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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

RITESH TANDON, et al., Plaintiffs, **v.** **GAVIN NEWSOM, et al.,** Defendants.	5:20-cv-07108-LHK **STATE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** Date: December 3, 2020 Time: 1:30 p.m. Courtroom: 8 Judge: The Honorable Lucy H. Koh Trial Date: None set. Action Filed: October 13, 2020

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CONSTITUTIONAL PROVISIONS

INTRODUCTION

The COVID-19 pandemic has caused unprecedented illness and death and is only getting worse. The United States has set records for the number of positive COVID-19 cases for multiple days in a row in November, with over 184,000 confirmed cases on Friday, November 13.[1] Also on Friday, the U.S. had more than 1,400 deaths from the virus, the most that day of any country.[2] Though California has fared better than states that have adopted less stringent restrictions to combat COVID-19, it has not been spared from the coming wave: California has surpassed 1 million cases and has had over 18,000 fatalities.[3] Recklessly disregarding these dangers, Plaintiffs seek to enjoin a broad range of restrictions imposed to combat the current COVID-19 pandemic. Their request should be denied.

Plaintiffs cannot meet the strenuous requirements for preliminary injunctive relief. To begin with, they have not shown a likelihood of success on any of their claims. Plaintiff Tandon's challenge to the State's guidelines that affect campaign events is moot: the election has passed, and his campaign has ended. Even more importantly, Plaintiffs' claims fail under any level of Constitutional scrutiny. The State's restrictions on the indoor and outdoor gatherings that Plaintiffs seek to host do not violate Plaintiffs' free speech or assembly rights because they do not regulate speech, and even if they did, they are permissible content-neutral restrictions that directly advance and important and, indeed, compelling government interest. Plaintiffs' Free Exercise claims fail because the restrictions imposed on indoor and outdoor gatherings are neutral requirements of general applicability, which easily satisfy rational basis scrutiny because they advance the State's interest in slowing the spread of COVID-19. Plaintiffs' substantive due process or equal protection challenges to the State's business capacity restrictions fail for the

[1] Matthew S. Schwartz, "U.S. Adds 184,000 Coronavirus Cases in 1 Day, With No End In Sight," NPR, November 14, 2020, available at https://www.npr.org/sections/coronavirus-live-updates/2020/11/14/934973850/u-s-adds-184-000-coronavirus-cases-in-one-day-with-no-end-in-sight (last accessed November 16, 2020).

[2] *Id.*

[3] California Department of Public Health COVID-19 Dashboard, available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx#COVID-19%20by%20the%20Numbers (last accessed November 18, 2020).

same reason. Moreover, the challenged directives are also permissible exercises of the State's broad emergency powers.

Plaintiffs' request for preliminary injunctive relief also should be denied because the balance of equities weighs heavily against the relief that they seek. None of the restrictions they challenge ban the gatherings Plaintiffs wish to hold or require them to close their businesses; they are permitted to have limited outdoor gatherings or unrestricted virtual ones and are permitted to run their businesses with limited numbers of people and without group events. By contrast, the State has a compelling interest in containing the spread of COVID-19, especially now in the face of the current wave of infections, and protecting all Californians, including Plaintiffs.

At the core of Plaintiffs' motion is the controversial theory advanced by their experts that California can safely lift restrictions that have been put in place to slow the spread of COVID-19, because the disease poses significant risk only to the elderly, and measures can focus solely on protecting them. To the extent that this theory has been tried, it has failed, and it runs counter to the vast weight of informed scientific opinion and the best practices recommended by public health authorities. As Chief Justice Roberts recently noted, courts lack the background and expertise to resolve the scientific debates over such theories, especially those rejected by the vast majority of the scientific and public health community, and should defer to the judgment of state and local public health officials combatting a disease in areas of scientific uncertainty. Plaintiffs' motion for injunctive relief should be denied.

BACKGROUND

I. THE COVID-19 PANDEMIC

The COVID-19 pandemic has now infected over 11.1 million Americans, taking the lives of over 245,000, including over 18,000 deaths in California. Decl. Lara Haddad Ex. 1-2. Since Plaintiffs moved for preliminary injunctive relief on October 22, 2020, the United States is seeing the worst daily infection rates over the course of the pandemic, with the number of positive infections topping 100,000 for 12 days in a row, from November 4 through November 16, 2020. Haddad Decl., Ex. 3. The number of hospitalizations in the United States due to COVID-19 has

increased by 24.2% just this week. Haddad Decl., Ex. 4.[4] In California specifically, infection rates have increased dramatically, Haddad Decl., Ex. 2, and have averaged 7,985 cases per day over the last week (nearly double the previous two weeks). Haddad Decl., Ex. 5. The United States is in the middle of a third wave. Decl. Dr. George Rutherford, ¶ 109.

The dangers of COVID-19 are well-known: not only can the disease be fatal; it can cause major health issues in individuals, with long-lasting negative effects. Decl. Dr. James Watt ¶¶ 21-23; Rutherford Decl. ¶¶ 23-25. Though those individuals over the age of 65 and individuals with comorbidities are at the most risk, people of color, and individuals in lower socioeconomic classes are also at much greater risk from the disease. Decl. Dr. Caroline Kurtz ¶ 22-24.

The novel coronavirus that causes this highly infectious and frequently fatal disease spreads through respiratory droplets that remain in the air or on surfaces, and individuals without any symptoms remain infectious, which means that COVID-19 can be transmitted by individuals who have no reason to know they are infectious to others who have no way of knowing that they are in danger. Watt Decl. ¶¶ 25-32; Rutherford Decl. ¶¶ 28-33. There is, as yet, no vaccine, no cure, and no widely effective treatment for this novel disease. Watt Decl. ¶ 24; Rutherford Decl. ¶¶ 38-40. As a consequence, other than mask wearing, measures that limit physical interaction are the only widely recognized way to slow the spread of the virus. Watt Decl. ¶¶ 45-46, 48-50; Rutherford Decl. ¶¶ 63, 75-82; *see also Gish v. Newsom*, No. EDCV20-755-JGB (KKx), 2020 WL 1979970, at *4 (C.D. Cal. Apr. 23, 2020).

