

No. 21-15228

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

RITESH TANDON, ET AL.,
Plaintiffs-Appellants,

v.

GAVIN NEWSOM, ET AL.,
Defendants-Appellees.

**On Appeal from the United States District Court
for the Northern District of California**

No. 5:20-cv-07108

The Honorable Lucy H. Koh, Judge

STATE APPELLEES' ANSWERING BRIEF

MATTHEW RODRIQUEZ
Acting Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

LARA HADDAD
Deputy Attorney General
State Bar No. 319630
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6250
Fax: (916) 731-2124
Email: Lara.Haddad@doj.ca.gov
*Attorneys for Defendants and Appellees
Governor Gavin Newsom, Acting
Attorney General Matt Rodriguez, and
State Public Health Officer and Director
of CDPH Tomás J. Aragón*

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INTRODUCTION

COVID-19 is now the world's deadliest infectious disease, which, as of this filing, has claimed over half a million lives in this country alone. The landscape is improving: in response to lower infection rates, the State has loosened restrictions in many counties, and, beginning April 15, many of the restrictions that Plaintiffs challenge will no longer apply in Santa Clara County, where Plaintiffs are located. Indeed, all industries in California may be able to return to usual operations by June 15. But the crisis is not over: less than 40% of California residents have received a dose of a vaccine, more contagious variants of the COVID-19 virus are spreading, and new waves are hitting many other states.

Against this landscape, Plaintiffs appeal the denial of their preliminary injunction motion seeking to enjoin the State's restrictions on private, in-home, in-person gatherings, and the capacity restrictions and PPE requirements that apply to small businesses. But Plaintiffs have not shown a likelihood of success on the merits of their claims. As both the district court and the motions panel held, the State's private gatherings restrictions do not violate Plaintiffs' free exercise rights, because those restrictions are neutral and generally applicable. On their face, they apply to all private gatherings, secular and nonsecular alike, and they do not leave unrestricted any *analogous* secular activity. The Supreme Court's recent decisions concerning restrictions that single out public houses of worship and compare those

houses of worship with public-facing businesses, do not alter this analysis. And even applying strict scrutiny, the private gatherings restrictions survive, because they are narrowly tailored to serve a compelling government interest, restrict protected conduct no more than necessary, and are the least restrictive means available.

Plaintiffs' free speech and assembly claims also fail. First, the private gatherings restrictions apply to all in-home gatherings that Plaintiffs seek to have, including political salons and campaign meet-and-greets; they are content-neutral time, place, and manner restrictions that serve a substantial (indeed, compelling) government interest and leave open adequate alternative avenues of speech. In addition, these restrictions on the size of private gatherings neither regulate core political speech nor suppress an entire medium of expression.

Plaintiffs' substantive due process and equal protection claims likewise fail, because no fundamental right has been violated, and the public health restrictions that apply to their businesses do not discriminate against any protected group.

Finally, the balance of the equities weighs decisively against the injunctive relief altering the status quo sought by Plaintiffs. Plaintiffs have not shown that they will suffer irreparable harm, especially in light of the imminent relaxation of the private gatherings restrictions. By contrast, while the State hopes and expects that to relax restrictions even further as more vaccines are distributed and

administered, as the record shows, that time has not yet arrived. Enjoining the State's restrictions at this juncture could unravel the progress that has been achieved at great sacrifice by Californians over the past year, especially in light of the recent spread of potentially more contagious virus variants.

The district court's order denying Plaintiffs' preliminary injunction should be affirmed.

STATEMENT OF ISSUES

1. Whether the district court abused its discretion in ruling that Plaintiffs are unlikely to succeed on their Free Exercise Clause challenge to the State's restrictions on private gatherings.
2. Whether the district court abused its discretion in ruling that Plaintiffs are unlikely to succeed on their free speech and assembly challenges to the State's restrictions on private gatherings.
3. Whether the district court abused its discretion in ruling that Plaintiffs are unlikely to succeed on their substantive due process and equal protection challenges to the State's public health restrictions on their businesses.
4. Whether the district court abused its discretion in ruling that the balance of equities weighs against equitable relief.

JURISDICTION STATEMENT

The District Court had subject matter jurisdiction over Plaintiffs' claims under 28 U.S.C. § 1331. The Court denied Plaintiffs' motion for a preliminary injunction on February 5, 2021, and Plaintiffs timely appealed. This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

A. The COVID-19 Pandemic

As is well-known by now, COVID-19 is highly contagious and transmitted primarily by respiratory droplets containing SARS-CoV-2, the novel coronavirus causing the disease. 3-ER-0407, 0580. As is also known, the disease can be spread by individuals who exhibit no symptoms and may not know they are infected. *Id.* There is no known cure and only limited treatment options for the disease. 3-ER-0579.

Nevertheless, the State has made great progress in combatting the disease: indeed, since Plaintiffs moved for a preliminary injunction in the lower court, the State has started the process of vaccinating residents, and by April 15, will make vaccinations available to all California residents over the age of 16. Request for Judicial Notice ("RJN"), Ex. 1. Moreover, if the State achieves equitable vaccine availability for all residents who wish to be inoculated, and if hospitalization rates,

particularly among fully vaccinated individuals, are low, all industries across the state will be able to return to usual operations, with common-sense risk reduction measures. RJN, Ex. 2.

But less than 25% of California's population have received both doses of the vaccine as of this filing.¹ Disturbingly, mutated variants of the COVID-19 that are more easily spread and appear to be deadlier have been detected throughout California.² And while infection rates are currently low in this State, especially as compared to the devastating surges in December and January, the climbing rates in other states due to these new variants demonstrate how easily a new wave can begin.³

¹ California Department of Public Health, *Vaccination Dashboard* (updated April 5, 2021), <https://covid19.ca.gov/vaccines/#California-vaccines-dashboard>.

² See, e.g., Marisa Iati & Angela Fritz, *What You Need to Know About the Coronavirus Variants*, Wash. Post (Mar. 22, 2021), <https://www.washingtonpost.com/health/interactive/2021/01/25/covid-variants/>; Maura Dolan, *Bay Area COVID-19 Variants Could Outpace Vaccine Distribution, Health Director Warns* (April 1, 2021), <https://www.latimes.com/california/story/2021-04-01/bay-area-health-director-warns-variants-new-spike-in-infections>.

³ See, e.g., Jennifer Millman, *New Jersey Variants May Cause Record Caseloads; Younger Hospitalizations Soar*, NBC New York (Mar. 31, 2021), <https://www.nbcnewyork.com/news/coronavirus/almost-no-point-nyers-vexed-as-vaccine-demand-outpaces-supply-cuomo-travel-rule-set-to-expire/2973698/>; Sharon Otterman & Joseph Goldstein, *The New Normal in NY: High Virus Cases and a Steady Stream of Cases*, NYTimes (Mar. 31, 2021), <https://www.nytimes.com/2021/03/31/nyregion/nyc-coronavirus-cases-variants.html>.

Consequently, until the process of distributing the vaccine is completed, limiting the physical interactions in which COVID-19 may spread remains crucial. 3-ER-0416, 0419-0420. This is especially true with large indoor gatherings, which create a particularly great risk of spreading the disease. 3-ER-0419-0420, 0583-0584. The more that people gather together, the more likely it is that at least one person at that gathering is infected with COVID-19 and the more people that may be infected. 3-ER-0419, 0584. Transmission risk is also increased when people gather in close proximity for an extended period, thereby increasing the probability that uninfected individuals will be exposed to respiratory droplets containing the COVID-19 virus and infected. 3-ER-0419, 0420, 0582-0583. Holding gatherings indoors increases risk as well because indoors there is limited ventilation and respiratory droplets disperse less easily. 3-ER-0419, 0584. This is especially true in smaller spaces with poorer ventilation, such as private homes. *Id.* In addition, the nature of the activity, including, for example, whether the activity involves close interactions affects the risk of disease because, to become infected, an individual must receive a sufficient “viral load”—the number of “viable viral particles” to which a person is exposed—to overcome their immune system. 3-ER-0408-0409. Accordingly, transmission risk increases where, as in private social gatherings, individuals interact in close proximity for extended periods. 3-ER-0419, 0419-0420.

Precautions like face coverings and physical distancing reduce transmission risk, but a significant risk remains when people gather for extended periods indoors. 3-ER-0415, 0420, 0586.

B. California’s Efforts to Combat the COVID-19 Pandemic and the State’s Early COVID-19 Directives

As the district court noted, from the beginning of the pandemic, California’s efforts to combat the virus have evolved based on changing circumstances and developing scientific and medical understanding. 1-ER-0012 (District Court Order). On March 4, 2020, near the beginning of the pandemic, the Governor proclaimed a State of Emergency. 3-ER-0510. On March 19, 2020, in response to the first wave of COVID-19 infections, the State issued a broad Stay-at-Home Order. 3-ER-0521-0522. In late April, as this first wave receded, California began to relax restrictions, reopening lower- and then higher-risk places and activities. 3-ER-0524-0537, 0589. In connection with these reopenings, California issued sector-specific guidance requiring sectors to take precautions, many tailored to the particular sector, to reduce transmission risk. *See, e.g.*, 3-ER-0539-0548, 0662-0807. In addition, when research showed that COVID-19 is transmitted primarily through respiratory droplets, the State adopted a state-wide face covering requirement but relaxed restrictions on activities outdoors, where such droplets are more likely to be dispersed. 3-ER-0590-0591.

