No. 20-15949

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RON GIVENS and CHRISTINE BISH,

Plaintiffs-Appellants

v.

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

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING VACATUR

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INTEREST OF THE UNITED STATES

The United States files this brief as *amicus curiae* pursuant to 28 U.S.C. 517 and Federal Rule of Appellate Procedure 29(a)(2). The United States is committed to protecting the freedoms guaranteed by the First Amendment, which lie at the heart of a free society and are the "effectual guardian of every other right." James Madison, Virginia Resolutions (Dec. 21, 1798), 5 The Founders' Constitution, 135, 136 (Philip B. Kurland & Ralph Lerner eds., 1987). Especially in the midst of the COVID-19 pandemic, the United States has a strong interest in the development

and maintenance of public-health policies that protect citizens from harm while respecting their First Amendment rights, including the peaceful exercise of the freedom of speech, freedom to assemble, and freedom to petition the government on matters of public importance in a traditional public forum.

STATEMENT OF THE ISSUE

Whether California's statewide ban on all in-person gatherings for an indeterminate length of time, which is incorporated in its stay-at-home order in response to the COVID-19 pandemic, violates plaintiffs' First Amendment rights to freedom of speech, freedom to assemble, and freedom to petition the government on matters of public importance in a traditional public forum.

STATEMENT OF THE CASE

1. On March 19, 2020, in response to the COVID-19 pandemic, California Governor Gavin Newsom issued Executive Order N-33-20 (State Order), which requires "all individuals living in the State of California to stay at home or at their place of residence except as needed to maintain continuity of operations" in various "critical infrastructure sectors." E.R. 193.[1] The stated purpose of the State Order is to "protect the public health of Californians" by "mitigat[ing] the impact

[1] This brief uses the abbreviations "E.R. ___" for plaintiffs' Excerpts of Record and "Doc. __, at __" for the document recorded on the district court docket sheet for Case No. 2:20-cv-852 and page number, respectively. The page number cited is the Bates stamp number at the top of the document's page.

of COVID-19." E.R. 194. The State Order requires Californians to "heed the current State public health directives." E.R. 193. When the complaint was filed in this case, those directives banned all public gatherings of any size in any "indoor or outdoor" space for an indeterminate length of time, and applied to "all non-essential professional, social, and community gatherings regardless of their sponsor." E.R. 3. The State Order provides that it "shall stay in effect until further notice." E.R. 193. Violations of the State Order are subject to criminal penalties. E.R. 194.

Subsequently, the California Public Health Officer designated a list of "Essential Critical Infrastructure Workers." E.R. 176. Taken together, the thirteen categories listed more than 170 types of essential workers, including employees of restaurants and convenience stores. *Essential Workforce* (Apr. 28, 2020), https://covid19.ca.gov/img/EssentialCriticalInfrastructureWorkers.pdf. Neither the State Order nor the directives in place when this case was filed made any exceptions for First Amendment activities, such as peaceful protest. Thus, all gatherings of any size protesting government action were banned. E.R. 177.

2. On April 27, 2020, plaintiffs Ron Givens and Christine Bish, two individuals seeking to hold protests at the California State Capitol Building, brought this lawsuit against Governor Newsom and others alleging that the State Order violates their rights under the Federal and California Constitutions, including

their First Amendment rights to freedom of speech, freedom to assemble, and freedom to petition the government. E.R. 172-191.

As alleged in the complaint, Givens is a firearms instructor and the director of training at the Sacramento Gun Club. E.R. 174-175. He has been seeking to hold a protest on the State Capitol Building grounds objecting to the State's delay, purportedly due to the COVID-19 pandemic, in conducting background checks for gun purchasers. E.R. 178. On April 22, 2020, he submitted a permit application to the California Highway Patrol (CHP), stating that he planned to follow the Center for Disease Control (CDC) guidelines and instruct the attendees to practice social distancing and wear masks. E.R. 179. He also intended to have volunteers mark socially distanced areas with tape. E.R. 179. He noted that the State Capitol grounds are approximately 40 acres (or 1,742,400 square feet), providing the expected 1000 attendees ample room to spread out. E.R. 179. The CHP denied his permit. E.R. 179. Givens was informed that Governor Newsom had instructed the CHP not to issue permits for protests because they are not allowed under the State Order. E.R. 179.

Bish is a resident of Sacramento County and is running for election to the United States House of Representatives. E.R. 175, 180. She will be on the ballot in the November 3, 2020, general election. E.R. 180. Bish attended a rally in Sacramento protesting the State Order and advocating the reopening of the

economy. E.R. 180. On or about April 23, 2020, she applied for a permit to hold a rally on May 2, 2020, in front of the California State Capitol Building, where protesters would urge the State to lift its COVID-19-related restrictions and raise voter awareness about the State Order and civil rights. E.R. 180. Bish expected approximately 500 attendees, and she and her fellow protesters intended to practice social distancing and wear masks. E.R. 14, 180. The CHP denied her permit because of the State Order. E.R. 180.

The complaint alleged that defendants' enforcement of the State Order violated plaintiffs' First Amendment rights to freedom of speech, freedom to assemble, and freedom to petition the government, and their rights under the Fourteenth Amendment Due Process Clause. E.R. 181-186. The complaint also raised similar claims under the California Constitution. E.R. 186-190. Plaintiffs sought an injunction permanently enjoining defendants from enforcing the State Order or otherwise interfering with plaintiffs' ability to exercise their constitutional rights. E.R. 190.

3. On the same date plaintiffs filed their complaint, they filed an application for a temporary restraining order (TRO) and for an order to show cause why a preliminary injunction should not issue permitting them to proceed with their protests on the State Capitol grounds. E.R. 160-162. Plaintiffs asserted that the grounds of the State Capitol Building "are the most important and widely used

public forum in California" and have been the site of "[c]ountless watershed protests." E.R. 177. They further asserted that the State Order "amount[ed] to a total ban on public gatherings for the purpose of engaging in First Amendment [conduct] by means of demonstrations, rallies, or protests, regardless of the measures taken to reduce or eliminate the risk of the [COVID-19] virus spreading." Doc. 5, at 11. Plaintiffs explained that they were not challenging the right of the State "generally to issue stay at home orders," but rather that the First Amendment requires such orders to "include exceptions for demonstrations conducted in accordance with CDC guidelines." Doc. 15, at 11-12.

On May 8, 2020, the district court denied plaintiffs' motion for a TRO. E.R. 1-24. As relevant here, the court concluded that plaintiffs are unlikely to succeed on the merits because the State Order and the denial of their permits to protest on the State Capitol grounds are within the scope of the State's emergency powers to fight the spread of COVID-19. E.R. 7. Citing *Jacobson* v. *Commonwealth of Massachusetts*, 197 U.S. 11 (1905), the court stated that the State's police powers include the power to enact emergency health measures unless the measure is "'beyond all question' a 'plain, palpable invasion of rights secured by [] fundamental law.'" E.R. 7-8 (brackets in original). Under that standard, the court concluded that California's "total ban on public demonstrations" does not run afoul of plaintiffs' First Amendment rights. E.R. 10. Although the court acknowledged

that "a blanket ban * * * for an unspecified period does not intuitively ring of narrow tailoring," the court held that it is a valid time, place, and manner restriction because, the court reasoned, it is "the only fool-proof way" to prevent the spread of COVID-19 and plaintiffs had available other channels of communication for their messages, including the Internet and in-car protests. E.R. 13-16.

On May 17, 2020, plaintiffs filed a notice of appeal. E.R. 81.

4. Since the filing of the notice of appeal, California has announced new guidelines for political protest that, in relevant part,

> do not prohibit in-person protests as long as (1) attendance is limited to 25% of the relevant area's maximum occupancy, as defined by the relevant local permitting authority or other relevant authority, or a maximum of 100 attendees, whichever is lower, and (2) physical distancing of six feet between persons or groups of persons from different households is maintained at all times.

Stay home Q&A, Protected Activities: Can I engage in political protest gatherings? (May 29, 2020) (New Guidance), https://covid19.ca.gov/stay-home-except-for-essential-needs/#political; see *ibid.* ("These questions and answers are directives from the State Public Health Officer, and have the same force and effect as other State Public Health Officer directives."). According to California, "[t]his limitation on attendance will be reviewed at least once every 21 days, beginning May 25, 2020," to "assess the impacts of these imposed limits on public health and

provide further direction as part of a phased-in restoration of gatherings that implicate the First Amendment." *Ibid.*

SUMMARY OF ARGUMENT

The district court wrongly denied plaintiffs' request for a TRO. While States have broad authority to protect the public during public-health crises like the COVID-19 pandemic, a State's authority to protect its citizens does not give it *carte blanche* to ban peaceful public protests and rallies. In denying plaintiffs' request for temporary injunctive relief, the district court misapplied *Jacobson* v. *Commonwealth of Massachusetts*, 197 U.S. 11 (1905), a Supreme Court case addressing the limitations the Fourteenth Amendment's Due Process Clause imposes on the scope of a State's police power during a public-health crisis. The district court cited no authority holding that *Jacobson* authorizes a State to enact California's previous ban on public demonstrations protected by the First Amendment, and the Supreme Court's post-*Jacobson* precedent indicates that a State may not do so.

Nevertheless, the ultimate merits of California's original policy are not currently suitable for appellate review because the facts on the ground have substantially changed since the district court's order. California no longer imposes a total ban on peaceful public protests but has since recognized that, even when justified on the basis of public-health concerns, such bans "implicate the First

Amendment." Under the new guidelines, California permits in-person protests of limited size that comply with certain conditions, such as maintaining adequate physical distancing, and strongly recommends, but does not require, masks and cloth face coverings at such events. In general, when a statute or regulation is materially revised while a challenge to the provision is on appeal, the appellate court treats the challenge to the original version of the provision as moot and vacates the district court's judgment. See *New York State Rifle & Pistol Ass'n* v. *City of N.Y.*, 140 S. Ct. 1525, 1526-1527 (2020) (per curiam); *Dilley* v. *Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995) (explaining that "[i]n the decades since [*United States* v. *Munsingwear*, 340 U.S. 36 (1950)], [this Court] [has] treated automatic vacatur as the 'established practice,' applying whenever mootness prevents appellate review").

That relief is appropriate here. Because plaintiffs may have claims with respect to the revised provision—given the number of anticipated protesters—this Court should vacate the district court's erroneous order and remand to allow plaintiffs to litigate any remaining claims based on California's now-existing legal regime. See *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 482-483 (1990). However, given that the errors in the district court's analysis may well be repeated in evaluating any new claims on remand, this Court may also wish to provide some guidance for the district court's consideration on remand.

STANDARD OF REVIEW

The standards governing the issuance of temporary restraining orders are "substantially identical" to those governing the issuance of preliminary injunctions. *Stuhlbarg Intern. Sales Co.* v. *John D. Brush and Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). The plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter* v. *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). This Court reviews a district court's denial of a motion for a preliminary injunction for abuse of discretion. *Pom Wonderful LLC* v. *Hubbard*, 775 F.3d 1118, 1123 (9th Cir. 2014). This Court reviews the district court's interpretation of the legal principles underlying its preliminary-injunction decision de novo, and "a district court abuses its discretion when it makes an error of law." *Shell Offshore, Inc.* v. *Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013) (citation omitted). This Court reviews factual findings for clear error, which results "from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *Pom Wonderful LLC*, 775 F.3d at 1123.

ARGUMENT

I

THIS COURT SHOULD VACATE THE DISTRICT COURT'S ERRONEOUS DENIAL OF PLAINTIFFS' CHALLENGE TO CALIFORNIA'S BAN ON POLITICAL PROTESTS IN LIGHT OF CALIFORNIA'S INTERVENING CHANGE IN LAW

The district court erred in denying plaintiffs' request for temporary injunctive relief, but in light of the significant intervening changes to the challenged provisions, this Court need not reach the ultimate merits of that question.[2] On May 25, 2020, California acknowledged in a new public-health directive that bans on public protests, even when based on public-health concerns, "implicate the First Amendment." New Guidance, *supra*. Rather than completely banning peaceful in-person political protests, as California previously had done, the new public-health directives permit such protests, as long as the "attendance is limited to 25% of the relevant area's maximum occupancy * * * or a maximum of 100 attendees, whichever is lower," and social distancing protocols are "maintained at all times." *Ibid.*

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[2] A denial of a motion for a TRO is appealable if the denial is "tantamount to the denial of a preliminary injunction," *Religious Tech. Ctr., Church of Scientology Int'l, Inc.* v. *Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (citation omitted), or it "effectively decides the merits of the case," *Hunt* v. *National Broad. Co.*, 872 F.2d 289, 292 (9th Cir. 1989). The analysis in this brief assumes that the district court's order is appealable, but the United States takes no position on the issue of appealability.

In general, when a statute or regulation is materially revised while a challenge to the provision is on appeal, the appellate court treats the challenge to the original version of the provision as moot and vacates the judgment. See *New York State Rifle & Pistol Ass'n* v. *City of N.Y.*, 140 S. Ct. 1525, 1526-1527 (2020) (per curiam); *United States* v. *Munsingwear*, 340 U.S. 36, 39-40 (1950); *Dilley* v. *Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995) (explaining that "[i]n the decades since *Munsingwear*, [the Ninth Circuit] [has] treated automatic vacatur as the 'established practice,' applying whenever mootness prevents appellate review"). Because California's change in its legal regime has prevented appellate review of the district court's order in this case, vacatur of the district court's order is appropriate. See *United States Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994).

Where the plaintiff may have a claim with respect to the revised provision, the appellate court may vacate the judgment and remand to allow the plaintiff to litigate that claim. See *New York State Rifle & Pistol Ass'n*, 140 S. Ct. at 1526-1527; *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 482-483 (1990). Here, there may be live claims with respect to the revised order because plaintiffs anticipate protests of 500 and 1000 individuals (E.R. 14), and the revised directive may limit the protests to a fraction of their anticipated size. In view of that possibility, the

district court's judgment should be vacated and the case remanded for further proceedings with respect to the revised directive.

II

THIS COURT SHOULD PROVIDE GUIDANCE ON THE APPROPRIATE FIRST AMENDMENT FRAMEWORK TO APPLY ON REMAND

However, because certain errors in the district court's analysis may affect the court's analysis of plaintiffs' claim on remand, this Court may wish to provide guidance, as set forth below, on the appropriate framework for analysis of these claims.

A. First Amendment Protection Is At Its Apex When Citizens Seek To Engage In Core Political Speech In A Traditional Public Forum Such As The State Capitol

The First Amendment, which is incorporated against the States through the Fourteenth Amendment, provides that "Congress shall make no law * * * abridging the freedom of speech, * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I; see *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938). This Court has recognized that "[t]he values embodied in the [F]irst [A]mendment * * * constitut[e] the hallmark of free societies." *Monterey Cty. Democratic Cent. Comm.* v. *United States Postal Serv.*, 812 F.2d 1194, 1196 (9th Cir. 1987). "Political speech lies at the core of speech protected by the First Amendment, as it is the means by which citizens disseminate information, debate issues of public

importance, and hold officials to account for their decisions in our democracy." *National Ass'n for Gun Rights, Inc.* v. *Mangan*, 933 F.3d 1102, 1111 (9th Cir. 2019), cert. denied, No. 19-767, 2020 WL 2814774 (S. Ct. June 1, 2020). The "special protection" accorded such speech, *Snyder* v. *Phelps*, 562 U.S. 443, 452 (2011) (citation omitted), reflects the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964).

"To ascertain what limits, if any, may be placed on protected speech, [the Supreme Court] ha[s] often focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby* v. *Schultz*, 487 U.S. 474, 479 (1988). Traditional public forums, such as streets and parks, "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague* v. *CIO*, 307 U.S. 496, 515 (1939)). In such forums, content-based regulations must be "necessary to serve a compelling state interest" and "narrowly drawn to achieve that end," while content-neutral regulations of the "time, place, and manner of expression" must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Ibid.*

Plaintiffs seek to speak on issues relating to the California state government's response to the COVID-19 pandemic, and to do so on the grounds of the iconic State Capitol, which everyone agrees is a traditional public forum. See E.R. 11; see also *Edwards* v. *South Carolina*, 372 U.S. 229, 235 (1963) (holding that peaceably assembling and expressing grievances "at the site of the State Government" is the "most pristine and classic form" of exercising First Amendment freedoms); *Simpson* v. *Municipal Court*, 14 Cal. App. 3d 591, 597 (1971) (describing the California State Capitol grounds as a public forum). Givens wishes to hold a peaceful protest of the California Department of Justice's delay, purportedly due to the COVID-19 pandemic, in processing background checks of gun purchasers. E.R. 178. Bish wants to hold a peaceful rally encouraging the State to lift its COVID-19-related restrictions and raising voter awareness about civil rights issues pertaining to the State Order. E.R. 180. Both messages are unquestionably political in nature and thus deserving of robust First Amendment protection.[3]

[3] "The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable'" in this case because "[t]hrough exercise of these First Amendment rights, [plaintiffs] s[eek] to bring about political * * * change." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) (quoting *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)).

B. The District Court Erred In Evaluating Plaintiffs' First Amendment Challenge To California's Statewide Ban On All In-Person Gatherings

The district court held that plaintiffs failed to establish a likelihood of success on the merits of their First Amendment claims on the ground that the challenged actions "are within the scope of the State's emergency powers to fight the spread of COVID-19." E.R. 7. In the view of the United States, the district court's conclusion was wrong. More importantly for present purposes, however, the district court's erroneous analysis may also affect its analysis of any new challenge on remand. Accordingly, this court should make clear that California's exercise of its police power does not warrant complete deference under *Jacobson* v. *Commonwealth of Massachusetts*, 197 U.S. 11 (1905), and provide guidance for applying any time, place, and manner analysis to the challenged actions.

1. Jacobson *Does Not Foreclose First Amendment Claims*

In *Jacobson*, the Supreme Court rejected a substantive due process challenge to a state law requiring vaccination during a public-health crisis. 197 U.S. at 12-13, 26-39. In keeping with its analysis of other, similar challenges to the exercise of a State's police powers, the Court explained that the law would be invalid if it had "no real or substantial relation to th[e] objects" of protecting public health or safety, "or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* at 31; see also, *e.g.*, *Mugler* v. *Kansas*, 123 U.S. 623, 661 (1887) (applying identical standard to state liquor law).

Jacobson is a reminder that the Constitution entrusts the regulation of public health and safety primarily to the "politically accountable officials of the States." *South Bay United Pentecostal Church* v. *Newsom*, No. 19A1044, 2020 WL 2813056, at *1 (S. Ct. May 29, 2020) (Roberts, C.J., concurring in denial of application for injunctive relief). It does not follow from *Jacobson*, however, that a State may, simply by invoking a public-health emergency, ban all individuals from exercising the very rights they use to hold those officials accountable. To the contrary, the Supreme Court has "repeatedly" admonished that "laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil." *United Mine Workers of Am., Dist. 12* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) (citing cases). Thus, *Jacobson* does not require judicial abdication with respect to California's public-health directives that impinge on the exercise of core First Amendment rights.

To the extent the district court's order might be read to suggest that "in *abnormal* circumstances" a State's police power to enact laws to protect the public health or safety *displaces* constitutional standards, it is wrong. E.R. 8. Rather, *Jacobson explicitly* acknowledges that a State must exercise that power *within* constitutional parameters. The Court in *Jacobson* stressed that "no [emergency

health] rule prescribed by a state * * * shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument[.]" 197 U.S. at 25. To that end, California's emergency regulations still must be analyzed to determine whether they violate plaintiffs' First Amendment rights. *Ibid.*; cf. *Amato* v. *Elicker*, No. 3:20-cv-464, 2020 WL 2542788, at *11 (D. Conn. May 19, 2020) (holding that state order that limited the size of social and recreational gatherings, but did not prevent individuals from assembling with others altogether or limit with whom individuals could assemble, was not a plain, palpable invasion of the freedom of assembly).

2. The District Court Erred In Its Time, Place, And Manner Analysis

California defended the State Order and public-health directives below as permissible time, place, and manner regulations. Assuming *arguendo* they are properly analyzed as such, they must be subjected to intermediate scrutiny, which requires that they be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States* v. *Grace*, 461 U.S. 171, 177 (1983) (citation omitted); see p. 14, *supra*; *Santa Monica Nativity Scenes Comm.* v. *City of Santa Monica*, 784 F.3d 1286, 1296 (9th Cir. 2015). Although no one disputes that slowing the spread of COVID-19 is a "significant governmental interest," *McCullen* v. *Coakley*, 573 U.S. 464, 477 (2014) (citation omitted), to survive First Amendment scrutiny as a time, place,

and manner regulation, the State Order and directives would need to be narrowly tailored to serve that interest and leave open ample alternative channels for plaintiffs' speech.

a. The tailoring standards for a time, place, and manner regulation of speech require that the regulation not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 799 (1989). Although the challenged restriction "need not be the least restrictive or least intrusive means of" advancing the government's interest, *id.* at 798, "an assessment of alternatives can still bear on the reasonableness of the tailoring," *Menotti* v. *City of Seattle*, 409 F.3d 1113, 1131 n.31 (9th Cir. 2005).[4]

In *Menotti*, for example, the City of Seattle responded to violent protests against the World Trade Organization (WTO) by enacting a targeted order prohibiting all persons, with limited exceptions, from entering a relatively small, carefully circumscribed portion of the downtown area around the location of the WTO conference and hotels in which WTO delegates were staying. 409 F.3d at 1124-1125. This Court held that the order and the restricted buffer zone were narrowly tailored to serve the significant governmental interest in maintaining

[4] This framework for analyzing compliance with the First Amendment incorporates an evaluation of the government's purported interest (*i.e.*, protecting public health) and the extent to which its regulation is appropriately tailored to that end. This reinforces why, in practical terms, *Jacobson* should not be understood to require judicial abdication with respect to California's public-health directives.

public order and safety. *Id.* at 1131-1137. In reaching this conclusion, the *Menotti* Court distinguished this Court's prior decision in *Collins* v. *Jordan*, 110 F.3d 1363 (9th Cir. 1996), which held facially unconstitutional a San Francisco ban on demonstrations enacted in response to sporadic violent protests, observing that "San Francisco restricted speech throughout the whole county, while Seattle merely restricted access within a well-defined security zone to facilitate a public event." *Menotti*, 409 F.3d at 1135-1136 (footnotes omitted); see *Collins*, 110 F.3d at 1372-1374.

In determining whether California's regulations of in-person gatherings are sufficiently tailored to achieve its interest in protecting public health and safety, the court must consider whether they include appropriate exceptions consistent with the public health. The district court admitted that the prior "blanket ban on the issuance of CHP permits d[id] not intuitively ring of narrow tailoring" before concluding that "'narrow' in the context of a public health crisis is necessarily wider than usual," and that a statewide ban on in-person gatherings was justified as the only "fool-proof way to prevent the [COVID-19] virus from spreading" at such gatherings. E.R. 13-14. But as California's new guidelines demonstrate, there are many less-burdensome enforceable limitations on in-person gatherings that the State could adopt, short of a complete ban, that would still further its interest in curtailing the spread of the COVID-19 virus. If plaintiffs continue to challenge

California's new regulations on remand, the district court must consider whether there remain available considerably less-burdensome alternatives such that California's regulations burden "substantially more speech than is necessary" to further the government's legitimate public-health interests. *Ward*, 491 U.S. at 799.

b. A permissible time, place, and manner regulation must also "leave open ample alternative channels of communication." *Menotti*, 409 F.3d at 1138 (citations omitted). "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Members of City Council of City of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) (internal citation omitted). This Court has held that "an alternative mode of communication may be constitutionally inadequate if the speaker's ability to communicate effectively is threatened," such as when "the speaker is not permitted to reach the intended audience." *Bay Area Peace Navy* v. *United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (internal quotation marks and citations omitted).