Activities where people gather together in the same place at the same time for an extended period greatly increase the risk of transmission because the time spent in proximity to an infectious individual allows a sufficient "viral load" to accumulate. Watt Decl. ¶¶ 33, 37-44; Rutherford Decl. ¶¶ 75-82. Wearing masks and maintaining a distance of at least six feet diminishes—but does not eliminate—the risk of infection, especially while indoors. Watt Decl. ¶ 50; Rutherford Decl. ¶¶ 76-77, 81. In indoor settings, including personal homes, the risk of

[4] See also Washington Post, *Coronavirus Daily Counts – Hospitalization Rates*, updated November 18, 2018, available at https://www.washingtonpost.com/graphics/2020/national/coronavirus-us-cases-deaths/?itid=lk_inline_manual_7&itid=lk_inline_manual_55 (last accessed November 18, 2018) (showing COVID-related hospitalizations rose 24.2% over the past week).

spreading the disease remains high if someone is infected because of limited ventilation and the proximity of individuals to each other. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 76-77, 80.

II. CALIFORNIA'S RESPONSE TO THE PANDEMIC EMERGENCY

California took early and decisive action to combat the spread of COVID-19, and since then California has shaped its actions based on developing knowledge and changing circumstances, with the goals of slowing the spread of the disease and saving human lives. Watt Decl. ¶¶ 55-57; Decl. Dr. Caroline Kurtz. ¶¶ 8-9. Accordingly, the State has tailored its response, targeting different populations according to the threats they face, and collaborating with county officials to limit community spread.

A. The Initial Executive Order

On March 4, 2020, the Governor proclaimed a State of Emergency in California, formalizing emergency state actions already underway and helping the State prepare for the broader spread of the disease. Haddad Decl., Ex. 6. Two weeks later, the Governor issued Executive Order N-33-20, the Stay-at-Home Order, which required "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." Haddad Decl., Ex. 7.

B. The State's Measures With Respect to Vulnerable Populations

Since the beginning of the pandemic, the State has recognized the especially great threat that COVID-19 poses to the elderly and in particular to residents of long-term care facilities. Accordingly, beginning in January, the State has issued guidelines and directives requiring long-term care facilities and skilled nursing facilities to undertake precautions to ensure they remain safe. Decl. Heidi Steinecker ¶ X; Decl. Lilit Tovmasian ¶¶ 8-33. These precautions include routine testing and 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 Tovmasian Decl.; Steinecker Decl. ¶¶ 19-24.

C. The Reopening Plan

On April 28, 2020, the Governor announced a "Resilience Roadmap" for safe and gradual reopening, which had four stages: (1) safety and preparation; (2) reopening of lower-risk

workplaces and other spaces; (3) reopening of higher-risk workplaces and other spaces; and (4) an end to the Stay-at-Home Order. Haddad Decl., Ex. 8. On May 25, 2020, as the pandemic subsided, the California Department of Public Health (CDPH) issued guidelines for reopening, including retail stores. Haddad Decl., Ex. 9.

D. The Surge in COVID-19 and Retightening of Activities

Unfortunately, during the summer of 2020, COVID-19 infections—and resulting deaths—resurged. Watt Decl. ¶ 66. In early July 2020, the State issued new guidelines to combat this surge. Watt Decl. ¶ 67. On July 13, 2020, in light of the continuing spread of COVID-19, the State again tightened restrictions. Haddad Decl., Ex. 10. The State ordered statewide closures, whether indoors or outdoors, of bars, pubs, brewpubs, and breweries, restaurants, wineries and tasting rooms, family entertainment centers, movie theaters, zoos, museums, and cardrooms. *Id.*, pp. 5-6. In counties on the "watchlist" because of heightened infection rates, the State also closed indoor operations of places of worship, as well as offices for non-critical infrastructure sectors, personal care services, hair salons and barbershops, gyms and fitness centers, and malls. *Id.*, p. 6.

E. The Blueprint for a Safer Economy

As a result of the retightening in July 2020, the infection rate in California substantially decreased. Watt Decl., ¶ 76. On August 28, 2020, the Governor unveiled the "Blueprint for a Safer Economy," which incorporates what the State learned over the first several months of the pandemic and how COVID-19 spreads. Kurtz Decl. ¶ 12; Haddad Decl., Ex. 11. The Blueprint divides activities into categories and imposes restrictions based upon riskiness, which is determined based on criteria such as the ability to accommodate face coverings and ensure physical distancing, duration of exposure, and ventilation. Haddad Decl., Exs. 11, 12. In addition, the Blueprint separates counties into tiers based on the status of the pandemic in them, and restrictions on activities are gradually relaxed as counties progress from Tier 1 where infections are "widespread" to Tier 4 where infections are "minimal." *Id.* Thus, restaurants, gyms, movie theaters, and museums are barred from operating indoors until the second tier, where they are subject to capacity restrictions that are relaxed further in subsequent tiers; indoor church services are only permitted in subsequent tiers as well. *Id.* Similarly, private indoor

gatherings are permitted only in subsequent tiers. *Id.* Private *outdoor* gatherings are permitted in all tiers, with restrictions: they are limited to three households; masks and physical distancing are required. Haddad Decl., Ex. 11.

The Blueprint has several goals: to save human life, first and foremost; to curb the spread of disease; and to delay the spread to preserve resources while better therapeutic treatments and vaccines are developed. Watt Decl. ¶ 55; Kurtz Decl. ¶ 8. In keeping with these goals, the tiers in the Blueprint are not based on hospitalization rates because, as the State discovered in connection with the Resilience Roadmap, hospitalization rates do not register spread of the virus until weeks after it occurs and less responsive to changes in restrictions. Rutherford Decl. ¶ 55; Decl. Michael A. Stoto ¶ 23; Kurtz Decl. ¶ 17-iii.

III. THE RELEVANT RESTRICTIONS

Santa Clara County is currently in the Purple Tier (Tier 1), the highest risk level. Even at this risk level, many business operations—including hair salons—can operate indoors, with modifications; restaurants can still operate as well, but dine-in must be outdoors, also with modifications. Haddad Decl., Exs. 11, 12. This is separate from any directives the County itself issues. Private gatherings are permitted outdoors, with a three-household limit; indoor private gatherings with other households, however, remain prohibited in the Purple Tier, but are permitted in other tiers under the State's gathering guidance. Haddad Decl., Exs. 11, 12.

IV. THE PRESENT CASE

On October 13, 2020, Plaintiffs, who each reside in Santa Clara County, filed their complaint, alleging that the State's directives violated multiple constitutional rights. Plaintiff Ritesh Tandon, a congressional candidate for representative in Santa Clara, alleges that the directives inhibit his ability to campaign in violation of his First Amendment rights to Free Speech and Assembly. PI Mot. at 7. Plaintiffs Terry and Carolyn Gannon also allege that the prohibition on in-home political discussions violates their Free Speech and Assembly rights. PI Mot. at 7.

