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

Defendants.

No. 2:20-cv-00852-JAM-CKD

ORDER DENYING PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER

Ron Givens and Christine Bish filed an eight-count complaint against Defendants Governor Gavin Newsom, Attorney General Xavier Becerra, California Highway Patrol Commissioner Warren Stanley, and California Public Health Officer Sonia Angell. Compl., ECF No. 1. Plaintiffs allege the stay at home order enacted by Governor Newsom to slow the spread of Coronavirus Disease 2019 ("COVID-19") impermissibly infringes upon their constitutional rights to speak, assemble, and petition the government. They further allege that the order infringes upon their due process

rights and their right to liberty under the California Constitution.

Plaintiffs then filed an application for a temporary restraining order. Application for TRO ("TRO"), ECF No. 5. They request the Court enjoin enforcement of the State order so they may hold political demonstrations, rallies, protests, and religious services[1] in compliance with the Centers for Disease Control's ("CDC") social distancing guidelines. TRO at 2. Plaintiffs also request the Court order Defendants to issue them permits so they may proceed with their planned protests and rallies at the State Capitol. Id.

The Court held a hearing on the TRO application on May 7, 2020. After considering the papers filed in support of and in opposition to the request, and argument presented at the hearing, for the reasons set forth below, the Court DENIES Plaintiffs' Application for a Temporary Restraining Order.

I. BACKGROUND

On December 31, 2019, the World Health Organization ("WHO") China Country Office learned of cases of a pneumonia of unknown cause. WHO, COVID-19 Situation Report (January 21, 2020). COVID-19 was later identified as the cause. Id. Those initial infections were but squalls preceding a hurricane. To date, COVID-19 has infected over three and a half million and killed

[1] The complaint does not allege Plaintiffs are injured by being barred from religious services in violation of the First Amendment's Free Exercise Clause. As a result, Plaintiffs have not sufficiently alleged standing to challenge the State order to the extent it bars in-person religious services.

over 250,000 people worldwide. WHO, COVID-19 Situation Report (May 7, 2020). Responding to this ever-evolving public health crisis, Governor Newsom issued a statewide "stay at home order." See Ex. A to Compl., ECF No. 1-1. The order went into effect on March 19, 2020. Id. It directs California residents "to stay home or at their place of residence except as needed to maintain continuity of operations of federal critical infrastructure services." Id. ¶ 1. The order's stated purpose is "to protect the public health of Californians" by "mitigat[ing] the impact of COVID-19." Ex. A to Compl. ¶ 1.

To that end, the order directs residents to "heed the current State public health directives." Id. State public health officials have determined that "all gatherings" of any size and in any "indoor or outdoor space" "should be postponed or canceled." Cal. Dep't of Pub. Health, Guidance for the Prevention of COVID-19 Transmission for Gatherings, March 16, 2020. This determination "applies to all non-essential professional, social, and community gatherings regardless of their sponsor." Id. The order is in effect "until further notice." Ex. A to Compl. ¶ 1.

Givens works for the Sacramento County Gun Club. Compl. ¶ 8. As COVID-19 infections increased, the Gun Club experienced a surge in firearm sales. Id. ¶ 27. Busy enforcing the state's COVID-19 protective measures, the California Department of Justice began to experience a backlog in processing the background checks required for firearm purchasers. Id. ¶¶ 25-29. Givens seeks to protest these delays at the California State Capitol. Id. ¶ 24. He submitted a permit application to the

California Highway Patrol's ("CHP") permit office on April 22, 2020. Id. ¶ 31. The CHP denied his permit application. Compl. ¶ 34.

Bish, on the other hand, is campaigning to be California's U.S. Representative for its Sixth Congressional District. Id. ¶ 41. On April 23, 2020, Bish applied to the CHP for a permit to hold a political rally at the California State Capitol. Id. ¶ 43. The CHP also denied Bish's permit application. Id. ¶ 45.

The CHP denied Plaintiffs' permits pursuant to the State's ban on mass gatherings. Ex. A to Opp'n ¶ 10. Under this directive, the CHP may not issue any permits that would authorize gatherings barred by the State's stay at home order. Id. Plaintiffs challenge the State order, facially and as applied, alleging it violates their freedom of speech, freedom to assemble, and freedom to petition the government under the United States and California constitutions. They also argue the order violates their right to liberty under the state constitution.