During the summer, in response to a second wave of infections, the State closed many high risk activities, including restaurants and wineries, throughout the State; and in counties with heightened infection rates, the State closed the indoor operations of other activities, including hair salons, personal care services, and fitness centers. 3-ER-0550-0554, 0591-0592.

C. The Blueprint for a Safer Economy and the State’s Restrictions on Gatherings

1. Blueprint For a Safer Economy

In late August, after this second wave receded, the Governor announced the Blueprint for a Safer Economy, a carefully calibrated set of restrictions on the location and size of various activities. 3-ER-0592-0594. These restrictions, which are layered on top of state- and industry-wide guidelines, are based on objective risk factors such as the ability to ensure physical distancing, to limit the number of people per square foot, and to reduce the duration of exposures. *Id.* In addition, each county is assigned to one of four tiers based on how widespread COVID-19 is in that county, measured primarily by the number of positive cases per 100,000 residents. 3-ER-0600-0601. The State also closely monitors hospitalization rates, but does not use them as a basis for the Blueprint, because of the significant “lag” time between the spread of infections and hospitalization. 3-ER-0451.

The Blueprint allows lower-risk sectors and activities such as salons and personal care services to operate “with modifications”—that is, subject to state-

wide and industry-specific guidance—in all tiers. *See* 3-ER-0567-0572. Higher-risk sectors such as retail are permitted to open indoors in all tiers but subject to capacity limits in the higher tiers with greater community spread. *Id.* at 0568. Even higher-risk activities such as restaurants are not permitted to operate indoors in Tier 1, but allowed to do so subject to capacity limits in other tiers. *Id.* at 0570. Wineries are not permitted to serve customers indoors in Tiers 1 and 2 but are allowed to do so subject to capacity limits in Tiers 3 and 4. *Id.* The State has revised the Blueprint’s restrictions for various activities as knowledge about the relative risk of those activities has increased. *See* RJN, Exhibit 3.

2. The State’s General Gatherings Guidance and the Private Gatherings Restrictions

On March 16, 2020 the State issued general guidance on gatherings, 4-ER-0824, and issued subsequent guidance in September 2020, 4-ER-0827, October 2020, 4-ER-0830, and November 2020. RJN Ex. 3 This guidance defines gatherings as “social situations that bring together people from different households at the same time in a single space or place.” 4-ER-0831. The restrictions in the guidance apply to “private gatherings.” *Id.* In addition, the guidance prohibits “all other gatherings not covered by existing sector guidance.” *Id.*

Recognizing the “higher risk of transmission and spread of COVID-19 when people mix from different households and communities,” 4-ER-0832, the

guidance’s private gatherings restrictions limit the size and location of private gatherings. In all tiers, “[g]atherings that include more than 3 households are prohibited.” 4-ER-0831. In Tiers 2-4 (the Red, Orange, and Yellow Tiers), indoor gatherings are “strongly discouraged” but permitted. 4-ER-0567. And in Tier 1, or the Purple Tier, only, indoor gatherings are prohibited; outdoor gatherings, however, are still permitted. *Id.*

Because of the current pace of vaccinations and low infection rates, the State has updated the private gatherings restrictions and plans to relax these restrictions considerably. For example, effective April 15, 2021, counties in Tier 3 (Orange Tier), gatherings will be permitted to have 50 people outdoors and the lesser of 25 or 25% capacity indoors. *See* RJN, Ex. 1. The State also has issued even more lenient new guidance for private events, which require, among other things, purchased tickets or defined guest lists as well as assigned seating. *Id.*

D. The Surge in Infections, the Regional Stay-at-Home Order, and Current Circumstances and Restrictions

After the Blueprint was instituted, infections initially fell. However, as in the rest of the country, infection rates began to increase in late October, and throughout the winter, California experienced a massive surge in COVID infections, hospitalizations, and deaths. *See South Bay v. Newsom*, 985 F.3d 1128, 1135-36 (9th Cir. 2021) (*South Bay III*).

In response to that surge, on December 3, 2020, the State issued a Regional Stay-At-Home Order, which applied in regions where ICU availability dropped below 15%. 2-ER-100, 103. The Order placed additional restrictions on many activities, including temporarily barred private gatherings, in-person dining, hair salons, and personal care services, as well as reducing capacity for retail and other activities in regions where it was in effect. 2-ER-100. On January 25, 2021, After projections for ICU availability rose above 15%, the Regional Stay-at-Home Order was lifted. ECF 61 at 14.⁴

On March 4, 2021, the State updated the Blueprint to account for vaccine administration. RJN, Ex. 1. This update eases the case count requirements for moving to less restrictive tiers once vaccination equity thresholds are met, allowing counties to move to these tiers sooner. California has now reached the second benchmark.⁵

Currently, because of its low infection rates, Santa Clara County is in the Orange Tier.⁶ Under the current private gatherings restrictions, in this tier, private

⁴ “ECF” refers to the district court docket below.

⁵ California Governor’s Office, *Governor Newsom Outlines the State’s Next tsep in the COVID-19 Pandemic Recovery, Moving Beyond the Blueprint* (April 6, 2021), <https://www.gov.ca.gov/2021/04/06/governor-newsom-outlines-the-states-next-step-in-the-covid-19-pandemic-recovery-moving-beyond-the-blueprint/>.

⁶ California Department of Public Health, *California Blueprint Data Chart* (updated March 30, 2021),

gatherings limited to three separate households can be held both indoors and outdoors, and effective April 15, in that tier private gatherings will be permitted to have 50 people outdoors and the lesser of 25 or 25% capacity indoors. RJN, Exhibit 3. In addition, outdoor private events will be permitted with up to 100 individuals, and with proof of vaccination or testing, the limit will be 300 individuals outdoors and 150 individuals indoors. *Id.* In the Orange Tier, salons also can open indoors with modifications, and wineries and bars can operate indoors at the lesser of 25% capacity or 100 people. *See* Dkt. 18.

II. PROCEDURAL BACKGROUND

A. Plaintiffs' Complaint, the Preliminary Injunction Motion, and the District Court's Decision

Ten plaintiffs have brought this case, and they divide into three groups. *See* ECF 1 at 23-30. Two plaintiffs, Pastor Jeremy Wong and Karen Busch, seek to hold Bible studies, collective prayer, and other religious gatherings in their homes. ECF 1 at 25-26. Three plaintiffs, Ritesh Tandon, Terry Gannon, and Carolyn Gannon, wish to hold political events and discussions in their homes. *Id.* at 23-25. The remaining five plaintiffs run businesses whose operations are restricted by the gatherings guidelines, the Blueprint, and the County's restrictions: (1) Maya

https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Blueprint_Data_Chart_033021.xlsx.

Mansour, owner of a skin care bar;⁷ (2) Julie Evarkiou, owner of salon that sometimes hosts events, (3) Dhruv Khanna, owner of a winery that also hosts events; (4) Francis Beaudet, owner of a restaurant; and (4) Connie Richards, former owner of a now-closed fitness center. *Id.* at 26-30.

On October 13, 2020, nearly two months after the Blueprint was adopted but before the gatherings guidance was issued, Plaintiffs sued State Defendants and Jeffrey V. Smith, County Executive of Santa Clara County, and Sara H. Cody, Health Officer and Public Health Director of Santa Clara County (the “County Defendants”). ECF 1. In their Complaint, Plaintiffs bring free exercise, free speech, substantive due process, and equal protection challenges to the gatherings guidance and other COVID-19 restrictions.

On October 22, 2020, Plaintiffs moved for a preliminary injunction. ECF 18. At that time, Santa Clara was in the Red Tier (Tier 2). A hearing was held on the motion on December 17, 2020, ECF 46, and on February 5, 2021, in a lengthy and

⁷ Plaintiff Mansour only challenged the use of PPE, as required by Santa Clara County, in the District Court. *See* 5-ER-1019-1022. For the first time in this appeal, she objects to “modifications” that prohibit her from providing dual services and double bookings, and require physical distancing. OB at 27.

thorough opinion, the district court denied Plaintiffs' motion in its entirety.⁸ *See* 1-ER-0001, 0081.

The district court began with the substantive due process claims of the five business owners. Finding that the right to earn a living asserted by these plaintiffs is not a fundamental liberty interest, the court reviewed the challenged restrictions deferentially, 1-ER-0029-0030, and ruled that Plaintiffs were unlikely to succeed because the restrictions further the State's legitimate interest in slowing the spread of COVID-19. 1-ER-0032-0035. The court also found that the business plaintiffs were unlikely to succeed on their equal protection claims because, among other things, it was rational to place restrictions on the general population rather than follow the strategy urged by Plaintiffs' experts, which the court noted "the vast majority of public health experts reject." 1-ER-0034-0044; *see also* 1-ER-0039-0040 (rejecting Plaintiffs' objection to PCR testing).