Plaintiffs Jeremy Wong and Karen Busch allege that the State's directives violate their rights to free exercise of religion and assembly because they are prohibited from hosting indoor

in-person Bible studies and prayer meetings in their homes, and are limited to three households if they meet in their backyards. PI Mot. at 7. The remaining plaintiffs—Connie Richards, a gym owner; Julie Evarkiou, a salon co-owner; Dhruv Khanna, a vineyard owner; Frances Beaudet, a restaurant co-owner; and Maya Mansour, a facial bar owner—each allege that the State's directives violate their Equal Protection and substantive due process rights under the Fourteenth Amendment, due to restrictions placed on their businesses, including capacity limitations.[5] PI Mot. at 7-8. Plaintiffs moved for a preliminary injunction on October 22, 2020. ECF No. 18.

LEGAL STANDARD

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008). Parties seeking such extraordinary relief must demonstrate (1) a strong likelihood of success on the merits, (2) irreparable injury if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. *Id.* at 20; *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132-35 (9th Cir. 2011). Because they seek an injunction against already-implemented COVID-19-related directives, Plaintiffs have the "doubly demanding" burden of "establish[ing] that the law and facts *clearly favor* [their] position." *Garcia v. Google*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc).

ARGUMENT

Plaintiffs' request for a preliminary injunction should be denied for two reasons. First, they have failed to show a likelihood of success on any of their claims. Second, in light of the new wave of infections sweeping across the country, the balance of equities weighs heavily against the sweeping injunctive relief that they seek.

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THEIR CONSTITUTIONAL CLAIMS

A. Plaintiff Ritesh Tandon's Claims Are Moot

At the outset, it should be noted that the claims of one plaintiff, Ritesh Tandon, are now moot. Tandon alleged the State's limitations on gatherings and political activities interfered with

[5] Plaintiff Maya Mansour also challenges a County requirement regarding PPE. PI Mot. at 8.

his ability to campaign for public office. PI Mot. at 13-14. As Plaintiffs concede, the State exempts campaign events from its Gathering Guidance, PI Mot. at 14, and political rallies and other outdoor campaign events are permitted. Haddad Decl., Exs 11, 12. Further, Tandon was a congressional candidate in the November 3, 2020 election. Compl ¶ 13; Tandon Decl. ¶ 3. As that election is over, his campaign has ended, and his claims are moot.

Federal courts have jurisdiction to adjudicate only live cases or controversies. U.S. Const., art. III, § 2, cl. 1. Thus, "'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir. 2001) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). If an event occurs while the case is pending that removes the threat of injury where only prospective relief is sought, the case must be dismissed. *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1244 (E.D. Cal. 1999) (citing *Fund for Animals v. Babbitt*, 89 F.3d 128, 133 (2d Cir. 1996)). Further, under the doctrine of prudential mootness, courts may exercise their discretion to find a case moot where they cannot grant meaningful relief. *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, No. 07-CV-358-PK, 2007 WL 4117978 at *7 (D. Or. Nov. 16, 2007). This doctrine especially applicable where, as here, injunctive relief is sought against the government. *Sierra Club v. Babbitt*, 69 F. Supp. 2d at 1244 (internal quotations and citations omitted).

Because Tandon's campaign has ended and the election has passed, he can no longer allege any threat of injury to himself; his claim is therefore moot under Article III, because there is no actual controversy that gives this Court jurisdiction. And because Tandon seeks injunctive relief against the State, his claim fails under the doctrine of prudential mootness as well: this Court cannot grant him meaningful relief.

B. Plaintiffs' Claims Fail Under Ordinary Constitutional Analyses

This Court should deny relief to the remaining Plaintiffs because they have failed to show a likelihood of success on their claims even under ordinary constitutional analyses.

1. Plaintiffs' Free Speech Rights Are Not Violated

The State directives restricting indoor and outdoor gatherings do not regulate speech. Instead, they regulate conduct and thus are subject to rational basis scrutiny. *See Homeaway.com, Inc. v. City of Santa Monica*, 918 F.3d 676, 685 (9th Cir. 2019) (restriction on "nonspeech, nonexpressive conduct" does not implicate First Amendment, receives rational basis scrutiny); *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184, 1194 (2018) ("If the government's actions do not implicate speech protected by the First Amendment, we need go no further"). Plaintiffs do not—and cannot—deny that the restrictions on gatherings are a rational way to reduce the spread of COVID-19. *See also* Section I.C *infra*. For this reason alone, Plaintiffs' First Amendment challenge to the gathering restrictions are unlikely to succeed.

Plaintiffs' challenge also would fail even if the restrictions were somehow deemed to affect speech because any such effect is incidental. A rule that regulates conduct but incidentally burdens expression is reviewed under intermediate scrutiny "to see whether it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062, 1068 (9th Cir. 2020) (internal quotations omitted). This is the same standard used for time, place, and manner restrictions. *Id.*; *see also Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). The directives easily satisfy these requirements.

The restrictions are "beyond question, content-neutral." *Givens*, 459 F. Supp. 3d 1302, 1312 (2020) (State's Stay-At-Home Order, which resulted in denial of permits for political rally, are content neutral), *appeal docketed*, No. 20-15949 (9th Cir. May 19, 2020). As Plaintiffs recognize, PI Mot. at 13, a law is content-based if it "differentiates based on the content of speech on its face." *ACLU v. Nevada v. City of Las Vegas*, 466 U.S. 784, 793 (9th Cir. 2006). The restrictions on gatherings, however, make no mention of any content, and as they "serve[] purposes unrelated to the content of expression"—namely, limiting the spread of COVID-19—they must be "deemed neutral" even if they have some incidental impact on speech. *Ward v.*

Rock against Racism, 491 U.S. 781, 792 (1989).[6] In addition, limiting the spread of COVID-19 is clearly an important—indeed, a *compelling*—state interest. *Givens*, 459 F. Supp. 3d at 1315. Finally, the restrictions do not prohibit substantially more expressive association than is necessary to protect public health. *See id.* They do not *prevent* Plaintiffs from gathering: they only prohibit *indoor* in-person meetings in counties in the Purple Tier (i.e., with the highest rates of disease transmission), and they permit outdoor gatherings with up to three different households. And they target the most dangerous activities in which the virus can be spread—*i.e.*, through gatherings of persons from different households inside where ventilation is poor (*see* Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 76-77, 80)—and Plaintiffs have the option of gathering remotely, by phone or by video, or outdoors in limited numbers. Therefore, the restrictions on private gatherings do not violate Plaintiffs' free speech rights.