II. OPINION

A. Judicial Notice

District courts may take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). To this end, a court may take judicial notice "of court filings and other matters of public record," Reyn's Pasta Bella, LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir.

2006), including "government documents available from reliable sources on the internet," California River Watch v. City of Vacaville, No. 2:17-cv-00524-KJM-KJN, 2017 WL 3840265, at *2 n.1 (E.D. Cal. Sept. 1, 2017).

Plaintiffs request the Court take judicial notice of: (1) Executive Order 2020-18, from the Executive Department of the State of Arizona, signed by Governor Douglas Ducey on March 13, 2020; and (2) Stay at Home Order, from the Department of Public Health for the State of Ohio, signed by Director Amy Acton on March 22, 2020. Plaintiffs' Request for Judicial Notice, ECF No. 16. The government documents Plaintiffs reference are both proper subjects of judicial notice. The Court therefore GRANTS Plaintiffs' requests. In doing so, the Court judicially notices "the contents of the documents, not the truth of those contents." Gish v. Newsom, No. EDCV 20-755-JGB(KKx), at *2 (C.D. Cal. April 23, 2020).

B. Legal Standard

Temporary restraining orders are emergency measures, intended to preserve the status quo pending a fuller hearing on the injunctive relief requested, and the irreparable harm must therefore be clearly immediate. Fed. R. Civ. Proc. 65(b)(1); see Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006). The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. Lockheed Missile & Space Co. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995); see Stuhlbarg Intern. Sales Co., Inc. v. John D. Brushy & Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2011).

Plaintiffs seeking these forms of injunctive relief must demonstrate (1) that they are likely to succeed on the merits, (2) that they are likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting Winter v. Natural Res. Def. Council, 555 U.S. 7 (2008)). In the Ninth Circuit, courts may also issue temporary restraining orders when there are "serious questions going to the merits" and a "balance of hardships that tips sharply towards the plaintiff" so long as the remaining two Winter factors are present. Alliance for Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011).

When applying either test, courts operate with the understanding that a temporary restraining order, much like a preliminary injunction, is an "extraordinary and drastic remedy." Cf. Munaf v. Geren, 553 U.S. 674, 690 (2008). "The propriety of a temporary restraining order, in particular, hinges on a significant threat of irreparable injury [] that must be imminent in nature." Gish v. Newsom, No. EDCV 20-755-JGB(KKx), 2020 WL 1979970, at *3 (April 23, 2020) (citing Simula, Inc. v. Autoliv, Inc., 175 F.3d. 716, 725 (9th Cir. 1999); Caribbean Marine Serv. Co. v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988)).

C. Analysis

Plaintiffs request the Court enjoin Defendants from enforcing the State stay at home order against their permit applications to hold protests and political rallies at the State

Capitol. TRO at 1–2. Plaintiffs contend they satisfy each of the four conventional Winter factors for injunctive relief. If allowed to protest or hold a rally, Plaintiffs maintain they would follow "the Center for Disease Control's social distancing guidelines." TRO at 18.

This Court finds, however, that Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claims because the State order, and the CHP's denial of their permit applications, are within the scope of the State's emergency powers to fight the spread of COVID-19. See Opp'n at 6–12. Moreover, even under traditional constitutional analysis, the State order does not violate Plaintiffs' rights. Id. at 12–20. For the same reasons, Plaintiffs also fail to raise serious questions going to the merits of these eight claims. As a result, the Ninth Circuit's "serious question" analysis does not provide Plaintiffs an alternative avenue for preliminary relief.

1. Likelihood of Success on the Merits / Serious Questions Going to the Merits

a. Emergency Powers

"Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members." Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 27 (1905). The Supreme Court penned those words over a hundred years ago, but they remain relevant today. In Jacobson, the Supreme Court upheld a state's exercise of its general police powers to promote public safety during a public health crisis. Id. at 25. A state's police power entails the

authority "to enact quarantine laws and 'health laws of every description'"—even under normal circumstances. Id. Under normal circumstances, however, state regulations enacted pursuant to a general police power must, "always yield in case of conflict" to both the Constitution and permissible exercises of federal authority. Id.

