APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[FILED: July 12, 2022]

BEST SUPPLEMENT GUIDE, LLC; SEAN COVELL,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California; SONIA Y. ANGELL, MD, MPH, in her official capacity as the Director and State Public Health; COUNTY OF SAN JOAQUIN; CITY OF LODI; MAGGIE PARK, MD., in her official capacity as the Public Health Officer of San Joaquin County,

Defendants-Appellees,

and

KATHERINE MILLER, in her official capacity as a member of, and the Chair of the San Joaquin County Board of Supervisors; TOM PATTI, in his official capacity as a member of, and as Vice Chair of, the San Joaquin County of Board of Supervisors; MIGUEL VILLAPUDUA, in his official capacity as a member of the San Joaquin County Board of

Supervisors; CHUCK WINN, in his official capacity as a member of the San Joaquin County Board of Supervisors; BOB ELLIOTT, in his official capacity as a member of the San Joaquin County Board of Supervisors; SHELLIE LIMA, in her official capacity as the San Joaquin County Director of Emergency Services; PATRICK WITHROW, in his official capacity as the Sheriff of San Joaquin County; DOUG KUEHNE, in his official capacity as a member of the Lodi City Council and Mayor of Lodi; ALAN NAKANISHI, in his official capacity as a member of the Lodi City Council and Mayor Pro Tempore of Lodi; MARK CHANDLER, in his official capacity as a member of the Lodi City Council; JOANNE MOUNCE, in her official capacity as a member of the Lodi City Council; SIERRA VRUCIA, in his official capacity as the Chief of the City of Lodi Police Department; SIERRA BRUCIA; MARCIA CUNNINGHAM,

Defendants.

Appeal from the United States District Court
for the Eastern District of California

John A. Mendez, District Judge, Presiding

Argued and Submitted December 10, 2021
Pasadena, California

Submission deferred December 13, 2021

Resubmitted June 15, 2022

Before: M. SMITH, LEE, and FORREST, Circuit Judges.

Plaintiffs operate a membership-based gym in San Joaquin County, California. Due to state and local public health orders, the gym was required to shut down for several months during the COVID-19 pandemic. Plaintiffs brought this lawsuit against a variety of state, city, and county officials, alleging both federal and state law claims. Because the parties are familiar with the facts, we do not recount them here, except as necessary to provide context to our ruling. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court's order dismissing this case against the city and county defendants. We dismiss the appeal against the state defendants as moot.

We stayed this case pending our en banc court's decision in Brach v. Newsom, No. 20-56291, 2022 WL 2145391 (9th Cir. June 15, 2022). Because Plaintiffs' request for declaratory and injunctive relief depends on "the mere possibility that California might again" shut down businesses, all claims against the state defendants are now moot. Id. at *2. Because Plaintiffs seek damages against the city and county defendants, however, those claims are not moot. See Porter v. Jones, 319 F.3d 483, 488–89 (9th Cir. 2003) (finding the plaintiff's claims for damages, including those brought under the California Constitution, were not moot because

they represented a "live controversy . . . between the parties.").

Plaintiffs fail to state a First Amendment freedom of speech claim. The public health orders restricted conduct that only incidentally burdened speech. See Virginia v. Hicks, 539 U.S. 113, 123–24 (2003). Plaintiffs also fail to state a freedom of association claim. Similar to the dance hall patrons in City of Dallas v. Stanglin, the gym members here are not an organized group gathering to "take positions on public questions." 490 U.S. 19, 24–25 (1989) (quoting Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987)).

Plaintiffs' Fifth Amendment Takings Clause claim also fails. To determine whether an act constitutes a regulatory taking, courts consider several factors including (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). The second and third factors cut strongly against finding the public health orders were a regulatory taking. Plaintiffs' gym was shut down for about five months with an additional eleven months of restrictions, and the public health orders "adjust[ed] the benefits and burdens of economic life to promote the common good." Id.; see also Tahoe-

Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency, 535 U.S. 302, 319–20, 342–43 (2002). Likewise, Plaintiffs cannot state a Takings Clause claim under the California Constitution. See Bottini v. City of San Diego, 238 Cal. Rptr. 3d 260, 283 (Cal. Ct. App. 2018) (holding that the Penn Central test applies to regulatory takings claims under the California Constitution).

Neither the Supreme Court nor the Ninth Circuit recognizes the right to intrastate travel, so the district court did not err in dismissing Plaintiffs' Fourteenth Amendment right to travel claim. See, e.g., Nunez by Nunez v. City of San Diego, 114 F.3d 935, 944 n.7 (9th Cir. 1997).

Plaintiffs have not stated a Fourteenth Amendment procedural or substantive due process claim. Even assuming Plaintiffs had adequately alleged a deprivation of a protected interest, the public health orders fall under a well-recognized category of governmental actions that satisfy procedural due process. See Halverson v. Skagit Cnty., 42 F.3d 1257, 1260–61 (9th Cir. 1994) ("[G]overnmental decisions which affect large areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing."). As for their substantive due process claim, Plaintiffs have not adequately alleged any fundamental interest. See Franceschi v. Yee, 887

F.3d 927, 937 (9th Cir. 2018). Thus, rational basis applies to Plaintiffs' right to property and occupation claims, but they have not shown that the public health orders are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." Slidewaters LLC v. Wash. State Dep't of Labor and Indus., 4 F.4th 747, 758 (9th Cir. 2021) (quoting Samson v. City of Bainbridge Island, 683 F.3d 1051, 1058 (9th Cir. 2012)).

As for Plaintiffs' equal protection claim, they have not plausibly alleged they received discriminatory treatment as compared to a similarly situated group. See Thornton v. City of St. Helens, 425 F.3d 1158, 1167–68 (9th Cir. 2005). Plaintiffs' equal protection claim under the California Constitution similarly fails. See Kenneally v. Med. Bd., 32 Cal. Rptr. 2d 504, 507 (Cal. Ct. App. 1994) (holding that equal protection under the Fourteenth Amendment and the California Constitution are "substantially equivalent and are analyzed in a similar fashion.").

Plaintiffs fail to state a Contracts Clause claim. Even assuming that the public health orders substantially impaired contractual relationships, Plaintiffs have not carried their burden of proving that the orders were not "an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" Sveen v. Melin, 138 S.

Ct. 1815, 1822 (2018) (quoting Energy Rsrvs. Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411–412 (1983)); see also Apartment Ass'n of Los Angeles Cnty., Inc. v. City of Los Angeles, 10 F.4th 905, 913 (9th Cir. 2021), cert. denied, 142 S. Ct. 1699 (2022).

Lastly, Plaintiffs cannot state a claim for a violation of their right to liberty pursuant to article I, section 1 of the California Constitution. See Nat. Org. for Reform of Marijuana Laws v. Gain, 161 Cal. Rptr. 181, 187 (Cal. Ct. App. 1979) ("The guarantees of that section are not absolute and do not operate as a curtailment on the basic power of the Legislature to enact reasonable police regulations.").

We dismiss this appeal against the state defendants as moot and remand with instructions for the district court to vacate its judgment and dismiss the state defendants from this lawsuit. We affirm the district court's order dismissing all claims against the city and county defendants.

AFFIRMED IN PART, DISMISSED IN PART, AND REMANDED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOT FOR PUBLICATION

[FILED: AUGUST 17, 2022]

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BEST SUPPLEMENT GUIDE, LLC; SEAN COVELL,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California; SONIA Y. ANGELL, MD, MPH, in her official capacity as the Director and State Public Health; COUNTY OF SAN JOAQUIN; CITY OF LODI; MAGGIE PARK, MD., in her official capacity as the Public Health Officer of San Joaquin County,

Defendants-Appellees,

and

KATHERINE MILLER, in her official capacity as a member of, and the Chair of the San Joaquin County Board of Supervisors; TOM PATTI, in his official capacity as a member of, and as Vice Chair of, the San Joaquin County of Board of Supervisors; MIGUEL VILLAPUDUA, in his official capacity as a

member of the San Joaquin County Board of Supervisors; CHUCK WINN, in his official capacity as a member of the San Joaquin County Board of Supervisors; BOB ELLIOTT, in his official capacity as a member of the San Joaquin County Board of Supervisors; SHELLIE LIMA, in her official capacity as the San Joaquin County Director of Emergency Services; PATRICK WITHROW, in his official capacity as the Sheriff of San Joaquin County; DOUG KUEHNE, in his official capacity as a member of the Lodi City Council and Mayor of Lodi; ALAN NAKANISHI, in his official capacity as a member of the Lodi City Council and Mayor Pro Tempore of Lodi; MARK CHANDLER, in his official capacity as a member of the Lodi City Council; JOANNE MOUNCE, in her official capacity as a member of the Lodi City Council; SIERRA VRUCIA, in his official capacity as the Chief of the City of Lodi Police Department; SIERRA BRUCIA; MARCIA CUNNINGHAM,

Defendants.

