the State Capitol Building for the protest,  
5 to ensure that he and other protesters had enough space for social distancing (i.e. a minimum of six  
6 feet between households).

7           33.     After the application was submitted, a CHP officer reached out to Givens to verify his  
8 identity. The officer reached out again on the morning of April 24, 2020, inquiring as to why Givens  
9 required the entirety of the State Capitol Building grounds for his protest. Givens explained that he  
10 required sufficient space for all of his fellow protestors to maintain social distancing. The officer  
11 agreed with Givens that upon that basis, the request was a good idea.

12           34.     The officer reached out again later in the afternoon to inform Givens that his permit had  
13 been denied. Givens received an email stating the same after the call.

14           35.     The CHP officer informed Givens that the basis for his application's denial was that  
15 defendant Governor Newsom had instructed the CHP that no permits should be issued for protests, as  
16 they were not allowed under the State Order. CHP provided no other reason for its decision.

17           36.     The California State Capitol grounds have sufficient space for Givens' planned protest,  
18 even with social distancing and assuming large number of people attend. The State Capitol grounds  
19 are at least forty acres of land, or 1,742,400 sq. ft. Even if each protester was surrounded by 144 sq. ft.  
20 of space, more than ten thousand protestors would be able to fit within the State Capitol grounds in  
21 this manner. Givens believes approximately one thousand people are likely to attend the protest,  
22 leaving ample room for the protesters to spread out.

23           37.     Givens intends to instruct his fellow attendees to follow social distancing and wear  
24 masks, and to have volunteers to ensure the same, by acting as guides and marking socially-distanced  
25 places with tape.

26           38.     To his knowledge, Plaintiff Givens has never had or contracted coronavirus, nor does  
27 he exhibit any symptoms associated with coronavirus.  
28









1 restricts fundamental rights, it is subject to “strict scrutiny” and may be justified only if it furthers a  
2 compelling government purpose and, even then, only if no less restrictive alternative is available. *See*,  
3 *e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405  
4 U.S. 330 (1972).

5 62. By denying Plaintiffs the ability to conduct political demonstrations and rallies while  
6 maintaining space in a manner that complies with the CDC guidelines for social distancing,  
7 Defendants are in violation of the Freedom of Assembly Clause. Defendants cannot meet the no-less-  
8 restrictive-alternative test. The CDC’s social distancing guidelines are appropriate to limit the spread  
9 of COVID-19. Imposing more restrictive requirements that prohibit all political demonstrations  
10 regardless of protective measures is not the least restrictive means of achieving Defendants’ public  
11 safety goals.

12 63. Requiring Plaintiffs to refrain from political demonstrations and rallies, despite  
13 substantial modifications to satisfy the public health interests at stake, violates Plaintiffs’  
14 Constitutional right to peaceably assemble.

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

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

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

**THIRD CLAIM FOR RELIEF**

**Violation of First Amendment Right to Petition**

**(42 U.S.C. § 1983)**

*(By all Plaintiffs against all Defendants)*

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

68. The Orders and Defendants' enforcement thereof violate the Petition Clause of the First Amendment both facially and as-applied to Plaintiffs.

The Petition Clause was incorporated against the states in *Edwards v. South Carolina*, 372 U.S. 229, 83 S. Ct. 680 (1963).

69. The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." Like other First Amendment rights, the right to petition is fundamental. The right is implicit in "[the] very idea of government, republican in form." *United States v. Cruikshank*, 92 U.S. 542 (1876) "The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482, 105 S. Ct. 2787, 2789 (1985). In fact, "[t]he right to petition is in some sense the source of other fundamental rights, for petitions have provided a vital means for citizens to request recognition of new rights and to assert existing rights against the sovereign." *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 397, 131 S. Ct. 2488, 2500 (2011)

70. 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).

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

72. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating and restraining enforcement of

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

4 **FOURTH CLAIM FOR RELIEF**

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

6 **(42 U.S.C. § 1983)**

7 *(By all Plaintiffs against all Defendants)*

8 73. Plaintiffs incorporate by reference the allegations in the preceding paragraphs, as if  
9 fully set forth herein.