But in abnormal circumstances, "[t]he authority to determine for all what ought to be done in [] an emergency must [be] lodged somewhere or in some body." Id. at 27. It is not "unusual nor [] unreasonable or arbitrary" to invest that authority in the state. Id. Moreover, "the court would usurp the function of another branch of government if it adjudged, as a matter of law, that the mode adopted under the sanction of the state, to protect the people at large was arbitrary, and not justified by the necessities of the case." Id. at 28. In view of this principle, when a state exercises emergency police powers to enact an emergency public health measure, courts will uphold it 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." Id. at 30.

This standard has endured. Courts continue to apply it when reviewing emergency public health measures enacted pursuant to emergency police powers. See, e.g., Gish, WL 1979970 at *5 (C.D. Cal. 2020) (citing Jacobson, 197 U.S. at 31); Robinson v. Attorney General, No. 20-11401-B, WL 1952370, at *8 (11th Cir. April 23, 2020) (same); In re Abbott, No. 20-50296, 2020 WL 1911216, at *16 (5th Cir. 2020) (same); Legacy Church, Inc. v.

Kunkel, No. CIV 20-0327 JB/SCY, 2020 WL 1905586, at *40 (D. N.M. April 17, 2020) (same); Hickox v. Christie, 205 F.Supp.3d 579, 591-93 (D. N.J. 2016) (same).

In this case it is uncontroverted that the State's stay at home order bears a real and substantial relation to public health. Here in California, as of May 6, 2020 COVID-19 has infected 58,815 and killed 2,412. See COVID-19 By the Numbers, Cal. Dep't of Pub. Health (May 6, 2020). The virus that causes COVID-19 is known to quickly spread from person to person. Watt Decl. ¶¶ 9-10, ECF No. 13. Unchecked, it can spread exponentially and can endure over ten transmission cycles, causing one person to be responsible for 1,024 other infections. Id. ¶ 10. Many who are infected show no symptoms but still contribute to COVID-19's spread. Id. ¶ 13. The State's order, and the Department of Public Health directives it incorporates, seek to slow down the rate of transmission by drastically reducing the number and size of all gatherings. The "goal is simple, [the State] want[s] to bend the curve, and disrupt the spread of the virus." Ex. A to Compl. ¶ 1.

Starting in December 2019, "California began working closely with the national Centers for Disease Control and Prevention, the United States Health and Human Services Agency, and local health departments to monitor and plan for the potential spread of COVID-19 to the United States." Opp'n at 3 (citing Medley Decl., ECF No. 11). The Court is in no position to question expert determinations on the efficacy of reducing gatherings in lowering the number of new infections. See Jacobson, 197 U.S. at 30 ("[I]t is no part of the function of a

court . . . to determine which of two modes was likely to be the most effective for the protection of the public against disease."); see also In re Abbott, 954 F.3d at 777.

Having to concede that the State's order relates to public health, Plaintiffs contend only that the blanket ban on CHP permits for protests or rallies at the State Capitol "is beyond all question, a plain, palpable, invasion of fundamental rights protected by the First and Fourteenth Amendments." TRO at 7. But their argument fails to convince this Court that the State's total ban on public demonstrations is not a proper exercise of the State's emergency powers. This Court does not take lightly its mandate to "guard with firmness every right appertaining to life, liberty, or property as secured to the individual by the supreme law of the land." Jacobson, 197 U.S. at 38. But, in the context of this public health crisis, the judiciary must afford more deference to officials' informed efforts to protect all their citizens, especially their most vulnerable, against such a deadly pandemic. See Jacobson, 197 U.S. at 28-32, 34-38; Gish, 2020 WL 1979970, at *4-5.