No. 20-17362
D.C. No. 2:20-cv-00965-JAM-CKD
Eastern District of California, Sacramento
ORDER

Before: M. SMITH, LEE, and FORREST, Circuit Judges.

The panel unanimously voted to deny the petition for rehearing en banc. The full court was advised of

the petition for rehearing en banc, and no judge of the court requested a vote on it. Fed. R. App. P. 35.

The petition for rehearing en banc, Dkt. No. 63, is DENIED.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JOHN A. MENDEZ
[FILED: OCTOBER 27, 2020]

BEST SUPPLEMENT GUIDE, LLC., ET AL.

Plaintiff,

vs.

GAVIN NEWSOM, ET AL.

Defendant.
_____/

Sacramento, California
No. 2:20-CV-00965-JAM-CKD
October 27, 2020
1:56 p.m.

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REPORTER'S TRANSCRIPT RE: MOTION TO DISMISS
(Hearing conducted via Zoom videoconference)

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SACRAMENTO, CALIFORNIA, WEDNESDAY, OCTOBER 27, 2020, 1:56 p.m.

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Calling case 20-CV-00965-JAM-CKD; Best Supplement Guide, LLC, et al. v. Newsom, et al.

THE COURT: Starting with Plaintiffs' counsel, if you would state your appearances for the record, please.

MR. CHAVEZ-OCHOA: Good afternoon, Your Honor. Brian Chavez-Ochoa on behalf of the Plaintiff, Sean Covell, and Fitness Systems.

THE COURT: Good afternoon. Mr. Killeen.

MR. KILLEEN: Good afternoon, Your Honor. John Killeen for the State Defendants.

MS. FOX: Good afternoon, Your Honor. Deborah Fox of Meyers, Nave for the City of Lodi, and the County of San
Joaquin, Defendants.

THE COURT: All right.

This is on this afternoon on the Defendants all the Defendants' motions to dismiss the Plaintiffs' Third Amended Complaint.

Court's reviewed the briefing in its entirety as well as the Court's prior order that was issued in

this case back in May of 2020, May 22nd, 2020, with respect to the Plaintiffs' motion for a temporary restraining order and/or preliminary injunction.

So Mr. Chavez-Ochoa, that's where I want to begin.

I'm sure it's no surprise to you, and it's really Cutting through everything, the point raised in the reply briefs.

And that is I have reread my order, although it involved not a motion to dismiss, but a motion for a restraining order, or a preliminary injunction.

It clearly reached a conclusion that there was no likelihood of success on the merits of the claims that had been raised at that point in this case.

Since that order, you filed amended complaints to the point now where we are up to the Third Amended Complaint, yet you haven't focused the case at all on what might be your clients' most meritorious claims, and instead, continue to maintain what I would call a "kitchen sink" approach: Let's keep the nine claims in there and throw everything at the judge and see if something sticks.

And if it didn't stick the first time, I'm not sure it's going to stick this time around, because when I saw this case again and read everything again, the first question that pops up is obviously what's changed since May of 2020 to make this situation

worse for these defendants -- or Plaintiffs, I'm sorry, such that their claims might have some merit at this point?

What's changed at all?

If anything, your clients now are allowed to have activities indoors, albeit severely limited, but at least they're back indoors.

A number of restrictions have been lifted, and the Court's underlying legal rationale is still appropriate.

And I know that your principle argument really focuses on Jacobson, and in effect, that Jacobson shouldn't apply to a motion to dismiss.

But I think the reply briefs respond to that and undermined that argument exactly in the manner that that the Court views it, and that is, that's the legal standard.
It's not a procedural issue.

The Court has to determine at this point, even at a motion to dismiss point, whether there is any legal basis for these claims.

Obviously, we don't have a whole lot of cases prior to all of these lawsuits being brought all over the country challenging the orders of the Government shutting down businesses and the like.

And admittedly, almost every court looked to Jacobson as the standard, but that hasn't changed. Jacobson is the legal standard in this area.

And if that's the standard, and I know you put it in a footnote, if that's what the Court is, in effect, doing, then the Court needs to make that clear.

I couldn't be clearer. I think I made it clear in my May order, and I'm making it clear here today.

That's what I'm looking to as the standard that's to be applied in these -- these very unique and unusual cases.

And applying Jacobson, I just don't see any way that that there's been any change in circumstances since May that would allow any of these claims to go forward, and I'll go through each claim so that there's a record, and you understand my rationale.

But let me tell you just generally, when I look at your clients' lawsuit, what strikes me in your clients' lawsuit -- and, again, it's pointed out and argued in the briefs by the Defendants -- but what's missing here is any facts to support your clients' claims that these orders, the State orders, and the County orders, that these orders do not bear a real and substantial relation to public health.

And there simply is no fact that you have -- you've had obviously months to try to come up with some facts that might support an allegation that

would at least give the Court some pause for thinking these orders don't make any sense.

There really isn't any relationship or substantial relationship to public health, and I don't think you can -- you can make or raise any facts that would support that type of allegation. If you could, you would have put it in your complaints.

You've had three or four chances, and that's the Achilles heel to your lawsuit, if you want to break everything down, and, you know, wonder what's this judge thinking?

There's no -- no scientifically-backed opinion from a public health expert.

There's no one from the CDC.

There's no public health official who stated that it's safe to reopen gyms the way your clients want to reopen them.

That -- that these orders don't make any sense.

Obviously if you had that, you'd have a much better chance of moving forward and challenging these orders, but
that's what strikes me. That's the glaring omission from this lawsuit. I've got defendants who have issued orders based on science. Based on how dangerous this virus is.

This is a virus that kills people, and the only way that we've been able to get some type of handle on the virus, from a public health perspective, is to issue orders like the Governor and the county public health officials have ordered.

I have yet to see, in any of these cases, some public health official, some scientist come forward and say this makes no sense. It makes no sense at all. And I think if it was out there, I would have seen it in your complaint.

There's no doubt. It's, in effect -- as the Defendants' argued -- it's undisputed that the State and County orders do, in fact, bear a real and substantial relation to public health, and then the second part of the Jacobson test is whether these orders are, beyond all question, a plain and palpable invasion of Plaintiffs' fundamental rights.

In my first order, I have found that there really were no fundamental rights that were being impinged upon here.

You've added allegations to try to convince me that there are fundamental rights that are being impinged.

I didn't find the allegations, the additional allegations, to change my view of that, and then the other part that, beyond all question, this is a plain and palpable invasion.

Again, there's no scientific basis.

No facts to support that type of allegation.

I know I threw a lot at you, but that basically was my impression from the reply briefs, and I want to give you an opportunity to respond to the reply briefs.

But I just don't see any basis, legal basis, for allowing this lawsuit to go forward in the district court.

Okay.

Go ahead.

MR. CHAVEZ-OCHOA: Thank you, Your Honor. I understand the Court's position. I understood it from the very beginning. I think at the time that we filed this complaint we were in the very early stages of what we've been experiencing, both locally, and through the state and the courts countrywide.

Since that time, and as we've learned more and more about COVID, I think some of the -- I think it has come out, the world health organization, and has begged the countries not to shut down businesses, so there has been a change of thinking.

For CDC, I mean, I would be the first to admit CDC says one thing this week, and then something the next, and then recuse what they said in the prior weeks.

But there's been a change in the CDC's guidelines as well, and what we have maintained all along is that you can open a gym, and still maintain CDC guidelines for the health and safety of their clients.

