COURT FILE NUMBER:	2001-14300
COURT:	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE:	CALGARY
APPLICANTS:	REBECCA MARIE INGRAM, HEIGHTS BAPTIST CHURCH, NORTHSIDE BAPTIST CHURCH, ERIN BLACKLAWS and TORRY TANNER
RESPONDENTS:	HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH

FINAL WRITTEN ARGUMENT OF THE RESPONDENTS, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH

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I. OVERVIEW

A. Issues Addressed in this Closing Argument

1. On September 14, 2021, Her Majesty the Queen in right of the Province of Alberta and the Chief Medical Officer of Health (collectively, Alberta) filed an extensive Pre-Trial Factum[1] addressing the Applicants' claims that certain of the CMOH Orders[2] should be declared invalid on the basis of *Charter* and *Bill of Rights* grounds. Alberta relies on its arguments in the Pre-Trial Factum with respect to the *Charter* and *Bill of Rights* issues, and will not repeat those arguments in this Closing Argument.

2. In this Closing Argument, Alberta responds to new *Bill of Rights*[3] arguments raised by the Applicants in their respective Closing Arguments. As such, Alberta will not repeat its submissions from its Pre-Trial Factum on these issues unless necessary to address any new issues raised in the Closing Arguments.

3. As well, Alberta responds to the new arguments of Ms. Ingram that the CMOH Orders are *ultra vires* s. 29 of the *Public Health Act*[4] because they are inconsistent with the object, purpose, and scheme of the *PHA*[5], and because the CMOH Orders are allegedly inconsistent with the delegated authority in s. 29 as they are in fact decisions of Cabinet and not those of the Chief Medical Officer of Health (CMOH).[6]

4. In addition, this Closing Argument also addresses the scientific and other evidence heard during the hearing, and in particular how, in Alberta's submission, this Court should assess that

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[1] Brief of Law of the Respondents, Her Majesty the Queen in right of the Province of Alberta and the Chief Medical Officer of Health, filed September 14, 2021 [Alberta's Pre-Trial Factum].
[2] As set out in para 6 of Alberta's Pre-Trial Factum.
[3] Closing Argument of Ingram at paras 82-86 (re Business Closure Restrictions in the CMOH Orders being expropriation) and paras 87-95 (re the process to promulgate the CMOH Orders did not follow the requirements of s. 29 and other sections of the *PHA*, including at para 95 that the restrictions were Cabinet decisions, and not those of the CMOH).
[4] *Public Health Act*, RSA 2000, c P-37 [*PHA*] – **TAB 6 of Alberta's Pre-Trial Factum**.
[5] Closing Argument of Ingram at paras 50-68.
[6] Closing Argument of Ingram at paras 69-76, and in particular on the CMOH Orders being Cabinet decisions or orders see paragraphs 71, 72, 76, and 95.

evidence after cross-examination, and how that evidence should be addressed in any section 1 *Charter* analysis it is necessary for this Court to undertake.

5. Further, as on October 21, 2021, Chief Justice Glenn Joyal of the Manitoba Court of Queen's Bench issued his reasons for judgment in *Gateway et al v Manitoba et al*[7] finding certain of Manitoba's public health orders during that province's second wave to be constitutional, Alberta makes submissions in this Closing Argument on the applicability of the reasons in *Gateway* to the present matter.

6. In particular, as the *Charter* issues and the scientific evidence in *Gateway* are very similar to the evidence and issues before this Court, Alberta submits that Chief Justice Joyal's reasons are highly instructive on the approach this Court should take in assessing the competing scientific evidence, on assessing the merits of the specific arguments of the Applicants on the scientific evidence as it relates to Alberta's COVID-19 restrictions, and on the expertise and credibility of the Applicants' main expert witness in both *Gateway* and the present matter, Dr. Bhattacharya.[8]

B. Alberta's Response to the Claims Before this Court

7. As this Court has already noted, this matter does not involve a public inquiry into every aspect of Alberta's handling of the pandemic nor a challenge to every mandatory public health restriction.[9] Rather, this matter involves a legal challenge to specific portions of the identified CMOH Orders.[10]

8. The current commencement document setting out the matters before the Court is the Amended Originating Application.[11] Accordingly, it is the Amended Originating Application, the particulars

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[7] *Gateway Bible Baptist Church et al v Manitoba et al,* 2021 MBQB 219 [*Gateway*] – **TAB 1**.
[8] The expert opinions in *Gateway* included Primary and Surrebuttal Reports from Dr. Bhattacharya, the "bulk" of which Dr. Bhattacharya admitted were "very similar" to those filed in this case (Transcript of Proceedings, February 10, 2022, p59/34). In qualification by Mr. Grey, Dr. Bhattacharya testified he was qualified as an expert in Manitoba in *Gateway*, and gave testimony similar to this Court case (Transcript of Proceedings, February 10, 2022, p40/13-21).
[9] See for example *Ingram v Alberta (Chief Medical Officer of Health)*, 2022 ABQB 311 [Public Interest Immunity Decision] at para 28 – **TAB 2**; Transcript of Proceedings, April 7, 2022, p18/15-17. See also *Gateway*, *supra* note 7 at para 19.
[10] *Ibid* at para 20.
[11] See Amended Originating Application Attached as Schedule "A" to Order filed June 22, 2021 [Amended OA]. However, as noted by this Court in *Ingram v Alberta (Chief Medical Officer of Health)*, 2022 ABQB 164 at para 6 "the Plaintiffs did not actually their Amended Originating Application until February 8, 2022, two days before the hearing commenced, more than seven months after the April order." [Scope of Hearing Decision] – **TAB 3**.

of the constitutional challenge provided pursuant to s 24 of the *Judicature Act*[12], and the well-established constitutional tests that define what is in issue in this case. This Court's focus therefore is on the identified portions of the specific CMOH Orders in question.[13]

1. The *Charter* claims

9. With respect to the *Charter* claims brought by all the Applicants, given that no further evidence was adduced at trial on the Applicants' asserted *Charter* violations, Alberta has no further submissions to make with respect to which *prima facie* infringements have or have not been made out on the facts of this case.

10. All submissions with respect to the *Charter* claims of the Applicants can be found in Alberta's Pre-Trial Factum, and Alberta relies upon its submissions made therein on the alleged *Charter* breaches[14] and its justification under s. 1.[15]

11. In addition, as the medical and scientific evidence called during the hearing is relevant to this Court's section 1 analysis, the application of this evidence to that analysis is considered below at paragraphs 314-372.[16]

12. In summary on the *Charter* grounds, Alberta takes the position that to the extent that the Applicants have demonstrated any infringements of their *Charter* rights, those infringements are demonstrably justified in a free and democratic society.

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[12] Dated June 9, 2021; see Alberta's Pre-Trial Factum at para 3.
[13] See also *Gateway*, *supra* note 7 at para 20.
[14] Alberta's Pre-Trial Factum at paras 9 to 123 re sections 2(a), (b), (c), (d), 7 and 15 of the *Charter*.
[15] *Gateway*, *supra* note 7 at paras 254-277 re section 1 of the *Charter*.
[16] Also see section 1 analysis in *Gateway*, *supra* note 7 at paras 277-336 involving the same or similar evidence and arguments.

2. The *Bill of Rights* claims and the claim the CMOH Orders are *ultra vires* the purpose of the *PHA*

a) *Bill of Rights Arguments*

13. Ingram is the only Applicant to claim an infringement of her rights under the *Alberta Bill of Rights*. With respect to the *Bill of Rights* grounds, Alberta also relies in response on its submissions in its Pre-Trial Factum.[17]

14. In summary, as detailed in Alberta's Pre-Trial Factum, Ms. Ingram's *Alberta Bill of Rights* claims are largely duplicative of her *Charter* claims (ie. violations of freedom of religion, assembly and association, and parental rights). As such, these particular claims are subsumed by the ss. 2(a)-(c) and 7 *Charter* claims, and are determined on the basis of *Charter* principles and caselaw.[18]

15. The only claim Ms. Ingram makes that is not completely subsumed by the *Charter* is the claim that Business Closures and Private Residence Restrictions are inconsistent with property rights under s. 1(a) of *Alberta Bill of Rights*.

16. In addition, because the Applicant, Ms. Ingram has now made further arguments to those in her Pre-Trial Factum, Alberta adds the following in response to Ms. Ingram's argument that the Business Closure Restrictions in certain of the CMOH Orders have resulted in an expropriation of her property contrary to the *Bill of Rights*.[19]

17. Ms. Ingram has raised three new arguments:

    1. The Business Closure Restrictions[20] and Private Residence Restrictions constitute a "use" or "expropriation" of her property;
    2. That the use or expropriation was not conducted in accordance with the process set out in the *PHA*; and [21]

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[17] Alberta's Pre-Trial Factum at paragraphs 124-136 and 242-248. Alberta relies on its Pre-Trial Factum for its response to the *Bill of Rights* claims in regard to freedom of religion, freedom of assembly and association, and the right of parents to make informed decisions respecting the education of their children.
[18] See Alberta's Pre-Trial Factum at paras 76, 99, 110, 125 and 136.
[19] Closing Argument of Ingram at paras 81 to 86.
[20] See Alberta's Pre-Trial factum at para 6.e.
[21] *Ibid*.

3. The CMOH Orders are *ultra vires* s. 29 of the *PHA* and the purposes of the Act and the means to achieve those purposes because they are decisions made by Cabinet and not the CMOH.

(1) There has been no expropriation

18. With respect to the first two arguments: Alberta starts from the position that there has been no expropriation of Ms. Ingram's property. Therefore, the provisions of the *PHA* are irrelevant.

19. Fundamentally, Ms. Ingram argues that the CMOH Orders amount to a governmental "use" or "expropriation" of both her business and private residence because they have interfered with her "preferred use" of these properties.[22] This position cannot be correct.

20. First, "de facto" expropriation requires (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.[23] There is no evidence before the Court that the government has acquired any sort of beneficial interest in any of Ms. Ingram's property. This ends the analysis.

21. Second, there is no evidence before the Court that the CMOH Orders have "removed all reasonable uses of the property" in question. For example, Ms. Ingram has not adduced any evidence that the Business Closures Restrictions prevented other uses of the property or equipment (eg. renting the equipment to customers for home use), or that Private Residence Restrictions have rendered her home uninhabitable.

22. Third, it is a trite law that property owners do not have an absolute right to use their property in any manner they choose - "preferred use" is not an absolute right. All businesses and private residences are subject to numerous pieces of regulatory legislation that place restrictions upon "preferred use".

23. In this respect then, Ms. Ingram's assertion that that s. 52.7 *PHA*

[22] *Ibid* at paras 83-84.
[23] *Canadian Pacific Railway Co v Vancouver (City)*, 2006 SCC 5 at para 30 – **TAB 4**.

protects her "preferred use" of property is simply wrong.[24] On a plain reading, s. 52.7 makes no use of the term "preferred use", or any reference to the "preferred use" of the property owner. The section simply states:

> Where the Minister or a regional health authority acquires or uses real or personal property under section 52.6 or where real or personal property is damaged or destroyed due to the exercise of any powers under that section, the Minister or regional health authority shall pay reasonable compensation in respect of the acquisition, use, damage or destruction.

24. Fourth, Ms. Ingram's position leads to absurd results. If the government legislates that individuals cannot drive their vehicles through school zones at 150 kilometres per hour does this mean that the government is "using" or "expropriating" the vehicles of individuals who want to speed through school zones? If the government legislates against open fires in high-rise apartments does this mean that the government is "using" or "expropriating" the property of individuals who want to have open fires in their apartments? Again, this position cannot be correct.

(2) The CMOH Orders are consistent with the purpose of the *PHA* and there is no pleading impugning the process authorized by s. 29 to achieve the purpose of the *PHA*

25. With respect to the third argument, in her Closing Argument, the Applicant, Ms. Ingram, asserts that the CMOH Orders are *ultra vires* s. 29 of the *PHA* and the overall purpose of the *PHA*. Ms. Ingram asserts this issue raises two sub-issues:

- Are the CMOH Orders consistent with the object, purpose, and scheme of the *PHA*?
- Are the CMOH Orders consistent with the statutory grant of authority and legislative processes set out in the *PHA*?

26. Alberta responds below[25] to the statutory interpretation argument that the CMOH Orders are *ultra vires* as being inconsistent with the object, purpose, and scheme of the *PHA*.

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[24] Closing Argument of Ingram at para 84.
[25] Paragraphs 48-58.

27. With respect to whether the CMOH Orders are *ultra vires* the statutory grant of power set out in the *PHA*, Ms. Ingram has raised this same new argument on the basis of both s. 1(a) of the *Bill of Rights* (Business Closure Restrictions) and on broad administrative law grounds that she argues applies to all the CMOH Orders.[26]

28. The argument is that the Business Closure Restrictions (*Bill of Rights*)[27] and all the CMOH Orders (administrative law grounds)[28] are orders of Cabinet and not of the CMOH and therefore *ultra vires* the authority delegated under s. 29 of the *PHA* because they are inconsistent with the means designated in s. 29 to achieve the purpose of the *PHA*, which requires they be the Orders of the CMOH.[29]

(a) There is no pleading of improper subdelegation

29. There is an unresolved issue before this Court whether this argument is actually plead.[30] In essence the argument that the CMOH Orders are inconsistent with the statutory grant of authority and legislative processes set out in the *PHA* is one of improper subdelegation.[31] That is, the statutory delegated decision maker has improperly acted under the dictation of an unauthorized party.[32]

30. There is no allegation of subdelegation in the Amended Originating Application. The related issue of fettering was first raised during the trial by Ms. Ingram who claimed Dr. Hinshaw had fettered her decision-making by allowing Cabinet to make her decisions when s. 29 of the *PHA* requires her to do so.

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[26] Closing Argument of Ingram at para 95.
[27] *Ibid* at paras 87-95.
[28] *Ibid* at paras 69-76.
[29] See *Ingram v Alberta (Chief Medical Officer of Health)*, 2021 ABQB 343 at para 77 (*Bill of Rights*) and para 51 (administrative law) [Striking Decision] - **TAB 37 of Alberta's Pre-Trial Factum**.
[30] See Public Interest immunity Decision, *supra* note 9 at para 15: The Plaintiffs also seek a declaration that the impugned Orders are *ultra vires* section 29 of the Public Health Act. It is an open question at this point of the proceedings whether the Plaintiffs' pleadings extend to this issue in terms of the process followed by the Chief Medical Officer before she issued the impugned Orders, but the potential exists that evidence may be admissible and relevant on this question. See also: Transcript of Proceedings, April 5, 2022, p97/29-p98/15; Transcript of Proceedings, April 6, 2022, p2/13-p3/38 ("not going to make a determination at this point in time"); and Transcript of Proceedings, April 7, 2022, p5/16-38 (Submissions of Counsel for Alberta), and p7/7-30 (Submissions of Counsel for Ingram).
[31] JM Keyes, *Executive Legislation* 2d ed (Markham: LexisNexis Canada Inc, 2010) at 276 [Keyes 2d] – **TAB 5** and also JM Keyes *Executive Legislation* 3d ed (Markham: LexisNexis Canada Inc, 2021) at 369 [Keyes 3d] [not reproduced].
[32] Keyes 2d, *ibid.*

31. Based on the Striking Decision of the Case Management Justice, Alberta's position is that while the unlawful purpose argument has been sufficiently plead to ground the argument sought to be made, no such pleading exists for the unlawful means argument. However, Alberta responds to the argument of improper subdelegation below.

32. To resolve whether improper subdelegation has been pled requires a review of paragraphs 14-16 of the Amended Originating Application and the decision of the Case Management Justice to strike certain claims and refuse permission to add other claims.[33]

33. Pursuant to the steps of the Order set by the Case Management Justice[34], Alberta applied to strike a number of claims that it argued had no reasonable prospect of success. The majority of these claims were struck by the Case Management Justice on April 30, 2021. The Applicants had also sought to amend the Originating Application.

34. While the Case Management Justice struck a number of the Applicant Rebecca Ingram's claims as they related to s. 1(a) of the *Alberta Bill of Rights* because these claims had no reasonable prospect of success[35], she went on to deny Alberta's application to strike the claim that the CMOH Orders deprived Ms. Ingram of her enjoyment of property under s. 1(a) of the *Bill of Rights*.

35. This was because "[o]n a generous reading of the claims asserted in the Originating Application, there is an issue raised in relation to whether business restrictions imposed by the CMOH Orders fall within the delegated order-making authority conferred on medical officers of health by the legislation; that is, whether the impugned business restrictions are consistent with the purpose of the *PHA*, and the means designated to achieve its purpose.[36]

36. Justice Kirker explained that although the only procedure required to satisfy due process is that proposed legislation receive three readings in the Legislature and that it receives Royal

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[33] Striking Decision, *supra* note 29.
[34] Order of Madam Justice Kirker dated March 12, 2021, and filed March 16, 2021 [Procedural Order].
[35] Striking Decision, *supra* note 29.
[36] *Ibid* at para 77 and see also at para 9.