The State's ban on public gatherings—namely ones where upwards of 500 or 1,000 people may be in attendance—flows from a larger goal of substantially reducing in-person interactions. See Opp'n at 3-4. Plaintiffs have not shown how this goal, and the means used to achieve it, do not bear a "real and substantial relationship" to preventing widespread transmission of COVID-19. See Jacobson, 197 U.S. at 30. Moreover, as further explained below, this Court finds that Plaintiffs have not shown that the State's order is "beyond all question" a

"plain, palpable invasion of rights secured by [] fundamental law." Id. at 30. Thus, the Court finds Plaintiffs are not likely to succeed on their challenge to the State's stay at home order as an impermissible exercise of emergency police powers.

b. Free Speech Clause

The First Amendment, as incorporated against the states through the Fourteenth Amendment, states that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of people peaceably to assemble." U.S. CONST. Amend. I; see also Lovell v. City of Griffin, 303 U.S. 444, 450 (1938) (holding that the First Amendment's prohibitions also apply to state and local government rule-makers). "The protections afforded by the First Amendment are nowhere stronger than in streets and parks, both categorized for First Amendment purposes as traditional public fora." Berger v. City of Seattle, 569 F.3d 1029, 1035-36 (9th Cir. 2009). The grounds of the State Capitol building are chief among traditional public fora. Home to California's state government, the grounds are "especially important locales for communication among the citizenry" and a place for the citizenry to convey important messages to its lawmakers. Id. at 1036.

Even so, "certain restriction on speech in the public parks are valid." Id. (internal quotation marks and citations omitted). Specifically, when the restriction "is not subject-matter censorship, but [a] content-neutral time, place, and manner regulation of the use of a public forum," it may be permitted. Thomas v. Chicago Park Dist., 534 U.S. 316, 322 (2002); see also Berger, 569 F.3d at 1036. And while "[t]he

California Constitution provides protections for speakers in some respects broader than those provided by the First Amendment of the Federal Constitution," with regard to "permissible restrictions on expression in public fora," the state constitution adopts the federal test. Kuba v. 1-A Agric. Ass'n, 387 F.3d 850, 856 (9th Cir. 2004) (internal quotation marks and citation omitted). Accordingly, the Court looks to federal standards to resolve both inquiries. See id. at 857-58.

Plaintiffs argue the State's order acts as an impermissible prior restraint on protected speech. See Opp'n at 8-10. And while Defendants do not dispute that State's order restricts speech before it occurs, they argue the temporary moratorium on issuing permits is nonetheless a permissible time, place, and manner restriction. See Opp'n at 12-15.

The State's order, and the resulting moratorium on permits, are, beyond question, content-neutral. Pursuant to the State's order, the CHP is temporarily denying all permits for any in-person gatherings at the State Capitol. See Ex. A to Opp'n ¶ 10. By definition, "blanket bans applicable to all speakers are content-neutral." Santa Monica Nativity Scenes Comm. v. City of Santa Monica, 784 F.3d 1286, 1295 n.5 (9th Cir. 2015). That the State's order permits a limited number of persons to leave their homes so they may report the news and deliver religious services via streaming or other technology is inapposite. See Reply at 4-5. The CHP's temporary moratorium on all permits for in-person gatherings applies to all applicants. Thus, the Court agrees with Defendants that the constitutionality of this restriction on speech at the State

Capitol turns on whether it is a valid time, place, or manner restriction. See Thomas, 534 U.S. at 322 (finding a park's content-neutral permit scheme regulating speech in a public forum need not adhere to prior restraint procedural requirements).

To be sure, a content-neutral regulation may nonetheless run afoul of the Constitution. A permissible time, place, or manner restriction must also: (1) be narrowly tailored to serve a significant governmental interest; and (2) leave open ample alternative channels for communication of the information. Berger, 569 F.3d at 1036 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). To be narrowly tailored, the restriction must not "burden substantially more speech than is necessary" to achieve a substantial government interest. Ward, 491 U.S. at 799. "[T]he existence of obvious, less burdensome alternatives is a relevant consideration in determining whether the fit between ends and means is reasonable." Berger, 569 F.3d at 1041 (internal quotation marks and citation omitted). But the government "need not [use] the least restrictive or least intrusive means" available to achieve its legitimate interests. Ward, 491 U.S. at 798.

Admittedly, a blanket ban on the issuance of CHP permits for an unspecified period does not intuitively ring of narrow tailoring. But "narrow" in the context of a public health crisis is necessarily wider than usual. The evidence before this Court clearly demonstrates that in-person gatherings increase the spread of COVID-19. This is true even when people attempt to comply with the CDC's recommendations. See Watt

Decl. ¶ 17. The State's stay at home order advances the only fool-proof way to prevent the virus from spreading at in-person gatherings: prohibiting in-person gatherings. The State's objective "is not to exclude communication of a particular content, but to . . . prevent uses that are dangerous." Thomas, 534 U.S. at 322. At present, gatherings of large groups of people would be dangerous.