The district court also found Plaintiffs' free speech claims unlikely to succeed because the State's private gatherings restrictions are content-neutral and satisfy

⁸ Though by this time the State had increased restrictions because of rising infections and implemented the Regional Stay-at-Home Order and Santa Clara County was in the Purple Tier, at the hearing, Plaintiffs confirmed that they were challenging only the restrictions "as they existed at [the] time" they filed their preliminary injunction motion (when Santa Clara was in the Red Tier). *See* RJN, Exhibit 5 at 4. Similarly, in their emergency application for an injunction pending appeal (discussed *infra*), Plaintiffs challenged the restrictions that applied to the Red Tier. *See* Dkt. 9 at 4 (describing restrictions in place in the Red Tier).

the intermediate scrutiny applicable to incidental restrictions on speech. 1-ER-0049-63. In so doing, the court rejected Plaintiffs' attempt to analogize private social gatherings to commercial activities, finding that private social gatherings are markedly riskier because, among other things, they bring together people for a longer time, are more likely to involve sustained conversations, and take place in private homes with limited ventilation. 1-ER-0052-0056.

The court likewise found that the Plaintiffs' free exercise claims were unlikely to succeed because the private gatherings restrictions are neutral and generally applicable and they easily satisfy the rational basis review applicable to such regulations. 1-ER-0069-0074. The Court also found that, if the gatherings guidance were subject to strict scrutiny, the guidance would satisfy it. 1-ER-0063-0069, 74.

Finally, the district court determined that balance of equities weigh against the preliminary injunction sought by Plaintiffs. 1-ER-0076-0080. The restrictions that Plaintiffs seek to enjoin, the Court observed, are "carefully designed to slow the spread of COVID-19." 1-ER-0077. If these were enjoined, "then more deaths, more serious illnesses, and more strain on California's already overburdened health care system would result." *Id.*

B. This Appeal, Plaintiffs’ Motion for Injunction Pending Appeal and the Motions Panel Order

Plaintiffs filed this appeal on February 9, 2021, four days after the district court’s order. Dkt. 1-1. Eight days later, on February 17, Plaintiffs moved for an injunction pending appeal in the district court, ECF 68, which the district court denied on February 19. ECF 69. Approximately two weeks later, on March 4, Plaintiffs moved for an injunction pending appeal in this Court. Dkt. 9. On March 30, 2021, in a published opinion, the motions panel denied the emergency motion. Dkt. 21.

First, the motions panel ruled that Plaintiffs Wong and Busch were unlikely to succeed on their free exercise challenge to the private gatherings restrictions. The panel ruled that the State’s restrictions on in-home private gatherings are neutral and generally applicable, and subject to rational basis review, which the restrictions satisfied. Dkt. 21 at 6-27. In so doing, it distinguished the Supreme Court’s recent orders in *Gateway City Church v. Newsom*, __ S. Ct. __, 2021 WL 753575 (February 26, 2021), *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (*South Bay II*), and *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), on the ground that those decisions considered restrictions on “public-facing houses of worship,” which are comparable to “public-facing businesses.” *Id.* at 14. By contrast, the panel reasoned, this case concerns private gatherings, which pose a much greater

transmission risk than and thus are not comparable to commercial activities because, as the District Court found, private gatherings are likely to involve longer social interactions, participants in those interactions are more likely to be involved in prolonged conversations, and the interactions are likely to take place in homes that are smaller and less ventilated than commercial establishments. *Id.* at 19; *see also id.* at 20-22 (discussing the “extensive safety protocols” imposed on commercial activities). Judge Butamay disagreed and dissented on this point. *Id.* at 31-52.

Second, the motions panel found Plaintiffs’ free speech and assembly claims to be moot. Dkt. 21 at 28-29. The panel found, based on the record before it, that the private gatherings restrictions do not apply to political activities because the trial court had ruled that the restrictions did not apply to the “political campaign events” that Plaintiffs Tandon wished to hold, and while the parties assumed that this ruling applied only to “rallies,” they failed to define the term or distinguish rallies from the other political activities that Plaintiffs Tandon or the Gannons wished to host. *Id.* The motions panel noted, however, that this ruling was without prejudice to a party asserting the contrary in a subsequent proceeding. *Id.* at 29 n.

13.

Finally, observing that this Court has never recognized a fundamental right to work and that business owners a suspect class, the panel quickly dispatched Plaintiffs' due process and equal protection claims. Dkt. 21 at 29.

SUMMARY OF THE ARGUMENT

As the motions panel has done, this Court should find that Plaintiffs Wong and Busch have failed to demonstrate a likelihood of success on their free exercise claims. The State's private gatherings restrictions are neutral and generally applicable, applying to all private, in-home gatherings alike. While the private gatherings restrictions do not apply to commercial businesses and similar secular activities, as both the District Court and the motions panel recognized, those public-facing activities are not comparable and thus not material to Free Exercise Clause analysis because they pose significantly different and lesser transmission risks. It makes no difference that the gatherings guidance exempts public gatherings covered by other guidance from the private gatherings restrictions because that exemption does not discriminate against religious activities; to the contrary, this exemption applies to churches and other houses of worship, the most salient example of religious conduct. Nor do the Supreme Court's orders in *South Bay II* and *Gateway* change the analysis: those cases, as the motions panel noted, concerned express prohibitions on indoor services in public houses of worship, not facially neutral and generally applicable restrictions on private gatherings. And

even if strict scrutiny were applicable, the private gatherings restrictions would survive because they are narrowly tailored to serve a compelling government interest and the least restrictive means available to achieve that interest.

Plaintiffs Tandon and the Gannons similarly have failed to demonstrate a likelihood of success on their free speech and assembly claims. The private gatherings restrictions are a content-neutral time, place, and manner regulation—all speech is permitted, and in-person gatherings are not prohibited completely, but merely restricted on a temporary basis. Accordingly, it survives intermediate scrutiny, because it serves a significant (indeed, compelling) government interest, is narrowly tailored, and leaves open alternative means of expression. Moreover, contrary to Plaintiffs' assertions, the private gatherings restrictions on where and how many individuals may gather do not regulate core political speech or foreclose an entire medium of expression fail.

The business plaintiffs also have failed to demonstrate a likelihood of success. As the motions panel held, the State's public health restrictions on private businesses do not violate Plaintiffs' substantive due process or equal protection rights because no fundamental rights have been violated, and the restrictions do not discriminate between any protected class.

Finally, the balance of the equities weighs decisively against the equitable relief Plaintiffs seek. Plaintiffs have not met their burden to show that they would

suffer irreparable harm absent injunctive relief, and as the district court rightly held, the injunctive relief they seek would harm the public interest.

STANDARD OF REVIEW

This Court reviews an appeal from the denial of preliminary injunctive relief for abuse of discretion. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). Such review is “limited and deferential,” *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (en banc), and the denial of the preliminary injunction motion should be reversed only if the district court “abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact,” *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016) (internal quotation marks omitted).

“A preliminary injunction is ‘an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.’” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)). In particular, parties seeking such extraordinary relief bear the heavy burden to demonstrate (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The party seeking the injunction

bears the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT PLAINTIFFS' FREE EXERCISE CLAIM IS UNLIKELY TO SUCCEED

Plaintiffs do not seriously dispute that the restrictions that the State imposes on private gatherings rationally advance the State's legitimate interest in combatting the spread of COVID-19, and raise no argument with respect to the restrictions' rational bases in their discussion of their free exercise claim.⁹ Instead, they argue that the private gatherings restrictions are subject to strict scrutiny because the restrictions are not neutral and generally applicable. This argument fails because, as the motions panel recognized, the private gatherings restrictions are in fact neutral and generally applicable. And even if they were not, they would satisfy strict scrutiny, as the district court correctly found.¹⁰

⁹ To the extent they do challenge the rationales of the State's restrictions, in support of their due process and equal protection claims, *see* OB at 75-78, their arguments fail, for the reasons discussed *infra* at III.

¹⁰ Plaintiffs' free exercise claims, and certainly the preliminary injunctive sought based on them, may be moot by the time this appeal is heard. As mentioned below, effective April 15, 2021, new guidelines will permit outdoor private gatherings in the Orange Tier of up to 50 people and indoor events of up to 25 people or 25% capacity as well as private events (those with defined guest lists or purchased tickets and a seating chart) with up to 100 people. Since Plaintiffs Wong and Busch seek to hold gatherings with only 8-12 people, 5-ER-1007, 1015, the private gatherings restrictions may no longer pose any threat of injury to them.

A. The Court Should Follow the Motions Panel’s Carefully Considered and Well-Reasoned Ruling that the State’s Private Gatherings Restriction Is Neutral and Generally Applicable

The motions panel determined that the State’s private gatherings restrictions are neutral and generally applicable, in a well-reasoned, published order that carefully considered and ultimately rejected Plaintiffs’ position. While a merits panel is not bound by a motions panel’s published ruling in the same case, *see East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1262 (9th Cir. 2020), as this Court noted, “a later merits panel should not lightly overturn a decision made by a motions panel.” *Id.* at 1262 (quotation omitted). This principle applies with especial force here because Plaintiffs’ opening brief, which was filed only five days after they moved for an injunction pending appeal, advances essentially the same arguments as their failed motion.