Assent[37], she was unable to conclude on a preliminary application that the *Bill of Rights* property rights claim relative to the CMOH Orders should be struck on this basis.[38]

37. Justice Kirker further explained that "[i]f the challenged business restrictions are found to be within the broad order-making authority delegated to the CMOH by the Alberta Legislature when, by due process of law, it enacted the *Public Health Act*", then, as the Applicants acknowledged there will be no basis to conclude that the CMOH Orders offend s. 1(a) of the *Alberta Bill of Rights*.[39]

38. However, erring on the side of generosity and permitting novel, but arguable, actions to proceed, she found she must dismiss Alberta's application to strike the claim that the CMOH Orders offend s. 1(a) of the *Alberta Bill of Rights*.[40]

39. While in making this ruling, Kirker J. also noted that Alberta had acknowledged that the conclusion that an exercise of the authority delegated in s. 29 that is inconsistent with the purpose of the *PHA*, or the means designated to achieve its purpose, would also be beyond the CMOH's delegated power and subject to judicial review[41], she made no further comments about this argument and the CMOH Orders generally, and made no finding on the issue of whether the pleadings supported a claim that the CMOH Orders generally were inconsistent with the purpose of the *PHA*, or the means designated to achieve its purpose.

40. The Case Management Justice was also clear in the Striking Decision that she was granting only two amendments that had been sought by the Applicants, and that the remainder of the application to amend the Originating Application was dismissed. The Case Management Justice ordered the Applicants to file and serve the Amended Originating Application.

41. As a result of the Striking Decision the *Bill of Rights* s. 1(a) claim was amended as follows:

> *The CMOH Orders Are Issued in Contravention of the Alberta Bill of Rights*
>
> 9. The orders of the CMOH made under section 29 of the *Public Health Act* contravene section 2 of the *Alberta Bill of Rights*. The paramountcy clause of the *Public Health Act*,

[37] *Ibid* at paras 75 and 76.
[38] *Ibid* at para 77.
[39] *Ibid.*
[40] *Ibid* at para 78.
[41] *Ibid* at para 51.

> section 75, expressly reiterates the supremacy of the *Alberta Bill of Rights*. To the degree the CMOH Orders abrogate and infringe the rights protected by sections 1(a), 1(b) and 1(e) of the *Alberta Bill of Rights*, the CMOH orders are unlawful and of no force or effect. Pursuant to section 2 of the *Alberta Bill of Rights*, section 29 of the *Public Health Act* must be construed and applied so as not to authorize the abrogation or infringement of the rights protected by section 1 of the *Alberta Bill of Rights*. All infringements of enumerated rights protected under section 1 are prohibited unless the government has passed legislation declaring that the infringement may occur "notwithstanding" the *Alberta Bill of Rights*. The CMOH Orders, as applied to busines (*sic*) restrictions, are *ultra vires* s 29 of the *Public Health Act*.[42]

42. The associated plea for relief to paragraph 9 that Justice Kirker allowed[43] resulted in the following being added:

> 1. n.1 A Declaration that the CMOH Orders issued since March 2020 regarding business restrictions imposed due to COVID-19 are *ultra vires* section 29 of the *Public Health Act* and of no force or effect;

43. In the Originating Application filed December 7, 2020, the Applicants originally alleged that the CMOH Orders were *ultra vires* as they were in both purpose and effect legislation.[44] The Amended Originating Application at page 7 contains the heading *The CMOH Orders are Ultra Vires*. Paragraphs 10 to 16 of the Amended Originating Application contain the Applicants' allegations of how the CMOH Orders are *ultra vires* on an administrative law basis. However, as paragraphs 10 to 13 were struck by the Striking Decision, the only paragraphs left alleging any ground are those in paragraphs 14 to 16.

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[42] *Ibid* at para 100 "… to add the words "section 29 of the *Public Health Act*" to the previously pleaded claim (under the heading "The CMOH Orders Are Issued in Contravention of the *Alberta Bill of Rights*") that the CMOH Orders are *ultra vires*. As addressed above, this claim is limited to whether the business restrictions imposed by the CMOH Orders fall within the delegated order-making authority conferred on medical officers of health by s. 29 of the *Public Health Act*." [emphasis added].

[43] Striking Decision, *supra* note 29 at para 101.

[44] Originating Application filed December 7, 2020 at para 14. The Originating Application filed December 7, 2020 also challenged the validity of s. 29(2.1)(b) of the *PHA* on grounds that it offended enumerated sections of the *Alberta Bill of Rights*, contravened s. 92 of the *Constitution Act*, and violated unwritten constitutional principles; the validity of ss. 38(1)(c) and 52.6(1)(d) of the *PHA* on grounds that these sections unjustifiably infringe rights protected by ss. 2, 7, 8 and 9 of the *Charter*; and, the validity of s. 66.1 of the *PHA* on grounds that it prohibits citizens from seeking damages arising from the Crown affecting property rights protected under s. 1(a) of the *Alberta Bill of Rights*. All these claims against the *PHA* were struck in the Striking Decision at para 102.

44. Paragraph 14 and the related relief in paragraph 1(j.1) were amended by agreement[45] to the following:

> 14. The CMOH Orders are effectively rules of general and universal application which, if not adhered to by all members of the public, can result in non-compliant members of the public being penalized. In both purpose and effect, the CMOH orders are legislation. The CMOH Orders are therefore *ultra vires* the purpose of the *Public Health Act* and of no force or effect.
>
> 1. j.1 A Declaration that all provisions of the CMOH Orders currently in force are *ultra vires* the purpose of the *Public Health Act*;[46]

45. The remaining paragraphs[47] under this heading in the Amended Originating Application allege that:

- the CMOH Orders derive their basis in flawed reasons as available medical literature indicates that the PCR testing utilized as the primary testing method in Alberta is highly inaccurate[48], and
- the CMOH Orders arbitrarily and capriciously shut down certain businesses while allowing others to remain open without any intelligible reason that would permit judicial review.

46. Thus, the only administrative law ground pleading in the Amended Originating Application is that the CMOH Orders are *ultra vires* the purpose of the *PHA* because they are "in both purpose and effect" mandatory (i.e. subject to penalty for non-compliance) "rules of general and universal application".[49]

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[45] See Order of Madam Justice Kirker filed June 22, 2021 at para 3 [Amendment Order]. The Amended Originating Application is found at Schedule A of the Amendment Order.
[46] See Amended OA, See also Scope of Hearing Decision, *supra* note 11 at para 4.
[47] Amended OA at paras 14-16.
[48] *Ibid* at para 15.
[49] The only administrative law argument raised in either of the Applicants' respective Pre-Trial Factums was that the CMOH Orders were *ultra vires* the delegated power in s 29 of the *PHA*, which was raised by the Applicant, Ms. Ingram, who argued at paragraphs 32-61 of her Pre-Trial Factum (and see para 54-68 of Ms. Ingram's Pre-Hearing Reply Factum) that based on the express language used to delegate the power to the CMOH in s. 29 of the *PHA*, the CMOH was not authorized to make laws of general application. See also at Ingram's Pre-Trial Factum at para 56 that discretionary power must be exercised for the purpose granted, and para 58 of Ingram's Pre-Trial Reply Factum that s. 29 does not grant the CMOH authority to pass orders for the purpose of stopping the health care system from becoming overwhelmed (i.e. that this is an improper purpose for the CMOH to consider in making her decisions to promulgate the CMOH Orders).

47. While Alberta accepts on a generous reading of the Amended Originating Application that Ms. Ingram has plead the CMOH Orders, including the Business Closure Restrictions are *ultra vires* the purpose of the *PHA* such that she can make the related statutory interpretation arguments she has made, Alberta disagrees that there is any pleading impugning the means or process being authorized to make the CMOH Orders to allow the new argument on improper subdelegation to be decided by this Court.

(b) Ingram's Inconsistent with Purpose Argument[50]

48. Ms. Ingram argues this Court should adopt the interpretative approach set out in *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*.[51] Ms. Ingram also argues that the well-established principles of statutory interpretation do not support the broad delegation of authority to the Chief Medical Officer of Health[52].

49. As the CMOH's Orders involve the exercise of a discretionary authority delegated under the *PHA*, they constitute regulations as defined in the *Interpretation Act*.[53]

50. Alberta agrees that the following principles set out by the Supreme Court of Canada in *Katz* apply to whether the CMOH Orders are inconsistent with the purpose of the *PHA*:

> Regulations benefit from a presumption of validity (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 458). This presumption has two aspects: it places the burden on challengers to demonstrate the invalidity of regulations, rather than on regulatory bodies to justify them (John Mark Keyes, *Executive Legislation* (2nd ed. 2010), at pp. 544-50); and it favours an interpretative approach that reconciles the regulation with its enabling statute so that, *where possible*, the regulation is construed in a manner which renders it *intra vires* (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3 (loose-leaf), at 15:3200 and 15:3230).[54]
>
> Both the challenged regulation and the enabling statute should be interpreted using a "broad and purposive approach . . . consistent with this Court's approach to statutory interpretation generally" (*United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 8; see also Brown and Evans, at 13:1310; Keyes, at pp. 95-97; *Glykis v. Hydro-Québec*, 2004

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[50] Closing Argument of Ingram at paras 50-68.
[51] *Katz Group Canada Inc v Ontario (Health and Long-Term Care)*, 2013 SCC 64 [*Katz*] – **TAB 6.**
[52] See Closing Argument of Ingram at paras 50-68.
[53] *Interpretation Act*, RSA 2000, c I-8, s 1(c) – **TAB 7**. Section 29(6) of the *PHA* states the *Regulations Act*, RSA 2000, c R-14 does not apply to orders made under subsection 29(2) or (2.1); and Section 29.1 of the *PHA* validates any orders made under s. 29(2)(b)(i) or (2.1) before June 17, 2021.
[54] *Katz, supra* note 51 at para 25.

> SCC 60, [2004] 3 S.C.R. 285, at para. 5; Sullivan, at p. 368; *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F, s. 64).[55]
>
> This inquiry does not involve assessing the policy merits of the regulations to determine whether they are "necessary, wise, or effective in practice".[56] (*Jafari v. Canada (Minister of Employment and Immigration)*, 1995 CanLII 3592 (FCA), [1995] 2 F.C. 595 (C.A.), at p. 604). As explained in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 2002 CanLII 41606 (ON CA), 211 D.L.R. (4th) 741 (Ont. C.A.):
>
> > . . . the judicial review of regulations, as opposed to administrative decisions, is usually restricted to the grounds that they are inconsistent with the purpose of the statute or that some condition precedent in the statute has not been observed. The motives for their promulgation are irrelevant. [para. 41]
>
> It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, 1978 CanLII 40 (SCC), [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, 1981 CanLII 175 (SCC), [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 1976 CanLII 739 (ON SC), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p. 111).[57]

51. A plain reading of the *PHA* demonstrates that Ms. Ingram's argument is meritless. No extrinsic interpretive aides are necessary to determine the *vires* of the CMOH Orders when the delegation to the CMOH by the *PHA* has been clear and unequivocal.

52. "As suggested by its title, the *Public Health Act* serves the remedial purpose of protecting the health of all Albertans. Section 29(1) of the *PHA* itself states that: "[a] medical officer of health who knows of or has reason to suspect the existence of a communicable disease or a public health emergency within the boundaries of the health region in which the medical officer of

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[55] *Ibid* at para 26.
[56] *Ibid* at para 27.
[57] *Ibid* at para 28 [citations removed].

health has jurisdiction may initiate an investigation to determine whether any action is necessary to protect the public health."[58]

53. Section 29(2) to (4) states:

> (2) Where the investigation confirms the presence of a communicable disease, the medical officer of health
>
> > (a) shall carry out the measures that the medical officer of health is required by this Act and the regulations to carry out, and
> >
> > (b) may do any or all of the following:
> >
> > > (i) take whatever steps the medical officer of health considers necessary
> > >
> > > > (A) to suppress the disease in those who may already have been infected with it,
> > > >
> > > > (B) to protect those who have not already been exposed to the disease,
> > > >
> > > > (C) to break the chain of transmission and prevent spread of the disease, and
> > > >
> > > > (D) to remove the source of infection;
> > >
> > > (ii) by order
> > >
> > > > (A) prohibit a person from attending a school,
> > > >
> > > > (B) prohibit a person from engaging in the person's occupation, or
> > > >
> > > > (C) prohibit a person from having contact with other persons or any class of persons for any period and subject to any conditions that the medical officer of health considers appropriate, where the medical officer of health determines that the person's engaging in that activity could transmit an infectious agent;
> > >
> > > (iii) issue written orders for the decontamination or destruction of any bedding, clothing or other articles that have been contaminated or that the medical officer of health reasonably suspects have been contaminated.
>
> (2.1) Where the investigation confirms the existence of a public health emergency, the medical officer of health
>
> > (a) has all the same powers and duties in respect of the public health emergency as he or she has under subsection (2) in the case of a communicable disease, and

[58] Striking Decision, *supra* note 29 at para 58 [emphasis in original].

> (b) may take whatever other steps are, in the medical officer of health's opinion, necessary in order to lessen the impact of the public health emergency.
>
> (3) A medical officer of health shall forthwith notify the Chief Medical Officer of any action taken under subsection (2)(b) or of the existence of a public health emergency.
>
> (3.1) On being notified of the existence of a public health emergency under subsection (3) the Chief Medical Officer shall forthwith notify the Minister.
>
> (4) The jurisdiction of a medical officer of health extends to any person who is known or suspected to be
>
> (a) infected with a communicable disease, illness or health condition,
>
> (b) a carrier,
>
> (c) a contact,
>
> (d) susceptible to and at risk of contact with a communicable disease, illness or health condition, or
>
> (e) exposed to a chemical agent or radioactive material, whether or not that person resides within the boundaries of the health region.

54. As set out in Alberta's Pre-Trial Factum[59], sections 29 and 29(2.1) of the *PHA* clearly delegate broad authority[60] to the CMOH where her investigation confirms the existence of a public health emergency.[61]

55. Dr. Hinshaw's evidence speaks directly to how she uses her delegated authority under s. 29 in respect to COVID-19:

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[59] Alberta Pre-Trial Factum at paras 242 to 248.

[60] See also *Ingram v Alberta (Chief Medical Officer of Health)*, 2022 ABCA 97 at para 8: "The wording of section 29(2.1)(b), though broad, is clear and unambiguous." – **TAB 8**.

[61] Section 1(hh.1) of the *PHA* defines "public health emergency" to include "an occurrence or threat of…. (iii) an epidemic or pandemic disease … , that poses a significant risk to the public health". See Affidavit of Dr. Hinshaw, affirmed July 12, 2021 and filed July 12, 2021 at para 27 [Hinshaw Affidavit]: Dr. Hinshaw has "provide[d] advice to the Premier and Cabinet, including the Priorities Implementation Cabinet Committee (PICC) and the Emergency Management Cabinet Committee (EMCC) on the need to declare a state of public health emergency in response to the COVID-19 pandemic". Section 52.1 of the *PHA* states: "[w]here, on the advice of the Chief Medical Officer, the Lieutenant Governor in Council is satisfied that (a) a public health emergency exists or may exist, and (b) prompt co-ordination of action or special regulation of persons or property is required in order to protect the public health, the Lieutenant Governor in Council may make an order declaring a state of public health emergency relating to all or any part of Alberta."

> I also have the tools under s. 29 of the *Public Health Act* to address communicable disease outbreaks or a state of public health emergency by judiciously applying restrictions when necessary to intervene on outbreaks and in public health emergencies ("CMOH Orders"). Section 29(2)(b)(i) of the Act has provided me with the power to take whatever steps I consider necessary: (A) to suppress COVID-19 in those who may have already been infected with COVID-19; (B) to protect those who have not already been exposed to COVID-19; (C) to break the chain of transmission and prevent spread of COVID-19; and (D) to remove the source of infection. I also have the authority under section 29(2.1), to take whatever other steps, in my opinion, are necessary in order to lessen the impact of the public health emergency.[62]

56. As the CMOH was authorized by the *PHA* to take whatever steps she believed were necessary to break the chain of transmission and to stop the spread of COVID-19, then she was clearly acting within the scope of her delegated authority.

57. Given that Dr. Hinshaw was acting within the scope of delegated authority in promulgating all the CMOH Orders, including those containing the Business Closure Restrictions, there can be no suggestion that the Applicant, Rebecca Ingram, was denied due process of law if she was in fact deprived of enjoying her property.

58. Neither can there be any doubt that the CMOH Orders generally are *intra vires* the purpose of the *PHA*. As a result, these claims should be dismissed.

(c) Ingram's improper subdelegation argument

59. The COVID-19 pandemic gave rise to the greatest challenge faced by the Canadian public health system in a century. The pandemic lead to unprecedented challenges for all provinces in responding to the public health emergency. In Alberta, public health officials and elected representatives were forced to make difficult choices every day regarding, among other things, the approach to public health and the timing of voluntary measures and mandatory non-pharmaceutical interventions (NPIs), along with choices as to resource allocation.[63]

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[62] *Ibid* Hinshaw Affidavit at para 22.

[63] See Transcript of Proceedings, April 6, 2022, p 99/3-11; and p117/15-24; and see also Hinshaw Affidavit, *ibid* at paras 25-29, and 100. See also *Gateway, supra* note 7 at paras 19, 119, 199, 297 and 327.