2. Plaintiffs' Freedom of Assembly Rights Are Not Violated

Plaintiffs' freedom of assembly claim fails for similar reasons. "Today, the freedom of association has largely subsumed the freedom of assembly." *Givens*, 459 F. Supp. 3d. at 1314, quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). "Parties bringing an expressive-association claim under the First Amendment must demonstrate that they are asserting their right to associate 'for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.'" *Id.* "The right to expressive association is not an absolute right and can be infringed upon if that infringement is: (1) unrelated to the suppression of expressive association; (2) due to a compelling government interest; and (3) narrowly tailored." *Id.*, quoting *Roberts*, 468 U.S. 623. As shown above, all three criteria are satisfied here. First, the State's directives were imposed to

[6] Plaintiffs assert in a footnote that the State "singles out political protests and campaign activities for special treatment, exempting these types of gatherings from the three-household limit that apply to other gatherings." PI Mot. at 14 n. 17 (internal quotations omitted). This argument mistakes the location and nature of gatherings for their content: as the Central District recently observed, the directives concerning worship services "restrict activities based on the location and nature of the gathering, rather than the content of the speech at those gatherings." *Harvest Rock Church v. Newsom*, No. 2:20-cv-6414-JGB PI Mot. at 13. (C.D. Cal. Aug. 12, 2020), 2020 WL 5265564 at *3 (holding State's restrictions on religious services constitutional), *appeal docketed*, No. 20-55907 (9th Cir. 2020). Plaintiffs also lack standing to object to the treatment of political protests and campaign activities, as they seek to hold gatherings indoors and indoor political protests and campaign activities are currently prohibited in Santa Clara County.

slow the spread of COVID-19, not to suppress expressive associations. Second, the State has a compelling government interest in limiting the spread of COVID-19 and protecting California's residents from a global pandemic that already has killed 18,000 Californians. *See supra*, p. 9. Third, the restrictions on gatherings are narrowly tailored, because they do not prohibit substantially more expressive association than is necessary to protect public health and they leave open ample alternative avenues of communication and association. *See Givens*, 459 F. Supp. 3d at 1315; *see also supra*, pp. 9-10, Section 1.C *infra*.

3. The State's Directives on Worship Gatherings Do Not Violate the Free Exercise Clause

Nor can Plaintiffs Jeremy Wong and Karen Busch succeed on their Free Exercise Clause claim. In fact, every court to consider challenges to California's restrictions on in-person worship services—including the Supreme Court, this Court, California district courts, and the California Court of Appeal—has rejected them.[7]

As the Supreme Court recognized long ago, "[t]he right to practice religion freely does not include the liberty to expose the community […] to communicable disease." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). So long as the State does not target or unfairly discriminate against religious activity, restrictions on religious practice to protect public health need only be "rationally related to a legitimate government purpose." *Stormans, Inc. v Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015).

a. The State's Directives Are Neutral Laws of General Applicability

The Free Exercise Clause is violated "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."

[7] *South Bay III*, 140 S. Ct. 1613; *Harvest Rock II*, 977 F.3d 728; *South Bay II*, 959 F.3d 938; *Gish v. Newsom*, No. 20-55445 (9th Cir. May 7, 2020); *Harvest Rock I*, 2020 WL 5265564; *Abiding Place Ministries v. Wooten*, 2020 WL 2991467 (S.D. Cal. June 4, 2020); *S. Bay United Pentecostal Church v. Newsom*, (S.D. Cal. May 15, 2020) (*South Bay I*) (ER 1-35); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758 (E.D. Cal. 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); *Whitsitt v. Newsom*, 2020 WL 5944195 (E.D. Cal. Oct. 7, 2020) (dismissal without leave to amend), *adopting* 2020 WL 4818780; *County of Los Angeles*, 2020 WL 4876658; *County of Los Angeles v. Grace Cmty. Church*, 2020 WL 6302630 (L.A. Cty. Super. Ct. Sept. 10, 2020); *County of Ventura v. Godspeak Calvary Chapel*, No. 56-2020-0054408 (Ventura Cty. Super. Ct. Oct. 6, 2020); *see also Calvary Chapel Dayton Valley*, 140 S. Ct. 2603; *Calvary Chapel Dayton Valley v. Sisolak*, 2020 WL 4274901 (9th Cir. July 2, 2020).

Church of the Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533, 543 (1993). It is not violated when a law does not "'infringe upon or restrict practices because of their religious motivation'" and does not "impose[] burdens only on conduct motivated by religious belief.'" *Stormans*, 794 F.3d at 1076 (quoting *Lukumi*, 508 U.S. at 533, 543).

Plaintiffs allege that the State's directives prohibiting indoor and outdoor gatherings violate their Free Exercise rights because they cannot host in-person Bible study groups in their homes, and are limited to three households if they meet outside. PI Mot. at 7; Compl. ¶¶ 131-138. But the State's directives are constitutional because they are neutral and generally applicable, regardless of whether a gathering is for religious purposes, and are thus only subject to rational basis review, which they easily satisfy. *See Lukumi*, 508 U.S. at 531-32 (no compelling governmental interest needed for neutral generally applicable laws even if there is an incidental effect of burdening religious practice). Several courts have already held that California's earlier (and much broader) Stay at Home orders, which also limited gatherings, were neutral and generally applicable. *See, e.g.*, *Cross-Culture Christian Center v. Newsom*, 445 F. Supp. 3d 758, 770 (E.D. Cal. 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); *South Bay II*, 959 F.3d 938.

b. The State's Directives Are Not Underinclusive

When considering whether orders are generally applicable, courts look to whether their restrictions "substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." *Stormans*, 794 F.3d at 1079; *see also Lukumi*, 508 U.S. at 543-46 (analyzing whether the challenged law failed to prohibit nonreligious conduct that would have furthered the city's professed interests in enacting the restriction).[8] To determine underinclusivity, courts compare the treatment of religious conduct

[8] Plaintiffs misread *Lukumi* in asserting that the standard is whether the directives burden a category of religiously motivated conduct, exempt a substantial category of conduct that is not religiously motivated, and exempt conduct that undermines the purposes of the law to the same degree as the religiously-motivated conduct. PI Mot. at 18 (citing *Lukumi*, 508 U.S. at 543-46). *Lukumi* did not set forth the standard described by Plaintiffs and in fact noted explicitly that it does "not define with precision the standard used to evaluate whether a prohibition is of general application," because the ordinances at issue there clearly did not meet the "minimum standard necessary to protect First Amendment rights." *Lukumi*, 508 U.S. at 543 (challenged law

and "*analogous* non-religious conduct." *Lukumi*, 508 U.S. at 546 (emphasis added); *see also Stormans*, 794 F.3d at 1079 (examining "*comparable* secular conduct") (emphasis added).