The fact that we're this far down the road now, I think gives us a little bit more insight as to what's happening.

I think if the Court is going to apply Jacobson, and there's no doubt in my mind that it is, my only response to that would be is that even in Jacobson, the issue there was mandated vaccines, and there's really three options.

You could get -- you could get the vaccine. You could pay the fine, or you could leave the commonwealth.

So there was some options there, which aren't presented here.

Here, my client has had to abide by the mandates of both the state and the local and county health offices.

But even in Jacobson, the Court said that there might be those circumstances in which the Court would have to intervene, and I think -- and the reason we brought this suit, was we believed that this could be one of those circumstances where we believe the State, the County, and the City Defendants acted perhaps initially in the best interest of the citizens of the state.

But as it -- as COVID went on, and as we saw the death rates plummet to below -- to less than one percent, and we saw now the recovery of those who have COVID, including our President. I mean, he was diagnosed with it, what was it, four days later, or five days later, he was cleared to go back to work.

THE COURT: You're really not going to go there and rely on that; are you?

MR. CHAVEZ-OCHOA: Oh, no, no, no. Not at all, sir. I just --

THE COURT: I don't think if any of us got COVID, we'd get the type of medical treatment that the President of the United States got, so...

MR. CHAVEZ-OCHOA: I concur. I concur. But what I'm saying is this: I think we're seeing in just a -- take me for example, an average citizen, and I'm 64 years of age, and my doctors are pretty sure I had, you know, back in the very early

So I'm not saying, necessarily, that it's -- it's not beginnings of COVID, and I was at risk. I had five heart attacks a year ago today, and had open-heart surgery, and yet I recovered. Something that we have to be concerned with, but I think it's something we have to look to, as far as where we are present day, as to where we were when we filed the first -- the first complaint.

The reason we ended up with the -- the Third, was because this was fluid, and the facts were changing almost on a daily, if not weekly, basis.

So that's where we are at today.

I understand that the Court -- the Court's position, and I'm not -- I'm not going to tell the Court anything that we haven't already told you.

I think we put it in our opposition.

I think we put it in our complaint, and while I disagree that -- let me say this, I don't think Jacobson was ever intended to be a wall or an immunity bar from bringing any actions against government actors under extraordinary circumstances.

I certainly understand the Court's reliance on it.

THE COURT: Okay.

Mr. Killeen, anything you want to add?

MR. KILLEEN: Your Honor, the Court hit the nail on the head.

The only thing that has changed here is that conditions have gotten better for the Plaintiffs since May.

I mean, the Court is well aware having handled all of these cases in April and May, gyms were closed, churches were closed, schools were closed.

Everything was closed.

And now, for gyms, they are allowed to have outdoor operations with modifications, but with no substantive restrictions.

In San Joaquin County, which is in a Tier 2 county, they are allowed to operate indoors with 10 percent capacity.

The idea -- the idea behind the current regime is that -- that capacity limits increases as the County moves through the tier system.

First it's 10 percent, and then it's 20 percent, then it's 50 percent, and then, you know, God willing, all of this goes away, and it becomes 100 percent.

But I think the State's response has been well-tailored to respond to the advances we have made since April or May.

We have made strides in understanding the difference between indoor and outdoor transmission, and the State's regulations responded to that accordingly, and they certainly have not come anywhere close to being a constitutional violation under Jacobson.

THE COURT: I would note it's interesting, and obviously the Court can take judicial notice of certain facts, and I have, but it was only really in a footnote that -- in the State's reply brief -- that the State pointed out that: Subsequent to the filing of the motion to dismiss, the State modified its guidance and put into place the blueprint for a safer economy.

Last accessed on October 19th, 2020.

Currently, whether a fitness center may offer indoor classes and services depends on a county's tier status.

San Joaquin County is currently a Tier 2 red substantial, and under state guidance, fitness centers may open for indoor operations at 10 percent capacity.

So it is, in effect, better than when the lawsuit was first brought.

Ms. Fox, anything you want to add?

MS. FOX: Your Honor, I'll be brief, on behalf of the City and the County.

I have three main points that I wanted to make.

I think the Court has covered them, at least two of them, in your comments.

One, there's simply no federally protected right here.

Two, the rubric of Jacobson applies, and that is a differential rubric, and in this case there is no difference, and change of the law or any circumstances that would warrant, as a matter of law, this complaint moving forward.

And finally, Your Honor, that there has not been any allegations of official policy or practice as against the City of Lodi and the police Chief.

The mere appearance of two officers at the fitness center advising them and educating them about the public health order, does not rise to a level of official action under Monell.

There was no citation.

There was no arrest.

There was no City Council action.

There was no action by an official decision-maker.

I would just like to add for the record a couple of items since the Court's well-reasoned decision of May 22nd.

On May 29th, Your Honor, we had the decision from the United States Supreme Court in the South Bay United Pentecostal cas versus Newsom.

That was on the emergency application.

There, again, the Court used and validated the rubric of Jacobson.

I think that the discussion by Judge Roberts, Chief Justice, is worth offering this afternoon.

Justice Roberts writes: Our Constitution principally entrusts the safety and the health of the people to the pubically accountable officials of the state to guard and protect.

While those officials undertake to act in areas fraught with medical and scientific uncertainties, the latitude must be especially broad. The federal judiciary, Chief Justice Roberts goes on, should not second-guess them.

This is a health crisis of a once in a century.

I know that it is certainly that no one underestimates or wants to diminish the financial and emotional toll that we all suffer here.

But the fact is that under the rubrics at play, they have not met the Jacobson test, and the orders are presumed constitutional.

They have no fundamental right.

There's no constitutional right to work out indoors.

There's no constitutional right to associate and speak to your trainer, or speak to your gym buddies.

That does not rise to a protected First Amendment right.

There's simply no support for that case law.

Your Honor, I had a lot more to say, but I think that you've spent so much time and read the papers, that we'll submit on the papers, unless the Court has some additional questions that you would like me to answer this afternoon.

THE COURT: Mr. Chavez-Ochoa, I did want to raise that with you just to give you an opportunity for purposes of making a record, that I did not see, in effect, any response to that argument with respect to the City.

I thought it was a meritorious argument, but I don't know if you want to respond just for purposes of the record, or whether you are conceding that there really is no basis to keep the City in this lawsuit?

MR. CHAVEZ-OCHOA: Well, your Honor, thank you for asking.

As far as the City, it was more than just the two officers. You know, it was at the direction of the City itself to send them out, and whether or not they were there for purposes of education, or otherwise, I mean, we raised it in our allegation, that's

something that would have been ferreted out later on in discovery.

So I can't answer beyond what I've put. The only other thing that I would answer, Your Honor, or add to what I've already said, and what everybody else has said, because it's been very well-briefed, is it would appear to be the way that these orders have been enforced.

I mean, we're all aware of the horrific, and horrible fates we've seen taking place in the streets and in our City, not only here in this state, but across the country.

And it would appear that there is no enforcement of some of the demonstrations, and probably well-placed demonstrations that should have been allowed, and have been allowed to take place. And not only the demonstrations, but some of the other acts that are absolutely horrific.

But, nonetheless, you know, I think that's one of the things that goes along with what we've said in our opposition.

But, Your Honor, as I said moments ago, I'm not going to challenge you. I don't agree with you, Your Honor, that Jacobson is blanket immunity, but I understand that was your position when you issued the denial of the initial request for temporary restraining order and preliminary injunction. So I -- I --

THE COURT: The question more on the City was simply, normally when there isn't a response to an argument in a motion, I take that as a concession that the argument has merit, and I didn't see, again, any response -- specific response -- in your opposition brief to the arguments raised by Ms. Fox on behalf of the City.

This isn't a Monell claim, and there's really no basis for keeping the City in this lawsuit.

Should I take your failure to respond as a concession?

MR. CHAVEZ-OCHOA: No, Your Honor. It was at least our intention to include all of the Defendants, and not leave out the City, and if we did, it was by omission on our part.

THE COURT: Okay.

MS. FOX: May I respond, Your Honor?

THE COURT: I don't need any further argument.