60. Based on s. 29 of the *PHA*, the CMOH has been delegated "the onerous and formidable task"[64] of implementing measures to prevent or lessen the danger to public health posed by COVID-19. The CMOH Orders are all signed by Dr. Hinshaw as the CMOH, and the preamble to each sets out the basis for the Orders grounded in the relevant section of the *PHA*. The CMOH Orders are clearly made under Dr. Hinshaw's delegated authority under s. 29. Dr. Hinshaw's evidence has been absolutely clear and consistent that she sincerely believed that not only were the mandatory restrictions used necessary[65], but that they were also a "last resort"[66].

61. Dr. Hinshaw's evidence on the process followed under s. 29 is that:

> While my office and the Ministry of Health and AHS have played a lead role in informing the Province of Alberta's strategy to respond to the COVID-19 pandemic, under the *Public Health Act,* the Chief Medical Officer of Health is not the final decision-maker. Rather, the Chief Medical Officer provides advice and recommendations to elected officials on how to protect the health of Albertans. Those elected officials take that advice as one part of the considerations in the difficult decisions that they have had to make in response to COVID-19. The final policy decision-making authority rests with the elected officials, and these policy decisions are then implemented through the legal instrument of CMOH Orders.[67]

62. Dr. Hinshaw was asked several times about this evidence at trial.[68] She explained that the CMOH's s. 29 powers must not be considered in a vacuum, but rather in the context of her overarching roles set out in s 14 of the *PHA*, under which she provides advice and recommendations for the purpose of improving public health outcomes across a wide range of acute and chronic health issues affecting the population of Alberta.[69]

63. Therefore, as Dr. Hinshaw explained at trial, the decisions she makes pursuant to her authority under s. 29 to issue CMOH Orders cannot be simply separated from the final policy decisions made by Cabinet:

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[64] *Gateway, supra* note 7 at para 199.
[65] See Alberta Pre-Trial Factum at para 247/footnote 430 and para 248. As stated in footnote 430: "See e.g. Hinshaw Affidavit, *supra* note 1 at paras 100-101. Moreover, a cursory review of the Hinshaw Affidavit demonstrates that at all times Dr. Hinshaw was exercising her authority for a purpose contained in the *PHA* – she acted to preserve lives. Ms. Ingram's implied argument that Dr. Hinshaw was acting with an improper purpose (see Ingram Pre-Trial Factum at para 43) must be dismissed…"
[66] Hinshaw Affidavit at para 98.
[67] Hinshaw Affidavit at para 29; and see also at para 166.
[68] See for example Transcript of Proceedings, April 6, 2022, p83/25-p84/5; p98/16-p99/11; and p117/6-24.
[69] See Hinshaw Affidavit at paras 14-15 re her roles under the *PHA*.

> MR. RATH: Let's regard the specific orders as to who to lock down, when to lock them down, how to lock them down, et cetera, et cetera, would you agree that those aren't policy decisions, Doctor, that those are public health decisions that are -- that are advised by data and information that you would obtain as the Chief Medical Officer of Health?
>
> MR. PARKER: Objection. This is asking for a legal interpretation, whether the power's exercised under the *Public Health Act* or not.
>
> THE COURT: Okay. Mr. Rath?
>
> MR. RATH: I didn't mention the *Public Health Act.* I'm simply asking whether she agrees that (INDISCERNIBLE) decisions with regard to who to lock down, where to lock them down, when to lock them down, et cetera, aren't policy decisions, that they're public health decisions. As an example, locking down a nightclub versus locking down a school or locking down a school as opposed to locking down a restaurant.
>
> THE COURT: I will allow Dr. Hinshaw to answer that question.
>
> A I don't think that's an appropriate distinction. Clearly the decisions that have been made with respect to intervening and spreading the -- stopping the spread of COVID-19 are policy decisions that are of course also public health interventions. The two, in my mind, are intertwined because of the impacts that these particular decisions have. So I wouldn't distinguish between the public health intervention which is a policy decision because of how broad the impacts are, as we've discussed over the past several days.[70]

64. As Dr. Hinshaw explains, it was the unprecedented nature and scale of this public health emergency that resulted in the CMOH (and not the local, Alberta Health Services' Zone Medical Officers of Health ("MOH")) exercising her authority under section 29 of the *PHA* to manage the COVID-19 response through a consistent, coordinated, province wide approach.[71]

65. Further, given the "nature of the virus was a novel and significant threat" raising unprecedented issues, under the process put in place for when there was a province-wide decision to be made, it was the elected representatives of the population who made those policy decisions.[72] As Dr. Hinshaw has repeatedly testified she provided her recommendations on various public health measures to Cabinet Committees, at first EMCC and then PICC, and then used their

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[70] Transcript of Proceedings, April 6, 2022, p99/13-38; see also Transcript of Proceedings, April 6, 2022, p115/16-20.
[71] Transcript of Proceedings, April 6, 2022, p115/22-p117/4.
[72] Transcript of Proceedings, April 6, 2022, p98/35-p99/11; Transcript of Proceedings, April 6, 2022, p83/25-p84/5.

policy decisions to inform and implement her subsequent CMOH Orders, which reflected her recommendations to manage the COVID-19 pandemic public health emergency.[73]

66. In developing public health recommendations and policy options for the COVID-19 response, including the mandatory restrictions in the CMOH Orders, Dr. Hinshaw also worked closely with Alberta's Emergency Operations Centre (EOC), which was the organizational unit within the Ministry of Health that oversaw COVID-19 health policy development and implementation.[74]

67. Further informing the context in which the CMOH Orders are made is that the CMOH serves at the pleasure of the Minister of Health, who is the Minister responsible to the Legislature for both the *PHA*[75] and also the *Regional Health Authorities Act*.[76]

68. There was therefore a working together of elected officials and the CMOH in making the CMOH Orders. In the context of this unprecedented pandemic, consulting with the Minister of Health, as well as Cabinet was clearly proper and essential given that it is for elected representatives to set high level policy. The involvement of other ministries is obviously both necessary and appropriate given the broad effects of the COVID-19 pandemic across all aspects of society and governance.[77]

69. As was argued at trial, there is absolutely nothing in the Amended Originating Application that pleads fettering, improper subdelegation or the absence or transformation of authority.[78]

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[73] *Ibid*. This Court also recognized that contrary to the argument of Ms. Ingram, Dr. Hinshaw's evidence was not that "she is not the one making the orders", and that what she actually said what was "that those policy decisions made by Cabinet would inform her orders", see Transcript of Proceedings, April 6, 2022, p85/24-26; Transcript of Proceedings, April 6, 2022, p83/25-p84/5. See also Hinshaw Affidavit at paras 27, 29, 85 and 85.

[74] Hinshaw Affidavit at para 26.

[75] Hinshaw Affidavit at para 9; Transcript of Proceedings, April 6, 2022, p83/12-23.

[76] Hinshaw Affidavit at paras 30-38. The Minster of Health also has the power under s. 16 of the *Regional Health Authorities Act (RHAA),* to do any other thing that he considers necessary to promote and ensure the provision of health services in Alberta, and both the Minister of Health, in s. 24 of the *RHAA*, and the Lieutenant Governor in Council, in s. 17 and s. 23 of the *RHAA*, have broad regulation making powers under the *RHAA.*

[77] See for example, Transcript of Proceedings, April 5, p95/17-24: "Alberta Health Services were part of the discussions", "there was a group of people who deliberated and who ensured again that everything that could possibly be done to expand acute care capacity was being done", and "minimize the need for utilizing non-pharmaceutical interventions."

[78] Transcript of Proceedings April 5, p97/29-35 re "fettering discretion … not been raised in pleadings"; see also Transcript of Proceedings April 6, p3/6-40; and see also Transcript of Proceedings, April 7,

70. Although Alberta maintains its position at trial that this issue has not been pled, in the event the Court disagrees then Alberta provides its response below on the new issue raised for the first time at trial that Dr. Hinshaw is fettering her delegated authority in her decision-making about the CMOH Orders[79]

71. Counsel for Ms. Ingram insisted that Cabinet directing the CMOH in the making of the CMOH Orders was inappropriate.[80] He stated both that "fettering" "is a new issue" coming "directly from" Dr. Hinshaw's testimony[81], and also insisted that the current pleadings in the Amended Originating Application[82] meant that fettering and improper subdelegation were sufficiently pled.

72. Not only is there is no pleading alleging fettering in the Amended Originating Application, the administrative law concept of fettering is not realistically raised on the record before the Court. In terms of fettering legislative discretion, "[p]urposive limits … require discretionary powers to be exercised with due consideration for relevant factors. If they are not, their exercise is said to have been fettered."[83]

73. However, the application of fettering to lawmaking powers recognizes that ministers have wide-ranging responsibilities, and thus must be capable when acting to establish policy to do so on equally wide ranging reasons, notably those of a political nature.[84]

74. For a delegated decision-maker to take account of the realities of politics and government is not fettering, and does not mean that the CMOH Orders were in any way passed for a purpose

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2022, p5/16-38: "nothing in the pleadings with facts about her abdicating her decision-making responsibility".

[79] See Transcript of Proceedings, April 5, 2022, p97/9-17 per Counsel for Ms. Ingram "that she makes recommendations to Cabinet and then Cabinet tells her what to do", and Transcript of Proceedings, April 5, 2022, p97/29-41 per Counsel for Ms. Ingram that the issue of fettering "is a new issue … that came directly from here testimony".

[80] Transcript of Proceedings, April 6, 2022, p84/38-39 "she's being told what to do by Cabinet and I think we're entitled to ask which of her recommendations were being overruled by Cabinet"; and p85/33-34 "was she ever directed to do things contrary to her recommendations".

[81] Transcript of Proceedings, April 5, 2022, p97/29-41.

[82] Amended OA at paragraph 1.J.1 seeking a declaration that all provisions of the CMOH orders currently enforced are *ultra vires* the purpose of the *PHA,* and Amended OA at para 1. n.1. seeking a declaration that the CMOH Orders issued since March 2020 regarding business restrictions imposed due to COVID-19 are *ultra vires* section 29 of the *PHA* and of no force or effect.

[83] Keyes 2d, *supra* note 31 at 275.

[84] *Ibid.*

inconsistent with the *PHA*.[85] Taking account of the realities in which the executive legislative powers are exercised is not itself open to attack on the basis of improper purpose.[86]

75. As explained by J.M. Keyes with respect to fettering, "[t]his ground of review requires analysis of the purposes themselves and it is satisfied if the executive legislation advances its authorized purposes. Whatever else it does is of no judicial interest."[87]

76. Further, while "improper subdelegation is a different issue [than fettering], it does not arise as long as delegates retained decisive involvement in exercising their authority and do not wholly surrender it to some other person or body."[88]

77. That fettering does not apply to executive legislation such as the CMOH Orders was argued at trial on April 6 in the context of an objection to the following question[89] (subsequently withdrawn):

> Q Right. So, Dr. Hinshaw, is it your evidence then that these orders weren't your orders and that these were Cabinet orders that were being promulgated under section 29 of the *Public Health Act?*

78. The Court asked for argument on the objection the following morning, and although the objection was withdrawn the morning of April 6, Alberta advised the Court that:

> MR. PARKER: Well, I've sent you materials[90] that says fettering does not apply to executive legislation and so if we get into this again, there are two points. It is not pled my friend's amended originating application, fettering or any facts supporting it and it doesn't apply to executive legislation. So there will be an objection. I wanted to return to that, and it is pertinent to the point you have raised when you said, put the question to Dr. Hinshaw again, the objection yesterday was relevance, that is maintained, of course, and will be maintained I should say if the objection comes up again through future questions from Mr. Rath.[91]

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[85] *Ibid* at 276.
[86] *Ibid.*
[87] *Ibid.*
[88] *Ibid.*
[89] Transcript of Proceedings, April 6, 2022, p3/6-40.
[90] Keyes 2d, *supra* note 31 at 275-277.
[91] Transcript of Proceedings, April 6, 2022, p3/6-13. Ms. Ingram's counsel's response was that the issue of fettering was covered by the pleading (Heading) that "the CMOH Orders are *ultra vires*" - Transcript of Proceedings, April 6, 2022, p3/30-33.

79. That fettering has no application to executive legislation such as the CMOH Orders was again argued at trial on April 7 in the context of arguing that the concept had no relevance to the matters before this Court requiring the Court to intrude into Cabinet confidences, a position Alberta maintains:

> to sum up what the allegation is here based on the evidence of Dr. Hinshaw and the evidence of Dr. Hinshaw has been consistent from her affidavit through her cross-examination, she said it repeatedly, that she makes recommendations to Cabinet committee, that's one of her overarching duties and roles under section 14 of the *Public Health Act.* They, Cabinet, make[] the policy decisions and that the Chief Medical Officer of Health's orders implement the decisions and those decisions are her decisions under the *Public Health Act.* But my point is that she is making her orders within and consistent with the broader Government policy and that broader Government policy is something you've heard about in the cross-examination of Dr. Hinshaw. That is, where does information come from dealing with things like that the economy and other areas that are outside of Dr. Hinshaw's expertise, and she's advised, well, Cabinet committee consults with and obtains information from other ministries and that is the -- that is the point here. Cabinet committees obtain information from other ministries, consider that, develop broader Government policy in terms of the responding to the pandemic, and then Dr. Hinshaw, again who serves at the pleasure of the Minister of Health, makes her *Public Health Act* orders, her Chief Medical Officer of Health orders within and consistent with the broader Government policy.[92]

80. Again, the purpose of the broad powers granted to the CMOH in s. 29 is to take steps to achieve particularized public health objectives, and, by order to prohibit activity in three contexts. The decision-maker under the statute is the CMOH. The CMOH powers in the statute are permissive.[93]

81. The CMOH Orders all state they were made to lessen the impacts of the COVID-19 public health emergency, and, again, Dr. Hinshaw has testified extensively that the purpose of the mandatory measures contained in CMOH Orders was clearly as a last resort for public health purposes.

82. In Alberta's submission, on the record before this Court, there should be no doubt that Dr. Hinshaw did not "wholly surrender" her authority under s. 29 "to some other person or body", and always retained decisive involvement in exercising her authority in respect to the CMOH

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[92] Transcript of Proceedings, April 7, 2022, p16/30-17/5.
[93] See, "may", and "any conditions … considers appropriate".

Orders.[94] There was no dictating by an unauthorized party, fettering of her discretion or improper subdelegation of the authority imposed on her by the *PHA*.

83. Although Alberta argued that the administrative law concepts of fettering and directing had no application to this matter and were not pled, this Court determined that it was "strictly necessary" to override Cabinet confidences by asking the following questions of Dr. Hinshaw *in camera*:

> 1. Did the Premier and Cabinet, including the PICC and the EMCC (the "Cabinet") ever direct you, Dr. Hinshaw, to impose more severe restrictions in your CMOH orders than you had recommended to them?
>
> 2. Did Cabinet ever direct you to impose more severe restrictions on particular groups such as churches, gyms, schools, and small businesses than you had recommended to them?
>
> 3. Did you ever recommend to Cabinet that restrictions should be lifted or loosened at any period of time and that recommendation was refused or ignored by Cabinet?[95]

84. Although Alberta maintains its position that it was unnecessary to erode Cabinet confidences for this Court to adjudicate this matter, given the answers to the three questions on directing were "no", then there can be absolutely no doubt that Dr. Hinshaw always retained decisive involvement in exercising her authority under s. 29 of the *PHA*.[96] There has been no improper subdelegation in the making of the Orders.

C. Alberta has provided a credible evidentiary record justifying restrictions

a) *The relevant time frame*

85. Just as the relevance of the evidence is rooted in the pleadings, so too must the relevant time frame.[97] The issue of the relevant time period was confirmed by this Court's ruling during trial that CMOH Orders 42-2021 and 43-2021, from September 2021 and covering the Restrictions Exemptions Program, do not fall within the scope of the hearing.[98]

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[94] See Keyes 2d, *supra* note 31 at 275.
[95] Public Interest Immunity Decision*, supra* note 9 at para 27 [emphasis added]; and see at para 15.
[96] Keyes 2d, *supra* note 31 at 275; see also Keyes 3d at 369 (not reproduced).
[97] See *Gateway, supra* note 7 at para 22.
[98] Scope of Hearing Decision, *supra* note 11 at para 26.

86. Setting the time frame is important because "the COVID-19 pandemic was fluid and evolving."[99] The situation in the spring of 2020 during the first-wave was markedly different from that in the summer of 2021 when the impugned third-wave CMOH Orders were made. Accordingly, and as is described in detail below.[100] Alberta's "public health measures have necessarily and frequently varied in order to respond to the prevailing conditions of the COVID-19 pandemic."[101]

87. The evidence in the Applicants' Affidavits focuses on the period over the holidays in December 2020 during Alberta's second wave. Pursuant to the Procedural Order[102], Alberta filed its evidence in rebuttal to the evidence of the Applicants on July 12, 2021. Accordingly, Alberta's scientific evidence and its arguments below under section 1 are focussed on justifying the impugned CMOH Orders from the start of the second wave in October 2020 until the third wave had subsided at the end of June 2021. Alberta's evidence also covers the first wave to provide necessary context.

b) *Credible evidentiary basis*

88. While this Court on this application was the recipient of a large amount of complex scientific evidence covering various issues related to the COVID-19 pandemic, the relevance of that evidence must be tested by reference to what is in issue.[103]

89. As in Gateway, the evidence produced by the Applicants included contrary scientific and other expert opinion evidence through which they sought to call "into question some of the science inextricably tied to and relied upon by" the CMOH, in her decisions to issue the impugned CMOH Orders.[104]

90. In providing his assessment of <u>all of the evidence following cross-examinations</u> (including of Dr. Bhattacharya), Chief Justice Joyal stated "to the extent differences in the expert evidence exists" the question was "whether there is nonetheless":

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[99] *Gateway, supra* note 7 at para 22.
[100] See below paras 132-135 under the heading "The Chief Medical Officer of Health Orders were Progressive and Responsive to the Course of the Pandemic".
[101] See also *Gateway, supra* note 7 at para 22.
[102] Procedural Order, *supra* note 34.
[103] *Gateway, supra* note 7 at para 20.
[104] *Ibid* at para 45.