10 74. The State Order and Defendants' enforcement thereof violate the Due Process Clause  
11 of the Fourteenth Amendment, both facially and as-applied to Plaintiffs.

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

19 76. The State Order void for vagueness.

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

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

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

5 79. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm  
6 to their constitutional rights unless Defendants are enjoined from implementing and enforcing the  
7 Orders.

8 80. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and  
9 temporary, preliminary, and permanent injunctive relief invalidating and restraining enforcement of  
10 the Orders.

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

14 **FIFTH CLAIM FOR RELIEF**

15 **Right to Liberty**

16 **(Cal. Const. Art. 1, § 1)**

17 *(By all Plaintiffs against all Defendants)*

18 82. Plaintiffs incorporate by reference the allegations in the preceding paragraphs, as if  
19 fully set forth herein.

20 83. In California, "[a]ll people are by nature free and independent and have inalienable  
21 rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting  
22 property, and pursuing and obtaining safety, happiness, and privacy. Cal. Const. Art. 1, §1.

23 84. California courts have held that Public Health Officials' authority over the rights of  
24 personal liberty is limited. Before exercising their full powers to quarantine, there must be "reasonable  
25 grounds [] to support the belief that the person so held is infected." *Ex parte Martin*, 83 Cal. App. 2d  
26 164 (1948). Public Health Officials must be able to show "probable cause to believe the person so held  
27 has an infectious disease ..." *Id.*  
28

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

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

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

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

18           89.     Plaintiffs have never had or contracted said coronavirus; they have never been at any  
19 time exposed to the danger of contracting it, and have never been in any locality where said  
20 coronavirus, or any germs of bacteria thereof, has or have existed. Plaintiffs may not be presumed to  
21 be infectious on the basis of the evidence available to Defendants.

22           90.     Requiring Plaintiffs to abstain from all political rallies or demonstrations, despite  
23 substantial modifications to satisfy the public health interests at stake, violates their California  
24 Constitutional liberty rights.

25           91.     Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm  
26 to their constitutional rights unless Defendants are enjoined from implementing and enforcing the  
27 Orders.  
28



**SEVENTH CLAIM FOR RELIEF**

**Freedom of Assembly**

**(Cal. Const. Art. 1, § 3)**

*(By all Plaintiffs against all Defendants)*

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

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

101. For the reasons stated in Plaintiffs’ Second Claim for Relief, requiring Plaintiffs to abstain from political demonstrations and rallies, despite substantial modifications to satisfy the public health interests at stake, violates Plaintiffs’ right to assemble freely under the California Constitution as well.

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

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

**EIGHTH CLAIM FOR RELIEF**

**Right to Petition**

**(Cal. Const. Art. 1, § 3)**

*(By Givens against all Defendants)*

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

105. In California “[t]he people have the right to ... instruct their representatives [and] petition government for redress of grievances. Cal. Const. Art. 1, §3.

106. For the reasons stated in Plaintiffs’ Third Claim for Relief, requiring Plaintiffs to abstain from political demonstrations, rallies, and protests, despite substantial modifications to satisfy



1 the public health interests at stake, violates Plaintiffs' right to petition freely under the California  
2 Constitution as well.

3 107. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm  
4 to their constitutional rights unless Defendants are enjoined from implementing and enforcing the  
5 Orders.

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

9 **WHEREFORE**, Plaintiffs respectfully request that this Court enter judgment against  
10 Defendants as follows:

11 A. An order and judgment declaring that the State Order, facially and as-applied to  
12 Plaintiffs, violates the First and Fourteenth Amendments to the U.S. Constitution and Article 1,  
13 Sections 1, 2, and 3 of the California Constitution;

14 B. An order temporarily, preliminarily, and permanently enjoining and prohibiting  
15 Defendants from enforcing the State Order or otherwise interfering with Plaintiffs ability to exercise  
16 constitutionally protected rights;

17 C. For attorneys' fees and costs;

18 D. Such other and further relief as the Court deems appropriate and just.

19  
20 Respectfully submitted,

21 Date: April 27, 2020

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# 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