The State's restrictions on indoor and outdoor gatherings in private homes are not underinclusive: they apply whether the gathering is for a reception, a meal, a book club, or a bible-study. Plaintiffs do not dispute this, but instead attempt to draw comparisons to activities that take place *outside* the home that are permitted by the State's directives, which they allege "favor" a substantial amount of secular conduct that also risks the spread of COVID-19, such as protests, football games, or large outdoor church gatherings. PI Mot. at 19-21.

But by comparing outdoor activities to indoor ones, or activities in wide outdoor spaces to ones in private backyards, "Plaintiffs are comparing apples and oranges." *South Bay United Pentecostal Church v. Newsom*, No. 20-cv-00865 (S.D. Cal. October 15, 2020), 2020 WL 6081733 at *14 (*South Bay IV*); *see also Harvest Rock I*, 2020 WL 52665564, at *2 ("[B]ecause indoor activities carry a much greater risk of COVID-19 spread, indoor religious services are not comparable to outdoor protests" and the treatment of such protests is "irrelevant"). In addition, Plaintiffs conflate activities that are permitted in one tier with those that are not permitted in another—that is, they compare indoor home gatherings, which are prohibited in the Purple tier, with indoor church services, which are *also* prohibited in the Purple tier.[9]

Further, the events that Plaintiffs point to that allow for greater capacity requirements are in completely different settings with air circulation and ventilation, with restrictions in place mandating physical distancing, limitations on capacity, mask-wearing, and sanitization. The in-home gatherings Plaintiffs propose are not comparable: living-room discussions, with no certain ventilation and prolonged face-to-face conduct, and backyard gatherings where social distance and face coverings are likely not to be maintained, are fraught with the potential that the virus

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prohibited, for public health reasons, the religious practice of animal sacrifice, which was directed at the Santeria religion).

[9] In less restrictive tiers, however, both indoor home gatherings and indoor church services are permitted, each with their attendant capacity restrictions: indoor church services can operate with a maximum of 25% capacity or 100 people, whichever is fewer, and indoor gatherings may occur with up to three households. Haddad Decl., Ex. 11, 12. Similarly, football games, which Plaintiffs cite to, cannot have live audiences in the Purple tier, but in the last two tiers, they may, outdoors with capacity restrictions and other requirements. *Id.*

will spread. See Rutherford Decl. ¶ 50, 60; Watt Decl. ¶¶ 44, 45-46 (stressing importance of physical distancing). COVID-19 is spread through respiratory droplets that infected individuals exhale and uninfected individuals may breathe in. Watt Decl. ¶ 43; Rutherford Decl. ¶ 29. This risk increases when the individuals are in close proximity to one another for an extended period, especially indoors where there is limited ventilation, which allows the COVID-19 virus to accumulate into doses large enough to overcome the immune system. Watt Decl. ¶¶ 33, 37-44; Rutherford Decl. ¶¶ 75-82. For the same reasons, gatherings at private homes, cannot be compared to faith-based services and cultural ceremonies conducted at houses of worship, which are subject to numerous physical distancing, capacity, and sanitation requirements.

In another case concerning California's restrictions on worship services, Chief Justice Roberts rejected comparisons to activities in which people do not gather in close proximity for extended periods of time, noting that "[t]he Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate nor remain in close proximity for extended periods." *So. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (May 29, 2020) (*South Bay III*) (Roberts, C.J., concurring). Accordingly, the prohibition on private indoor gatherings and restrictions on private outdoor gatherings are more properly compared to similar events—for example, different households gathering indoors for Thanksgiving dinner (which is prohibited in the Purple Tier to the same degree as indoor Bible study or prayer groups involving multiple households) or more than three households meeting in a private backyard for a book club (also prohibited). Plaintiffs cannot show that the State's directives are underinclusive.

c. The State's Directives Satisfy the Rational Basis Test

Because the challenged directives are neutral and generally applicable laws, they are subject to a rational basis inquiry. *Lukumi*, 508 U.S. at 531-32. As described above, the State has more than a rational basis in restricting gatherings—it has a compelling interest in doing so: to slow the spread of COVID-19, and to save lives. Plaintiffs' citation is inapposite. See PI Mot. at 19 (citing *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428-32 (2006)). That case concerned a religious sect's ceremonial use of a hallucinogen that is barred by

the Controlled Substances Act; the Supreme Court held that this restriction was a substantial burden under the compelling interest test set forth in the Religious Freedom Restoration Act of 1993. *Gonzales*, 546 U.S. at 439. Accordingly, Plaintiffs cannot establish a violation of their free exercise rights.

4. The State's Directives Do Not Violate the Due Process and Equal Protection Clauses

The State's directives currently permit the businesses of Plaintiffs Frances Beaudet, Julie Evarkiou, Dhruv Khanna, and Connie Richards to be open, with capacity restrictions.[10] PI Mot. at 7-8. Their due process and Equal Protection challenges subject those restrictions to rational basis review, which they easily satisfy given the State's compelling interest in slowing the spread of COVID-19.

a. Plaintiffs Are Not Deprived of Due Process

The range of liberty interests protected by the Due Process Clause of the Fourteenth Amendment is narrow, and has largely been 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). Courts' recognition of a right to pursue one's occupation "have 'dealt with a *complete prohibition* on the right to engage in a calling, and not [a] sort of brief interruption.'" *Guzman v. Shewry*, 552 F.3d 941, 954 (9th Cir. 2009). The State's directives do no such thing: they impose temporary restrictions on Plaintiffs' businesses to combat the COVID-19 epidemic. Under the State's directives, even in the most restrictive tier, each of their businesses can remain open: restaurants can continue to have outdoor seating and to provide take-out and delivery, gyms and wineries can operate outside as well, and salons can serve customers indoors.

Moreover, "the 'generalized' right to choose one's employment 'is nevertheless subject to reasonable government regulation.'" *Sagana v. Tenorio*, 384 F.3d 731, 743 (9th Cir. 2004) (quoting *Conn v. Gabbert*, 526 U.S. 286, 292 (1999)). Judicial review in this context is "very narrow." *Id.* To invalidate the State's directives, Plaintiffs must show that they are "arbitrary and

[10] Plaintiff Mansour challenges County PPE requirements, not State restrictions.