> a sufficiently sound and credible evidentiary basis (even in light of any opposing evidence) for the claim that the limitations and restrictions on the fundamental freedoms represent valid policy approaches which are reasonably justified and constitutionally defensible in Canada's free and democratic society.[105]

91. "On an "all things considered' assessment of the evidence", he had "no difficulty concluding" that the restrictions that were imposed represented "public health policy choices rooted in a comparatively well-accepted public health consensus … generally consistent with measures seen across most of Canada and the rest of the world."[106]

92. Alberta submits that its evidence invokes and relies upon credible science, and provides both a convincing scientific evidentiary foundation and a sound and compelling factual foundation for finding in the context of Alberta's response to this unprecedented pandemic that the measures in the impugned CMOH Orders, "were necessary, reasonable and justified."[107]

D. Courts not well-suited to resolve disputes over complex areas of science[108]

93. In *Beaudoin v British Columbia*, Chief Justice Hinkson observed in the context of section 1 of the *Charter* that deference is particularly appropriate when a court is addressing complex areas of science and medicine in relation to COVID-19, which he acknowledged, courts are not well suited to resolve.[109]

94. Similarly, in *Gateway*, Chief Justice Joyal, recognized that the factual underpinnings for managing a pandemic are rooted in mostly scientific and medical matters that fall outside the expertise of courts, and therefore "where a sufficient evidentiary foundation has been provided":

> the determination of whether any limits on rights are constitutionally defensible should be guided by a requisite judicial humility that comes from acknowledging that courts do not have the specialized expertise to casually second guess the decisions of public health officials, which decisions are otherwise supported in the evidence.[110]

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[105] *Ibid* at para 50.
[106] *Ibid* at para 197.
[107] *Ibid* at paras 119 and 202.
[108] See *Beaudoin v British Columbia*, 2021 BCSC 512, at paras 120, 124 and 212-221 [*Beaudoin*] - **TAB 9**.
[109] *Ibid at* para 37 [emphasis added].
[110] *Gateway, supra* note 7 at para 292 [emphasis added].

E. Differences in scientific evidence, cross-examination and credibility

95. In Gateway, Chief Justice Joyal explained that absent a clear determination that the science relied upon was wrong (a determination he said he "most definitely" did "not make") to the extent differences in the expert evidence exists", then the determinative and salient question in relation to the s. 1 defence is whether there exists a credible evidentiary basis justifying the restrictions.[111]

96. The Chief Justice further stated that he "did not need to make stark, zero-sum determinative findings of credibility to rationalize divergent views and interpretations of the scientific information." Where differences in the scientific evidence existed, it did not persuade him that the supporting evidence that Manitoba invoked for its position was, "in the final analysis, lacking in reliability, credibility or cogency so to compromise its s. 1 defence."[112] He concluded:

> in the face of Manitoba's otherwise reliable and credible expert witnesses (an assessment which the cross-examinations did not change), absent a more persuasive and conclusive evidentiary challenge to Manitoba's witnesses and their evidence the evidence of the applicants and their challenge on cross-examination represent at best, a contrary if not contrarian scientific point of view, which did not satisfy him that Manitoba had failed to discharge its s. 1 onus.[113]

97. The question this Court needs to answer in applying the scientific evidence to the s. 1 analysis is, after your review of Alberta's evidence, any contrary scientific evidence of the Applicants, and any cross-examination of Alberta's witnesses, whether "there nonetheless remains a credible evidentiary record" supporting Alberta's position that "any restrictions on the identified fundamental freedoms are rationally connected, minimally impairing and reasonable and proportionate public health policy choices *vis-à-vis* [Alberta's] pressing and substantial public health objectives?"[114]

II. THE SCIENTIFIC AND EMERGENCY MANAGEMENT EVIDENCE

98. As in Gateway, the evidence in this case was voluminous and often complex.[115] This evidence "provides much of the relevant background and context to the impugned" CMOH Orders "and the related constitutional issues." This evidence also provides "the foundational basis –

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[111] *Ibid* at para 50.
[112] *Ibid* at para 197 [emphasis added].
[113] *Ibid* at para 198 [emphasis added].
[114] *Ibid* at para 50.
[115] *Ibid* at para 47.

scientific and otherwise – for Alberta's decisions and line drawing in relation to the restrictions imposed in the impugned CMOH Orders.[116]

99. The evidence before this Court further supports that Alberta not only used the least restrictive measures available based on the best scientific evidence at the relevant time, but that the public health policy choices reflected in the CMOH Orders were appropriately those of the CMOH. Thus there can be no doubt that for s. 1 purposes, the objectives served by the CMOH Orders, and relied on by Alberta to justify limiting any rights and drawing any lines, were limited to those objectives that served the public health policy objectives claimed by Alberta.

100. The evidence of the Respondents (Alberta) was set out in the affidavits and expert reports of the following witnesses:

> a) The Respondent CMOH of Alberta Dr. Hinshaw is a specialist in public health and preventative medicine.[117]
>
> b) Dr. Simmonds is an applied epidemiologist with 15 years relevant experience managing outbreaks and leading infectious disease surveillance in Alberta.[118] Due to her expertise in infectious disease epidemiology, mathematical modelling of infectious diseases, and policy, she was asked to support Alberta's Emergency Operations Centre as the lead for analytics and modelling for the COVID-19 response.[119]
>
> c) Deb Gordon, AHS was the Vice President and Chief Operating Officer, Clinical Operations. Her roles as VP and COO changed beginning in January in 2020 as a result of COVID-19 with the activation of the AHS Emergency Coordination Centre (ECC).[120] She also led the oversight and development of an Acute Care Capacity Plan.[121]
>
> d) Dr. Zelyas is a medical doctor who completed a residency in medical microbiology, a speciality within medicine that focuses on the laboratory diagnostics of infectious diseases. He has been working at the Alberta Public Health laboratory since, and he has been one of the medical lab leads for COVID-19 diagnostics.[122] He was thus qualified as an expert to give opinion evidence as a medical microbiologist regarding COVID-19"[123], including an analysis of polymerase chain reaction (PCR) diagnostic test of COVID-19 including their

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[116] *Ibid* at para 47.
[117] Hinshaw Affidavit at para 11.
[118] Affidavit of Dr. Simmonds, affirmed July 11, 2021 and filed July 12, 2021 at para 4 [Simmonds Affidavit].
[119] Simmonds Affidavit at para 7.
[120] Affidavit of Deborah Gordon, affirmed July 12, 2021, filed July 13, 2021 at para 7 [Gordon Affidavit].
[121] Gordon Affidavit at paras 14-15.
[122] Transcript of Proceedings, February 22, 2022, PM, p15/30-36.
[123] Transcript of Proceedings, February 22, 2022, PM, p15/5-p16/23.

accuracy/inaccuracy, their use to determine cases of COVID-19, and whether people who test positive on a PCR test are infected/contagious with COVID-19.[124]

e) Dr. Kindrachuk completed his PhD in biochemistry in 2007[125], and has since 2009 worked as a virologist.[126] He recently completed his first five-year term as the Canada Research Chair in the molecular pathogenesis of emerging and re-emerging viruses (appointed January 1, 2017). Dr. Kindrachuk is undertaking significant research work specific to SARS-CoV-2[127], including investigations on models of infection, and the effects of respiratory virus co-infection on disease outcome.[128]

Dr. Kindrachuk was qualified as a virologist with expertise to give opinion evidence on[129]:

(1) Current knowledge of COVID-19 Cases and Disease Severity, including COVID-19 clinical symptom onset and diversity[130]
(2) SARS-CoV-2 Transmission and High Risk Activities[131]
(3) NPIs reduce SARS-CoV-2 transmission[132]
(4) SARS-CoV-2 Variants of Concern[133]
(5) Herd Immunity and Vaccinations[134] and
(6) Ongoing and Future Research, including long-term complications in COVID-19 recoverees and reproductive health concerns.[135]

f) Dr. Dean, Ph.D. and M.A. in Biostatistics from Harvard University, is an Assistant Professor in the Department of Biostatistics and Bioinformatics in the Rollins School of Public Health at Emory University. Her research interests include public health surveillance, infectious disease epidemiology, emerging pathogens, and vaccine evaluation. Her evidence[136] was provided to the Court as she was the supervising author of the Madewell Study.[137]

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[124] Expert Report of Dr. Nathan Zelyas filed July 9, 2012 [Zelyas Report]; see Form 25, Schedule A to Zelyas Report at 1/144; see also Transcript of Proceedings, February 22, 2022, PM, p15/9-25 and p16/19-23.
[125] Transcript of Proceedings, February 22, 2022, AM, p46/17-25.
[126] Transcript of Proceedings, February 22, 2022, AM, p53/17-25.
[127] Expert Report of Dr. Jason Kindrachuk dated July 8, 2021 and filed July 12, 2021 at 5/1236 [Kindrachuk Report].
[128] Kindrachuk Report at 5/1236; Transcript of Proceedings, February 22, 2022, AM, p54/25-34.
[129] Transcript of Proceedings, February 22, 2022, AM, p46/11-15; and also Transcript of Proceedings, February 22, 2022, AM, p48/18 re language as noted in qualifying Dr. Kindrachuk on Form 25 to Kindrachuk Report at 1/1236.
[130] Kindrachuk Report at 6/1236.
[131] *Ibid* at 9/1236.
[132] *Ibid* at 16/1236.
[133] *Ibid* at 17/1236.
[134] *Ibid* at 18/1236.
[135] *Ibid* at 21/1236.
[136] Affidavit of Dr. Natalie Exner Dean, filed August 27, 2021 at para 1 [Dean Affidavit].
[137] "Madewell ZJ, Yang Y, Longini IM, Halloran ME, Dean NE (2020). Household transmission of SARS-CoV-2: a systematic review and meta-analysis of secondary attack rate. In Press at JAMA Network Open" (the Madewell Study), which is footnote 30 to the Dr. Bhattacharya Primary Expert Report, dated January 21, 2022, of 2300 pages [Bhattacharya Primary Report] at 527-543/2300.

g) Dr. Balachandra is the Chief Medical Examiner in Alberta. He has provided his expert opinion[138] in response to the assertions contained in the report prepared by Dr. Martin Koebel. As Dr. Balachandra explains, "[c]ause of death is a medical opinion determined by a medical doctor based on medical findings or reasons for the death."

h) Patricia Wood is a Senior Mortality Classification Specialist with Statistics Canada. Ms. Wood's evidence responds directly to a factual inaccuracy contained in Dr. Bhattacharya's Primary Expert Report. Dr. Bhattacharya had incorrectly asserted that Statistics Canada records COVID-19 deaths and influenza deaths differently, which he claimed artificially inflated death statistics for COVID-19.[139] As Ms. Wood's affidavit[140] explains, in actuality, COVID-19 and influenza deaths are coded using the same international coding rules and guidelines.[141]

101. Neither Dr. Balachandra nor Patricia Wood were cross-examined by the Applicants at trial. Further, the Applicants do not refer to the evidence of Dr. Koebel in any of their Pre-Trial Factums or Closing Arguments.

102. In addition to the above scientific evidence, Alberta also filed evidence in the area of Emergency Management from Scott Long[142] in rebuttal to Mr. Redman's opinion,[143] and Affidavits from Chris Shandro (Assistant Deputy Minister, Agency Governance and Program Delivery, Ministry of Jobs, Economy and Innovation)[144] and Darren Hedley (Sr. Assistant Deputy Minister, Budget Development and Reporting, Treasury Board and Finance)[145] on various provincial and federal programs and benefits, including a number providing

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[138] Expert Report of Thambirajah Balachandra dated July 7, 2021 and filed July 9, 2021 [Balachandra Report].
[139] Bhattacharya Primary Report at 45-46/2300, (p5-6).
[140] Affidavit of Patricia Wood, affirmed on July 12, 2021 and filed on July 12, 2021 [Wood Affidavit].
[141] *Ibid* at paras 3-4.
[142] Expert Report and Affidavit of Scott Long filed July 16, 2021 [Long Expert Report]. Mr. Long was the Acting Managing Director of AEMA from October 2020 until May 2021. Mr. Long was qualified by the Court as an expert to give opinion evidence in emergency management, Transcript of Proceedings, February 15, 2022, PM, p28/2 and p25/24-25).
[143] Expert Report of David Redman filed January 22, 2021 [Redman Primary Report] also filed a Surrebuttal Report on August 6, 2021. Alberta took no issue with Mr. Redman being qualified to give evidence as an expert witness "in the area of emergency management, including the functions of mitigation, preparedness, response and recovery", Transcript of Proceedings, February 15, 2022, AM p45/33-35.
[144] Affidavit of Chris Shandro, affirmed July 8, 2021 and filed July 12, 2021 at para 1 [Shandro Affidavit].
[145] Affidavit of Darren Hedley, affirmed July 12, 2021 and filed July 12, 2021 at para 1 [Hedley Affidavit].

emergency financial relief programs targeted to help those in need of assistance during the COVID-19 pandemic.[146]

103. The Applicants' contrary scientific evidence largely came from Dr. Bhattacharya, a public health economist from Stanford University. He has filed two expert reports.[147] He was qualified as an expert to give opinion evidence in the area of public health and health economics, including a focus on epidemiology and infectious disease epidemiology, and on the public heath impacts of "lockdowns".[148] Alberta did not object to this qualification, but took the position that it would argue the weight that should be given to Dr. Bhattacharya's various opinions in his two reports.

104. In cross-examination, Dr. Bhattacharya acknowledged he understood his role as an expert[149], which he agreed is to assist this Court in determining the matters in issue.[150] He also understood this means his "obligation is to advise the Court of relevant authorities, even if they do not support" his opinion, if he is aware of them; and that he must provide the Court with any limitations or qualifications in the materials that he is asking this Court to rely on in support of his opinion.[151]

105. In Gateway, Chief Justice Joyal described Dr. Bhattacharya as testifying "as an expert in health economics", who "researches and writes primarily in the field of health outcomes related to various financial parameters in the United States, including Medicare, private insurance coverage, physician spending, the Affordable Care Act, National Institute for Health (NIH) funding and the ownership of facilities."[152]

106. Joyal CJ also found that "prior to COVID-19", Dr. Bhattacharya "had done limited work in respect of anything dealing with viruses and much of what he did was connected to

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[146] Hinshaw Affidavit at para 92.
[147] Bhattacharya Primary Report, and Expert Report of Dr. Jay Bhattacharya, dated July 30, 2021, of 24 pages [Bhattacharya Surrebuttal Report] and Bhattacharya Surrebuttal Book of Authorities; Transcript of Proceedings, February 10, 2022, p48/2-18.
[148] Transcript of Proceedings, February 10, 2022, p43/23-32.
[149] Transcript of Proceedings, February 10, 2022, p47/31-p49/15.
[150] Transcript of Proceedings, February 10, 2022, p48/20-23.
[151] Transcript of Proceedings, February 10, 2022, p49/9-15.
[152] *Gateway, supra* note 7 at para 166.

economics", and that "his knowledge of immunology is based on his studies in medical school and the articles he has since read."[153]

107. When paragraph 166 of Chief Justice Joyal's reasons in *Gateway* were put to Dr. Bhattacharya, he disagreed that Joyal CJ's description is an accurate and fair description of his expertise.[154]

108. He did acknowledge however that he wrote a one-line biography on the Stanford website describing himself as "A health economist who focusses on vulnerable populations and aging".[155] While he thought he wrote it 15 years ago, he also acknowledged "it is accurate".[156]

109. Exhibit 2[157] is his *curriculum vitae* from "a website that" he "put together". It lists 22 "Research Areas". These areas of research also suggest health economics is his focus as, consistent with the focus of his published material, 12 of 22 of his listed "Research Areas" are in various subjects in economics, insurance, Medicare, Affordable Care Act, and workers compensation.[158] Though he speculated he perhaps last updated Exhibit 2 in 2015[159], under cross-examination it was pointed out to him that Exhibit 2 contains papers from 2018[160], and so he acknowledged that he didn't "remember the last time he updated it".[161]

110. The cross-examination of Dr. Bhattacharya on his filed *curriculum vitae* as part of his Primary Report[162] further confirms that Chief Justice Joyal's conclusions about Dr. Bhattacharya's expertise and background were fair and accurate.