I'm not going to issue a written opinion.

What I will do at this point is I will go through in as much detail as I think is necessary so there's, in effect, an order on the record in the event this is appealed.

The order, in effect, will be the transcript from this hearing.

To give you, again, what I've already explained very generally, this is my reason for finding that these motions are meritorious and should be granted.

But let me go through these as quickly as I can, claim-by-claim, so everything is covered.

As the Court indicated, both the County and the City Defendants have moved to dismiss this entire action on the grounds that the Plaintiffs have failed to state a claim upon which relief can be granted.

The Defendants' primary argument is that the Plaintiffs still have not identified any protected constitutional right to indoor gym operations.

Defendants further contend that even if Plaintiffs have alleged a protected constitutional right, that they failed to allege that right has been violated under either of the deferential Jacobson framework, or the traditional constitutional standards that apply during non-emergency times.

Plaintiffs respond that the Court should not apply Jacobson when deciding this motion to dismiss, and instead that the Court should apply traditional constitutional standards.

The Court finds that the Plaintiff misunderstands what the application of Jacobson entails, and equates the application of Jacobson with the application of a higher pleading standard.

Plaintiffs' misunderstanding of Jacobson is encapsulated from the following line in their opposition brief, quote, "This Court should reject the State and local Defendants' invitation to invent and to apply their proposed heightened Jacobson pleading standard."

But Jacobson is not about pleading standards.

Jacobson provides the substantive elements needed to state a constitutional claim during a public health emergency.

The elements under Jacobson are, one, whether the Government action has a real or substantial relation to the crisis, and, two, whether the Government action is not beyond all question a plain, palpable invasion of rights secured by the fundamental law.

As indicated from my May decision, with respect to the preliminary injunction, I have already decided the issue with respect to Plaintiffs' arguments that Jacobson should not apply, and we've discussed that already.

And I did apply Jacobson in deciding the TRO application, and I applied Jacobson when deciding motions on pleadings and other legal challenges to State and County health orders, and other orders that I've issued including Givens v. Newsom from May 8th, 2020, and Cross Culture Christian Center v. Newsom issued on May 5th, 2020.

And until or unless the Ninth Circuit or the Supreme Court possibly revisits Jacobson or provides a different standard for evaluating State action that's taken to protect public health, the Court does find that Jacobson remains the proper standard to be applied throughout this litigation.

Under Jacobson the Court must uphold the gym closures required by the State and County stay-at-home orders, unless, again, there's no real or substantial relation to public health, or the measures, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.

Taking up that first factor, the Court does find that this complaint, the Third Amended Complaint, does fail to allege any facts that could support the contention that the public health orders lack a real or substantial relation to the pandemic.

And as I've indicated, the Court is skeptical that the Plaintiffs could do so.

As I've explained in my prior order, denying the TRO request, COVID-19 is extremely infectious.

Easily spread through droplets generated when an infected person coughs or sneezes or through droplets of saliva or discharge from the nose.

This undisputed information about COVID-19 and its transmission logically explains why the State and County officials have found that temporary gym

closures were and continue to be a critical step in slowing the virus' spread.

Workout facilities often contain high-density groups, congregating and exercising in closed areas, at the same time breathing heavily and sharing gym equipment.

And in the League of Independent Fitness Facilities and Trainers case, that court addressed a similar legal challenge to pandemic-related gym closures and also noted that heavy breathing and sweating in an enclosed space containing many shared surfaces creates conditions likely to spread the virus, and fairly supports the Governor's treatment of indoor fitness facilities.

While the Plaintiffs have amended their complaint three times since the denial of the request for a TRO, there has not been any factual allegations added that go to how the Governor's orders, or the County orders lack a real or substantial relation to the pandemic.

There are new factual sections in the Third Amended Complaint that have to do with the social value of gyms.

The George Floyd protests.

June and July changes to State and County public health orders.

But there have not been any facts added that go to the issue of whether the orders lack a real or substantial relation to the pandemic.

Because the Third Amended Complaint fails to allege sufficient facts to support the claim that the orders lack a real or substantial relation to the pandemic, it does fail, as a matter of law, on the first prong on Jacobson.

The Third Amended Complaint also fails as a matter of the law to show that the challenged orders are, quote, beyond all question, a plain and palpable invasion of rights secured by fundamental law.

In my prior order I explained that this standard plainly puts a thumb on the scale in favor of upholding state and local officials emergency public health responses.

But as I'll go on to explain, this Court does not even need to be a thumb on the scale, because Plaintiffs have failed to show any rights secured by the fundamental law is at issue in this case, and let alone that such a right has been violated.

And for this reason, the Court finds that the Third Amended Complaint fails even when viewed under traditional constitutional standards.

Starting with Count 1, the First Amendment claim, the Plaintiffs argue that the standing county gym closures unlawfully infringe upon their freedom of speech assembly and expressive association.

The First Amendment does protect individuals from undo interference with their freedom of speech assembly and expressive association.

The First Amendment's free speech clause only affords protection to symbolic or expressive conduct and actual speech.

Again, going to my prior order from May, I did warn that:

Plaintiffs' motion fails to explain how the State and County gym closures prohibit protected speech.

The State and County gym closures plainly restrict non-expressive conduct operating gyms, and this Court lacks any authority for the proposition that operating a gym implicates the First Amendment's free speech protections.

That view remains, to this day, and as argued by the Defendants, this case that the gyms claim -- at least this claim -- involves non-expressive conduct with an incidental effect on speech.

It doesn't involve speech or expressive conduct as you would expect in a claim of this type.

The Third Amended Complaint fails to provide authority supporting the Plaintiffs' position that operating a gym implicates First Amendment freedoms of assembly and of association protections.

The freedom of association and freedom of assembly protections are largely viewed as one, and parties may only bring an expressive association claim under the First Amendment if they demonstrate 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.

While Plaintiffs' attempt to characterize the interactions between gym staff and customers as expressive association, the Plaintiffs still have offered no legal authority to support the idea that this type of non-expressive commercial interaction is, in fact, protected.

In short, the Plaintiffs have not identified any excessive conduct or speech that is protected by the First Amendment.

The addition of new factual sections in the Third Amended complaint, apparently intended to show the preference of one topical category of speech over another constituting content-based restrictions is still of no avail.

The new amendments to the complaint do nothing to further Plaintiffs' First Amendment arguments, because the Plaintiffs still have not shown that the First Amendment protections are triggered in the first instance for the non-expressive conduct at issue, and, therefore, Count 1, the first

claim, fails as a matter of law to state a claim for relief under the First Amendment.

And while the inquiry could end there, the Court does note that even if Plaintiffs could show that the First Amendment free-speech protections were somehow triggered, the orders would still be constitutional, because they are content neutral, narrowly tailored to serve a significant governmental interest, and they leave open ample alternative means of communication.

Indeed, the only thing the orders have even prohibited Plaintiffs from, in terms of speech, are conversations inside the gym due to the danger of the spread of the COVID-19 virus.

Plaintiffs have always been permitted to communication and associate with their clients through virtual gatherings, and through things such as Zoom.

And since July, Plaintiffs have been free to conduct outdoor gatherings with their clients, although the Court understands that this gym in particular has pointed out that they aren't allowed to engage in outdoor activities.

Likewise, even if Plaintiffs could show that the First Amendment free association assembly protections were triggered here, the orders would still be constitutional, because they serve a compelling state interest unrelated to the suppression of ideas, namely responding to a public

health emergency that cannot be achieved through means less restrictive of associational freedom.

Turning to the takings claims in Count 2 and Count 9, under both Federal and State law.

In those claims, the Plaintiffs allege that these orders constitute a regulatory taking by the County and City Defendants in violation of the Fifth Amendment.
The Defendants respond, first, that a takings claim cannot operate as a substitute for a challenge to the substantive validity of a law, citing to Lingle v. Chevron U.S.A.

The Defendants argue the Plaintiffs' takings claim must fail here, because they really are actually challenges to the substantive validity of the public health orders.

The Plaintiffs attempt to distinguish Lingle by simply arguing that the procedural posture of Lingle was a summary judgment motion, not a motion to dismiss, and, therefore, according to the Plaintiffs, all they need to do at this stage is allege facts and establish a taking without compensation.