Plaintiffs assert they could hold protests and rallies "with no more risk than other activities" by following CDC guidelines, but a close examination of the evidence before this Court, including Plaintiffs' permit applications, belies this claim. Exs. A–B to Lyons Decl., ECF No. 12. Givens expects 1,000 people in attendance at his protest. Ex. B to Lyons Decl. Meanwhile, Plaintiff Bish expects 500 people in attendance and plans to play music, hire food trucks, distribute handouts, offer food and water, and set up balloons, chairs, tables, and tents. Ex. A to Lyons Decl. Further, it is unclear how Plaintiffs can confidently say they "have never contracted COVID-19" and could prevent anyone who has from attending their gatherings. Givens Decl. ¶ 14, ECF No. 5-2; Bish Decl. ¶ 10, ECF No. 5-3; TRO at 15. Contrary to Plaintiffs' contention, the record demonstrates that these gatherings put Plaintiffs and others at significantly higher risk than many other prohibited activities. Watt Decl. ¶¶ 15-18.

Defendants have conceded that Plaintiffs may plan in-car protests, "filling streets and honking horns as other groups have done during the COVID-19 pandemic." Opp'n at 14. Whether the State's order explicitly allows this means of protest does

not impact the Court's determination on the sufficiency of its tailoring. Plaintiffs challenge the stay at home order, facially and as applied, to the extent that it prevents them from hosting in-person gatherings at the State Capitol. See TRO at 1–2. So, even if the State's order prohibits in-car protests, that is not the basis upon which Plaintiffs allege the order is unconstitutional as applied to them. Nor does a ban on in-car protests render the order facially invalid. To succeed on a facial challenge, a plaintiff must show there is "no set of circumstances" under which the law could be constitutionally applied. United States v. Salerno, 481 U.S. 739, 745 (1987). Plaintiffs have not met that burden. Although a time, place, and manner restriction must be narrowly tailored, it does not require the "least restrictive means" possible." Ward, 491 U.S. at 798.

The California Department of Public Health has determined that, to slow the rate of COVID-19 infections, gatherings—especially of the scale Plaintiffs propose—should temporarily cease. See Cal. Dep't of Pub. Health, Guidance for the Prevention of COVID-19 Transmission for Gatherings, March 16, 2020. Plaintiffs have not proposed a more tailored option that would ensure comparable levels of safety. Absent an evidence-based alternative, the Court lacks any basis to enjoin the State's informed emergency response. Accordingly, the Court finds the State's prohibition on large gatherings and temporary moratorium on CHP permits are narrowly tailored to serve, at minimum, a significant governmental interest. See Gish, WL 1979970 at *6 (holding that preventing the spread of COVID-19 is

in fact a compelling state interest).

Finally, a temporary moratorium on the issuance of CHP permits does not foreclose all channels of communication. As Defendants argue, "Plaintiffs remain free to use online and other electronic media to stage their rallies and make their protests." Opp'n at 13. Indeed, given much of their intended audience is presently at home, this may be a more effective way of communicating their messages. Further, as mentioned above, Defendants concede that Plaintiffs may plan in-car protests without fear of reprisal. Opp'n at 14.

Considering the persistent threat of COVID-19, the Court finds the State's stay at home order, and the resulting moratorium on CHP permits, are content-neutral time, place, and manner regulations designed to slow its spread. Plaintiffs are therefore unlikely to succeed on the merits of their free speech claim.

c. Freedom of Assembly Clause

The First Amendment guarantees that "Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble." U.S. CONST. Amend. I. The right to assemble, "cannot be denied without violating those fundamental principles which lie at the base of all civil and political institutions." De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (internal citation omitted). However, the right to assemble is still subject to certain restrictions. Again, in Jacobson, the Supreme Court stated that constitutional rights "may at times, under the pressure of great dangers" be restricted "as the safety of the general public may demand." 197 U.S. at 29. "[T]his settled

rule allows the state to restrict, for example, one's right to assemble." Legacy Church, WL 1905586 at *25 (internal quotation marks and citation omitted).