111. Summarizing Manitoba's cross-examination of Dr. Bhattacharya, Chief Justice Joyal said he had "reviewed carefully the testimony and cross-examination of Dr. Bhattacharya given the importance of his evidence to the position being advanced by the applicants. In considering Dr. Bhattacharya's evidence, the Court must acknowledge without hesitation his undisputed

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[153] *Ibid.*
[154] Transcript of Proceedings, February 10, 2022, p61/31-p63/32.
[155] Transcript of Proceedings, February 10, 2022, p63/34-p65/7.
[156] Transcript of Proceedings, February 10, 2022, p64/21.
[157] Exhibit 2, Bhattacharya Research *curriculum vitae*.
[158] Transcript of Proceedings, February 10, 2022, p68/13-29 and p69/30-41.
[159] Transcript of Proceedings, February 10, 2022, p67/30-38.
[160] Transcript of Proceedings, February 10, 2022, p69/2-5.
[161] Transcript of Proceedings, February 10, 2022, p69/20.
[162] See Bhattacharya Primary Report (Schedule A) at 7-32/2300; and Transcript of Proceedings, February 10, 2022, p44/34-p45/26 and p70/2-p81/35.

and strong academic credentials as a professor at one of the world's leading universities". Nevertheless, Chief Justice Joyal found:

> Despite those obvious credentials and general qualifications, questions can be and were raised respecting the weight that should attach to some of his opinions and views on the specific topics of immunology and virus spread. On these topics — in the absence of a more consistent and more specialized long-term academic focus and a more obviously rooted practical and clinical experience — some of Dr. Bhattacharya's opinions and views can be justifiably challenged.[163]

112. Over the last 2 years, Dr. Bhattacharya's work on COVID-19 has been in the nature of public advocacy on lockdowns and the Great Barrington Declaration.[164] This advocacy included his admission in the December 2020 California *Tandon v Newsom*[165] case that lockdowns may be necessary to protect overwhelming hospitals.

113. When asked whether he remembered giving evidence in Florida in support of the State's mandate prohibiting school masking, he twice stated "we won on appeal".[166] He clearly identifies closely with the approach taken by the State of Florida. He has appeared with Florida's Governor Ron DeSantis at three or four roundtables.[167]

114. In the Tennessee case of *RK v Lee*[168], Judge Crenshaw found "Dr. Bhattacharya's expert testimony ... troubling and problematic for several reasons".[169] Dr. Bhattacharya purported to know better than the lead author and designer of the key mask study. Judge Crenshaw found:

> Dr. Bhattacharya is not qualified to make several of his conclusions. He conceded that he does not practice medicine, is not board-certified in any medical field, and did not complete an infectious disease residency. (Doc. No. 68-1 at 13:6-14). Nevertheless, Dr. Bhattacharya purported to comment on a child's risk of spreading infection or dying from COVID 19. In spite of not having practised medicine or being board certified, or not completing an infectious disease

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[163] *Gateway*, *supra* note 7 at para 181.
[164] Transcript of Proceeding, February 10, 2022, p46/18-25.
[165] *Tandon v Newsom*, 517 F Supp 3d 922, 2021 WL 411375 (ND Cal 2021) [*Tandon*] **- TAB 10**; see para 15 of Exhibit 3, Dr. Bhattacharya's Reply Declaration in *Tandon*, dated December 7, 2020.
[166] Transcript of Proceeding, February 10, 2022, p57/35-38 and p58/26.
[167] Transcript of Proceedings, February 14, AM, 2022, p41/18-29.
[168] *RK v Lee,* 3:21-cv-00725 (MD Tenn 2021) [*Lee*] – **TAB 11**.
[169] *Ibid* at para 10; See also cross-examination on *Lee* in Transcript of Proceedings, February 10, 2022, p53/22-p57/33.

> residency, [Dr. Bhattacharya] nevertheless, purported to comment on a child's risk of spreading infection or dying from COVID-19.[170]

115. Accordingly, his evidence was soundly rejected and given no weight as Judge Crenshaw said he was "simply unwilling to trust Dr. Bhattacharya".[171]

116. In Gateway, his almost identical evidence as in this matter was ultimately rejected by Chief Justice Joyal. The Chief Justice summarized his views of Dr. Bhattacharya's evidence stating "although he obviously carefully considered Dr. Bhattacharya's opinions":

> there was in the end, little in the evidence of Dr. Bhattacharya (or the cumulative evidence of all of the applicants' witnesses) that would cause [him] to seriously doubt the science upon which Manitoba is relying. Similarly, there is little in Dr. Bhattacharya's evidence that would cause [him] to doubt as to whether Manitoba has established what it must establish in order to discharge its onus on its s. 1 defence (of the impugned orders) on a balance of probabilities.[172]

117. When Dr. Bhatacharya was asked if he agreed with Chief Justice Joyal that his "contrary and in some cases contrarian views … need be seen as views and opinions that are not supported by most of the scientific and medical community currently advising on and formulating the ongoing public health responses to [the] pandemic"[173], he agreed that at the time of the *Gateway* trial in May 2021 his "opinions were in the minority".[174] However, he does not "agree with that any longer"[175], and now he says his views are "increasingly mainstream".[176]

118. In cross-examination, Dr. Bhattacharya raised criticism by Francis Collins, the head of the United States National Institute for Health (NIH), who he said had written an email four days after the GBD was written that characterized the GBD as being "fringe", and the authors of the GBD as "fringe epidemiologists".[177] Dr. Bhattacharya was very keen during cross-examination

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[170] *Lee*, *supra* note 168 at para 11; Transcript of Proceedings, February 10, 2022, p55/34-37.
[171] *Lee, ibid* at para 13.
[172] *Gateway, supra* note 7 at para 184.
[173] *Ibid* at para 183.
[174] Transcript of Proceedings, February 10, 2022, p91/30.
[175] Transcript of Proceedings, February 10, 2022, p90/26-27.
[176] Transcript of Proceedings, February 10, 2022, p90/25.
[177] Transcript of Proceedings, February 10, 2022, p90/34-38.

to express his opinion that his epidemiological views were "not fringe" nor was he a fringe epidemiologist, which he did on multiple occasions.[178]

119. He alleged Alberta's approach to the pandemic was "medical malpractice",[179]and confidently stated he didn't believe Alberta "has adopted the minimal necessary provisions".[180] However, he could provide little detail as to the specifics of Alberta's pandemic measures or approach.[181]

120. He was asked in cross if he knew "anything specifically about the forecasting … undertaken in Alberta", and said he "had not looked recently at Alberta's forecasting".[182]

121. When asked what, if any, changes he made to his Alberta reports compared to his reports filed in Manitoba in *Gateway*, he said "he made some alterations … more specific to Alberta's situation".[183] However, he wasn't certain about the specific changes made as "it's been a while, it's been a year since I wrote that report – but if I remember, I added Alberta's current case numbers, you know, that kind of thing."[184]

122. During his qualification by Mr. Grey, Dr. Bhattacharya updated the two expert reports he has filed by explaining that two unpublished studies referenced in his Primary Report had now been published.[185] However, he failed to mention the fact that the *Savaris Study*, a key part of his evidence in both Manitoba and Alberta on the effectiveness of NPIs, had been retracted by the editors of *Scientific Reports*.[186]

123. Dr. Bhattacharya was not candid with the Court. As discussed in further detail below, in spite of having been cross-examined previously in Manitoba on the same studies and same issues, he was not forthcoming about the *Savaris Study* retraction, and on the criticism of his own

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[178] See Transcript of Proceedings, February 10, 2022, p90/35, 90/38, 91/5, 91/11, 92/16, 93/3-7; Transcript of Proceedings, February 14, 2022, AM, p40/18; See also response of Dr. Simmonds, Transcript of Proceedings, February 24, 2022, AM p16/31-17/10.
[179] Transcript of Proceedings, February 10, 2022, p42/31-32.
[180] Transcript of Proceedings, February 10, 2022, p94/10-12.
[181] Transcript of Proceedings, February 10, 2022, p94/8-28.
[182] Transcript of Proceedings, February 11, 2022, p33/39-41.
[183] Transcript of Proceedings, February 10, 2022, p59/33-34.
[184] Transcript of Proceedings, February 10, 2022, p59/38-40.
[185] Transcript of Proceedings, February 10, 2022, p40/23-36.
[186] See detailed discussion on his evidence on the Savaris Study below at paras 255-275 under the subheading "Effectiveness of NPIs".

study *Assessing Mandatory* by the same group of scientists responsible for the "extraordinary" occurrence of the *Savaris Study* retraction.[187]

124. He also continued representing the data resulting in the 0.7 percent from the Madewell Study on asymptomatic/pre-symptomatic transmission, a key study in his opinion on symptom checks, as being the result of an analysis of 54 studies in the Madewell Study's Meta-analysis, when, in reality the 0.7% result was from only 4 studies in the sub-analysis.[188]

125. Not only did his evidence lack candour, he also came unprepared. When he was asked whether he had read expert reports and affidavits filed by Alberta on July 12, 2021 in rebuttal to the Applicants, he said "could be, you know, again, it's been months and months since I wrote it."[189] He said he had "read the reports [filed by Alberta on July 12] to which [he] filed a surrebuttal".[190] He specifically acknowledged he had not even reviewed the Affidavits of Deb Gordon[191] or those of ADMs Shandro and Hedley.[192] He said he may have read Dr. Dean's affidavit.[193]

126. Dr. Bhattacharya also appeared to misunderstand the relevance of certain evidence on retrospective NPI studies to the issue of whether the impugned restrictions in the CMOH Orders (largely from the second and third waves) were justified, as he frequently tried to give evidence on the "Johns Hopkins Study" that this Court had already ruled was not relevant to the matters it must decide.[194]

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[187] See below paras 262-263, 273-274.
[188] Transcript of Proceedings, February 10, 2022, p104/38-120/9; and Transcript of Proceedings, February 11, 2022, p91/32-p106/10. See detailed discussion below at paras 206-224 under the subheading "Asymptomatic and pre-symptomatic transmission".
[189] Transcript of Proceedings, February 10, 2022, p60/25-31.
[190] Transcript of Proceedings, February 10, 2022, p60/35.
[191] Transcript of Proceedings, February 11, 2022, p33/25-27.
[192] Transcript of Proceedings, February 14, AM, 2022, p27/29-34.
[193] Transcript of Proceedings, February 11, 2022, p96/25-32.
[194] For example: Transcript of Proceedings, February 10, 2022, p106/9-12, Transcript of Proceedings, February 11, 2022, p19/16-18, Transcript of Proceedings, February 11, 2022, p17/23-24, Transcript of Proceedings, February 14, 2022, AM, p45/5 and p45/29 (i.e. "Hawkins"); also see re the Johns Hopkins Study, Transcript of Proceedings, February 10, 2022, p106/14. This Court determined the Johns Hopkins Study was not relevant to matters in issue before the Court, Transcript of Proceedings, February 15, AM, p30/37-p31/7.

III. ALBERTA'S PANDEMIC RESPONSE[195]

A. Alberta's COVID-19 public health objectives

127. Dr. Hinshaw explains Alberta's COVID-19 public health objectives as follows:

> Alberta's objective, in common with all other Canadian jurisdictions, has always been to use the least restrictive measures required to prevent or limit the spread of the virus thereby minimizing the number of serious outcomes, in terms of both deaths (mortality) and illness (morbidity), while balancing the collateral effects of public health restrictions and minimizing the overall harm to society.[196]

128. Dr. Bhattacharya says although he doesn't disagree that this reflects Alberta's objectives, he doesn't believe that was what Alberta actually followed.[197]

B. Sharing of COVID-19 knowledge

129. Dr. Hinshaw describes the importance of the sharing of knowledge on the evolving pandemic[198]and how "[p]ublic health officials from Alberta, Canada and around the world have worked together to develop and share new information about how to best respond to the pandemic."[199] Knowledge has also been shared between various people and entities within Alberta since the start of the pandemic[200], and emerging information from other jurisdictions has been shared with these groups across the country to inform Alberta's response.[201]

C. Ethical principles in public health decision-making

130. Dr. Hinshaw's affidavit reviews the ethical principles applicable to public-health decision-making.[202] She explains that while "the objective of Alberta's public health guidance and

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[195] Hinshaw Affidavit at paras 9-38, and Part D on Alberta's Approach to the Pandemic at paras 85-161, which includes CMOH Role in decision-making process at paras 85 and 86, on CMOH's decision-making see also Hinshaw Affidavit at paras 13-17 (generally), and paras 22-29, (in Alberta and COVID-19)). See also *Gateway, supra* note 7 at paras 62-65.
[196] Hinshaw Affidavit at para 163. See also Hinshaw Affidavit at paras 87 and 98 re restrictive measures as "last resort"; and cross-examination of Dr. Bhattacharya Transcript of Proceedings, February 10, 2022, p93/30-p94/39; see also re Dr. Bhattacharya's Reports do not address morbidity, discussed below at paras 237-242, and Transcript of Proceeding, February 10, 2022, p94/41-p104/9.
[197] Transcript of Proceedings, February 10, 2022, p93/31-94/6.
[198] Hinshaw Affidavit at paras 78-84; *Gateway, supra* note 7 at paras 62-64.
[199] Hinshaw Affidavit at para 78.
[200] *Ibid* at para 80.
[201] *Ibid* at para 84.
[202] *Ibid* at paras 18-21, 87 and 93-99.

measures has been to protect the community and prevent widespread transmission", "the framework for Alberta's balanced approach in response to the COVID-19 public health threat was, where reasonably possible, to allow people to decide for themselves the risks they wanted to take as individuals."[203]

131. In addition, restrictive measures to control widespread transmission of COVID-19 were used as a last resort in the second and third waves when advice and voluntary guidance were not sufficient to stop rising case numbers and rising hospitalizations, ICU admissions and deaths due to COVID-19.[204]

D. The Chief Medical Officer of Health's Orders were Progressive and Responsive to the Course of the Pandemic[205]

132. Dr. Hinshaw explains "Alberta has implemented various public health measures in response to the COVID-19 pandemic since March 2020. Alberta's approach is consistent with that taken throughout Canada and across much of the world."

133. The approach taken globally by public health experts has been to seek to limit the number and duration of contacts between people, particularly when indoors, in order to prevent or reduce transmission of the SARS-CoV-2 virus. The extent to which mandatory measures have been implemented in Alberta has depended on local metrics, including active case rates, positivity rates, R-values, and hospital and ICU capacities.[206]

134. As no single measure alone is sufficient to control the spread of COVID-19, Alberta has attempted to control transmission by implementing a variety of voluntary and mandatory public health measures. The evidence during the second and third waves was clear that without widespread immunization, restrictions on how people interact with others outside of their households were effective in reducing cases of COVID-19 by reducing the transmission of SARS-CoV-2.[207]

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[203] *Ibid* at para 97; Transcript of Proceedings, February 10, 2022, p93/94.
[204] *Ibid* at para 98; see also at para 163 re objective.
[205] Hinshaw Affidavit at para 162-169; and see *Gateway*, *supra* note 7 at paras 66-69.
[206] Hinshaw Affidavit at para 162.
[207] *Ibid* at para 164.

135. While Alberta's approach has always been to attempt to control the spread of the virus while protecting, as much as possible, an individual's ability to interact with others and participate in work, recreational, religious and social activities, as the number of COVID-19 cases and related hospitalizations, ICU stays, and deaths increased, Alberta's public health measures in response also had to adapt.[208]

E. March 2020-summer 2020: Alberta's response to the first wave

136. The early response to the pandemic in the spring of 2020 was characterized by limited knowledge and tremendous uncertainty.[209] Dr. Hinshaw explains that "at the very beginning of the pandemic, a lack of scientific evidence on the effectiveness of the public health measures, including the degree of public compliance and the collateral effects, meant decisions had to be taken in circumstances of significant uncertainty."[210]

137. Fortunately, Alberta was spared widespread community transmission and did not experience a large number of cases during the first wave of the pandemic in the spring of 2020.[211] Dr. Hinshaw's evidence on the first wave is that:

> The initial closure (March 17 to May 14) was to address the increasing number of cases in the province. Alberta eased most public health measures in place at that time in a step-wise fashion beginning with the May 14, 2020 relaunch. After May 14, 2020, Alberta used targeted measures only as required to keep spread manageable and to ensure that our health system was able to cope with demands.
>
> Following Alberta's initial closure between March 17 and May 14, 2020, Alberta pursued a strategic and accelerated relaunch to facilitate opportunities for individuals and businesses to recuperate from both a financial and well-being perspective. Alberta was among the first jurisdictions in Canada to enter into the relaunch phase, and was often at the forefront of safely reopening sectors.

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[208] *Ibid* at para 165.
[209] *Gateway, supra* note 7 at para 68.
[210] Hinshaw Affidavit at para 77. See also *Gateway, supra* note 7 at para 316 citing "Public Health Law and Policy in Canada" that "in responding to novel public health threats, authorities will often lack scientific facts and must make judgement calls about restricting individual liberties for the sake of protecting the population as a whole. As Laskin CJC observed in *Oakes*: "It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance".
[211] Gordon Affidavit at paras 21-23.