The Court does not find merit in that argument, but even if the Court were to accept the procedural argument, Plaintiff still -- the Court finds -- have failed to establish a regulatory taking.

The case of Tahoe-Sierra Pres. Council v. Tahoe Regional Planning Agency is instructive.

In that case the Supreme Court held that even a complete but temporary restriction on property use, like the 32-month moratorium on the development at Lake Tahoe, which was at issue, did not in and of itself, constitute a regulatory taking.

Indeed, if the Supreme Court did not find a 32-month moratorium to constitute a regulatory taking, Plaintiffs' allegations of a few months of gym closures, and now capacity restrictions on re-opening, are clearly insufficient to establish a regulatory taking, and, therefore, Plaintiffs' takings claim under the Fifth Amendment fails as a matter of law.

As with the federal claim, Plaintiffs' takings claim under the California Constitution in Count 9 also fails.

Plaintiffs argue that California Takings Clause differs greatly from the Federal Takings Clause, but the California Supreme Court has held that the California Constitution Takings Clause should be construed congruently with the Federal Takings Clause.

That's the San Remo Hotel v. City and County of San Francisco case.

Further under California law, the challenged orders would survive as lawful and temporary economic restrictions supported by inherent police power, First English Evangelical Lutheran Church

v. County of Los Angeles, a 1989 Court of Appeals case, where the Court held that a temporary prohibition did not amount to a compensable taking.

This analysis applies, and Plaintiffs' state law takings claim also fails as a matter of law.

Plaintiff raises in Count 3 an allegation and a claim that the order violated their right to travel under the Fourteenth Amendment Privileges or Immunities Clause.

This right embraces at least three different components.

One, the right of a citizen of one state to enter and leave another state.

Two, the right to be treated as a welcomed visitor when temporarily present in another state.

And, Three, the right for travelers to elect to become residents to be treated like other residents of that state.

Neither the Supreme Court, nor the Ninth Circuit has recognized a constitutional right to intrastate travel.

Plaintiffs acknowledge that no such right has been recognized by the Ninth Circuit or the Supreme Court, but Plaintiffs ask, or argue, that they have well-pled facts alleging injury to the right to travel for which they seek vindication here.

But because the constitutional right to intrastate travel does not exist, it is not relevant what facts Plaintiffs have pled.

This Court declines Plaintiffs' invitation. This is not the court to create a constitutional right, that neither the Ninth Circuit, nor the Supreme Court have found exists.

The Court declines that invitation, therefore, and dismisses the Count 3 claim that is based upon that theory and those allegations.

Interesting claim.

Creative.

But I'll let the Ninth Circuit or Supreme Court tell me if it really exists.

That's not my place.

In Count 4 there are three separate violations of the Fourteenth Amendment Due Process Clause that are raised: procedural due process claim, a substantive due process claim, and a vagueness claim.

I addressed all of those in the May order.

My view of the claims, the due process claims back then, has not changed.

Very simply and quickly, there is no legal requirement that notice be provided before the orders were issued.

There's no law that supports that type of procedural due process claim, and, therefore, that claim fails as a matter of law.

The substantive due process claim also fails. In order to state a claim for substantive due process, the Plaintiff has to show that the state action challenge neither shocks the conscience, or arbitrarily deprives the Plaintiff of a fundamental right.

One, there are no fundamental rights that have been identified in this case, and, therefore, that claim fails.

This also is the case that involves a state action that shocks the conscious.

In terms of the vagueness portion of the due process claim, the Plaintiffs argue that the orders are unconstitutionally vague because they fail to provide a person of ordinary intelligence fair notice of what is prohibited, or are so standardless that it authorizes or encourages seriously discriminatory enforcement.

Understandably, Plaintiffs are frustrated that the orders continue to be changed or modified with little or no advanced notice, and according to the Plaintiffs, embody the whims of the Defendants.

Obviously that's a sentiment that many other business owners, many other individuals, share that sentiment, but that doesn't mean that the grievance rises to the level of unconstitutional vagueness, at least not as pled.

Plaintiffs needed to plead more than a conclusory allegation that the public health orders are vague. Again, under Ashcroft v. Iqbal, mere conclusory statements do not suffice in complaints.

Plaintiffs have failed to explain alleged facts that show how the orders are vague as to what is permitted and what is not, such that a person of ordinary intelligence would not have fair notice of what is prohibited.

Indeed, through their allegations in the Third Amended Complaint, Plaintiffs themselves have acknowledged that they actually understand the public health orders and what they do and do not permit.

As pled, the vagueness claim also fails as a matter of law.

Count 5 is a Fourteenth Amendment Equal Protection Clause claim. Count 8 is the State counterpart, California Constitutional Equal Protection Clause claim.

The same claim was -- the federal claim was part of the motion for a restraining order.

In the prior order this Court explained that the Equal Protection Clause prohibits the Government from drawing arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective.

Equal Protection claims only garner strict scrutiny when a law disadvantages a suspect class, or impinges upon a fundamental right.

In the May order, the Court explained that rational basis review applies to the challenged orders, do not impinge upon Plaintiffs' fundamental rights, nor do they discriminate based on any suspect classification.

Plaintiffs do raise an argument with respect to the George Floyd protests. Plaintiff contends that the decisions of the State and County to accommodate, encourage and endorse those demonstrations, protests, et cetera, embody a preference for those messages over the messages of the Plaintiffs, and that a preference for one message embodies a classic violation of the Equal Protection Clause.

Plaintiffs then insist that strict scrutiny applies because of this preferential and favorable treatment given to the George Floyd protestors.

The Court disagrees as explained with respect to the First Amendment claim. Plaintiffs have failed to allege that the First Amendment protections attach

in the first instance, and because none of their other claims survived the Court's analysis, there is no fundamental right upon which the orders have impinged, and, therefore, no fundamental right upon which strict scrutiny could be triggered.

The Court's conclusion does remain the same, that rational basis applies, and as explained in the May order, the Governor's orders, and the County Public Health official orders clearly pass muster under a rational basis review.

In my TRO order I explained that the decision to include gyms within the general prohibition on large indoor gatherings was rational, given the fact that gyms are particularly high-risk environments for the transmission of COVID-19.

The newest restrictions on gyms reopening, including capacity restrictions, likewise, passes rational basis review, because they are rationally related to slowing the spread of COVID-19, because the challenged orders easily survive rational basis review, Plaintiffs' Fourteenth Amendment Equal Protection claim fails.

In Count 8, Plaintiffs allege the orders violate the Equal Protection Clause of the California Constitution.

Parties do agree that equal protection claims under the California Constitution are generally analyzed the same as equal protection claims under the United States Constitution, and, therefore, given

the fact that the claim fails under the U.S. Constitution, it fails as well as a matter of law under California Constitution.

Count 6 is a Contracts Clause claim.

Court finds the Plaintiffs have not alleged any facts showing that the orders that are being challenged lack a significant and legitimate public purpose.

Rather than allege facts, Plaintiffs merely repeat a conclusory statement that, quote, "There is no significant or legitimate public purpose underlying the orders complained of in the opposition brief."

And that's from their Third Amended Complaint at paragraph 350.

This conclusory statement does not suffice to state a claim without any contrary showing.

This Court concludes the obvious, that the orders being challenged do, in fact, have a significant and legitimate public purpose to curb the spread of COVID-19.

Plaintiffs have also not alleged any fact showing that the contractural impairments resulting from the orders are not reasonable and necessary to fulfill a public purpose.

Again, Plaintiffs' argument is simply to repeat the same conclusory statement that Fitness Systems

has alleged, which is that the orders complained of are neither reasonable or necessary to the service of the alleged government interest.

As this Court has noted, the orders, while exacting, are temporary, rooted in science, and proportional to the threat that COVID-19 poses.

Plaintiffs' conclusory arguments and allegations do not provide the Court with any reason to change its analysis, and the Plaintiffs' claim under the Contracts Clause fails as a matter of law.

And then finally the last count, Count 7, alleges a violation of the California Constitution's Liberty Clause.