Today, the freedom of association has largely subsumed the freedom of assembly. See Roberts v. U.S. Jaycees, 468 U.S. 609, 618. 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. at 623.

For the reasons discussed above, the State's stay at home order and the CHP's temporary moratorium on permits are wholly unrelated to the suppression of expressive association. Both flow from the State's interest in slowing the spread of COVID-19. The State's order seeks to suppress the virus, not expressive association. And, as is now well-established, protecting California's residents from "[a] global pandemic and its local outbreak amount to a compelling state interest." Legacy Church, WL 1905586 at *40.

Finally, just as the State's order does not prohibit substantially more speech than necessary to protect public health, it also does not prohibit substantially more expressive association than is necessary to advance this same objective.

Plaintiffs are unlikely to succeed on the merits of their freedom of assembly claim.

d. Petition Clause

The First Amendment protects "the right of the people . . . to petition the Government for redress of grievances." U.S. CONST. Amend. I; see also Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 382 (2011). The rights of speech and petition share substantial common ground. Id. at 388. They are thought of as "cognate rights." Thomas v. Collins, 323 U.S. 516, 530 (1945). Nonetheless, there are subtle differences between the two. "The right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole realm of ideas and human affairs." Borough of Duryea, 564 U.S. at 388. While both advance personal expression, "the right to petition is generally concerned with expression directed to the government seeking redress of a grievance." Id.

Defendants argue that Plaintiffs have not raised any concerns in connection with their petition claim distinct from those that are addressed by their freedom of speech and assembly claims. Opp'n at 16. The Court agrees. The right to petition allows Plaintiffs to air a grievance to the government. The question then becomes: what grievances do Plaintiffs hope to air? At first blush, it seems Givens seeks to protest the delays in firearm background checks. See Compl. ¶ 2; Ex. B to Lyons Decl. And Bish seeks to promote herself as a candidate

while protesting the State's stay at home order. See Compl. ¶ 2; Ex. A to Lyons Decl. But upon closer inspection, Plaintiffs' overriding grievance is their inability to host in-person gatherings under the State's order and the CHP's temporary moratorium.

Plaintiffs' right to petition claim specifically states: "The Orders and Defendants' enforcement thereof violate the Petition Clause of the First Amendment . . . . " Compl. ¶ 68. Meanwhile, in their reply, Plaintiffs' only rebuttal is that, "[j]ust as the Orders impermissibly limit free speech and the right to peaceably assemble, they also impermissibly limit Plaintiffs' right to petition." Reply at 10. Nowhere do Plaintiffs suggest that the grievances they seek to air to the government are anything but their present inability to gather in person at the State Capitol. And, while courts "should not presume there is always an essential equivalence in the two Clauses or that Speech Clause precedents necessarily and in every case resolve Petition Clause claims[,]" "[i]nterpretation of the Petition Clause must be guided by the objectives and aspirations that underlie the right." Borough of Duryea, 564 U.S. at 388 (emphasis added).

Plaintiffs' goal is to regain the ability to speak and assemble on the grounds of the State Capitol. As a result, their Petition Clause claim is inextricably intertwined with their Speech Clause and Assembly Clause claims. The Court's analysis for each of those claims therefore necessarily applies here. It follows that Plaintiffs' right to petition claim is similarly unlikely to succeed on the merits.

e. Due Process Clause

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Plaintiffs allege the State's order violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is "vague as to what precisely is being ordered, and what actions may result in criminal penalties, fines, imprisonment." Compl. ¶ 77. However, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." Grayned, 408 U.S. at 110. "To put a finer point on it: perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." Edge v. City of Everett, 929 F.3d 657, 664 (9th Cir. 2019) (internal quotation marks and citations omitted).

Accordingly, the vagueness doctrine implicates two related requirements. "First, laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Id. (internal quotation marks and citation omitted). Typically, all that is required here is "fair notice of the conduct a statute proscribes." Id. (internal quotation marks and citation omitted). But when First Amendment freedoms are in the balance, "an even greater degree of specificity and clarity of laws is required." Kev, Inc. v. Kitspa Cty., 793 F.2d 1053, 1057 (9th Cir. 1986) (internal citation omitted). Courts must instead ask "whether language is sufficiently murky that speakers will be compelled to steer too far clear of any forbidden areas." Edge,

929 F.3d at 664 (internal quotation marks and citation omitted). The second requirement "aims to avoid arbitrary and discriminatory enforcement and demands that laws provide explicit standards for those who apply them." Id. at 665 (internal quotation marks and citation omitted).