> Seasonality obviously also benefitted our containment efforts during this time. During July and August the daily cases and corresponding hospital and ICU numbers remained stable, as shown in the … table.[212]

F. Fall 2020 and Alberta's second wave

138. Dr. Simmonds' evidence traces the work of Alberta's analytics team through the summer of 2020 into the second-wave:

> 18. In the summer of 2020, modelling work focused the transmission dynamics of COVID- 19 with the population back indoors in offices and schools in the fall. … Modelling predictions aligned with those from the Public Health Agency of Canada that stricter public health interventions would have the most significant effect on disease transmission rates. Short term projections were targeted to focus on the impact of COVID-19 on the acute care system to ensure there was enough health system capacity. The public health actions were to be informed by Alberta's data and experiences, up-to-date research, and experiences of other jurisdictions. The impact of proposed public health measures on transmission dynamics were assessed based on the following criteria provided to the analytics team- the goal was to protect those who are most vulnerable, tailor public health measures to local needs and circumstances as much as possible, and that consideration were made for the larger complex strategic context - health, economic, and social needs.
>
> 19. In September 2020, cases increased from the August average of 99 daily cases to 141 in September, driven by increased COVID-19 transmission in the Edmonton Zone and some rural areas, notably the City of Lethbridge and the surrounding county. This subsequently resulted in an increase in COVID-19 hospitalizations, and on October 11 Alberta's hospitalizations and ICU admissions reached a new high with 85 hospitalizations and 16 ICU admissions for a total of 101 hospitalizations including ICU. As Edmonton was experiencing a more significant level of disease transmission than the other areas of the province, voluntary measures were implemented to reduce the spread of COVID-19, specifically the potential for outbreaks and super spreader events:… Approximately two weeks later, these voluntary measures were implemented in Calgary as well.
>
> 20. In October [2020], daily cases continued to increase, and measures provided for Thanksgiving weekend included indoor gatherings limited to only household and cohort members. The data from Alberta and worldwide showed household transmission of COVID-19 was higher than in other settings, which follows logically as transmission is a function of exposure time, proximity to others, and use of personal protective equipment (PPE).
>
> 21. After the thanksgiving weekend, October 12, the rate of increase of new daily cases continued to rise. Edmonton remained the hotspot in the province with a

[212] Hinshaw Affidavit at paras 167-169.

> weekly Rt of 1.35. The sized of the outbreaks continued to grow in acute and continuing care facilities putting pressure on the health system.
>
> 22. The number of outbreaks rose steadily in October. Indoor and household gatherings became an increasing source of transmission. Two weeks after Thanksgiving, on October 26, the new daily cases, Rt, and positivity were all higher than they had ever been before. On October 26 a mandatory 15-person limit on all social gatherings (indoor and outdoor) in the cities of Edmonton and Calgary was implemented.
>
> 23. In November 2020, as expected, the hospitalizations began to rise rapidly as case growth leads to hospitalization growth, but as a lagging indicator as it takes time get sick enough to require hospitalization. A key characteristic of COVID growth is that it can tum from manageable to exponential in a matter of days to weeks. As case growth became exponential, the data obtained from contact tracing became less timely and complete. The ability to identify outbreaks and link cases to events began to deteriorate. The evidence suggested that targeted restrictions were insufficient, and that acute care would be overwhelmed. On November 24, 2020 with 1,264 new cases, 50,410 active cases in the province and 396 people in hospital and an additional 74 in the ICU, a state of public health emergency was declared.[213]

G. November 24, 2020: Alberta declares a Public Health Emergency [214]

139. Section 52.1 of the *PHA* authorizes the Lieutenant Governor in Council to make an order declaring a state of public health emergency relating to all or any part of Alberta, where satisfied on the advice of the CMOH that a public health emergency exists or may exist and prompt coordination of action or special regulation of persons or property is required in order to protect the public health.[215]

140. Dr. Hinshaw describes the rationale for the declaration of public health emergency as follows:

> [o]n November 24, 1,115 new cases had been identified over the last 24 hours, and there were 348 people in hospital, including 66 in ICU. The province had 50,410 active cases. In response to this growth, and because of increasing community transmission with unknown source, which made tracing contacts harder, Alberta declared a state of public health emergency on November 24, 2020.[216]

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[213] Simmonds Affidavit at paras 18-23.
[214] Hinshaw Affidavit at paras 187-211; *Gateway, supra* note 7 at paras 70-74.
[215] *PHA*, s. 52.1.
[216] Hinshaw Affidavit at paras 187.

141. “[N]ew restrictions along with increased enforcement were put in place to reduce the spread of COVID-19 in communities, protect hospitals, keep schools and businesses open as much as possible, and better protect vulnerable Albertans.”[217] “Mask wearing became mandatory effective immediately … in all indoor workplaces in the Calgary and Edmonton areas, except when working alone in an office or safely distanced cubicle or [where] a barrier is in place.[218] “However, the case trajectory continued to accelerate through November.”[219]

142. In spite of the mandatory restrictions put in place, by “December 2020 the sharp increase in unknown community transmission meant the effectiveness of contact tracing was greatly reduced. As the number of individuals testing positive for COVID-19 increased, the capacity of the healthcare system to contact cases, identify contacts and link cases was significantly limited”, and “the capacity to identify and control the spread in a targeted way was severely curtailed. By December 18, 2020, 78% of all active COVID-19 cases had no identifiable source.”[220]

143. “The very nature of exponential growth means even in areas with low numbers of COVID- 19 cases, the number of cases can grow very quickly.” [221] Due to the “exponential growth in the number of COVID-19 cases Alberta experienced during its second wave up to December 18”[222], the heath care system was under severe threat.

144. Dr. Simmonds explains that Alberta’s modelling “did accurately predict uncontrolled spread as observed in the real-world experience in wave 2 of the pandemic in Alberta as shown in Alberta’s fall predictions."[223]

145. “The estimated peak for cases was December 15, 2020 with 2,023 cases and the actual was December 13, 2020 with 1,875. The hospitalizations due to COVID were estimated to peak at 648 on December 27, 2020 in fact the peak was December 30, 2020 with 905 hospitalizations.

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[217] *Ibid.*
[218] *Ibid* at para 193.
[219] Hinshaw Affidavit at para 194.
[220] Hinshaw Affidavit at para 200.
[221] *Ibid.*
[222] *Ibid*.
[223] Simmonds Affidavit at para 16, Exhibit F, p36/58.

… COVID related ICU were estimated to peak 168 on December 29, 2020 and the peak was December 28, 2020 with 154 patients in the ICU."[224]

146. Deb Gordon's evidence is that there is no comparing the threat to Alberta's healthcare system from seasonal influenza compared to COVID-19.[225] Comparatively, when responding to other viral contagions such as seasonal influenza, surges in capacity for inpatient and ICU admissions are capable of being managed within the existing bed bases or with short-term opening of surge spaces.[226]

147. Over the past 5 years, the highest total seasonal influenza inpatient admissions to COVID-19 capable units with influenza was 206 patients (2017/18 influenza season), compared to COVID-19 Wave 2 admissions, which at its peak saw 767 patients hospitalized at one time with COVID-19, a more than 350% increase in the number of peak admissions for COVID-19 patients compared to annual seasonal influenza admissions.[227]

148. Consequently, the demands of COVID-19 on ICUs during Wave 2 were also unprecedented. In the five years prior to Wave 2, the highest number of total seasonal influenza admissions to the ICU saw 31 patients with influenza in 2017/2018. Comparatively, Wave 2 peak COVID-19 patient admissions in the ICU saw 158 patients, an increase of more than 500% for COVID ICU admissions compared to the highest annual admission levels for seasonal influenza.[228]

149. Dr. Hinshaw explains how the severe pressure on the healthcare system through the second wave necessitated further restrictions through late November and December in order to slow transmission and bend the curve in ICU cases and hospitalizations.[229]

H. March 2021-June 2021: Variants, alpha and Alberta's third wave

150. In February and March, 2021, the forecasting was revised to focus on the impact of the variants of concern (VOCs) and vaccinations on hospitalizations, particularly ICU. The model

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[224] *Ibid.*
[225] Gordon Affidavit "the flu outbreaks that we have experienced were nothing like what we have seen with this respiratory virus." Transcript of Proceedings, February 24, PM, 2022, p4/6-9; see also Hinshaw Affidavit at paras 64-65.
[226] Gordon Affidavit at para 56.
[227] Gordon Affidavit at para 58. Tables comparing the tracking of Influenza vs COVID-19 Inpatient and ICU levels are Exhibit "P".
[228] Gordon Affidavit at para 59.
[229] Hinshaw Affidavit at paras 195–211.

estimated that the impacts of rapid immunization would not immediately reduce the hospitalizations and ICU admissions as 14-21 days is required to develop immunity. The data shows that approximately two weeks after restrictions were implemented May 5, 2021 the number of people in ICU peaked and then began to decrease.[230]

151. As Dr. Simmonds further explains:

> The third wave began in March 2021 and was the result of the increasing variants, specifically [the alpha variant] B.1.1. 7, which has impacted younger and healthier Albertans compared to the previous waves. At the same time, there was increasing non-compliance with following the restrictions and cases who decline to provide information to contact tracers (para 27).

152. Dr. Kindrachuk explains that:

> In Canada, variants of concern had deleterious effects on health and healthcare systems across many regions during the third wave of Covid-19 in early 2021. While the high mortality associated with individuals in long-term care facilities and personal care homes were drastically reduced during the third wave, hospitalizations and ICU admissions pushed healthcare systems beyond their capacity in numerous jurisdictions.[231]

153. In Alberta, the peak of the third wave was April 30, 2021 when 2,408 cases were identified, the highest daily case count to date, with 665 outbreaks in schools, and 6,492 associated cases as a result of the VOCs. As with the previous waves targeted measures were implemented at first. On April 29th it was announced schools would close in areas with more than 350 active cases per 100,000. Affected areas included the biggest municipalities in the province – Edmonton, Calgary, Fort McMurray, Red Deer, Grande Prairie, Lethbridge, and Airdrie. With the VOC in schools and activities surrounding schools, these had become areas of increased transmission.

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[230] Simmonds Affidavit at para 26.

[231] Kindrachuk Report at 19/1236. Dr. Kindrachuk also notes an Ontario COVID-19 Science Table report from March 29, 2021 that detailed increasing trends in hospitalizations and ICU admissions as compared to late December 2020, during the second pandemic wave. The report showed a greater percentage of patients admitted to ICU under 60 years in the third wave compared to the second wave, Kindrachuk Report at 19/1236. Dr. Bhattacharya in cross-examination said he did not recall such data, Transcript of Proceedings, February 14, 2022, PM, p7/13-33.

154. Deb Gordon's evidence explains the real threat to Alberta's health care system that the alpha variant posed during the third wave and how AHS responded:

> 65. By the beginning of Wave 3 in April 2021, COVID-19 variants of concern (viral mutations and genetic variants of the SARS-Co V-2 virus … became the dominant strains of new cases in Alberta and cases requiring hospitalization. Many members of our Clinical Operation teams along with ECC worked to assess and integrate into AHS' Capacity Plan the impact that the variants of concern would have on acute care capacity. As throughout the pandemic, the goal to increase acute care capacity was to ensure there was sufficient capacity to meet the demands as projected by the AHS EWS high scenario and projections developed by Alberta Health.
>
> 66. We brought forward learnings and experiences gained through the first 2 waves. For example, we learned how long it would take to scale surge capacity up and down. We also knew that at the height of Wave 2, when we had a total of 291 ICU beds open (including 118 net new surge beds) and staffed, that it put a tremendous stress on the health care system due to case distributions which required a 30% reduction in usual surgical activity in the Edmonton Zone. We further knew that having beyond 291 ICU beds open and staffed would be extremely difficult. Consequently, we were required to manage ICU capacity more finitely and fine tune our ICU staffing plan for Wave 3.
>
> 67. … By mid-April 2021, actual ICU cases with COVID-19 were once again tracking above the AHS EWS high scenario. Consequently, the demands of COVID-19 on hospital capacity and resources continued to be unprecedented leading to an accelerated implementation of plans to increase surge capacity for COVID-19.
>
> 68. Our Acute Care Capacity Plans from Wave 2, as carried forward throughout Wave 3, had previously identified additional surge capacity of up to 2,250 beds. Our experience in Wave 2 had shown that the majority of those spaces could be made available within 72 hours notice.
>
> 69. Of the additional surge capacity for Wave 3, 320 net new spaces were available; that is the approximately equivalent to opening a new hospital such as the South Health Campus in Calgary or the Red Deer Regional Hospital Centre.
>
> 70. Capacity planning for ICUs remained unchanged from Wave 2, meaning we could accommodate up to 425 ICU beds for COVID-19 patients. Of that total, 118 net new spaces had been created in Wave 2; however, as Wave 2 subsided, the majority of those spaces were closed, and staff was redeployed back to surgery or were assigned to other pandemic related functions such as assisting with vaccinations. Reactivating those beds during Wave 3 therefore required adjusting staff assignments and reducing capacity in other COVID-19 and non-COVID 19 related functions.
>
> 71. For example, surgical reductions of 30% - approximately 1600 per week, would be required to add 120 of the 425 ICU beds, while another 187 additional beds

> necessary to reach maximum ICU capacity would require further reductions in surgery, doubling up of occupancy in existing single patient rooms and using additional unconventional spaces such as operating rooms. Unconventional staffing models would also have to be considered.
>
> 72. In total, a net new number of ICU beds during Wave 3 was increased from Wave 2 to a peak total of 126 net new beds. This unprecedented amount was approximately 73% more than our usual pre-pandemic capacity for ICU.
>
> 73. On May 17, 2021 Alberta reached peak COVID hospitalizations for Wave 3 with 187 patients with COVID-19 in ICU. The overall ICU occupancy (COVID and non-COVID patients) was approximately 141 % (244 COVID and non-COVID/173 baseline beds) without accounting for the 110 net new surge spaces or 86% including the net new surge spaces. On May 10, 2021 hit a peak of 542 inpatient hospitalizations of patients with COVID-19. The overall inpatient occupancy (COVID and non-COVID) was approximately 86% without accounting for the 320 net new surge spaces or 85% including the net new surge spaces. Wave 3 active COVID cases peaked at 25,159 cases provincially, while hospitalization rates per million peaked at 30.9 in the North Zone.[232]

IV. SUBMISSION OF THE APPLICANTS ON THE SCIENTIFIC AND EMERGENCY MANAGEMENT EVIDENCE

155. The Applicants argue "the crux of the matter here is the Court is being asked to assess the various scientific opinions and how they relate to the propriety of the order, and whether or not they violate the *Charter*, and certainly whether they meet the test under Section 1 of the *Charter*."[233] In the submission of HBC et al, this Court should "weigh the quality of the expert evidence – especially scientific data to determine whether a state of public emergency was actually justified."[234]

156. As it was in Gateway, "put simply, it is the applicants' position that COVID-19 is not a sufficient threat to most of the populace such that the state can prevent a free people from the exercise of their fundamental right to gather and worship if they choose."[235]

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[232] See also Hinshaw Affidavit at para 159. In spite of this evidence, the Applicants argue "that there is no evidence provided … that any appropriate steps were taken to create additional surge capacity", see opening statement of Ms. Ingram, Transcript of Proceedings, February 10, 2022, p25/30-33. Mr. Redman's opinion is Alberta's "surge capacity should be able to deal with whatever comes in each form of the variants as they progress", Transcript of Proceedings, February 15, 2022, PM, p11/17-18.
[233] Transcript of Proceedings, February 10, 2022, p12/10-13.
[234] Transcript of Proceedings, February 10, 2022, p35/20-22.
[235] *Gateway, supra* note 7 at para 236; Ingram Pre-Trial Factum at para 21.

157. Also as in *Gateway*, the Applicants argue the evidence demonstrates that Alberta has not established that the restrictions in the CMOH Orders were constitutionally justified pursuant to s. 1 of the *Charter*. Similar to *Gateway*, they argue that based on the evidence there is no pressing and substantial objective because there is "no evidence that Covid-19 ever threatened hospital capacity. Nor is there any evidence that the restrictions imposed under these orders reduced either the spread of Covid-19 or morbidity rates".[236]

158. They argue there is no rational connection between the public health objectives and the impugned provisions because: (i) PCR tests are unreliable[237], (ii) asymptomatic transmission risk is negligible, (iii) unreliable "mad cap" models and unreliable case counts, (iv) no evidence of easy outdoor transmission[238], (v) poor evidence on transmission in places of worship, and (vi) no cost benefit analysis.[239]

159. They argue there is no persuasive evidence to support Alberta's position that the impugned restrictions minimally impair the *Charter* rights they infringe. They also argue the deleterious effects of increased societal harms of the restrictions are severe and there are no salutary effects as "lockdowns don't work".[240]

160. They further insist that Alberta should have accounted for evidence in the academic literature published in January (*Assessment on Mandatory*) and March 2021 (the *Savaris Study*)[241] that showed there "were no significant benefits on case growth of more restrictive non-pharmaceutical interventions"; and focussed protection (the GBD) should have been used by Alberta from the beginning of the pandemic.