B. As The Motions Panel Ruled, The State Directive at Issue Is Neutral and Generally Applicable

1. The State’s Restrictions on Private Gatherings Are Neutral and Generally Applicable

The State’s restrictions on private gatherings do not mention religious activities and apply across the board to all gatherings. Consequently, as the District Court and the motions panel correctly found, these restrictions are neutral and generally applicable regulations subject to only rational basis review.

The First Amendment protects the free exercise of religion. However, “the right of free exercise does not relieve an individual of the obligation to comply

with a valid and neutral law of general applicability.” *Emp’t Div. v. Dep’t of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) (quotations omitted), *superseded by statute on other grounds*, Religious Freedom Restoration Act of 1993, *as recognized in Tanzin v. Tanvir*, 141 S. Ct. 486 (2020). The Free Exercise Clause is not violated when a law does not “infringe upon or restrict practices because of their religious motivation” or “impose[] burdens only on conduct motivated by religious belief.” *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) (quoting *Church of the Lukumi Babalu Aye, inc. v. City of Hialeah*, 508 U.S. 520, 533, 543 (1993)). Accordingly, “neutral, generally applicable laws that incidentally burden the exercise of religion’ need only be ‘rationally related to a legitimate government interest.’” *Parents for Privacy v. Barr*, 949 F.3d 1210, 1234 (9th Cir. 2020) (quoting *Lukumi*, 508 U.S. at 531); *see also Danville Christian Academy v. Beshear*, 981 F.3d 505, 507 (6th Cir. 2020) (COVID-related closure of all schools was neutral and generally applicable and did not discriminate against religious schools), *injunction denied without prejudice*, 141 S. Ct. 527 (2020).

The State’s COVID-19 restrictions distinguish between activities (and the locations of those activities) based on their attendant risks, and the gatherings guidance distinguishes between public and private gatherings on the same basis. The guidance’s provisions, which, among other things, limit the number of households that may gather and prohibits indoor gatherings in the Purple Tier,

“appl[y] to private gatherings.” 4-ER-0831. In addition, the guidance prohibits “other”—that is, public—“gatherings” unless they are authorized by existing industry-specific guidance. *Id.* (“[A]ll other gatherings not covered by existing sector guidance are prohibited.”). The term “[g]atherings” is defined as “social situations that bring together people from different households at the same time in a single space of place.” *Id.*

As the District Court recognized, the private gatherings restrictions are neutral on their face because they make “no reference to any religious practice, conduct, belief or motivation.” 1-ER-0071 (quoting *Stormans, Inc. v. Weisman*, 794 F.3d 1109, 1076 (9th Cir. 2009)). Nor, contrary to Plaintiffs suggestion, OB at 34-35, are the private gatherings restrictions substantially underinclusive or targeted towards religion. Just the opposite: the gatherings guidance applies categorically to all “private gatherings,” whether secular or religious.” 4-ER-0831. Nor is there any evidence that “the object of the law is to infringe upon or restrict practices *because of* those practices’ religious motivation.” *Parents for Privacy*, 949 F.3d at 1235 (quoting *Selecky*, 586 F.3d at 1130) (emphasis added in opinion). To the contrary, the restrictions are motivated by concern over the “higher risk of transmission and spread of COVID-19” posed by gatherings, 5-ER-0252, not any animus towards religion. *See* 1-ER-0071; *see also* Dkt. 21 at 12 (“[T]here is no indication, or claim, of animus toward religious gatherings.”).

The private gatherings restrictions are also generally applicable. As this Court recently observed, “the question of general applicability addresses whether a law treats religious observers unequally.” *Parents for Privacy*, 949 F.3d at 1235. Far from treating religious observers unequally, “[t]he State’s private gatherings restrictions apply to *all* gatherings, whether religious or secular.” 1-ER-71 (emphasis in original). Indeed, Plaintiffs implicitly confirm that the private gatherings restrictions are generally applicable by challenging their application not only to private gatherings for religious purposes, like Plaintiffs Wong and Busch propose, but also to private gatherings for political purposes, like Plaintiffs Tandon and the Gannons propose.

2. Plaintiffs’ Objections Concerning the Treatment of Public Gatherings Are Immaterial to the Restrictions on Private Gatherings and Unsupported by Evidence.

Plaintiffs do not dispute that the State’s private gatherings restrictions are neutral on their face or that they apply equally to religious and secular gatherings in their private homes. Instead, they argue that the restrictions are substantially underinclusive, and thus not generally applicable, because the restrictions do not apply to all secular *public* gatherings. This argument fails for three reasons.

First, public gatherings are not analogous to private ones. As Plaintiffs point out, a law that is neutral on its face nonetheless may fail to satisfy the general applicability requirement: if it “pursues the government’s interest ‘only against

conduct motivated by religious belief,’ but fails to include in its prohibition substantial, comparable secular conduct that would similarly threaten the government’s interest, then the law is not generally applicable.” *Stormans, Inc. v. Wiesman*, 794 F.3d at 1079 (quoting *Lukumi*, 508 U.S. at 545). But to determine whether a regulation is impermissibly underinclusive, courts do not examine the treatment of “*all* non-religious conduct”; instead, they focus on ““*analogous* non-religious conduct.”” ECF 21 at 17 (quoting *Lukumi*, 508 U.S. at 546) (emphasis added in opinion). As both the district court and the motions panel found, the public gatherings that are subject to sector-specific restrictions—and thus not barred by the gatherings guidance—are not proper comparators to in-home private religious gatherings. Dkt. 21 at 18; 1-ER-0053-0057, 0073.

In particular, the District Court found that the public gatherings identified by Plaintiffs below, which were all socially distanced commercial activities, are “different in kind” from Plaintiffs’ private gatherings. 1-ER-0053-0057, 0073. Private gatherings in which individuals “have social connections to one another and are coming together for the purpose of being together” generally bring people “together for a longer time” and are more likely to involve prolonged conversations, both of which increase the risk of transmission. 1-ER-0054. In addition, private homes tend to have poorer ventilation, and distancing and mask-wearing are less likely in private gatherings. 1-ER-0055-0056. Finally,

restrictions are more difficult to enforce in private gatherings, *id.*, because, as the motions panel observed, “ensuring public-facing businesses comply with [] regulations is a fundamentally different task from regulating conduct in private homes, which government authorities cannot simply enter at will.” Dkt. 21 at 22.

As the motions panel also noted, Plaintiffs do not dispute any of these findings. Dkt. 21 at 19. Thus, “public-facing” businesses and activities are “not analogous . . . or appropriate comparators to private in-home religious gatherings.” *Id.* at 14-22; *see also id.* at 8 (“Appellants are making the wrong comparison because the record does not support that private religious gatherings in homes are comparable—in terms of risk to public health or reasonable safety measures to address that risk—to commercial activities, or even to religious activities, in public buildings.”).

Second, the exception for public gatherings covered by other guidance, which includes the guidance applicable to houses of worship, does not show any discrimination against religion. In addition to imposing restrictions on private gatherings, the gatherings guidance prohibits “all other gatherings” unless they are “covered by existing sector guidance.” 4-ER-0831. This exception does not target or disproportionately burden religious conduct. To the contrary, it permits gatherings at houses of worship. Thus, any alleged under-inclusiveness in the guidance’s exceptions for public gatherings is irrelevant to Free Exercise analysis

because it is “not tied . . . to burdens on secular versus religious conduct” and thus does not show any discrimination against religion. *Parents for Privacy*, 949 F.3d at 1236 (school district’s allowing transgender students to use school bathrooms that match their gender identity does not infringe on free exercise rights because it does not target religious conduct).

Plaintiffs object that excepting public gatherings at house of worship arbitrarily distinguishes between “hierarchical faith traditions and less ritualized forms of religious practice.” OB at 36. In fact, however, the distinction is *not* arbitrary because there is clearly a lesser risk of infecting groups of people worshipping in buildings that are designed to accommodate such groups, and where other physical distancing and safety measures can be easily implemented. 3-ER-0419-0420. Moreover, by requiring courts to compare analogous conduct, the Supreme Court’s free exercise analysis requires just such differentiation.¹¹ *See* 1-ER-0018.

