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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

WENDY GISH, an individual, *et al.*,

Plaintiffs,

v.

GAVIN NEWSOM, in his official capacity as Governor of California, *et al.*,

Defendants.

Case Number: 5:20-cv-00755-JGB-KK

REPLY IN SUPPORT OF PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND FOR ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE

Date: April 22, 2020
Time: 2:00 p.m.
Judge: Hon. Jesus G. Bernal

INTRODUCTION

Defendants argue for what is perhaps the most extreme curtailment of constitutional rights ever to be considered by this Court—namely, that federal, state, and local authorities may do ***anything*** that is "rationally related" to slowing the spread of the coronavirus, without legal challenge. Selective quarantines, discriminatory suppression of religion, even more extreme measures—all of these, Defendants argue, should be subjected to rational basis review for the duration of the COVID19 outbreak, which may last for months, or even years. In other countries, governments have used extreme measures to curtail the spread of disease, which might pass a rational basis test, even if it condemned the infected to death, because it rationally helps stop the spread of the disease.

Defendants argue further that it is their victims' burden to prove that Defendants' actions are *not* rationally related to this or any other legitimate purpose, and that failure to prove as much renders Defendants' actions constitutional. Dkt. 13, pp. 24-25. Not only does the government urge error on this Court by insisting on the wrong test, but it also tries to flip the burden of proof. While the health crisis is a serious, even grave concern, there is no precedent in our nation's history for simply ignoring the Constitution or centuries of jurisprudence, and this case requires no such extreme abandonment.

Plaintiffs respectfully submit this reply brief to address the narrow issue of the level of judicial scrutiny applicable to Plaintiffs' claims: strict scrutiny. Given the multiple, lengthy opposition briefs filed by Defendants, and the short period in which Plaintiffs have had to draft and file this reply, Plaintiffs cannot adequately address all arguments raised by Defendants in this filing alone. Plaintiffs' counsel will be available to address Defendants' remaining arguments at the telephonic hearing scheduled for April 22, 2020.

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ARGUMENT

I. Strict Scrutiny Applies to Plaintiffs' Claims.

The rights afforded by the U.S. and California Constitutions are not up for debate; hard-fought as they are, these rights belong to the People. *See Kennedy v. Mendoza—Martinez*, 372 U.S. 144, 164–165 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action"); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties ... which makes the defense of the Nation worthwhile").

A. A State of Emergency Does Not Grant Defendants *Carte Blanche* Authority to Violate Plaintiffs' Fundamental Rights.

Plaintiffs' rights do not vanish simply because Defendants have declared an emergency. *See On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020) (granting a temporary restraining order so that the plaintiff could hold drive-up religious services, despite COVID19 outbreak). Defendants rely principally on *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), arguing that during a state of emergency "constitutional rights may be reasonably restricted 'as the safety of the general public may demand.' " *See, e.g.*, Def. Newsom and Becerra's Opp. p. 14.

The historical context in which the *Jacobson* case was decided is extremely important the Court's analysis here, yet it is altogether ignored by Defendants. In *Jacobson*, the Supreme Court upheld a conviction under a Massachusetts statute that criminalized the defendant's failure to vaccinate himself from smallpox. *Jacobson*, 197 U.S. at 12. *Jacobson* was decided *decades* before the First Amendment's Establishment and Free Exercise Clauses were held to apply to the States by

incorporation. *Everson v. Board of Edu.*, 330 U.S. 1 (1947) (Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause). As such, *Jacobson* does not, and could not, control this Court's analysis of Plaintiffs' 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.").[1] Since the Supreme Court's adoption of its modern analytical framework, it has never set it aside due to an emergency, let alone crafted a rule in which a government defendant could preemptively alter the applicable standard by declaring that an emergency exists. The Court should not craft such an exception here.[2]

Defendants also cite the Supreme Court's decision *Prince v. Massachusetts*, 321 U.S. 158 (1944), which stated, in *dicta*, "[t]he right to practice religion freely does