161. As in *Gateway*[242], a fundamental part of the Applicants' argument relates to the alleged "inadequacy or inconclusiveness" of the supporting scientific evidence, which the Applicants

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[236] *Gateway, supra* note 7 at para 84; See Pre-Trial Factum of HBC et al at para 80.
[237] Pre-Trial Factum of HBC et al at paras 87-94.
[238] Pre-Trial Factum of HBC et al at para 98.
[239] Pre-Trial Factum of HBC et al paras 85-102; see opening statement of Ms. Ingram, Transcript of Proceedings, February 10, 2022, p24/33-35 and p25/9-13 re no cost benefit analysis; see opening statement of HBC et al, Transcript of Proceedings, February 10, 2022, p31/8-p34/6; see also HBC et al Closing Argument at para 115.
[240] HBC et al Closing Argument at paras 117-118. Alberta notes the "Allen Report" at para 119/footnote 111 and 112 of HBC et al's Closing Argument is not in evidence, see Exhibit O for Identification.
[241] See discussion below at paras 255-275 re NPIs.
[242] *Gateway, supra* note 7 at para 86.

seek to challenge “and which they say is inextricably connected” to Dr. Hinshaw's decisions to issue the CMOH Orders.

162. The following list of bulleted factors is taken from *Gateway*[243] at the indicated paragraphs. The list is identical to the list of factors in the Pre-Trial Factum of HBC et al.[244] The corresponding paragraphs of HBC et al’s arguments are also noted below.

163. In introducing the argument of the applicants in *Gateway,* Chief Justice Joyal said “[i]n challenging Manitoba’s scientific evidence with their own affidavit evidence and in the cross-examinations they conducted of Manitoba’s expert witnesses, the applicants take aim at what they suggest is Manitoba’s inadequate appreciation, misunderstanding and misuse of such factors as:

- the morbidity danger of COVID-19; [89-91] [HBC et al paras 8-10]
- the asymptomatic (pre-symptomatic) transmission of COVID-19; [92-96] [HBC et al paras 11-15]
- the RT–PCR testing, infectiousness and Cycle thresholds; [97-107] [HBC et al paras 16-19]
- herd immunity; [108-111] [HBC et al paras 20-22]
- the likelihood of any spread of COVID-19 outdoors; [111] [HBC et al para 23]
- the ability to control the spread of COVID-19 in religious settings [112-115] [HBC et al paras 24-28] (see also Ingram Pre-trial brief para 149), and
- variants of concern. [116-118] [HBC et al paras 29-30].”[245]

164. The argument of HBC et al in the above referenced paragraphs in their Pre-Trial Factum is virtually identical to the argument of the Applicants in the corresponding paragraphs in *Gateway*. For example, paragraphs 8 and 9 of HBC et al’s Pre-Trial Factum are virtually identical to paragraphs 89-90 in *Gateway* on the “Mortality Danger of Covid-19”. The following paragraphs from the Pre-Trial Factum of HBC et al are also virtually identical to the referenced paragraphs in the *Gateway* decision:[246]

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[243] *Gateway, supra* note 7 at paras 84-118, “Submission of the Applicants Respecting the Affidavit Evidence Adduced”.
[244] Pre-Trial Factum of HBC et al at paras 8-14 under the heading “The Science”.
[245] *Gateway, supra* note 7 at para 87.
[246] They have only been changed to reflect this matter involves Alberta and not Manitoba, or by the addition of evidence in a brief or allegations of facts concerning parties not before this Court.

- HBC et al paras 11-15 are *Gateway* paras 92-96 on “Asymptomatic Transmission of Covid19”,
- HBC et al paras 16-19[247] are *Gateway* paras 97-100 on “RT-PCR Testing, Infectiousness and Cycle Thresholds”,
- HBC et al paras 20-22 are *Gateway* paras 108-110 on “Herd Immunity”,
- HBC et al para 23 is *Gateway* para 111 on “Spread of Covid-19 Outdoors”, plus improper evidence in a brief re “matter of public record” in HBC et al para 23,
- HBC et al paras 24-26 is *Gateway* paras 112-114 with change to reflect Dr. Hinshaw not Dr. Roussin (MB) on “Covid-19 Spread in Religious Settings” plus references to allegations of fact concerning non-parties at paragraphs 27 and 28, and
- HBC et al paras 29 and 30 is *Gateway* paras 116 and 117 on “Variants of Concern”.

165. Given this reliance by these Applicants on the identical argument made in Manitoba, it is obviously useful to review what Chief Justice Joyal said about the scientific evidence and the applicants’ arguments on these issues. He said this:

> … The foregoing criticisms set up and constitute the basis for an argument whereby the applicants then proceed to insist that Manitoba’s response, as exemplified by the restrictions in the PHOs, is based on misapprehension and misunderstanding all of which flows from generally questionable science. Not surprisingly, the applicants then say that the scope and nature of the accompanying measures are unnecessary and of a dubious utility and benefit, particularly given the disproportionate costs associated with the limiting of fundamental freedoms.[248]
>
> The weakness in the applicants’ position in making the arguments they do respecting the proportionality stage of the Oakes test is that having carefully reviewed and assessed the evidentiary foundation in this case, I reject the applicants’ criticisms of Manitoba’s reliance upon the science Manitoba acknowledges it has in fact relied upon. As I have already suggested and determined, Manitoba has persuaded me that there is nothing obviously flawed or deficient about the scientific evidence it has relied upon**.** As a consequence, for reasons already touched upon, I accept that Manitoba’s response and the accompanying limitations on rights that they imposed, were both necessary and appropriate.[249]

166. Chief Justice Joyal also reviewed[250] and rejected[251] the following “key assertions” of the applicants in *Gateway* on Manitoba’s pandemic response: modelling data was flawed, did not weigh loss of life, did not consider GBD, did not conduct risk assessment of lockdown harms

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[247] On the claim by the Applicants HBC et al that PCR testing is unreliable see also their Closing Argument at paras 73, 86, and 87.
[248] *Gateway, supra* note 7 at para 322.
[249] *Ibid* at para 323.
[250] *Ibid* at para 85.
[251] *Ibid* at para 329.

and failed to change course when lockdowns harms became apparent, and did not do cost benefit analysis of lockdowns or review same.

167. In rejecting these assertions, he stated:

> … the evidence suggests that the limitations were indeed required because: deaths from COVID-19 are real; positive PCR cases of COVID-19 are real; Manitoba's modelling projections were proven to be correct; and that in making the difficult and ultimately significant decisions required of them, public health officials properly balanced collateral effects. In my view, as I have already repeated, the evidence does indeed support all of those assertions.[252]

168. Alberta submits that on the evidence in this case, this Court should reject the Applicants' criticisms of the science Alberta has relied on, and find there is nothing flawed or deficient about Alberta's scientific evidence.

169. Alberta will now review the scientific evidence before the Court.

V. SUBMISSIONS OF ALBERTA ON THE SCIENTIFIC AND EMERGENCY MANAGEMENT EVIDENCE[253]

170. Alberta submits its position and its supporting evidence represent an appropriately all things considered reasonable basis for the decisions that it took respecting the restrictions that were ultimately imposed – decisions which Alberta urges you to find on the evidence, were made on the basis of credible science.[254]

171. By necessity, the CMOH Orders included measures to prevent exponential growth of the virus from overwhelming Alberta's limited health care resources, while trying to minimize the hardship and disruption that these restrictions impose on the day-to-day lives of Albertans.

172. As discussed further below under s. 1[255], given the lack of any persuasive evidence of any obviously faulty science relied on by Alberta, Alberta submits its evidence should convince this Court that "it is on solid ground in its s. 1 defence" of the CMOH Orders, which, as noted in

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[252] *Ibid* at para 329.
[253] *Ibid* at paras 51-83.
[254] *Ibid* at para 198.
[255] Below at paras 314-374.

Gateway, represented "the public health consensus and approach followed across most of Canada and the world."[256]

173. Alberta submits it has shown through its affidavit and expert evidence, and through the cross-examination of its witnesses, that the specific measures taken and the public health choices in the CMOHs Orders were solidly based on credible science

174. Alberta further submits it has consistently argued as part of its theory that the mandatory restrictions were used as a last resort in the face of widespread community transmission, and the resulting very real and imminent threat to Alberta's health care system during the peak of the second and third waves.[257] Deaths or serious cases requiring hospitalization and intensive care escalated rapidly and were projected to continue rising. The healthcare system was under tremendous strain.[258]

175. Given these critical circumstances, Alberta's witnesses have credibly and persuasively explained why the mandatory restrictions in the CMOH Orders were essential to regain control over transmission of the virus in order to save lives, minimize serious illness and lessen the extreme burden on the Alberta healthcare system.[259]

VI. The EVIDENCE BEFORE THIS COURT ON SARS-CoV-2 AND THE COVID-19 PANDEMIC[260]

A. Evolving scientific knowledge[261]

176. When it first appeared in Alberta in March 2020[262], COVID-19 was a new respiratory disease. COVID-19 is caused by the Severe Acute Respiratory Syndrome Coronavirus 2, or "SARS-CoV-2" virus'.[263] The COVID-19 pandemic has been characterized by a state of constantly growing and evolving scientific knowledge. The best evidence with respect to COVID-19 has thus changed and evolved throughout the course of the pandemic.

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[256] *Gateway, supra* note 7 at para 200.
[257] *Ibid* at para 201.
[258] *Ibid*.
[259] *Ibid*.
[260] *Ibid* at paras 53-61.
[261] *Ibid* at para 61.
[262] Transcript of Proceedings, February 24, AM, p5/30-34.
[263] Hinshaw Affidavit at para 40.

177. Dr. Hinshaw reviewed what it means to make critical public health decisions in the context of evidentiary uncertainty due in part to the evolving knowledge noting that the precaution principle in public health practice means that "while the search for scientific evidence should nonetheless be a goal, scientific uncertainty should not impede public health decision-makers from taking necessary actions to reduce the risks associated with COVID-19".[264]

178. Dr. Simmonds summed up what this state of constantly evolving knowledge meant to her as Alberta's lead for modelling, noting that "[e]pidemiologists use evidence, both local and from other jurisdictions to provide information to decision makers" and that the "evidence is constantly shifting". "What we thought in March 2020 is different than in 2021. Scientific knowledge is not static, rather it is constantly updating based on new data."[265]

179. Dr. Kindrachuk noted the sheer quantify of new information constantly being produced with 6,000 papers each month on COVID-19, which equates to 200 papers a day for 27 months.[266]

180. Several of Dr. Bhattacharya's own views on various NPIs, including distancing, masks[267], as well as on NPI overall effectiveness, have evolved over the course of the pandemic, as reflected in his cross-examination.[268] His views on transmission have also evolved, particularly with respect to his understanding of transmission by aerosols and the importance of "strong good ventilation."[269]

181. His views on immunity and vaccines protecting against transmission have changed.[270] It also appears, his views on the "lasting" protection provided by natural immunity have too. In cross-examination on the John Snow Memorandum[271] he said there is lasting protective immunity to SARS-CoV-2 from natural infection, and that "lasting" means "<u>at least a year</u>".[272] Whereas his

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[264] Hinshaw Affidavit at para 101; and see also at paras 75-84, and 100. Transcript of Proceedings, April 4, 2022, p65/33-p66/14 re "precautionary approach", "closing schools" in the first wave due to lack of knowledge of impacts on children.
[265] Simmonds Affidavit at para 29; See also *Gateway*, *supra* note 7 at para 55.
[266] Transcript of Proceedings, February 22, 2022, AM, p59/34-41. Dr. Bhattacharya re Savaris Study retraction note in December 2021: "tens of thousands of papers have been written since", see Transcript of Proceedings, February 10, 2022, p110/30-32.
[267] Transcript of Proceedings, February 14, 2022, AM, p38/35.
[268] See Transcript of Proceeding, February 11, 2022, p63/12-p65/19.
[269] Transcript of Proceedings, February 14, 2022, AM, p39/8-21.
[270] Transcript of Proceedings, February 14, 2022, AM, p30/29-34.
[271] Hinshaw Affidavit at para 238, Exhibit Y.
[272] Transcript of Proceedings, February 10, 2022, p93/20-25.

Primary Report stated "[s]cientific evidence strongly suggests that recovery from SARS-Cov-2 infection will provide lasting protection against reinfection, either complete immunity or protection that makes a severe reinfection extremely unlikely."[273]

B. Symptoms

182. As Dr. Hinshaw explains in her affidavit

> Infection with the SARS-Co V-2 virus may involve a range of potential symptoms that can also vary in frequency and severity. The most common symptoms have included fever, cough, fatigue, shortness of breath, loss of appetite, and loss of smell and taste. Many who are infected experience only mild symptoms followed by a quick return to completely normal health. However, certain segments of the population suffer very serious symptoms only treatable through hospitalization, and some of these individuals require admission to an Intensive Care Unit (ICU) and ventilation. COVID-19 has also been fatal for over 2,300 people in Alberta. Finally, it is also important to note that a proportion of those with COVID-19, even some with initial mild illness, experience symptoms for many months following their infection, and these persistent symptoms can be life-altering.[274]
>
> Thus, COVID-19 has both morbidity outcomes (illness) and mortality outcomes (death), and these outcomes may both impact hospitalization and require significant and critical medical treatment, including admission to intensive care. The risk of serious outcomes, including deaths, hospitalizations and ICU admissions, grows with the age and presence of pre-existing conditions in the population.[275]

183. Dr. Bhattacharya in suggesting that symptom checks could replace lockdowns[276] refers to COVID-19 having "pretty well-defined discreet symptoms" [277]and "not as long as a list as you might think."[278] This description of limited and discreet symptoms stands in contrast to the descriptions of COVID-19 symptoms above of Dr. Hinshaw, and of Dr. Kindrachuk, who stated "if we look at the overall symptoms of COVID-19, we know that that is a very, very vast

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[273] Bhattacharya Primary Report, at 75/2300 (p35); see cross-examination on this - Transcript of Proceedings, February 14, AM, p43/29-p44/2. See also *Gateway*, *supra* note 7 at para 108 where Chief Justice Joyal said this about Dr. Bhattacharya's opinion on lasting protection from natural immunity in his reasons explaining the applicants' views on the evidence: "Dr. Bhattacharya writes that the science strongly suggests that recovery from SARS-CoV-2 infection will provide lasting protection against reinfection, either complete immunity or protection that makes a severe reinfection extremely unlikely".
[274] Hinshaw Affidavit at para 50; see also *Gateway, supra* note 7 at para 57 re "Symptoms".
[275] *Ibid* at para 51.
[276] Transcript of Proceedings, February 11, 2022, p97/7-17.
[277] *Ibid* and at p97/28.
[278] *Ibid* at p97/7-17; Transcript of Proceedings, February 11, 2022, p8/38. Generally on Dr. Bhattacharya and symptoms see Transcript of Proceedings, February 11, 2022, at p97/7-98/40.

spectrum of symptoms that may be present that is dependent on age group, that's dependent on underlying risks, that's dependent on overall disease severity".[279]

184. Dr. Kindrachuk explained "the length of time that somebody can be infected to symptom onset is … 2 to 21 days, but it most commonly is going to fit within probably that 3 to 5 days, maybe even 6 day period, but that has changed also with the variants."[280] Dr. Kindrachuk explains this supports the policy of a 10-day isolation period post-symptom onset.[281]

C. Long-term symptoms

185. Dr. Kindrachuk[282] noted that 15-30% of those who were infected with MERS and SARS developed long-term lung complications, and he notes the "growing appreciation that COVID-19 can result in extended health complications and abnormalities, independent of disease severity and age", including "extended fatigue, shortness of breath, joint and chest pain, and neurological complications."[283]

186. "There is a growing appreciation that COVID--19 can result in extended health complications and abnormalities, independent of disease severity and age. These include extended fatigue, shortness of breath, joint and chest pain, and neurological complications. A recent study from Italy suggested that 44% of recovered patients reported a worsened quality of life post-COVID-19. A US study reported that 35% of surveyed patients had not returned to their normal state of health two to three weeks following a positive COVID-19 test result with 20% of those surveyed being 18-34 years of age with no underlying chronic medical conditions at the time of survey."[284]

187. "Therefore, though further research will be required to determine the full extent, it is likely that some who recover from COVID-19 will continue to experience long-term negative health effects."[285]

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[279] Transcript of Proceedings, February 23, 2022, p31/26-29; also see below at para 222 re Qiu Study.
[280] Transcript of Proceedings, February 23, 2022, p32/8-18.
[281] Transcript of Proceedings, February 23, 2022, p33/25-26.
[282] Kindrachuk Report at 9/1236; Hinshaw Affidavit at para 61.
[283] *Ibid* at 21/1236. See also *Gateway*, *supra* note 7 at para 59 on persistent long-term symptoms.
[284] *Ibid*, Kindrachuk Report at 21/1236.
[285] *Ibid* at 9/1236.

D. Serious outcomes

1. Mortality

188. In Alberta as of July 6, 2021 there had been 2,307 deaths due to COVID-19. The average age of death is 80 (range: 20-107), and the majority of Alberta's deaths were in the 80+ age range (1,353 or 59 percent). One in three deaths (766 people) were between the ages of 60 and 79, and 187 of the people that have died in Alberta due to COVID-19 were under the age of 60 (8.1 percent of total).[286]

189. Dr. Bhattacharya agrees the disease is deadly to older people and those who have some chronic conditions.[287] He acknowledged there have been over 35,000 deaths in Canada, over 939,000 in the US, 5.8 million worldwide – he has not looked at latest numbers[288] "but … it's a very dangerous disease."[289]

2. Comorbidities

190. Dr. Hinshaw's evidence on comorbidities and COVID-19 is that "COVID-19 disproportionally causes adverse health outcomes, including death, in people in two segments of the population: (1) those with pre-existing medical conditions, and/or (2) those over 65 years of age. People with these characteristics are more likely to have been hospitalized and more likely to have been admitted to ICUs with COVID-19.[290]

191. She refers to Statistics Canada information at May 14, 2021 on COVID-19 comorbidities and pre-existing conditions, which states "almost two-thirds (65%) had two or more comorbidities and almost half 46% had three or more comorbidities reported". However, importantly, she also explains that "[a]lthough individuals had pre-existing conditions, it does not imply that they were at risk of dying if there had been no COVID-19 infection."[291]

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[286] Hinshaw Affidavit at para 52.
[287] Transcript of Proceedings, February 14, 2022, PM, at p3/20-34.
[288] Transcript of Proceedings, February 14, 2022, PM, at p3/32.
[289] *Ibid*.
[290] Hinshaw Affidavit at para 53. See Hinshaw Affidavit at paras 53-58 on "*COVID-19: comorbidities and serious outcomes*".
[291] Hinshaw Affidavit at para 54.