¹¹ Although plaintiffs did not make this claim in their opening brief, in his dissent from the motions panel ruling Judge Bumatay suggested that the State’s restrictions privilege protests and rallies over worship services. *See* Dkt. 21 at 40-41. But, as the motions panel majority concluded, “indoor public religious activities and indoor rallies and protests are subject to the same capacity, face covering, and other safety restrictions.” *Id.* at 25. And public rallies and protests are different from in-home gatherings in other ways: for example, “[l]ocal Health Officers are encouraged to “consider outdoor attendance capacities,” and peace officers are often present. *Id.* at 25. And to the extent that Judge Bumatay’s

Third, far from showing substantial underinclusiveness, none of the excepted gatherings Plaintiffs identify pose a transmission risk as great as private in-home gatherings. For example, Plaintiffs point to a variety of businesses that are permitted to operate indoors in the Purple Tier, which they assert are comparable “because they each implicate *similar* (or greater) risk of transmitting COVID-19.” OB 36, 39 (citing examples). As noted above, however, none of these public gatherings involves the prolonged interactions including face-to-face conversations that are likely to occur in a private gathering, the difficulties in maintaining masking and social distancing, or the poorer ventilation characteristic of private houses. In addition, as the motions panel recognized, the commercial activities identified by Plaintiffs are subject to industry-specific guidances containing “extensive safety protocols,” including, among other things, the relation of workplace-specific COVID-19 prevention plans, screening and distancing requirements as well as “ventilation, cleaning and disinfecting protocols, that must be implemented—all of which reduce the risk of transmission. *See* ECF 21 at 20-22, citing Covid-19 Industry Guidance. Noticeably absent from Plaintiffs’ brief or

dissent suggests that the State’s “outdoor-gathering rules” would bar the plaintiffs from holding religious gatherings in their backyards, *id.* at 40, he failed to consider the possibility that those gatherings were already permissible under the State’s general guidance on outdoor worship services. *See infra* at n.12 (explaining that the religious gatherings guidance allows outdoor religious services in any outdoor area, so long as attendees adhere to appropriate protocols).

declarations submitted below is any evidence that, in spite of the differences between private gatherings and businesses and the industry-specific protections required for businesses, private gatherings pose a similar risk of transmission. As a consequence, Plaintiffs fail to show any likelihood of success on this point.

Plaintiffs also have failed to show any likelihood of success in arguing that other activities such as film and TV production pose a greater risk of transmission than private gatherings. OB at 39-40. Plaintiffs assert that “a 25-person television crew filming in a private residence undoubtedly presents a greater risk than a 5-person Bible study in the same residence.” OB at 39. TV and film productions, however, are subject to stringent industry protocols incorporated into mandatory state guidance, which include tri-weekly COVID-19 testing. *South Bay*, 981 F.3d at 1147. Plaintiffs do not—and cannot—offer any evidence that a 25-person television crew that is subject to stringent, enforceable industry guidance, which include requirements for regular testing, poses a greater risk than a private gathering with prolonged, close interactions and no enforceable protocols to prevent the spread of the disease.¹²

¹² In their briefs to this Court, Plaintiffs focus primarily on the restrictions that prohibit them from gathering “*in their home[s]*,” OB at 31 (emphasis added), and argue that the activities that they wish to engage in are similar to “indoor operations” at various commercial establishments, OB at 36. But in their application for emergency relief in the Supreme Court, they have also emphasized

3. The Supreme Court’s Rulings in *South Bay II* and *Gateway* Do Not Apply to the State’s Private Gatherings Restrictions

Plaintiffs also contend that strict scrutiny of the private gatherings restrictions is required by the recent Supreme Court decisions in *South Bay II* and *Gateway*. As the motions panel recognized, Plaintiffs’ reliance on these decisions is misplaced: unlike the restrictions on public houses of worship at issue in those cases, the restrictions at issue here concern private gatherings and, far from targeting religious gatherings, they apply to all private gatherings, regardless of the subject or purpose of the gatherings. *See* ECF 21 at 16 (“[I]t was essential in the recent Supreme Court decisions that the regulations in question implicated religious activity *in houses of worship*”) (emphasis in original). The distinction is important because the orders in *South Bay II* and *Gateway* did not overrule the Supreme Court’s decision in *Lukumi* requiring that restrictions on religious

the restrictions on holding worship outdoors. *See* Application, No. 20A151, S. Ct. (filed April 2, 2021), at 19. To the extent plaintiffs seek to hold religious gatherings outdoors in a “backyard,” they may do so without any limit on the number of attendees or households in attendance under the guidelines for houses of worship, so long as they adhere to the guidelines’ requirements, which require, among other things, masks, physical distancing, screening, and sanitation of bathrooms and highly trafficked areas. State of California, Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* 3 (July 29, 2020), <https://files.covid19.ca.gov/pdf/guidance-places-of-worship--en.pdf>. Nothing in the State’s policy on outdoor religious gatherings requires that the host be a “church” or “conventional ‘house of worship.’” OB at 37.

activities be compared to restrictions on comparable secular activities in determining neutrality and general applicability; they instead compared restrictions on houses of worship with other *comparable* activities. Thus, *South Bay II* and *Gateway* do not change the Supreme Court’s free exercise analysis: “to determine whether a state discriminates, the Supreme Court instructs us to compare ‘*analogous non-religious conduct.*’” ECF 21 at 17, citing *Lukumi*, 508 U.S. at 546 (emphasis in motions panel decision); *see also* ECF 21 at 16 (noting that the Supreme Court “focused on circumstances surrounding the regulated religious activities to determine whether those particular classes of religious activity were being treated less favorably than comparable classes of secular activity”).

Plaintiffs assert that there is “no meaningful difference” between the bans on indoor worship enjoined in *South Bay II* and *Gateway* and the private gatherings restrictions here. OB at 47. In *South Bay II*, however, several Justices drew comparisons between restrictions on houses of worship, designed to accommodate large public gatherings, with other venues also designed to accommodate public gatherings and concluded that the restrictions on houses of worship were underinclusive because they did not extend to all activities that pose a similar risk of bringing individuals into close proximity for extended periods in similar public-facing venues. *See South Bay II*, 141 S. Ct. at 718 (statement of Gorsuch, J.) Plaintiffs are unable to point to anything in that analysis suggesting that private

gatherings in homes such as Plaintiffs Wong and Busch wish to hold are analogous to public-facing commercial activities or any other activity which they seek to use as a comparator. Instead, Plaintiffs simply note that in the Purple Tier the private gatherings restrictions, like the place of worship guidance before *South Bay II*, prohibit indoor gatherings in the Purple Tier. Op. Br. at 47. But free exercise analysis focuses on comparable *activities*, and Plaintiffs do not even try to explain how a similarity in restrictions renders the activities restricted comparable.

Gateway does not help Plaintiffs either. The Supreme Court’s order in that case concerned Santa Clara County’s gathering restrictions. Those restrictions, however, covered public gatherings; indeed, while the County did not expressly define the term gatherings, it listed examples—“political events, weddings, funerals, worship services, movie showings, [and] cardroom operations”—all of which were public-facing. *See Gateway City Church v. Newsom*, 2021 WL 308606, at *15 (N.D. Cal. Jan. 29, 2021). Even more important, unlike the State’s gathering guidance, the list of examples given by the County expressly mentions “worship services,” and all the activities not listed and thus implicitly excluded from the restriction were secular. By contrast, the State’s guidance defines gatherings without reference to worship services or other religious conduct, *see* 4-ER-0831 (“Gatherings are defined as social situations that bring together people from different households at the same time in a single space of place.”), and, as

shown above, the guidance's exemption for public gatherings authorized by sector guidance includes religious as well as secular conduct.

C. The State's Private Gatherings Restrictions Are Likely to Survive Strict Scrutiny

Even if the State's gatherings guidance were subject to strict scrutiny, the restrictions, as the district court correctly concluded, would likely satisfy that test.

As the District Court noted, 1-ER-0037-0038, "stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese*, 141 S. Ct. at 67. Moreover, the private gatherings restrictions are narrowly tailored to advance this compelling interest. As the district court explained, the State imposes restrictions on location and attendance, beyond such precautions as face coverings and distancing, based on objective risk criteria related to the spread of COVID-19, and these factors all show that private gatherings create a great risk of spread, leading the "vast consensus of public health experts" to believe such gatherings must be limited. 1-ER-0065 (citing declarations from Drs. Rutherford, Stoto, Watt, and three other experts). In addition, the restrictions are no broader than needed: with the exception of indoor gatherings in the Purple Tier, the private gatherings restrictions limit rather than prohibit attendance at gatherings, place stricter limits on indoor gatherings than on outdoor gatherings, and are adjusted based on the extent of community spread in the county where the activity is conducted. 1-ER-0061-0062, 67. Finally, the restrictions are supported by the

State's experience with more limited restrictions, which did not stop the spread of the disease, and Plaintiffs failed to propose any adequate alternatives. 1-ER-0066.

Plaintiffs do not seriously dispute that the private gatherings guidance is narrowly tailored. Although they attest that they would require face coverings and distancing, and deny that they expressed a desire to sing, OB at 55-56, they do not deny that the objective risk criteria used by the State indicate that private gatherings should be limited or that the vast consensus of public health experts agree on this. Nor do they dispute that the restrictions are limited in that they still allow gatherings to take place, place stricter limits on indoor gatherings, or are adjusted to reflect the extent of community spread. Instead, Plaintiffs repeat their assertion that the State's objectives could be achieved through less restrictive means, such as imposing mask and physical distancing requirements. OB at 56. The District Court, however, found those alternatives insufficient to achieve the State's goals based on expert testimony presented by the State, *see* 1-ER-0066 (citing Watt and Rutherford declarations), and while Plaintiffs deny that those experts addressed these alternatives, the portions of their declarations cited by the District Court plainly show otherwise. *See id.*

Plaintiffs also question whether the State has a compelling interest in reducing community spread, asserting that the State could adopt a different strategy targeting vulnerable populations. OB at 38. In fact, the State *has* focused on

vulnerable populations. Beginning in January 2020, the State has issued extensive guidelines and directives to ensure safety in long-term care and skilled nursing facilities, including routine testing, infection prevention and control measures such as screening residents and staff, limiting visitations, enhanced sanitation, and mask wearing requirements as well as training, monitoring, and outbreak response measures. See 3-ER-0460-0466, 0472-0473.