Plaintiffs' argument focuses on the use of the word "heed" in the State's order. See TRO at 13. Plaintiffs argue that, because the State's order instructs the public merely to "heed" to public health directives, "it does not appear to order compliance therewith." Id. While the request to "heed the current State public health directives" might be understood as a recommendation, the remainder of the State's order, and the incorporated health directives, are unambiguous. Just before, and as part of, the request to heed to public health directives, Governor Newsom, bolded and uppercase, states, "IT IS HEREBY ORDERED . . . ." See Ex. A to Compl. ¶ 1 (emphasis added). The request to heed follows immediately thereafter. Id. Unlike "heed," "ordered" is unquestionably mandatory.

Next, the State's order incorporates the "Order of the State Public Health Officer." Id. Within that order, the State Public Health Officer and Director of the California Department of public health "order[s] 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 infrastructures." Id. Thus, looking exclusively at the language of the State's order, the Court is not persuaded that Plaintiffs might realistically interpret it as permitting groups of 500 to 1,000 to meet, in person, for any purpose other

than those defined as "needed to maintain continuity of operations of federal critical infrastructure."

Even considering the greater degree of clarity required when First Amendment freedoms are involved, the language is not so vague as to compel Plaintiffs' "to steer too far clear of any forbidden areas." Edge, 929 F.3d at 664. This claim is therefore unlikely to succeed on the merits.

f. Right to Liberty

Finally, Plaintiffs contend that the State's stay at home order violates their right to liberty under Article I, Section 1 of the California Constitution. In so arguing, Plaintiffs cite to the principle that, in California, public health officials seeking to place an individual in quarantine must have "'reasonable ground[s] [] to support the belief' that the person so held is infected." Ex Parte Martin, 83 Cal. App. 2d 164, 167 (1948) (citing Ex Parte Arata, 52 Cal. App. 380, 385 (1921)). Plaintiffs cite Jew Ho v. Williamson, 103 F.10 (C.C.D. Cal. 1900), wherein the court found that sealing off an entire section of San Francisco to prevent the spread of the bubonic plague was "unreasonable, unjust, and oppressive." Id. at 26.

Both cases relied upon by Plaintiffs are easily distinguishable and of little precedential value to this Court. Ex Parte Martin involved the quarantine of two individuals in jail after passing through a place of prostitution, and Jew Ho involved a racially-motivated and scientifically-unfounded quarantine of San Francisco's Chinatown. See Ex Parte Martin, 83 Cal. App. 2d at 166; Jew Ho, 103 F.10 at 23, 26. These cases are clearly inapposite.

The Court agrees with Defendants that, requiring public health officials in the current pandemic to "identify specific individuals who carry the virus and order only them to stay home would not be feasible." Opp'n at 17. That would require far more aggressive testing and contact-tracing, neither of which the State, at present, has the capacity to do. Moreover, the current public health crisis differs *toto coelo* from San Francisco's discriminatory quarantine of Chinatown. Because Plaintiffs fails to support this claim in any meaningful way, it is unlikely to succeed on the merits.

2. Remaining Factors

A district court may not grant a plaintiff's motion for a temporary restraining order if the request fails to show the plaintiff is likely to succeed on the merits of a claim or, at least, raises serious questions going to the merits of that claim. See Winter, 555 U.S. at 20; Alliance for Wild Rockies, 632 F.3d at 1135. Plaintiffs here did not make either showing. The Court need not consider the remaining factors in denying their request. Gish, WL 1979970, at *7.

The Court is well aware that the State's stay at home order being challenged by these Plaintiffs is burdensome, and even devastating, to many. This pandemic has undoubtedly taken its toll. But the sacrifices all California residents are being asked to make to protect the state's most vulnerable flow from a constitutional executive order. And our willingness to rise to the challenge posed by that order is a true measure of our humanity.

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III. ORDER

For the reasons set forth above, the Court DENIES Plaintiffs' Application for a Temporary Restraining Order.

IT IS SO ORDERED.

Dated: May 8,2020

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE