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FILED

UNITED STATES COURT OF APPEALS

MAR 30 2021

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U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

RITEESH TANDON; KAREN BUSCH;
TERRY GANNON; CAROLYN GANNON;
JEREMY WONG; JULIE EVARKIOU;
DHRUV KHANNA; CONNIE RICHARDS;
FRANCES BEAUDET; MAYA
MANSOUR,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM; XAVIER BECERRA;
SANDRA SHEWRY; ERICA PAN;
JEFFREY V. SMITH; SARA H. CODY,

Defendants-Appellees.

No. 21-15228

D.C. No. 5:20-cv-07108-LHK
Northern District of California,
San Jose

ORDER

Before: M. SMITH, BADE, and BUMATAY, Circuit Judges.

Order by Judges M. SMITH and BADE, Partial Dissent and Partial Concurrence by Judge BUMATAY

This appeal challenges the district court’s February 5, 2021 order denying Appellants’ motion for a preliminary injunction. Appellants now move for an emergency injunction pending appeal, seeking to prohibit the enforcement of California’s restrictions on private “gatherings” and various limitations on businesses as applied to Appellants’ in-home Bible studies, political activities, and business operations. We conclude that the Appellants have not satisfied the

requirements for the extraordinary remedy of an injunction pending appeal. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (“[I]njunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.”). Therefore, we deny the emergency motion.

I.

A.

In the district court, Appellants challenged the State’s and Santa Clara County’s restrictions on private “gatherings.” However, in this motion, Appellants limit their challenges to the State’s restrictions.¹ These restrictions “appl[y] to private gatherings, and all other gatherings not covered by existing sector guidance are prohibited.” Cal. Dep’t of Pub. Health, *Guidance for the Prevention of COVID-19 Transmission for Gatherings*, <https://cdph.ca.gov/programs/cid/dcdc/pages/covid-19/guidance-for-the-prevention-of-covid-19-transmission-for-gatherings-november-2020.aspx> (last visited Mar. 30, 2021). “Gatherings are defined as social situations that bring

¹ The State restrictions assign counties to different tiers based on factors such as adjusted COVID-19 case rates, positivity rates, a health equity metric, and vaccination rates. *See* Cal. Dep’t of Pub. Health, *Blueprint for a Safer Economy*, <https://covid19.ca.gov/safer-economy/#tier-assignments> (last visited Mar. 30, 2021). These tiers are assigned number and color designations in descending order of risk: Widespread (Tier 1 or purple); Substantial (Tier 2 or red); Moderate (Tier 3 or orange); and Minimal (Tier 4 or yellow). *See id.* Appellants reside in Santa Clara County, which is currently a Tier 2 county.

together people from different households at the same time in a single space or place.” *Id.* Under these restrictions, indoor and outdoor gatherings are limited to three households, but indoor gatherings are prohibited in Tier 1 and “strongly discouraged” in the remaining tiers. *Id.* The gatherings restrictions also limit gatherings in public parks or other outdoor spaces to three households. *Id.* A gathering must be in a space that is “large enough” to allow physical distancing of six feet, should be two hours or less in duration, and attendees must wear face coverings. *Id.* Finally, singing, chanting, shouting, cheering, and similar activities are allowed at outdoor gatherings with restrictions, but singing and chanting are not allowed at indoor gatherings. *Id.*

Appellants assert that the State’s gatherings restrictions provide exemptions, which allow outdoor gatherings with social distancing, political protests and rallies, worship services, and cultural events such as weddings and funerals. Therefore, we also consider the restrictions that apply to these events. Under the State’s restrictions, outdoor services with social distancing are allowed at houses of worship, such as churches, mosques, temples, and synagogues. *About COVID-19 Restrictions*, <https://covid19.ca.gov/stay-home-except-for-essential-needs> (under “Can I Go to Church” tab) (last visited Mar. 30, 2021). Indoor services at houses of worship are subject to capacity restrictions (25% of capacity in Tier 1 and 2 counties, and 50% of capacity in Tier 3 and 4 counties), and other safety modifications

including face coverings, COVID-19 prevention training, social distancing, cleaning and disinfection protocols, and restrictions on singing and chanting. *Id.*; *see also* *Industry Guidance to Reduce Risk*, <https://covid19.ca.gov/industry-guidance#worship> (under “Places of worship and cultural ceremonies—updated February 22, 2021” tab) (last visited Mar. 30, 2021).

The restrictions for houses of worship also apply to cultural ceremonies such as funerals and wedding ceremonies. *About COVID-19 Restrictions*, <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (under “Are weddings allowed?” tab) (last visited Mar. 30, 2021). However, wedding receptions are subject to the gatherings restrictions, so in Tier 1 receptions must take place outdoors and are limited to three households, while outdoor or indoor receptions, limited to three households, are allowed in the other tiers. *Id.*

“[S]tate public health directives do not prohibit in-person *outdoor* protests and rallies” with social distancing and face coverings. *Id.* (under “Can I engage in political rallies and protest gatherings?” tab) (emphasis in original). The terms “protests” and “rallies” are not defined,² but the guidance states that “Local Health Officers are advised to consider appropriate limitations on outdoor attendance capacities,” and that failure to follow the social distancing restrictions and to wear

² One dictionary defines a “rally” as “a mass meeting intending to arouse group enthusiasm.” *See Rally*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/rally> (last visited Mar. 30, 2021).

face coverings “may result in an order to disperse or other enforcement action.” *Id.* Indoor protests and rallies are not allowed in Tier 1 counties but are allowed in other counties subject to the capacity restrictions for places of worship, social distancing, face covering requirements, and prohibitions on singing and chanting. *Id.*

B.

Appellants challenge the restrictions on three grounds. First, Appellants Pastor Jeremy Wong and Karen Busch argue that the gatherings restrictions violate their right to free exercise of religion because they prevent them from holding in-home Bible studies and communal worship with more than three households in attendance. Second, Appellants Ritesh Tandon and Terry and Carolyn Gannon argue that the gatherings restrictions violate their First Amendment rights to freedom of speech and assembly. Tandon was a candidate for the United States Congress in 2020 and plans to run again in 2022, and he claims that the gatherings restrictions prevent him from holding in-person campaign events and fundraisers. The Gannons assert that the restrictions prohibit them from hosting forums on public affairs at their home. Finally, the business owner Appellants argue that the gatherings restriction, capacity limitations, and other regulations on their businesses violate their Fourteenth Amendment substantive due process and equal protection rights.

C.

In determining whether to grant an injunction pending appeal, we apply the



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