lacking a rational basis," *Engquist v. Or. Dept. of Agric.*, 478 F.3d 985, 997 (9th Cir. 2007). Plainly, however, the directives have a rational basis: they restrict personal interactions in order to reduce the spread of an infectious and often fatal disease. *Cf. S. Bay United Pentecostal Church*, 959 F.3d at 939. As discussed in greater detail in Section I.C below, the State's approach is grounded on scientific evidence, is consistent with the consensus view of science and public health experts, and is plainly rational. Accordingly, courts have repeatedly and emphatically rejected similar due process challenges. *See, e.g., Best Supplement Guide, LLC v. Newsom*, No. 20-cv-00965 (E.D. Cal. May 22, 2020), 2020 WL 2615022, at *6 (holding that the State's orders closing businesses "were enacted for a legitimate reason," justifying the temporary restrictions on plaintiffs' right to pursue the occupation of choice); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1073 (C.D. Cal, May 22, 2020) (professional musician's claim alleging violation of "right to earn a living" unlikely to succeed on the merits or even raise a serious question going to the merits); *McGhee v. City of Flagstaff, et al.*, No. CV-20-08081-PCT-GMS, 2020 WL 2308479, at *5 (D. Ariz. May 8, 2020) (rejecting substantive due process challenge to Arizona's stay-at-home order). For these reasons, the State's directives do not violate Plaintiffs' substantive due process rights.

b. Plaintiffs' Equal Protection Rights Are Not Violated

Nor do the directives violate Plaintiffs' equal protection rights. Plaintiffs do not contend that the restrictions employ any suspect classification, and the State's directives plainly have a rational basis for treating Plaintiffs' businesses differently from other activities: namely, the risk of spreading COVID-19 that they pose and the need to protect the community from spread of the disease. Plaintiff Mansour objects that the metrics used in the Blueprint are not related to her qualifications to practice her professions, PI Mot. at 22, but she is unable to dispute that a facial supplied by even a fully qualified professional requires close contact in an indoor setting and thus poses a risk of spreading of COVID-19. She also objects that she is able to provide cosmetic treatment as safely as a dentist or dermatologist, *id.*, but it is certainly rational for the State to believe that a medical professional is better trained to do so. Moreover, it is certainly reasonable for the State to impose more stringent restrictions on businesses in counties with more widespread infections because the risk of infection is in part a function of the background rate in the

community. *See* Stoto Decl. ¶¶ 13, 21-22. Further, to the extent that the State distinguishes between types of business and activities in imposing restrictions, as shown above, it is to account for the ways that the virus can spread and the relative risks generally attendant in different settings or sectors, which is plainly rational. Haddad Decl., Ex. 11 at 2-5, 7-8.[11]

C. The State's Approach Is Consistent with Public Health Standards and Prevailing Expert Opinions on Protecting the Public from the COVID-19 Pandemic

Supported by two expert declarations, Plaintiffs also contend that the State's approach to managing the pandemic is fundamentally irrational and, indeed, contrary to public health ethical standards, because in their view widespread community transmission is unlikely to cause significant public health harms relative the economic and social costs of the restrictions. This radical view is well outside the mainstream of scientific and public health expert opinion and rests on misunderstandings of California's response as well as flawed and unsupported assumptions.

1. The State's Goals Are Ethical

The State's goals of slowing the spread of the pandemic and saving human lives, and accompanying physical distancing measures and restrictions, are consistent with the consensus opinion of scientists and public health experts. See Rutherford Decl. ¶¶ 50, 61-62; Stoto Decl. ¶¶ 15, 26; Watt Decl. ¶ 45. These are ethical goals, and the ways by which the State has chosen to achieve them are also ethical and based in science: the State's directives operate to reduce the spread of the virus until a vaccine becomes available. Stoto Decl. ¶¶ 26-29; Rutherford Decl. ¶ 69. As noted above, the virus spreads when there is a lack of physical distancing and face coverings; but these measures are imperfect, and even with them, the chances of becoming infected with COVID-19 rise dramatically in group settings with limited ventilation. The risk of infection and spread also rises in settings where people cannot or tend not to maintain physical distancing and mask wearing, such as gatherings in private backyards and indoor business operations. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 76-77, 80. Accordingly, the State's Blueprint

[11] Plaintiffs also contend that it is irrational to permit a hotel to hold an outdoor bar mitzvah but prohibit Plaintiff Khanna from holding an outdoor wedding reception. Whether or not that is true, it is irrelevant: the State's guidance on worship services and cultural ceremonies does not allow receptions for either bar mitzvahs or weddings except to the extent that they are permitted by the general gatherings guidance.

and related measures implement restrictions to enforce physical distancing and slow the virus' spread, thereby balancing the potential harms caused by the restrictions with the State's ultimate goal of saving lives. Stoto Decl. ¶¶ 30-34, 36; Kurtz Decl. ¶¶ 8-9; Watt Decl. ¶¶ 54-57, 76-78.

Plaintiffs frame their assertions to the contrary as a public health ethics argument, asserting that the State's requirements are not based in science, PI Mot. at 9-12, 15. But in doing so, they have staked a position well outside the consensus generally held by experts all over the world in combatting this pandemic. Plaintiffs propose that the virus be left to spread virtually unchecked, as is made clear by the two expert declarations Plaintiffs submit in support of their motion from Dr. Rajiv Bhatia and Dr. Jay Bhattacharya. See ECF No. 18-2, 18-3. Though neither declarant mentions it, Dr. Bhattacharya is one of the three drafters of, and Dr. Bhatia is a principal signatory to, what is known as the Great Barrington Declaration, which urges that the virus be allowed to spread so that the population can achieve so-called herd immunity, and advocates that there be no government-imposed restrictions. Stoto Decl. ¶ 16; Rutherford Decl. ¶¶ 64-69, 98. But their position is widely considered to be outside the mainstream and unsupported by public health science, because it would lead to millions of deaths and would itself cause serious economic harm. *Id*.

2. The State Is Protecting Vulnerable Populations, But Those Restrictions Alone Will Not Slow the Spread of the Virus

Here, Dr. Bhatia and Dr. Bhattacharya insist that because individuals over the age of 65 are most at risk of death from COVID-19, the State should target restrictions with respect to long-term care facilities. PI Mot. at 15; Bhatia Decl. ¶¶ 73-89; Bhattacharya Decl. ¶ 39. But the State has, since the beginning of the pandemic, taken immediate action to protect the health and safety of residents and employees of such facilities and continues to do so. These steps include the same measures that Dr. Bhatia recommends, Bhatia Decl. ¶ 89: (1) site infection control and prevention practices such as screening, mask wearing, and enhanced sanitation; (2) routine healthcare worker screenings; (3) prohibiting staff from coming to work sick; (4) outbreak response; (5) training of staff in infection prevention and control measures; and (6) monitoring. Tovmasian Decl. ¶ 8-33;

Steinecker Decl. ¶¶ 13-24. Accordingly, Plaintiffs' suggestion (and that of their experts) that the State has not even considered targeted restrictions, PI Mot. at 15, is simply false.