This Court has already determined that neither the County order, generally, nor its gym closures, specifically, amount to virtual imprisonment such that it violates Plaintiffs' right to liberty under the cases the Plaintiffs cite.

That was the Court's view back in May.

It's still the Court's view and analysis.

The challenged public health orders simply do not operate as a quarantine on Plaintiffs, let alone amount to a virtual imprisonment.

Indeed, Plaintiffs' best supplemental is a corporate entity.

It cannot be either infected or quarantined, and Plaintiff, Sean Covell, is not, and has never been restrained from leaving his home, therefore, this claim plainly fails.

In short, Plaintiffs have failed to show that any right secured by the fundamental law is at issue here, let alone that there has been a plain and palpable invasion of such a right.

No constitutionally protected right attaches to indoor gym activities, and while the Court has expressed its understanding and concern not only for Plaintiffs' economic plight, but the plight of all businesses that have been affected due to this pandemic.

The Court has also recognized that these orders play an important role in preventing what is a serious -- a deathly challenge to the public health.

And the courts, as I indicated in my order in May, the courts appreciate -- and I want to read this again:

This Court finds that the State and County orders, as is, and is currently applied, are a constitutional response to an unprecedented pandemic.

Plaintiffs continued compliance with these orders are essential to the well-being of the general public.

The continued performance of this critical civic duty will help prevent the spread of COVID-19 and save lives, and for this, the Plaintiffs, and all gym owners similarly situated, are to be commended.

Finally, with respect to the City Defendants, I do agree with Ms. Fox's argument, that in addition to the reasons for dismissal that I just discussed, there's also a separate and independent reason for dismissing the claims against the City Defendants, and that is the Plaintiffs have not alleged a single City policy or custom to support that claim against the City Defendants, and in order to establish municipal liability under Section 1983, the Plaintiff must show that the policy or custom led to Plaintiffs' injury.

Absent an explicit policy, a Plaintiff may satisfy the requirement by showing there's a custom that deprives the Plaintiff of his or her constitutional rights, but random acts or isolated events are insufficient to establish custom.

Plaintiffs only alleged one contact with the City Defendants when the Lodi police officers came out to Plaintiffs' gym to educate them about health orders, and potential consequences of violating the orders by reopening the gym.

One isolated incident is insufficient to establish a custom or policy, and for this additional reason, the Plaintiffs' claims against the City Defendants fail as a matter of law.

And then finally, with respect to leave to amend, the leave to amend is denied. The Court does dismiss all of these claims with prejudice.

At this point, Plaintiffs have had ample opportunity to try to state claims that would survive dismissal.

This is the Third Amended Complaint, as I have indicated, and any further amendment the Court finds would be futile.

For those reasons, the Court grants the County and City Defendants' motion to dismiss. The Court grants the State Defendants' motion to dismiss, and Plaintiffs' request for leave to amend is denied.

Okay.

Thank you all.

The transcript, as I said, will serve as the Court's order, and hopefully creates a sufficient record if this goes up on appeal.

Okay.

Thank you.

MR. FOX: Thank you, your Honor.

MR. CHAVEZ-OCHOA: Thank you, your Honor.

MR. KILLEEN: Thank you, your Honor.

(The proceedings adjourned at 2:51 p.m.)

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[Court Reporter's Certification Omitted]

BEST SUPPLEMENT GUIDE, LLC v. NEWSOM
No. 2:20-cv-00965-JAM-CKD.

[FILED: MAY 22, 2020]

BEST SUPPLEMENT GUIDE, LLC; SEAN COVELL, an individual,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

United States District Court, E.D. California.

May 22, 2020.

ORDER DENYING PLAINTIFFS' EX PARTE APPLICATION AND MOTION FOR EMERGENCY TEMPORARY RESTRAINING ORDER AND FOR ORDER TO SHOW CAUSE WHY PRELIMINARY INJUNCTION SHOULD NOT ISSUE.
JOHN A. MENDEZ, District Judge.

Best Supplement Guide LLC is a California limited liability corporation that conducts business under the trade name "Fitness System." Compl. ¶ 17, ECF No. 1. Fitness System operates three membership-based gyms, including one in Lodi, California. Compl. ¶ 50. Sean Covell organized and registered Fitness System within the State of California. Compl. ¶ 20. He is the director, manager, and president of the corporation. Id. In March 2020,

Governor Newsom and San Joaquin County enacted "stay at home" orders to help counteract the rapid spread of COVID-19. Compl. ¶¶ 68-74. The State and County Orders required Plaintiffs to close Fitness System's Lodi facility against their wishes. Compl. ¶ 95. The gym remains closed.

In response, Plaintiffs brought this civil rights action against various state and local officials, challenging the validity and enforcement of both stay at home orders. Shortly thereafter, Plaintiffs filed an ex parte application to temporarily enjoin enforcement of the State and County Orders.[34] Mot. for TRO ("TRO"), ECF No. 3. The State and Local Defendants oppose the motion. See State Defs.' Opp'n to Plfs.' Ex parte App. ("State Opp'n"), ECF No. 9; County and City Defs.' Opp'n to Plfs.' Ex parte App. ("Local Opp'n"), ECF No. 10. For the reasons discussed below, the Court denies Plaintiffs' request for a temporary restraining order and for an order to show cause why a preliminary injunction should not issue.

I. BACKGROUND

In December 2019, a novel coronavirus known as COVID-19 began spreading across the globe. Compl. ¶ 61. The virus quickly traveled from one country to the next, and by late January 2020, the United States Secretary of Health and Human Services declared a public health emergency. Compl. ¶¶ 61-62. COVID-19 eventually reached California and

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[34] The Court determined Plaintiffs' ex parte application was suitable for decision without oral argument. E.D. Cal. L.R. 230(g).

began infecting people within its communities. Compl. ¶¶ 63-65. In an effort to prevent widespread infection, Governor Newsom declared a state of emergency and issued Executive Order N-33-20. Compl. ¶¶ 63, 68. The order directed California residents to "stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure services." Compl. ¶ 69; see also Ex. G to TRO, ECF No. 3-1. Governor Newsom reserved authority to "designate additional sectors as critical [to] protect the health and well-being of all Californians." Ex. G to TRO.

On March 20, San Joaquin County followed suit. Compl. ¶ 74. It issued a stay at home order directing "all individuals living in the County to stay . . . at their place of residence except . . . to provide or receive certain essential services or engage in certain activities." Ex. J to TRO, ECF No. 3-1. The County Order's intent was to help implement the State stay at home order and slow the spread of COVID-19. Id.

As COVID-19 continued to spread, Governor Newsom and County officials issued amendments containing increasingly stringent restrictions. Compl. ¶¶ 76-85. Specifically, an April 14 amendment to the County's stay at home order required all gyms to close. Compl. ¶ 85. In the April 14 amendment, the County again maintained it was implementing the State Order. Compl. ¶ 80.

In late April, Plaintiffs announced they would reopen Fitness System's Lodi facility

notwithstanding the County Order. Compl. ¶ 100. San Joaquin County and the City of Lodi learned of Plaintiffs' plans to reopen. Compl. ¶¶ 102-103. On April 30, three Lodi Police Officers arrived at the Lodi gym with a letter from County Counsel. Compl. ¶¶ 103-104, 111. The officers informed Covell that reopening the gym would result in civil, administrative, and criminal penalties. Compl. ¶¶ 106-110.

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). Consequently, 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 and the Local Defendants request the Court take judicial notice of various documents issued by the federal government, the State of California, San Joaquin County, and the City of Lodi. See TRO at 11-13; Local Defs.' RJN, ECF No.

11. Moreover, the State Defendants request the Court judicially notice "a series of order[s] and directives of the Governor and Public Health Officer" that make up the State's stay at home order. State Defs.' RJN, ECF No 9-3. Finding these government documents to be proper subjects of judicial notice, the Court grants the parties' requests.