Moreover, Plaintiffs' suggestion that the State should focus solely on vulnerable populations has been rejected by "the vast majority of public experts." 1-ER-0045. As explained by State Defendants' experts at length, focusing *solely* on vulnerable populations is not feasible, because vulnerable populations include individuals who live in multigenerational homes and individuals who are in the workforce, and because many individuals have very severe COVID-19 reactions even if they do not have preexisting conditions or are not apparently at risk. 3-ER-0424-0425, 0454-0456. As a consequence, Plaintiffs' focused protection strategy is unworkable and would lead to unnecessary severe illness and death. 1-ER-0041-0046. Plaintiffs do not even attempt to explain how the Free Exercise Clause can be interpreted to require California to follow such a discredited and potentially disastrous public health strategy.

Thus, Plaintiffs fail to show a likelihood that their free exercise claims will succeed even under strict scrutiny.

II. PLAINTIFFS CANNOT SUCCEED ON THEIR FREE SPEECH AND ASSEMBLY CLAIMS

A. The State’s Private Gatherings Restrictions Apply to Plaintiffs’ Private, In-Home Gatherings

The motions panel ruled that Plaintiffs’ free speech and assembly claims are moot on the basis that it was not clear whether the State’s restrictions applied to the political gatherings that Plaintiffs want to hold. Dkt. 21 at 28-29. The panel noted that the district court “concluded, without explanation,” that the State’s private gatherings restrictions do not apply to “political campaign events Tandon wishes to hold,” but “did not explain why the State’s restrictions would apply to the Gannons but not Tandon.” *Id.* (quoting 1-ER-0046). The panel therefore concluded that the State’s restrictions did not apply to either Tandon or the Gannons. Dkt. 21 at 28-29. But it specifically noted that this “is without prejudice to a party asserting in subsequent proceedings that either Tandon’s or Gannons’ motion for an injunction is not mooted by the district court’s ruling limiting the scope of California’s gatherings restrictions.” Dkt. 21 at 29 n. 13.

This expressly tentative ruling should be reconsidered because, as Plaintiffs, the State, and the District Court all have recognized, the private gatherings restrictions apply to all the private political gatherings Tandon and the Gannons wish to hold. State Defendants applied the restrictions to the Gannons’ political gatherings in the lower court, *see* RJN, Exhibit 5 at 24-25 (“It applies equally to

the Gannons, the Plaintiffs who wish to have a discussion of political ideas, and it applies to book clubs”), and the district court did so as well. *See* 1-ER-0049-0069. Moreover, as the motions panel recognized, Plaintiffs likewise assumed that the gatherings restrictions prohibit the private political gatherings they wish to hold. Dkt. 21 at 28; OB at 44-45.

The motions panel’s confusion on this issue stems from the District Court’s understandable failure to explain its uncontested conclusion that the State’s private gatherings restrictions do not apply to the “political campaign events” that Tandon sought to hold. 1-ER-0045. The Court reached this conclusion because the State’s gatherings guidance “applies to private gatherings” and “all other gatherings” are prohibited unless “covered by existing sector guidance.” 4-ER-0831. The political campaign events that Tandon sought to hold were rallies, and because rallies are public rather than private gatherings, and there is guidance covering them, they are “other gatherings . . . covered by existing sector guidance,” and are exempt from the gatherings guidance. By contrast, the meet-the-candidate and other political gatherings that Tandon wants to hold in private homes, as well as the political discussions the Gannons wish to conduct, fall squarely within the State’s private gatherings restrictions. Thus, while those restriction do not apply to Plaintiff Tandon’s public rallies, they do apply to all the private gatherings that Tandon and the Gannons seek to hold.

B. The State’s Private Gatherings Restrictions Are Valid Time, Place, and Manner Restrictions

The analysis of free speech and free assembly claims is the same. *See Ward v. Rock Against Racism*, 491 U.S. 781, 797-98 (1989) (noting the standards for both categories of claims). Regulations that burden First Amendment rights are not subject to strict scrutiny if they are content-neutral; they are instead classified as time, manner, and place restrictions, and are subject to intermediate scrutiny. *Jacobs v. Clark Cty. Sch. Dist.*, 526 F.3d 419, 434 (9th Cir. 2008); *see also Ward*, 491 U.S. at 791 (“[T]he government may impose reasonable restrictions on time, place, or manner of protected speech,” if the restrictions are content-neutral, if they “are narrowly tailored to serve a significant governmental interest, and [] they leave open ample alternative channels for communication of the information”) (quotation omitted). The State’s private gathering restrictions are content-neutral, time, place and manner restrictions, and they easily satisfy intermediate scrutiny.

1. The Private Gatherings Restrictions Are Content-Neutral

To determine whether a regulation is content based or content-neutral, courts consider whether on its face the regulation draws a distinction based on the message of the speaker. *See Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017), quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Blanket bans that are applicable to all speakers are content-neutral. *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1295 & n. 5 (9th

Cir. 2015); *see also One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996) (test for whether a regulation is content-neutral is whether the government has adopted the restriction because of disagreement with the message it conveys). As the district court found, the private gatherings restrictions are content-neutral “because they apply to all gatherings regardless of the speech to be shared at that gathering.” 1-ER-0051.

Rather than attempting to show that the private gatherings restrictions draw any distinction based on the message of a speaker, Plaintiffs point out that the gatherings guidance exempts religious services and cultural ceremonies as well as political protests and rallies. OB at 62-63. Plaintiffs assert that these distinctions are based on the “purpose of the gathering” and are therefore content-based. OB at 62. However, as the district court recognized, 1-ER-0049, “[c]ontent-based laws” are “those that target speech based on its communicative content” and “cannot be justified without reference to the content of the regulated speech.” *Reed*, 576 U.S. at 163-64. Exemptions based on the location or nature of an activity are not based on speech and certainly not on communicative content of any speech. Thus, Plaintiffs’ challenge to the District Court’s conclusion that the private gatherings restriction is content-neutral fails.

2. The Private Gatherings Restrictions Are Valid Time, Place, and Manner Regulations

Because the private gatherings restrictions are content-neutral, they are properly analyzed as a time, manner, and place regulation. To be valid, such a regulation must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication. *Santa Monica Nativity Scenes*, 784 F.3d at 1296, quoting *Ward*, 491 U.S. at 791. Time, place, and manner analysis is, however, a form of intermediate rather than strict scrutiny, and a content-neutral time, place and manner regulation need not be the least restrictive or least intrusive means of furthering government’s interest in order to be narrowly tailored for the purposes of intermediate scrutiny. *Id.* at 1297. The State’s private gatherings restrictions satisfy this test.

As discussed *supra* at I.C., the private gatherings restrictions serve a government interest—combatting the spread of COVID-19—that is not only significant, but compelling. As also shown above, the restrictions are narrowly tailored to achieve that interest because they directly advance that interest and are no broader than necessary; and given the high risk created by private gatherings, there is no less restrictive alternative that would adequately protect against the spread of COVID-19. *See supra* at I.C.; *see also One World One Family Now*, 76 F.3d at 1013-14 (restrictions are narrowly tailored if governmental interests “would be achieved less effectively absent the regulation”); *County of Los Angeles*

Department of Public Health v. Superior Court, __Cal. Rptr. 3d__, 2021 WL 777699 at *10 (Cal. App. 2021) (county’s prohibition on outdoor dining was reasonable restriction on time, place, and manner of protected assembly that was narrowly tailored to serve significant government interest and left open alternative channels for assembling).

The private gatherings restrictions also leave open adequate alternatives for speech and assembly. As noted, in-person private gatherings are never prohibited completely. Even in the Purple Tier, outdoor gatherings are still permitted in smaller numbers; indoor gatherings in limited numbers are permitted in the other Tiers, and Plaintiffs can assemble in any size group by video or telephone conference. *See County of Los Angeles*, 2021 WL 777699 at *10, citing *Amato v. Elicker* (D. Conn. 2020) 460 F. Supp. 3d 202, 222 (D. Conn. 2020) (“[T]he limitation on the size of in-person social and recreational gatherings leaves open alternative channels of expression: ... residents are free to communicate and express themselves in any means other than a large, in-person gathering. They may assemble in small groups and may communicate with any number of people over the phone or over videoconference.”). Because the private gatherings restrictions leave open ample alternatives for equivalent speech, they are valid time, place, and manner regulations.

C. Plaintiffs' Strict Scrutiny Arguments Fail to Show Any Likelihood of Success

Rather than disputing the District Court's finding that the private gatherings restrictions satisfy intermediate scrutiny, Plaintiffs argue that, despite being content-neutral, the restrictions are subject to strict scrutiny. These arguments fail.