[1] The Supreme Court's more recent citations to *Jacobson* cast further doubt as to its continued applicability to modern constitutional analysis. For example, in *Kansas v. Hendricks*, 521 U.S. 346 (1997), cited by Defendants, the Court upheld the civil commitment of a convicted sexual predator. In its decision, the Court cited *Jacobson* for the limited purpose of establishing that there is no "absolute" right to liberty—a concept Plaintiffs do not challenge here. The Court did not hold that those rights are diminished during an emergency. *Id.* at 353 (emphasis added).

[2] The Fifth Circuit's decision in *In re Abbott*, No. 20-50264, 2020 WL 1685929, at *1 (5th Cir. Apr. 7, 2020) (holding that the plaintiff's immediate access to abortion services did not warrant issuance of a temporary restraining order)— is not binding on this Court. There, the court relied on *Jacobson* without considering the historical context in which the *Jacobson* decision arose, as discussed above. *See 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).

not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166-67 (*citing People v. Pierson*, 176 N.Y. 201 (1903) (upholding the conviction of man who willfully refused to seek medical care for child in his custody who later died of catarrhal pneumonia)). Read in proper context, it is abundantly clear that Supreme Court simply acknowledged that limits exist as to the exercise of constitutional rights; a concept Plaintiffs do not challenge here.

Nothing in *Prince* supports Defendants' outlandish proposition that the same religious liberties so carefully considered by the Supreme Court in that case, are subject to virtually *no* judicial scrutiny when there is an emergency declared by the government. Indeed, the Court in *Prince* openly acknowledged the child labor law at issue in that case would itself have been invalid if it were applied more broadly to all persons and not just children. *Id.* at 167.

Even if the Court adopts Defendants' proposed analytical framework, the Orders still fail to pass constitutional muster and should be enjoined. The *Jacobson* Court expressly acknowledges that:

> "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, *a plain, palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Jacobson, 197 U.S. at 31.

Here, Defendants' Orders constitute a "plain, palpable invasion" of Plaintiffs' fundamental rights, as set forth in Plaintiffs' moving papers. The Orders have not passed Legislative scrutiny, as is the case for duly enacted statutes, but rather are decrees unilaterally issued by executive officers. As such, this Court is all that stands between Defendants and their newly-claimed, nearly-absolute exercise of control over

Plaintiffs' lives and liberties. *Jacobson* directs this Court to protect Plaintiffs' rights, even in times of an emergency.

B. Defendants' Orders Are Neither Neutral, Nor Generally Applied.

Contrary to Defendants' contentions otherwise, their Orders expressly encumber religious practices, and do so in an arbitrary, discriminatory fashion. Indeed, Governor Newsom and Attorney General Becerra now argue that the Executive Order permits drive-in worship services because such conduct constitutes "faith based services that are provided through . . . other technology."[3] Setting aside this strained re-interpretation of their own Order, the mere fact such an interpretation, strained or otherwise, is necessary proves the point: religious worship is not permitted on the same terms and conditions as other activities deemed "essential" by Defendants.[4] Instead, Plaintiffs are required to adhere to vaguely worded specifications applicable to the faithful, only. The U.S. and California Constitutions do not tolerate such treatment—nor should this Court.

CONCLUSION

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

Respectfully submitted,

Date: April 20, 2020

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[3] Following Governor Newsom's filing of his opposition brief, San Bernardino and Riverside Counties issued clarifications as to their respective Orders, indicating that drive-in worship services would be permitted as a result of the Governor's revised stance. See, https://www.pe.com/2020/04/17/riverside-san-bernardino-counties-change-course-allow-drive-up-worship/.

[4] Defendants' decision to permit drive-in religious services does not affect Plaintiffs' request for the issuance of a temporary restraining order, because Plaintiffs also seek to hold in-person services while adhering to social-distancing protocols.

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