Moreover, targeting restrictions *only* to long-term care facilities, as Plaintiffs' experts urge at length (Bhatia Decl., ¶¶ 73-89, Bhattacharya Decl., ¶¶ 32-39), will not protect California's vulnerable populations from the disease, because populations that are at greatest risk of severe infection or death from COVID-19, such as all individuals over the age of 65 and individuals with comorbidities, are not limited to the elderly who reside in long-term care facilities. Kurtz Decl. ¶¶ 22-24; see also Rutherford Decl. ¶¶ 64-69, 98; Stoto Decl. ¶ 16. It has also been determined that individuals under the age 65 from ethnic minority backgrounds, including Latino and African-American, are at greater risk of serious illness and death from COVID than other individuals. Kurtz Decl. ¶ 22-24. Further, this ignores the long-term health effects that COVID-19 has on some individuals seemingly without regard to age. Rutherford Decl. ¶¶ 23-25. It also ignores substantial evidence (including from California's experience) that targeted, additional restrictions focused on such settings are not 100 percent effective, so rampant spread in the community puts individuals in such facilities at significantly greater risk than concurrently attempting to minimize the spread of the virus in surrounding communities. Stoto Decl. ¶¶ 16, 33; Watt Decl. ¶ 85. The State simply cannot limit itself to targeted restrictions only and achieve its goals of saving as many lives as possible and stopping the spread of the virus. See Watt Decl. ¶ 85. Capacity restrictions and other restrictions on gatherings that create a high risk of transmission in the community help to achieve this.

Plaintiffs' contentions that imposing restrictions by county is "myopically focused" on positive test rates. PI Mot. at 1, 22-23, also fail. The Blueprint properly relies on positive tests, Stoto Decl. ¶¶ 17-24, even though they include asymptomatic individuals because individuals who are asymptomatic can spread the virus and indeed may be the primary avenue of spread. Watt Decl. ¶¶ 31-32, 50; Rutherford Decl.¶ 28. And the PCR tests that are used are the best tests available, and do not lead to false positives at any rate that undermines their reliability in signaling changes in the spread of the virus. Rutherford Decl. ¶ 94. Plaintiffs also accuse the State of "ignoring" hospitalization rates in its Blueprint. PI Mot. at 9. The State in fact closely

monitors hospitalization rates. Kurtz Decl. ¶ 17-iii. But hospitalization rates do not record the spread of infections until much later in the cycle—too late to meaningfully inform whether further restrictions are warranted to avoid rampant community spread—and as a result are not a meaningful measure for adapting the response to the virus. Stoto Decl. ¶ 23.

3. The State's Public Health Authorities Have Broad Discretion

Finally, this Court should not second guess the scientific judgments made by State public health experts, much less constitutionally require them to follow the decidedly minority views advanced by Plaintiffs' experts. As Chief Justice Roberts recently noted, the Constitution "principally entrusts '[t]he safety and health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay III*,, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). Consequently, public health authorities enjoy "especially broad latitude when they 'undertake to "act in areas fraught with medical and scientific uncertainties,'" and when they do so, "they should not be subject to second guessing by the federal judiciary, which lacks the background, competence and expertise to assess public health and is not accountable to the public." *Id*. at 1613-1614 (quoting, *inter alia*, *Marshall v. United States,* 414 U.S. 417, 427 (1974)). Nor is this deference limited to the initial phase of an emergency or even to emergencies: to the contrary, as the authority cited by the Chief Justice demonstrates, it applies in the absence of an emergency when there is medical or scientific uncertainty. *See Marshall*, 414 U.S. at 427. At best, the minority views expressed by Plaintiffs' their experts establish a degree of scientific uncertainty and absence of absolute consensus among the scientific and public health expert community. That, however, provides no basis for concluding that the restrictions imposed by the State to combat COVID-19 are so irrational that they fail rational basis scrutiny.

D. The State's Directives Are a Constitutional Exercise of the State's Power to Respond to Public Health Emergencies

In addition to failing to show a likelihood of success under ordinary constitutional analysis, Plaintiffs fail to show a likelihood of success under the standards applicable in a public health emergency. In *Jacobson*, the Supreme Court held that "a community has the right to protect itself

against an epidemic of disease which threatens the safety of its members." 197 U.S. at 27 (internal quotation marks omitted). The Court also recognized that, because States often must take swift and decisive action during a health crisis, constitutional rights may be reasonably restricted "as the safety of the general public may demand." *Id.* at 29. Thus, a measure designed to combat a public health crisis will be upheld against constitutional challenge unless it has no "real or substantial relation" to the emergency or "is, beyond all question, a plain, palpable invasion of rights" secured by the Constitution. *Id.* at 31.

Plaintiffs do not dispute that *Jacobson*'s requirements are satisfied. They instead contend that *Jacobson* does not apply to this case because (1) the current emergency has essentially ended and so *Jacobson* deference is not owed, and, (2) with respect to their Free Speech, Assembly, and Exercise claims, because *Jacobson* did not involve a First Amendment challenge. PI Mot. at 16-18. Plaintiffs are wrong on both counts.

1. The State of Emergency is Ongoing

Plaintiffs' assertion that there is no longer an emergency warranting deference to State decisions is simply wrong: it blinks at reality, as well as contradicts recent decisions determining that the pandemic continues to present a public health emergency in California. *See South Bay IV*, 2020 WL 6081733 at *17-18; *see also Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020); *Antietam Battlefield KOA v. Hogan*, __ F. Supp.3d __, 2020 WL 2556496, at *5-*7 (D. Md. May 20, 2020); *Givens v. Newsom*, __ F. Supp.3d __, 2020 WL 2307224, at *3-*4 (E.D. Cal. May 8, 2020); *Cross Culture*, 445 F. Supp.3d at 766-68; *Gish*, 2020 WL 1979970, at *4-*5.

Indeed, since Plaintiffs filed their motion, the pandemic has only gotten worse, both throughout the United States and in California. *See* Rutherford Decl. ¶ 109. California is currently in a third wave with the highest case counts of the pandemic. Rutherford Decl. ¶¶ 109, 114. Though Plaintiffs' experts assert otherwise, COVID-19 is one of the leading causes of death in California. Rutherford Decl. ¶ 112. More troublingly, even though COVID-19 was completely unknown to scientists less than a year ago and resources have been mobilized worldwide to slow its spread, it is now the deadliest *infectious* disease, and one still with no

vaccine, no cure, and no widely effective treatment. Watt Decl. ¶ 24; Rutherford Decl. ¶¶ 36-37, 40. In addition, while Plaintiffs focus on the mortality rates of those over the age of 65, they completely ignore the other vulnerable populations that suffer from higher mortality rates from COVID-19, Kurtz Decl. ¶¶ 22-24, and they ignore the serious, long-term effects the disease may have in those who survive it. Rutherford Decl. ¶¶ 23-25. They also ignore that death rates, even if relatively low in younger populations, will yield a high absolute number of deaths if the virus spreads uncontrolled, as their experts advocate.[12] California public health officials have more than adequate reason to be concerned about the pandemic, which is the greatest faced in over a century. Rutherford Decl. ¶¶ 26-27. California recently passed its one million case mark; the United States as a whole has had eleven million positive cases. Haddad Decl. Ex. 1.

