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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Date: April 27, 2020

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By: /s/ D. Gill Sperlein

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

INTRODUCTION

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

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

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

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

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

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

RELEVANT FACTUAL BACKGROUND

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

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

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

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

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

Plaintiff Ron Givens is Chief Firearms Instructor and Director of Training Operations at the Sacramento Gun Club. Compl., ¶ 8. Givens has exercised his rights to free speech and peaceful assembly under the First Amendment numerous times in the past decades through public protests in front of the California State Capitol Building and has participated in and/or organized at least five permitted protests from 2010 to 2015. Givens sought to hold a protest on the State Capitol Building grounds, decrying the delay of background checks for gun purchasers by the DOJ under the guise of a public health emergency. Seeking to hold a protest on this matter on May 3, 2020, Plaintiff Givens submitted a permit application to the State Capitol Permit Office of the California Highway Patrol on April 22, 2020. Compl. ¶¶22-31.

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

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

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

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

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

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

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

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

[2] https://www.rt.com/usa/occupy-protest-california-sacramento-979/.

[3] https://abc7news.com/stephon-clark-shooting-sacramento-officer-involved/3252401/.

[4] https://www.latimes.com/archives/la-xpm-1991-10-12-mn-153-story.html.

[5] https://www.pbs.org/hueypnewton/actions/actions_capitolmarch.html.

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

LEGAL STANDARD

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

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

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

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

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

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

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

//

ARGUMENT

I. PLAINTIFFS ARE ENTITLED TO TEMPORARY AND PRELIMINARY INJUNCTIVE RELIEF.

A. There Is a Strong Likelihood Plaintiffs' Will Succeed in Proving Their Claims on Multiple Constitutional Grounds.

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

As Plaintiffs' first and sixth causes of action, they assert facial and as-applied challenges pursuant to (1) 42 U.S.C. Section 1983 on the grounds that Defendants' Orders violate the Free Speech Clause of the First Amendment to the U.S. Constitution, and (2) state law on the grounds that the Orders violate Article 1, Section 2 of the California Constitution. "[T]he California liberty of speech clause is broader and more protective than the free speech clause of the First Amendment." *Fantasyland Video, Inc. v. Cty. of San Diego*, 496 F.3d 1040, 1042 (9th Cir. 2007). However, in some areas, the protection afforded by the California liberty of speech clause is coterminous with that provided by the federal Constitution. *Los Angeles All. For Survival v. City of Los Angeles*, 22 Cal. 4th 352, 367, n.12 (2000). California courts treat the prior restraint and overbreadth doctrine similarly to federal courts. *See Wilson v. Superior Court*, 13 Cal.3d 652, 658-62 (1975) (relying mostly on federal citations to analyze prior restraint doctrine under California Constitution); *In re J.M.*, 36 Cal. App. 5th 668, 680 (2019) (citing some federal cases and paralleling overbreadth doctrine analysis under California Constitution with that under the U.S. Constitution).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Defendants' Orders Are Void for Reasons of Vagueness.

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

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

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

[6] The New York Times, for example, reported that "Gov. Gavin Newsom of California on Thursday ordered Californians—all 40 million of them—to stay in their houses…." As of the date of this filing, the article is available online at the following URL: https://www.nytimes.com/2020/03/19/us/California-stay-at-home-order-virus.html.

5. The Orders Violate Article 1, Section 1 of the California Constitution.

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

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

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

[7] Per Sacramento County Department of Public Health's web page visited on April 27, 2020 https://www.saccounty.net/COVID-19/Pages/default.aspx.

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

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

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

B. Plaintiffs Face Imminent Irreparable Harm Absent Immediate Injunctive Relief

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

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

2002), *in turn citing Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *see also S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) (holding that a civil liberties organization that had demonstrated probable success on the merits of its First Amendment overbreadth claim had thereby also demonstrated irreparable harm). "In other words, the requirement that a party who is seeking a preliminary injunction show 'irreparable injury' is deemed fully satisfied if the party shows that, without the injunction, First Amendment freedoms would be lost, even for a short period." *Reed*, 523 F. Supp. 2d at 1011. "Unlike a monetary injury, violations of the First Amendment 'cannot be adequately remedied through damages.'" *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1058 (C.D. Cal. 2016) (*citing Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)).

Without an injunction preventing Defendants from further enforcing the Orders, Plaintiffs will suffer irreparable harm in the form of deprivation of fundamental freedoms secured by the First and Fourteenth Amendment to the U.S. Constitution and the California Constitution. Plaintiffs' irreparable injuries cannot adequately be compensated by damages or any other remedy available at law. Thus, irreparable injury is clearly shown, necessitating the relief Plaintiffs seek in this Application.

C. The Balance of Hardships Tips Decidedly in Plaintiffs' Favor.

In cases implicating constitutional rights, "the 'balancing of the hardships' factor also tends to turn on whether the challengers can show that the regulations they attack are substantially overbroad." *Reed*, 523 F. Supp. 2d at 1101.

Given Plaintiffs' showing of the facially and as-applied invalidity of the vague, overbroad Orders, Plaintiffs necessarily have shown that leaving those Orders in place for even a brief period of time "would substantially chill the exercise of fragile and constitutionally fundamental rights," and thereby constitute an intolerable hardship to Plaintiffs. *Reed*, 523 F.Supp.2d at 1101. As mentioned above, Defendants' ban on all protests, even socially distanced and with masks, will deprive Plaintiffs, and innumerable other Californians, of their ability to exercise their rights to speech, petition, and assembly as secured by the First and Fourteenth Amendments and Article 1 of the California Constitution.

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

D. Injunctive Relief Is in the Public Interest

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

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

II. THE COURT SHOULD DISPENSE WITH ANY BOND REQUIREMENT

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

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

CONCLUSION

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

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

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

3. Defendants shall show cause, at a time and place to be directed by the Court, why a preliminary injunction should not issue requiring Defendants to act as described above; the temporary restraining order shall remain effective until such time as the Court has ruled on whether a preliminary injunction should issue.

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

Respectfully submitted,

Date: April 27, 2020

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