B. Legal Standard

Parties seeking a temporary restraining order must establish (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); see also Stuhlbarg Intern Sales Co., Inc. v. John D. Brush and Co., Inc., 240 F.3d 832, 839 n.7 (9th Cir. 2001). 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, 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

Arguing they satisfy each of the four Winter factors, Plaintiffs request the Court temporarily enjoin enforcement of the State and County orders so Fitness System may reopen its Lodi facility. TRO at 13-27. But the Court finds Plaintiffs have not shown they are likely to succeed on the merits of any of the claims discussed in their motion. Nor have they raised serious questions going to the merits of these claims. Emergency relief is therefore improper.

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

This Court, alongside many others, has adopted the standard set forth in Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 31 (1905) to assess the constitutionality of a state or local official's exercise of emergency police powers. See Givens v. Newsom, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224, at *3 (E.D. Cal. May 8, 2020); Cross Culture Christian Center. v. Newsom, ___ F. Supp. 3d ____, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111, at *4 (E.D. Cal. May 5, 2020); see also Calvary Chapel of Bangor v. Mills, ___ F. Supp. 3d ____, No. 1:20-cv-00156-NT, 2020 WL 2310913, at *7 (D. ME May 9, 2020); SH3 Health Consulting, LLC v. Page, No. 4:20-cv-605-SRC, 2020 WL 2308444, at *6 (E.D. Mo. May 8, 2020); Gish v. Newsom, No. 5:20-cv-00755-

JGB(KKx), 2020 WL 1979970, at *5 (C.D. Cal. April 23, 2020). Accordingly, this court must uphold the gym closures required by the State and County stay at home orders unless (1) there is no real or substantial relation to public health, or (2) the measure is "beyond all question" a "plain [and] palpable" invasion of rights secured by the fundamental law. Cross Culture Christian Ctr., 2020 WL 2121111, at *5 (quoting Jacobson, 197 U.S. at 30).

a. Real and Substantial Relation to Public Health

The Court first finds that the State and County gym closures bear a real and substantial relation to public health. In reaching this conclusion, the Court disagrees with Plaintiffs' contention that the State and County orders are simply too far reaching to bear a substantial relation to public health. See Reply at 10-12, ECF No. 16. COVID-19 is extremely infectious. State Opp'n at 10. It can "easily spread through droplets generated when an infected person coughs or sneezes, or through droplets of saliva or discharge from the nose." Park Decl. ¶ 6, ECF No. 10-1. "These droplets can [] live on skin as well as objects," allowing the virus to spread "when there is contact between people" or "when a person touches contaminated objects." Id. This undisputed information about COVID-19 and its transmission logically explains why State and County officials found that temporary gym closures were, and continue to be, a critical step in slowing the virus's spread. Workout facilities often contain high density groups, congregating and exercising in closed areas

at the same time, breathing heavily, and sharing gym equipment. Park Decl. ¶ 21. "And unlike grocery stores . . . many gym members return to [their gyms] multiple times per week as part of a fitness routine." Id.

Plaintiffs' reply brief highlights the "miniscule" COVID-19 infection, hospitalization, and death rates in California and San Joaquin County. Reply at 2-4. Presumably, these statistics are designed to showcase a disproportionality between the drastic economic impact of the State and County orders and the danger COVID-19 poses. To the extent that this was Plaintiffs' objective, their data points—stripped of any context—fall short of reaching their goal. Plaintiffs wholly fail to grapple with the possibility that the health of their neighbors is a symptom of the stay at home orders, rather than evidence that the restrictions aren't needed.

Just like the current restrictions on in-person church services and in-person protests, the gym closures required by the State and County orders plainly bear a real and substantial relation to public health. See Givens, 2020 WL 2307224, at *4; Cross Culture Christian Ctr., 2020 WL 2121111, at *4.

b. Plain and Palpable Invasion of Fundamental Law

The State and County orders are also not "beyond all question" a plain and palpable invasion of Plaintiffs' fundamental rights. Although courts have not yet defined the precise contours of this standard, it plainly puts a thumb on the scale in favor of

upholding state and local officials' emergency public health responses. Viewing the State and County orders through this lens, the Court finds the State and County gym closures do not exceed the scope of remedial action Jacobson, 197 U.S. at 30 allows.

i. Freedom of Speech, Assembly, and Expressive Association[35]

The First Amendment protects individuals from undue interference with their freedom of speech, assembly, and expressive association. U.S. CONST., amend. I; De Jonge v. Oregon, 299 U.S. 353, 364 (1937). Plaintiffs argue the State and County gym closures unlawfully infringe upon each of these freedoms. TRO at 14-15. The Court disagrees.

As a preliminary matter, Plaintiffs' motion fails to explain how the State and County gym closures prohibit protected speech. The First Amendment's free speech clause only "affords protection to symbolic or expressive conduct [and] actual speech." Virginia v. Black, 538 U.S. 343, 358 (2003). As Defendants argue, the State and County gym

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[35] In Plaintiffs' TRO, they argue the California Constitution, like the United State Constitution, protects the expressive right to speech, assembly, and association. TRO at 14 n.17 (citing Cal. Const. art. 1, § 3). Plaintiffs' complaint, does not, however, set forth a cause of action under Article 1, Section 3 of the California Constitution. The Court will not adjudicate Plaintiffs likelihood of success on a claim they have not alleged. This principle applies with the same force to Plaintiffs' assertion that the California Constitution protects a right to intrastate travel. See TRO at 18 n.19.

closures plainly restrict non-expressive conduct: operating gyms. The Court lacks any authority for the proposition that operating a gym implicates the First Amendment's free speech protections. State Opp'n at 12; Local Opp'n at 12; see also United State v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled `speech whenever the person engaging in the conduct intends thereby to express an idea."). Plaintiffs are therefore unlikely to succeed on the merits of this claim. They also fail to raise serious questions going to the claim's merits.

Nor are Plaintiffs likely to succeed on the merits of the freedom of assembly or freedom of association claims. Today, the freedom of association and freedom of assembly are largely viewed as one. See Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). Parties may only bring an expressive-association claim under the First Amendment if they 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. Plaintiffs contend that "[w]hen Fitness System and Covell's staff and customers interact, they engage in expressive association and the advancement of shared beliefs." TRO at 14. They do not, however, cite any cases to support the idea that the freedom to associate is designed to protect this type of non-expressive, commercial interaction. Just like the freedom of speech, the rights conferred by the

freedoms of assembly and association do not guard against the grievances Plaintiffs claim.

ii. Right to Travel

It is well-established that the Fourteenth Amendment's Privileges or Immunities Clause enshrines a "constitutional right to travel from one State to another." Saenz v. Roe, 526 U.S. 489, 498 (1999). This right "embraces at least three different components": (1) the right of a citizen of one state to enter and leave another state; (2) the right to be treated "as a welcome visitor" when temporarily present in another state; and (3) the right for travelers who elect to become residents to be treated like other residents of that state. Id. at 500. But the Supreme Court has not defined or even recognized a constitutional right to intrastate travel. The Ninth Circuit has been similarly silent on this issue. See Adams v. United States Dep't of Agric., No. CV 08-283-TUC-RCC, 2010 WL 11523866, at *7 (D. Ariz. Mar. 9, 2010) (citing Nunez ex rel. Nunez v. City of San Diego, 114 F.3d 946, 949 n.7 (9th Cir. 1994)).

Plaintiffs contend that although the Supreme Court has not yet recognized a constitutional right to intrastate travel, it "certainly [is] not dismissive of the possibility" that such a right exists. Reply at 7. Plaintiffs' argument that their claim at least raises questions about the merits of an alleged right to intrastate travel claim misunderstands the burden Plaintiffs bear at this stage of the proceedings. To obtain the preliminary relief under the Jacobson framework, Plaintiffs must either show (1) they are

likely to succeed on the merits of their claim that the State and County gym closures are beyond all question an invasion of their fundamental rights, or (2) there are serious question going to the merits of whether the State and County gym closures are beyond all question an invasion of their fundamental rights. This Court cannot find that the State and County orders violate "beyond all question" a right that is not yet known to exist. Plaintiffs are unlikely to succeed on this claim and have failed to raise serious questions going to its merits.

iii. Due Process

The Due Process Clause contained in the Fourteenth Amendment contains both a procedural and substantive component. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997). "Procedural due process imposes constraints on governmental decisions which deprive individuals of `liberty' or `property interests within the meaning of the Due Process clause." Mathews v. Eldridge, 424 U.S. 319, 332 (1976). "A liberty interest may arise from the Constitution itself . . . or it may arise from an expectation or interest created by state laws or policies. Wilkinson v. Austin, 545 U.S. 209, 222 (2005) (citing Wolff v. McDonnell, 418 U.S. 539, 556-558 (1974)). Substantive due process, on the other hand, "forbids the government from depriving a person of life, liberty, or property in such a way that . . . interferes with rights implicit in the concept of ordered liberty"—regardless of what type of process is first given. Engquist v. Oregon Dept. of Agric., 478 F.3d 985, 996 (9th Cir 2007).