Accordingly, Plaintiffs' reliance on Justice Alito's *dissent* to the Supreme Court's denial of application for injunctive relief against Nevada's COVID-19 restrictions is unpersuasive. *See* PI Mot. at 16 (quoting *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603 (mem.) (Alito, J., dissenting). Plaintiffs' reliance on *Korematsu v. United States*, PI Mot. at 16-17, is equally misplaced. *Korematsu* involved a racially-motivated action taken during wartime, not a global pandemic in which over a million people have perished and tens of millions have gotten sick; it is inapposite. Similarly, *Buck v. Bell*, to which they also cite, concerned a discriminatory forced sterilization law; the Court there cited to *Jacobson* for the principle that vaccinations could be required. 274 U.S. 200, 207 (1927). These sorry and egregious episodes do not even begin to justify Plaintiffs' request to disregard the public health crisis current facing the State.

2. *Jacobson* Applies to Plaintiffs' First Amendment Claims

Plaintiffs' argument that *Jacobson* does not apply to the Free Exercise Clause and freedom of speech and assembly claims fares no better. Multiple courts have recognized that *Jacobson* remains good law and extends to such claims. *See, e.g.*, *Givens*, 459 F. Supp. 3d at 1310-1311; *Grace Cmty. Church*, 2020 WL 4876658; *Elim Romanian IV*, 962 F.3d 341; *Antietam Battlefield KOA v. Hogan*, 2020 WL 2556496; *Legacy Church I*, 2020 WL 1905586; *see also Phillips v. City*

[12] For illustrative purposes, 0.5% of 20 million (roughly half of California's population) is 100,000.

of New York, 775 F.3d 538 (2d Cir. 2015); *Workman v. Mingo Cty. Bd. of Ed.*., 419 Fed. Appx. 348 (4th Cir. 2011); *Whitlow v. California*, 203 F. Supp. 3d 1079 (S.D. Cal. 2016).

Under *Jacobson*, measures taken to protect public health will be upheld "unless (1) there is no real or substantial relation to public health, or (2) the measures are 'beyond all question' a 'plain, palpable invasion of rights secured by [] fundamental law." *Jacobson*, 197 U.S. at 31. Plaintiffs have not alleged such a violation with respect to any of their claims. And nor could they: the virus' infectiousness, its asymptomatic spread, and the lack of a vaccination or effective treatment make restrictions on public gatherings crucial to combatting it, as described at length above. Nor are the State's directives "beyond all question" a "plain, palpable" invasion of Plaintiffs' First Amendment rights. The directives permit gathering, and they permit Plaintiffs' businesses to operate, with certain restrictions on both.

Because of the ongoing pandemic, the State must have the ability to be flexible in its response, and to change its policies and directives based on the facts on the ground. Although California has managed to keep the fatality rate relatively low, this is no time—in the middle of record-high daily infection rates and skyrocketing hospitalizations—to second-guess the State's public health officials and force it to loosen restrictions based on actions taken in other states facing less dire circumstances as well as different characteristics such as population, demographics, geography, and urbanization. Thus, Plaintiffs are unlikely to succeed on the merits in the face of *Jacobson*.

II. THE REMAINING FACTORS WEIGH HEAVILY AGAINST AN INJUNCTION

A. Plaintiffs Face Limited Imminent Harm from Limiting Indoor and Outdoor Gatherings and Restrictions on Businesses

Plaintiffs who wish to gather with others can still do so, with restrictions: they may gather outdoors with up to three separate households, or without limit if they do so remotely. Plaintiffs who wish to operate their businesses can still do so, with restrictions: they can operate outside and in some cases must abide by capacity requirements preventing them from hosting large events, but their businesses are not locked down, even though Santa Clara is currently in the highest tier. Thus, Plaintiffs face limited imminent harm if their request for injunctive relief is denied.

B. The Public Interest in Preserving People's Health Outweighs Any Harm to Plaintiffs

By contrast, if Plaintiffs' motion is granted, the harm to the general public may be incalculable, especially during this critical time when the State's directives must be followed to combat the pandemic. While Plaintiffs correctly note that the public has an interest in preventing the violation of constitutional rights, they ignore the public's unquestionable interest in slowing the spread of COVID-19 and, in particular, saving human lives. They also ignore the economic harm that the ongoing pandemic causes. Without minimizing the economic impacts that Plaintiff may suffer as a result of the limitations created by the current restrictions, those impacts are far outweighed by the potential harm to public health if the State's directives for all California businesses were to be abruptly lifted.

If accepted, Plaintiffs' challenge to the rationality of the State's approach to combatting COVID-19 will cast doubt on most if not all of the measures that the State has taken to slow the spread if this deadly disease and hamstring the State's ability to fight it in the likely many months before a vaccine can be developed and distributed.

Plaintiffs contend that the State's restrictions are unnecessary because, at least when they filed their motion, mortality rates and hospitalizations were lower than they had been in the spring. In doing, however, they ignore the reason why the State has been able to slow the spread of the disease: the imposition of the very types of public health restrictions that Plaintiffs ask the Court to enjoin. *See Six*, 462 F. Supp. 3d at 1068 (California hospitalization rates possibly lower *because* of Stay at Home Order) (emphasis in original); *see also PCG-SP Venture I LLC v. Newsom*, No. 20-cv-11138 (C.D. Cal. 2020), 2020 WL 4344631 at *7. California and other governments around the world have been able to reduce case numbers due largely to restrictions on personal interactions in which COVID-19 may be transmitting—including restrictions on in-person gatherings—the *only* measures proven to be effective in containing the disease's spread in the absence of a vaccine or cure. Rutherford Decl. ¶ 50, 61-62. The resurgence of the virus in California after the state began easing restrictions, and indeed, the current events in the State and throughout the country, underscores the importance and, indeed, indispensability of such

restrictions. *See* Rutherford Decl. ¶ 53, 109. Consequently, enjoining restrictions because they have proven effective in curbing COVID-19 would be "like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

Therefore, the public interest in keeping the State's directives and the orderly process of the gradual reopening of the California economy in place greatly outweighs any harm caused to Plaintiffs, who seek to depart from the status quo.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' preliminary-injunction motion.

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