Plaintiffs first contend that the private gatherings restrictions are subject to strict scrutiny because they burden "core political speech." OB at 54. Time, place and manner restrictions burden core political speech whenever an individual wishes to engage in such speech in violation of those restrictions. Nevertheless, when such restrictions are content-neutral, as here, the Supreme Court has applied intermediate, not strict, scrutiny. *See, e.g., Heffron v. Society of International Krishna Consciousness, Inc.*, 452 U.S. 640, 647-55 (1981) (applying time, place and manner analysis to restrictions preventing plaintiffs from proselytizing about their faith); *Grayned v. City of Rockford*, 408 U.S. 104, 115-21 (1972) (applying time, place and manner analysis to restrictions preventing political demonstration).

The Supreme Court's decisions in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995), and *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 339 (2010), do not suggest otherwise. Indeed, both cases addressed direct regulations of speech rather than time, place, and manner restrictions. In *McIntyre*, the Court considered a state ordinance that prohibited the anonymous distribution of campaign literature. 514 U.S. at 341. The Supreme Court held that the

ordinance burdened “core political speech” because it restricted anonymous advocacy during an issues-based election. *Id.* at 347. Similarly, *Citizens United* concerned a law that prohibited corporations and unions from using their general funds to promote candidates or campaign for candidates; “[i]ts purpose and effect is to silence entities whose voices the Government deems to be suspect.” 558 U.S. at 339. This is clearly distinguishable from the private gatherings restrictions, which merely restrict the number of households that gather in a specific place during a pandemic (and do not *bar* such gatherings), and do not dictate how campaign literature may be distributed, prohibit the use of money in campaigns, or otherwise directly regulate political speech.¹³

Plaintiff Tandon asserts that the private gatherings restrictions make it “impossible” for him to reach the 800,000 people in the district, many of whom do not have Internet access. OB at 55. But he does not explain how that is the case: he is permitted to hold political rallies, he can go door-to-door, *and* he can hold in-person gatherings in households, including indoors when the County is in the Red Tier. He can also hold successive meetings in private homes, ensuring that he can

¹³ *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999), and *National Association for Gun Rights v. Mangan*, 933 F.3d 1102, 1111 (9th Cir. 2019), are also distinguishable because they involved direct regulations of political speech: Both cases involved requirements that voters be registered in order to circulate a petition or to serve in a political committee position, as well as disclosure requirements.

meet with multiple households. Nor, contrary to his assertions, is Plaintiff Tandon “forbidden” from holding indoor fundraisers or meeting with constituents” simply because indoor gatherings are limited in number. OB at 56. He is therefore not prohibited from communicating with voters about proposed political change, as he contends.

Repeating an argument that it improperly raised only in its reply brief in the district court, ECF 39 at 7, Plaintiffs argue that strict scrutiny should apply to the gatherings guidance because, they assert, it suppresses an entire medium of expression. OB at 59-61. For support, they rely on *City of Ladue v. Gilleo*, 512 U.S. 43, 55-56, 58 (1994), which involved a challenge to a city ordinance that banned all residential signs except those falling within ten exemptions; establishments, churches, and nonprofits were also permitted to post signs. *City of Ladue*, 512 U.S. at 45. The Court noted the regulation of signs was the regulation of an entire medium of speech and considered whether the virtually complete ban prohibited too much protected speech. *Id.* at 50-51. The Court held that it did, because it was so overbroad that it prohibited not only “absolutely pivotal speech” such as anti-war protests, but also many other types of speech. *Id.* at 54 (noting the city has “almost completely foreclosed a venerable means of communication that is both unique and important. It has totally foreclosed that medium to political,

religious, or personal messages”). The Court also noted that no alternative channels were left open. *Id.* at 56.

The private gatherings restrictions guidance does not implicate the “suppression doctrine” created in *City of Ladue*. As this Court has recognized this doctrine is an overbreadth doctrine that applies to “highly restrictive yet content-neutral limitations on speech” that foreclose an entire medium of expression. *Maldonado v. Morales*, 556 F.3d 1037, 1046 (9th Cir. 2009) (content-neutral advertising ban did not foreclose or nearly foreclose an entire medium of speech and therefore is not unconstitutional). Thus, the suppression doctrine has been applied to ordinances that completely ban tattoo parlors or forbid the display of the U.S. flag with any alteration. *See, e.g., Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (tattoo parlors); *Spence v. Washington*, 418 U.S. 405, 406 (1974) (flag); *see also City of Ladue*, 512 U.S. at 55 (collecting cases). The private gatherings restrictions are plainly distinguishable. As shown above, under these restrictions, in-person gatherings are *not* prohibited, even in the most restrictive tier. Rather, they are limited in location and size, which is not enough to render the restrictions overbroad. *See, e.g., San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1033 (9th Cir. 2004) (Zoning restriction prohibiting religious college from building on a specific site did not constitute a ban on speech or assembly; “the fact that the church’s congregants cannot assemble at that precise

location does not equate to a denial of assembly altogether”). Even more important, Plaintiffs erroneously conflate “medium of speech” with location: the private gatherings restrictions do not prohibit the discussion of political topics or the gathering of like-minded individuals either over computer, or by phone, or even, in limited numbers, indoors or in backyards.¹⁴

In any event, when presented with a regulation alleged to be “an unconstitutional restriction on a *means* of expression,” this Court has analyzed whether it “is a reasonable time, place, or manner restriction on protected speech.” *Anderson*, 621 F.3d at 1064 (emphasis in original) (Because the Court applied time, place, manner analysis to First Amendment challenge to an ordinance that bans tattoo parlors, it did not reach the question of whether ordinance was *per se* unconstitutional). For the reasons discussed *supra* at II.B., the State’s gatherings guidance is a reasonable time, place, and manner restriction.

Finally, as also shown above, *supra* at I.C., even if strict scrutiny were applied to the private gatherings restrictions, Plaintiffs are unlikely to prevail because the restrictions are narrowly tailored to advancing the State’s compelling

¹⁴ Plaintiffs also misapply *City of Ladue* to assert that laws prohibiting assemblies in the home are presumptively unlawful. OB at 53. In that decision, the Court observed that the government’s need to regulate speech from the home is less pressing, in the context of prohibiting signs, but it did not in any way suggest that the governments are prohibited from imposing reasonable capacity restrictions on homes. *City of Ladue*, 512 U.S. at 58.

interest in combatting COVID-19 and there are no adequate lesser restrictive alternatives.

III. THE STATE’S PUBLIC HEALTH RESTRICTIONS ON BUSINESS OPERATIONS DO NOT VIOLATE PLAINTIFFS’ SUBSTANTIVE DUE PROCESS OR EQUAL PROTECTION RIGHTS

Plaintiffs Mansour, Khanna, Beaudet, and Evarkiou challenge the capacity and PPE requirements specifically relating to their businesses, based on substantive due process and the Equal Protection Clause. OB at 58. Both claims fail because under these provisions the State’s restrictions are subject only to rational basis review, which they easily satisfy.

Although cases have recognized that the Due Process Clause protects the right to earn a livelihood, the Supreme Court has made clear that “[t]hese cases all deal with a complete prohibition of the right to engage in a calling” and do not reach a “brief interruption” even if it completely forecloses one’s ability to work. *Conn v. Gabbert*, 526 U.S. 286, 292 (1999). Indeed, as the District Court observed, 1-ER-0029-0030, substantive due process has “been largely confined to protecting fundamental liberty interests such as marriage, procreation, contraception, family relationships, child rearing, education, and a person’s bodily integrity,” *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018).

As the motions panel observed, “[w]e have ‘never held that the right to work is a fundamental right,’ and as such, the district court likely did not err in applying

rational basis review to [Plaintiffs'] due process claims.” ECF 21 at 29, quoting *Sagana v. Tenorio*, 384 F.3d 731, 743 (9th Cir. 2004); *see also Litmon v. Harris*, 768 F.3d 1237, 1242 (9th Cir. 2014); *Dittman v. California*, 191 F.3d 1020, 1031 n.5 (9th Cir. 1999). And as courts repeatedly have recognized, *see* 1-ER-0031 (listing cases), COVID-19 related restrictions imposed on Plaintiffs’ businesses satisfy this test because they reduce the risk of spreading the disease and, thus, “bear a real and substantial relation to public health.” 1-ER-0032-0034 (citing cases).

Plaintiffs’ contention that a heightened form of review, “rational basis with a bite,” should apply to the State’s restrictions on business operations is based on cases that are inapposite. OB at 71, citing *Dairy v. Bonham*, 2013 WL 3829268 (N.D. Cal. July 23, 2013), *United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015); *United States v. Wilde*, 74 F. Supp.3d 1092 (N.D. Cal. 2014); and *Desoto CAB Co., Inc. v. Picker*, 228 F. Supp. 3d 950, 957 (N.D. Cal 2017). As the cases recognize, rational basis review with a bite is limited to “situations where a legislative classification appears to have been based on animus or a desire to harm a politically unpopular group.” *United States v. Wilde*, 74 F. Supp.3d at 1097. Notably absent from Plaintiffs’ complaint is any suggestion that the State’s restrictions are due to any animus against business or that business is a politically unpopular and powerless group. Thus, Plaintiffs’ request to apply rational basis review with a bite should be rejected.