Plaintiffs seem to argue that State and County officials should have afforded them some sort of legal process prior to enacting and threatening to enforce their stay at home orders. TRO at 19. Without citing any supporting authority, Plaintiffs contend the State and Local Defendants were under an obligation to conduct individualized public health investigations before enacting any measures designed to protect the public from COVID-19's spread. Id. Not so. Indeed, as the State argues, the Ninth Circuit has specifically rejected the notion that the Due Process Clause requires this type of pre-deprivation process before enacting and enforcing laws of general applicability. State Opp'n at 17-18 (citing Halverson v. Skagit County, 42 F.3d 1257, 1260 (9th Cir. 1994)). "[G]overnmental decisions which affect law areas and are not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing; general notice as provided by law is sufficient." Halverson, 42 F.3d at 1260. Plaintiffs do not allege the current gym closures are targeted at individual gym owners or particular facilities. Rather, the State and County orders prohibit the operation of all gyms and workout facilities within their respective jurisdictions. State Opp'n at 18 (citing Ex. G to TRO).

Plaintiffs' due process claims do not fare any better under the Due Process Clause's substantive component. As discussed above, Plaintiffs are unlikely to show that the State and County gym

closures arbitrarily deprived them of their fundamental rights to travel, engage in expressive association, speak, or assemble. Plaintiffs' remaining theory of substantive due process liability is that the State and County orders unlawfully abridge Plaintiffs' right to pursue the occupation of their choice. TRO at 18-19. To be sure, "[i]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Sagana v. Tenorio, 384 F.3d 731 (9th Cir. 2004) (quoting Truax v. Raich, 239 U.S. 33, 41 (1915)). Even so, neither the Supreme Court nor the Ninth Circuit "has []ever held that the right to pursue work is a fundamental right," entitled to heightened constitutional scrutiny. Id. at 743.

The judicial review that applies to laws infringing on nonfundamental rights is "a very narrow one." Id. The Court need only ask "whether the government could have had a legitimate reason for acting as it did." Id. (emphasis in original). The Court finds that the State and County orders, albeit burdensome, were enacted for a legitimate reason. As this Court has previously explained, COVID-19 is a highly infectious, and sometimes deadly, virus that is often spread by people who do not even know they have it. There's no cure or vaccine, and its long-term effects are still largely unknown. But health experts do know this: limiting physical contact between people is the most effective way to stop COVID-19's spread. Park Decl. ¶¶ 6-8. Given these uncontroverted facts,

elected officials at the state and county level enacted stay at home orders, codifying this best practice into law. The Court finds this to be a legitimate reason for temporarily restricting Plaintiffs' right to pursue the occupations of their choice.

iv. Equal Protection

As both parties agree, the Equal Protection Clause prohibits the government from drawing "arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection." TRO at 20 (citing City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985)); Local Opp'n at 15 (same). The parties, however, disagree about what degree of constitutional scrutiny applies to the State and Local orders. Equal protection claims only garner strict scrutiny when a law "disadvantages a suspect class or impinges upon a fundamental right." Maynard v. U.S. Dist. Court for the Cent. Dist. Of Calif., 701 F.Supp. 738, 742 (1988). As previously explained, the State and County orders do not impinge upon Plaintiffs fundamental rights. Nor do they discriminate on the basis of any suspect classification. As a result, the orders need only survive rational basis review. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

When a law regulates different classifications of conduct differently, rational basis review requires that there be "a plausible policy reason for the classification" and that "the relationship of the classification to its goal is not so attenuated as to

render the distinction arbitrary or irrational." Angelotti Chiropractic, Inc. v. Baker, 791 F.3d 1075, 1085 (9th Cir. 2015) (quoting Nordlinger v. Hahn, 505 U.S. 1, 11 (1992)). Plaintiffs argue it is arbitrary to keep gyms closed when they are equally as capable of complying with the CDC's social distancing guidelines as businesses that have been allowed to reopen. But State and County public health experts disagree with this premise. Dr. Park's declaration, in particular, identifies several reasons why the challenges posed by reopening gyms differ, both in kind and in scale, from those that arise when reopening other businesses. Park Decl. ¶¶ 20-26. These reasons persuade the Court that State and County's continued gym closures bear a rational relationship to public health.

c. Right to Liberty

Finally, Plaintiffs contend that the State and County stay at home orders violate their right to liberty under Article I, Section 1 of the California Constitution. As an initial matter, Plaintiffs' state constitutional claim against state officials in their official capacity is barred by the Eleventh Amendment. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) (finding the Ex parte Young, 209 U.S. 123 (1908) and Edelman v. Jordan, 415 U.S. 651 (1974) exceptions to Eleventh Amendment immunity inapplicable in a suit against state officials on the basis of state law). Plaintiffs can neither succeed nor proceed on this claim against the State.

Plaintiffs argue they are nonetheless likely to succeed on their Article 1, Section 1 claim against the Local Defendants because public health officials may not exercise their quarantine powers absent "reasonable grounds [] to support the belief that the person so held is infected." TRO at 22 (quoting Ex Parte Martin, 83 Cal.App.2d 164, 167 (1948)). Plaintiffs also cite Jew Ho v. Williamson, 103 F.10 (C.C.D. Cal. 1900), where the California 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 Plaintiffs rely upon 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. 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." State Opp'n at 22. That would require far more aggressive testing and contact-tracing, neither of which the State, at present, has the capacity to do. Id. It also ignores the fact that many people who are infected with COVID-19, and contributing to its spread, are completely asymptomatic. Id.

The Court is under no illusion that compliance with the State and County stay at home orders is easy or

not causing economic hardships. The changes to daily life caused by the restrictions these orders impose range from uncomfortable to crippling, depending on each person's circumstances. But neither the County order, generally, nor its gym closures, specifically, amount to "virtual imprisonment" such that it violates Plaintiffs' right to liberty under the cases Plaintiffs cite. See TRO at 22 (quoting Ex parte Arta, 52 Cal.App. 380, 383 (1921)). Plaintiffs are unlikely to succeed on this claim and do not raise serious questions going to its 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. Cross Culture Christian Ctr., 2020 WL 2121111, at *8.

D. Conclusion

The restrictions imposed by the State and County orders are exacting. But they are also temporary, rooted in science, and proportional to the threat COVID-19 poses. It bears repeating: these restrictions are temporary. Governor Newsom and County officials have made it clear gyms and other

similarly-situated venues will reopen as soon as it is safe. Relying upon scientifically-backed opinions of their public health experts, these officials have concluded it is not safe to reopen yet. This conclusion reflects these elected officials' best efforts to balance the interests in promoting public health with those in ensuring economic stability.

For the third time in less than a month, this Court finds the State and County orders, as is and as currently applied, are a constitutional response to an unprecedented pandemic. Plaintiffs continued compliance with these orders are essential to the well being of the general public. The continued performance of this critical civic duty (i.e. remaining temporarily closed) will help prevent the spread of COVID-19 and save lives. For this, plaintiffs and all gym owners similarly situated are to be commended.

III. ORDER

For the reasons set forth above, the Court DENIES Plaintiffs' ex parte application for a temporary restraining order. The Court also DENIES Plaintiffs' request for an order to show cause why a preliminary injunction should not issue. Plaintiffs failed to show a likelihood of success on their claims or raise serious questions going to the merits of those claims. Absent newly-discovered facts or a change in intervening caselaw, Plaintiff's failure to make this showing would likewise preclude the Court from granting a motion for preliminary injunction.

IT IS SO ORDERED.