In *Taxpayers for Vincent*, the Supreme Court held that an ordinance that banned signs on public property left open adequate alternatives because it "d[id] not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property [wa]s

prohibited." 466 U.S. at 812. Along similar lines, the *Menotti* Court concluded that the City of Seattle's order provided ample alternatives for communication because it allowed the protesters to communicate directly across the street from most WTO venues. 409 F.3d at 1141. By contrast, in *Bay Area Peace Navy*, this Court invalidated a 75-yard security zone around a pier that prevented anti-war protesters from conveying their messages through banners and songs to individuals on the pier because the alternatives of passing out pamphlets on land and demonstrating at the pier's entrance did not allow the protesters to access their intended audience. 914 F.2d at 1229-1230.

In evaluating California's ban on all in-person gatherings, the district court reasoned that because plaintiffs were still able to use in-car protests and "online and other electronic media to stage their rallies and make their protests," the "temporary moratorium on the issuance of CHP permits d[id] not foreclose all channels of communication." E.R. 16. But that reasoning ignores the symbolic importance and communicative advantages of protesting at the State Capitol. Also, as plaintiffs noted, their in-person protests are intended to communicate their messages to a specific audience primarily composed of strangers in order to sway public opinion, and internet-based media may not be well-suited for this task. Doc. 15, at 13; see *Menotti*, 409 F.3d at 1174 (Paez, J., concurring in part and dissenting in part) (observing that "there is no internet connection, no telephone call, no

television coverage that can compare to attending a political rally in person") (citation omitted).

What is more, due to cost and access issues, the alternatives of in-car and online protests the district court proposed also may not be as readily available to participants as an in-person protest. "The Court has been particularly hesitant to close off channels of communication which provide individuals with inexpensive means of disseminating core political messages." *Colacurcio* v. *City of Kent*, 163 F.3d 545, 555 (9th Cir. 1998), cert. denied, 529 U.S. 1053 (2000); see also *City of Ladue* v. *Gilleo*, 512 U.S. 43, 57 (1994) (holding that "[r]esidential signs are an unusually cheap and convenient form of communication" and, "[e]specially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute").

In evaluating any remaining claims on remand under the time, place, and manner analysis, the district court should give careful consideration to whether California's new regulations leave open sufficient alternatives for communication and should not simply point to the possibility of in-car protests or online media that may not provide plaintiffs with the "ability to communicate effectively." *Menotti*, 409 F.3d at 1138 (citations omitted).

Finally, on remand, the court must consider whether the new guidelines are being enforced in a viewpoint-neutral way. "The outrage of our national

community about what happened to George Floyd in Minneapolis is real and legitimate."[5] Our country's response to George Floyd's tragic killing has shown the importance of peaceful public protests to maintaining our civic fabric—and has highlighted the extreme nature of California's earlier blanket protest ban. Over the past weeks, in California and across the country, hundreds and, in many cases, thousands of people have gathered to express outrage and demand justice. California's political leaders have expressed support for such peaceful protests and, from all appearances, have not required them to adhere to the now operative 100-person limit. Going forward, it could raise First Amendment concerns if California were to hold other protests, such as those proposed by plaintiffs here, to a different standard. See *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (explaining that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (citation omitted); *United States* v. *Armstrong*, 517 U.S. 456, 463-468 (1996) (addressing selective enforcement).

* * *

While the COVID-19 pandemic has presented serious public-health challenges, some state governments have enacted unprecedented restrictions on

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[5] *Attorney General William P. Barr's Statement on the Death of George Floyd and Riots* (May 30, 2020), https://www.justice.gov/opa/pr/attorney-general-william-p-barr-s-statement-death-george-floyd-and-riots.

citizens' fundamental liberties. Times like this, where matters of great public concern are at stake, highlight the importance of allowing citizens to make themselves heard. California's indefinite ban and the CHP's denial of all permit applications for in-person gatherings at the State Capitol pursuant to that ban violated plaintiffs' rights to speak, peaceably assemble, and petition their government on matters of public importance in a traditional public forum. The district court erred in several respects when it concluded that plaintiffs were not likely to succeed on the merits of their First Amendment claims in challenging the prohibition as originally enacted. The court should ensure that the district court does not repeat its errors when evaluating any remaining claims on remand.

CONCLUSION

The Court should vacate the district court's opinion and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

1. This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), the brief contains 5607 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 in Times New Roman, 14-point font.

s/ Christopher C. Wang
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Attorney

Date: June 10, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING VACATUR with the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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