Plaintiffs’ equal protection claim also fails, because, as the motions panel noted, “business owners are not a suspect class, and the district court correctly applied rational basis review to their equal protection claims.” Dkt. 21 at 29 (citing *Williamson v. Lee Optical*, 348 U.S. 489, 491 (1955)).¹⁵

Finally, State Defendants’ restrictions clearly survive rational basis review. Plaintiffs assert that there is no evidence connecting COVID-19 outbreaks to restaurants, wineries or facial salons, showing that the restrictions imposed by the State have prevented transmission, or establishing why these settings present several factors known to increase the risk of transmission, particularly indoors. OB at 63. In fact, the State Defendants did present evidence that the restrictions have reduced transmission.¹⁶ 1-ER-0065. Even more important, Plaintiffs do not—and cannot—point to any authority requiring a State to produce such evidence before responding to a pandemic; indeed, because scientific studies of the

¹⁵ Plaintiffs also assert that the District Court should not have applied deferential review under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). OB at 71. But, like the motions panel, this Court need not reach the issue of whether *Jacobson* applies.

¹⁶ Plaintiffs also criticize the State for using PCR testing and positive test counts rather than hospitalization rates to determine the Blueprint’s Tiers. OB at 28-31, 75-78. The District Court correctly found these criticisms unpersuasive because Plaintiffs’ own expert conceded that the PCR test is the “gold standard for measuring the presence of infection in the community.” 1-ER-0040. In addition, hospitalization rates are a lagging indicator that reflects spread weeks earlier which, if used alone, would prevent the State from responding quickly and underestimate the pandemic at its worst. Far from answering these concerns, Plaintiffs simply ignore them.

type Plaintiffs seem to be demanding may take years to conduct, this novel and unsupported requirement would severely hamstring efforts to respond to new and deadly diseases such as the novel coronavirus that causes COVID-19. It is precisely for this reason Chief Justice Roberts has admonished that, when public health officials “undertake to act in areas fraught with medical and scientific uncertainties, their latitude must be especially broad,” and “they should not be subject to second-guessing by an unelected federal judiciary.” *South Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring) (quotation omitted); *see also Andino v. Middleton*, 141 S.Ct. 9, 10 (2020) (Kavanaugh, J., concurring); *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *Kansas v. Hendricks*, 521 U.S. 346, 360 & n.3 (1997); *Jones v. United States*, 463 U.S. 354, 364-65 & n.13, 370 (1983); *Marshall v. United States*, 414 U.S. 417, 427 (1974); *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926); *Collins v. Texas*, 223 U.S. 288, 297-98 (1912). Moreover, a majority of the Supreme Court expressly has reaffirmed this important and well-established principle.¹⁷

Especially in light of this deference, the well-reasoned opinions of the

¹⁷ *See Roman Catholic Diocese*, 141 S.Ct. at 74 (Kavanaugh, J., concurring) (“Federal courts [] must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic.”); *id.* at 75-76 (Roberts, C.J., dissenting); *id.* at 78 (Breyer, J., dissenting); *id.* at 79 (Sotomayor, J., dissenting).

accomplished experts concerning the general consensus supporting the State’s restrictions is more than sufficient to satisfy rational basis review.

IV. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST WEIGH DECISIVELY IN THE STATE’S FAVOR

A. Plaintiffs Have Demonstrated Only Limited Harm From the Restrictions They Challenge

Plaintiffs Wong, Busch, Tandon, and the Gannons assert that they will suffer irreparable injury absent an injunction because they are being deprived of their First Amendment rights. OB at 78. But, as demonstrated above, Plaintiffs have shown no deprivation. Moreover, even if they could show some deprivation, the harm would be limited because the private gatherings restrictions permit them to hold several small group gatherings, as opposed to one large one, or hold those gatherings virtually or outside. *See, e.g.*, RJN Exhibit 6 (Transcript of Proceeding – Order Denying Preliminary Injunction, *Cross-Culture Christian Center v. Newsom*, No. 20-cv-832, March 9, 2021) at 49 (in considering challenge to State’s capacity requirements on houses of worship, even if the plaintiff had to hold additional services, the judge noted, “I don’t find that [plaintiff] is irreparably injured.”); *see also Cassell v. Snyders*, No. 20-1757, _ F.3d _, 2021 WL 852227, **3-8 (7th Cir. Mar. 8, 2021) (“The risk of irreparable injury to these plaintiffs is very low and dropping.”). And, as of April 15, the restrictions on private gatherings will be significantly relaxed, meaning Plaintiffs Wong, Busch, and the

Gannons will be permitted to have gatherings of the sizes they seek, both indoors and outdoors, as well as minimize any harm to Plaintiff Tandon.

The business owner plaintiffs assert that they face a threat of being driven out of business, OB at 78-79, but in support, they only cite declarations submitted in October and December. *See id.* They present no evidence that they are facing a greater threat now in the Orange Tier (where Plaintiffs Evarkiou and Mansour may operate their personal care businesses indoors, and Plaintiffs Beaudet and Khanna may serve customers outdoors without a capacity restriction and indoors at 25% capacity), than they did three months ago when Santa Clara County was in the Purple Tier and subject to the Regional Stay at Home Order. *See* 3-ER-0567-0572; Dkt. 18. In addition, after April 15, under the new events guidelines, Plaintiffs Beaudet and Khanna will be permitted to host the revenue-generating events that they are currently prevented from holding. *See, e.g.*, 5-ER-0999, 1003-1004.

Additionally, Plaintiffs' delay in filing suit and moving for preliminary injunctive relief casts doubt on the existence and severity of the harm that they claim. *See Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm"); *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief"). As

Plaintiffs themselves note, variations of restrictions on their businesses, many of which were *more* restrictive than the ones all Plaintiffs are challenging here, have been in place since March 2020. *See* OB at 69. Yet they did not file this motion until the end of October 2020. Plaintiffs offer no explanation why they waited so long to seek relief.

B. The Risk to Public Health Weighs Heavily Against an Injunction

In contrast to the limited harm facing Plaintiffs absent a preliminary injunction, the public has a powerful interest in curbing COVID-19 to prevent illness and death as well as preventing the State’s hospital system from being overwhelmed, as it almost was in the most recently receded wave. 1-ER-0078-79 (noting, among other things, that during this crisis “paramedics in Los Angeles [were] instructed to conserve oxygen in treating patients and not to bring patients to the hospital who have little chance of survival”) (internal quotations and citations omitted). As the district court found, enjoining the restrictions on Plaintiffs’ gatherings and businesses would not be in the public interest because doing so may cause “more deaths, more serious illnesses, and more strain on California’s already overburdened health care system.” *Id.* at 76.

The State hopes and expects that, as vaccines are increasingly distributed and administered, it will be able to relax restrictions on private gatherings and businesses even further. But, especially with the devastating winter surge so close

behind, and the presence of new and more dangerous and infectious variants of the COVID-19 virus, as discussed *infra*, the Court should not endanger the State's hard fought progress or the health of individuals who might be saved with a little more perseverance. Indeed, as one district court judge recently noted, "With vaccinations ramping up and the goal line so near, it would be tragic and senseless to prematurely abandon restrictions that have helped to slow the spread of COVID-19 over the last year." RJN, Exhibit 6 at 49 (quotation omitted).

Noting that the health situation has improved dramatically, Plaintiffs deny that an injunction would create a risk to public health. OB at 40, 86. But this ignores the reason why the State was able to overcome the surge this winter's surge: by adopting restrictions that lowered the spread of COVID-19 by reducing the interactions in which the disease could be transmitted. Plaintiffs also contend that the public interest is served by vindicating their constitutional rights. OB at 40, 86. But "when balancing the public interest, this Court must also keep in mind the interest of those not before the Court. The plaintiffs are not asking to be allowed to make a self-contained choice to risk only their own health" to avoid the State's restrictions. RJN, Exhibit 6 at 50. The risk is not only to them, but to "many other who did not consent to that tradeoff." *Id.*

Thus, even if Plaintiffs could show a likelihood of success on the merits, they would not be entitled to the equitable relief they seek, changing the status quo and

disrupting the State's hopefully latter-stage efforts to combat the pandemic and relax its restrictions.

CONCLUSION

The District Court's ruling should be affirmed.

Dated: April 6, 2021

Respectfully submitted,

MATTHEW RODRIQUEZ
Acting Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

s/ Lara Haddad

LARA HADDAD
Deputy Attorney General
Attorneys for State Defendants

21-15228

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RITESH TANDON, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, State Appellees state that to the best of their knowledge, there are no related cases.

Dated: April 6, 2021

Respectfully Submitted,

MATTHEW RODRIQUEZ
Acting Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

/s/ Lara Haddad
LARA HADDAD
Deputy Attorney General
Attorneys for State Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because it contains 12,839 words, excluding the portions exempted by Rule 32(f).

This brief's type size and type face comply with the requirements set forth in Fed. R. App. P. 32(a)(5) and (6): it is proportionally spaced and has a typeface of 14 points or more.

Dated: April 6, 2021

/s/ Lara Haddad
Lara Haddad

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2021, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Dated: April 6, 2021

/s Lara Haddad

Lara Haddad