192. Dr. Hinshaw also refers to the Government of Canada document published December 8, 2020[292] that outlines people who are at risk of more severe disease or outcomes from COVID-19 as "older adults … especially over 60 years", and "people of any age with chronic medical conditions including: lung disease, heart disease, hypertension (high blood pressure), diabetes, kidney disease, liver disease, dementia, and stroke. People of any age who are immunocompromised, including those with an underlying medical condition (e.g., cancer) or taking medications that lower the immune system (e.g., chemotherapy), and people of any age living with obesity (BMI of 40 or higher) [293]

193. Dr. Kindrachuk reviewed Canadian data and Alberta's data and concluded as at July 2, 2021 the "data continues to demonstrate that younger age groups are susceptible to moderate to severe illness and at risk for hospitalization and intensive care admission."[294]

194. In cross-examination, Dr. Kindrachuk referred to a "litany of comorbidities now that are linked to higher risks of COVID-19, it is a broad set of comorbidities, so that now makes it difficult".[295] He questions how to distinguish between the vulnerable (most, moderately, severely, barely vulnerable). It is not as easy as pinpointing a specific age group.[296]

195. Dr. Bhattacharya summarizes his opinion[297] by stating "COVID-19 does not pose a real or imminent serious threat to the health of the population in general but only to the health of a specific part of the population – the elderly and a <u>limited number of people with certain chronic conditions</u>.[298]

196. Dr. Bhattacharya did not have "any estimate as to the number of people in Alberta who fall into that <u>limited number of people with certain chronic conditions</u>". He "guess[ed]" the question was a "qualitative" rather than "quantitative one".[299] He did not "know the specific number"[300],

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[292] Hinshaw Affidavit at para 55, Exhibit K.
[293] Kindrachuk Report at 6/1236.
[294] *Ibid* at 6-8/1236; see also Transcript of Proceedings, Feb 23, 2022, p37/23-p38/36 re comorbidities, mortality and vulnerable populations.
[295] Transcript of Proceedings, February 23, 2022, p37/39-41.
[296] Transcript of Proceedings, February 23, 2022, p44/10-15.
[297] On Part A of his Primary Report answering the question "Does Covid-19 pose a real or imminent serious threat to the health of the population?
[298] Bhattacharya Primary Report at 48/2300 (p8); see cross-examination Transcript of Proceedings, February 14, 2022, AM, p11/12-40.
[299] Transcript of Proceedings, February 14, 2022, AM, p11/18.
[300] Transcript of Proceedings, February 14, 2022, AM, p11/36.

"it would depend on what you deem is appropriate for what a public health emergency is", but he didn't "believe it's tremendously high".[301] His evidence on an estimate of the "limited number of people with certain chronic conditions" North American wide[302] was it's "primarily people with diabetes and obesity".[303]

197. Alberta agrees with the argument of Manitoba in *Gateway* that vulnerable people are integrated throughout society.[304]

3. Morbidity

198. Dr. Hinshaw's evidence is "people not in a high risk group can also experience adverse health outcomes after becoming infected with the SARS-Co V-2 virus that may require hospitalization or admission to an ICU for treatment."[305]

199. "In Alberta, as of July 6, 2021 the average age for COVID-19 cases with an ICU stay was 57 years (range: 0-90), the average age for COVID cases hospitalized was 60 years (range: 0-104), and the average age for COVID cases not hospitalized was 34 years (range: 0-108).[306] Since February 1, 2021, 40 percent of those hospitalized with COVID-19 in Alberta have been under 50.[307]

200. Table 5 to Dr. Hinshaw's Affidavit[308] which shows "severe outcomes", provides a breakdown of Alberta's total hospitalizations, ICU admissions and deaths among COVID-19 cases by age as of July 1, 2021, Dr. Hinshaw explains that:

> [o]f particular significance for the purposes of Alberta's ability to plan for health care capacity is that, as illustrated in the table below, for every 100 people testing positive for COVID-19 in Alberta, just over 4 of them (4.1) were hospitalized, just under 1 person (0.8) had to be admitted to ICU, and 1 person out of every 100 testing positive in Alberta died as a result of the disease. <u>These numbers are very</u>

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[301] Transcript of Proceedings, February 14, 2022, AM, p11/36-37.
[302] Transcript of Proceedings, February 14, 2022, AM, p12/1-15.
[303] Transcript of Proceedings, February 14, 2022, AM, p12/15.
[304] *Gateway, supra* note 7 at para 309, considering the GBD and minimal impairment.
[305] Hinshaw Affidavit at para 62.
[306] Hinshaw Affidavit Exhibit L, Figure 13 and Table 5.
[307] Hinshaw Affidavit at para 62.
[308] Hinshaw Affidavit at para 63; and see also Table 5 at July 7, 2021 in Exhibit L to Hinshaw Affidavit, p 219/393.

important in assessing and managing hospital capacity and resources as part of Alberta's response to the pandemic.[309]

E. Transmission

201. COVID-19 primarily affects the respiratory tract and lungs but can also affect other organs. COVID-19 is highly communicable and contagious among people. SARS-Co-V-2 is spread primarily from close person to person contact. The virus may be transmitted by respiratory droplets (>5-10 um in diameter) or smaller droplet nuclei (small-particle aerosols) (<5 um) produced when an infected person breathes, coughs, sneezes, talks, or sings. Aerosols remain airborne while traveling longer distances than droplets.[310]

202. SARS-CoV-2 can be spread through direct or indirect (surfaces) contact with an infected person. A person becomes infected by inhaling the infected droplets or aerosols or by the droplets or aerosols coming into direct contact with the mucous membranes of the person's nose, mouth or eyes. The virus may also be transmitted by a person touching a surface of an object or other person (i.e. handshake) contaminated with the virus and then touching their own nose, mouth or eyes.[311]

203. Epidemiological data suggests that a close contact, defined as anyone who has shared an indoor space or enclosed setting with a positive case for a cumulative total of 15 minutes over a 24-hour period is a major driver for SARS-CoV-2 transmission.[312] Recent animal and model investigations and epidemiological studies suggest aerosol transmission can occur during prolonged exposure in enclosed settings with reduced ventilation.[313]

204. Dr. Kindrachuk explains what distinguishes SARS-CoV-2 from the three previous coronaviruses that have emerged over the past two decades is the “high degree of community

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[309] See further discussion below on “Morbidity: Community spread and protecting the health care system”; and see also *Gateway, supra* note 7 at para 58.
[310] Hinshaw Affidavit at para 41.
[311] Hinshaw Affidavit at para 42.
[312] Kindrachuk Report at 9/1236; see also *Gateway, supra* note 7 at para 56 re transmission.
[313] Kindrachuk Report *Ibid.*

transmission", which makes it "important to establish the infectious period for those that have been infected."[314]

205. Dr. Kindrahuck was asked whether aerosol transmission can extend beyond 30 metres, he said "it can certainly extend quite far".[315] He also explained that the virus may be spread not just by droplets or aerosols, but also by a heterogeneous mixture of droplets and fine aerosols.[316]

1. Asymptomatic and pre-symptomatic transmission

206. Scientific studies have demonstrated that SARS-CoV-2 can be transmitted by persons who are asymptomatic (those who never develop symptoms) and especially those who are pre-symptomatic (those who do not yet display symptoms but will develop them).[317]

207. The topic of asymptomatic and pre-symptomatic transmission is an important one in both the Primary and Surrebuttal Reports of Dr. Bhattacharya. Dr. Bhattacharya's opinion that both asymptomatic and pre-symptomatic spread are extremely rare[318] leads to his conclusion that symptom checks can replace "lockdowns' with no harm to public health.[319]

208. Dr. Hinshaw notes that the "comprehensive survey of the literature on reported cases through early June 2020" referenced by Dr. Bhattacharya[320] states that "about 20 percent of COVID-19 cases are asymptomatic", and, importantly, "that pre-symptomatic virus spread was substantial enough to justify continued social distancing measures".[321]

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[314] *Ibid*. See Transcript of Proceedings, April 4, 2022, p73/32-36 re impact of widespread transmission on Alberta's younger population during the second and third waves.
[315] Transcript of Proceedings, February 22, 2022, p56/23-28.
[316] Transcript of Proceedings, February 22, 2022, p57/39-p58/4. On viral load and transmission/peak infectiousness see Dr. Kindrachuk at 9-14/1236.
[317] Joyal CJ also defines these terms in *Gateway, supra* note 7 at para 55; and see also as defined by Dr. Bhattacharya Transcript of Proceedings, February 11, 2022, p92/36-38. As was also noted in *Gateway* at para 168, at times in his cross-examination, "it would appear that Dr. Bhattacharya did not distinguish between asymptomatic transmission and pre-symptomatic transmission, instead characterizing both concepts as "asymptomatic transmission".
[318] Transcript of Proceedings, February 14, 2022, AM, p8/10-13.
[319] Bhattacharya Surrebuttal Report at 11/24 (p7); Transcript of Proceedings, February 11, 2022, p97/7. This identical opinion was offered by Dr. Bhattacharya, and rejected, in *Gateway supra* note 7 at para 168.
[320] Bhattacharya Primary Report at 53/2300 (p10).
[321] Hinshaw Affidavit at para 49; and also see Hinshaw Affidavit at paras 46-47 (pre-symptomatic) and 48-49 (asymptomatic) decision-making with uncertain evidence. See Kindrachuk Report pages 9-14/1236.

209. While Dr. Kindrachuk and Dr. Bhattacharya agree that "pre-symptomatic is more likely to spread than purely asymptomatic"[322], they disagree on the degree of risk of transmission by asymptomatic individuals, and particularly on the degree of risk by pre-symptomatic individuals. As a result, they also disagree on whether symptom checks were an appropriate remedy given the risk of spread by people displaying no symptoms (whether pre-symptomatic or asymptomatic).

210. Dr. Kindrachuk's evidence on symptom checks is that "there is strong scientific evidence that transmission of SARS-CoV-2 primarily occurs from a few days before symptom onset until about five days after"[323], and thus given "symptoms are highly variable in regards to both type and severity across infected individuals" "screening alone as a measure of case identification would likely lead to many missed cases of infection."[324]

211. Dr. Bhattacharya's opinion is that as of January 21, 2021 the best evidence was that asymptomatic individuals were an order of magnitude less likely to spread the disease to even close contacts than symptomatic COVID-19 patients.[325] Dr. Bhattacharya also explained his view was as of May 3 and 4, 2021 (when he testified in *Gateway*) that based on the Madewell Study[326] "the combined effect of pre-symptomatic and asymptomatic spread" is "somewhere in [the] order, [of] 0.7 percent".[327]

212. The Madewell Study is "A Systematic Review and Meta-Analysis" on the "Household Transmission of SARS-CoV-2." The Meta-Analysis looks at 54 studies involving 77,758 individuals that looked at secondary attack rates[328] in household settings.[329] The Madewell

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Dr. Bhattacharya agreed there are many peer reviewed and non-peer reviewed articles on pre-symptomatic and symptomatic transmission, and there is a "vast literature on asymptomatic spread".
[322] See Exhibit 9, MB Vol 1 p121/29-30 and p122/31.
[323] Kindrachuk Report at 14/1236 in reliance on the Qiu Study discussed further below at para 222.
[324] Kindrachuk Report at 8-9/1236 and 14/1236; see also cross of Dr. Kindrachuk, Transcript of Proceedings, February 23, 2022, p31/26-27: "very, very vast spectrum of symptoms".
[325] Bhattacharya Primary Report, Part B, at 50/2300 (p10). His opinion has changed because of Omicron as "it's likely asymptomatic spread is more important with Omicron than it was previous", Transcript of Proceedings, February 11, 2022, p87/32-88/4.
[326] Madewell Study, *supra* note 137, Bhattacharya Primary Report at 527-543/2300.
[327] Transcript of Proceedings, February 14, 2022, AM, p4/38-41. Dr. Bhattacharya did however agree "since Madewell, we've learned more about pre-symptomatic spread", specifically, he believes that "there's a decline in infectiousness as the infection proceeds", Transcript of Proceedings, February 14, 2022, AM, p5/37-6/4. He also agrees that it is hard to delineate between asymptomatic and pre-symptomatic transmission, Transcript of Proceedings, February 11, 2022, p92/33-36.
[328] Which is the rate at which someone who is infected infects other people.
[329] Transcript of Proceedings, February 11, 2022, p92/20-24.

Study, published December 14, 2020[330] "played an enormously important part" in his thinking on asymptomatic transmission.[331]

213. The Madewell Study also featured a sub-analysis on asymptomatic and pre-symptomatic transmission. Madewell's sub-analysis found that the estimated mean household secondary attack rate from symptomatic index cases[332] was significantly higher than that from asymptomatic or pre-symptomatic index cases, which was found to be 0.7% with a range of 0%-4.9%.

214. However, importantly, as explained by the Madewell Study's supervising author (Dr. Natalie Dean), the Madewell Study's sub-analysis on the transmissibility of asymptomatic SARS-CoV-2 index cases included "much less data" than the Meta-Analysis.[333] While the Meta-Analysis for which the Madewell Study is named involved 77,758 individuals across 54 studies, the sub-analysis summarizes just 4 studies involving only 151 individuals reporting household secondary attack rates from asymptomatic or pre-symptomatic index cases.

215. It is noteworthy that Dr. Bhattacharya had been asked already in May 2021 in *Gateway* by Chief Justice Joyal about his heavy reliance on the Madewell Study's sub-analysis given the very limited data.[334] Dr. Bhattacharya's refusal to acknowledge the obvious limits to the results from Madewell's sub-analysis given the "much less data", and the fact that he nevertheless

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[330] Bhattacharya Primary Report at 527-543/2300.

[331] Transcript of Proceedings, February 14, 2022, AM, p5/5-14; see cross-examination on asymptomatic, pre-symptomatic, Cevik, Qiu and Madewell at Transcript of Proceedings, February 11, 2022, p87/27-p108/27 and Transcript of Proceedings, February 14, 2022, AM, p4/22-p10/35. Notably, in regard to Dr. Bhattacharya's views on asymptomatic transmission, in an article he co-authored, and published on December 1, 2020 just two weeks before the Madewell Study, he states "it will likely take a long time until we can, with full confidence, deliver reliable measurements of this asymptomatic group. In the meantime, mathematical modeling can provide valuable insight into the tentative outbreak dynamics and outbreak control of COVID-19 for varying asymptomatic scenarios." Dr. Bhattacharya confirmed these comments reflected his views in December 2020 and still do today, Transcript of Proceedings, February 11, 2022, p22/13-19.

[332] 18.0% with a range of 14.2%-22.1%. Madewell also reported the findings were consistent with other household studies reporting asymptomatic index cases as having a limited role in household transmission.

[333] Dean Affidavit at para 8(d) The sub-analysis data is shown on eFigure 8 in the Supplemental Online Content to the Madewell Study (Exhibit D to her affidavit).

[334] See Exhibit 9, MB Vol 1 p121-123. See also Exhibit 9, MB Vol 1 p121/37-41 and Manitoba's counsel re what "Dr. Madewell says … in his note that he puts on his own study on the JAMA website".

posits such strong conclusions from it, as well as his refusal to acknowledge other points raised in Dr. Madewell's comment on his own study[335] caused Chief Justice Joyal to state that:

> [d]espite being confronted in the course of his cross-examination with commentary from the literature that one would have expected would precipitate more nuance in Dr. Bhattacharya's position, Dr. Bhattacharya continued to insist that asymptomatic transmission, including pre-symptomatic transmission, had an upper limit of 0.7 per cent secondary attack rate.[336]

216. When Dr. Bhattacharya was cross-examined in Alberta about his heavy reliance on the 0.7% figure, and the fact that the "much less data" in the sub-analysis was not identified by him in either of his reports[337], he said he was not aware how many individuals were in the 54 studies.[338] However, he did agree that the "54 Studies, [in] the Meta-analysis … was important" as he has put it in his report.[339]

217. However, after being questioned in *Gateway* in May 2021 on the very point of the value of the data given the analysis was of only 151 individuals, he wrote in his Alberta Surrebuttal Report dated July 30, 2021 that Madewell's "large Meta-analysis, which ultimately found, after analyzing 54 studies (including Kindrachuk's cited studies and others) a very low chance of asymptomatic and pre-symptomatic disease spread". This is clearly inaccurate. He should have been alerted to this due to his cross-examination, and questions from the Chief Justice in *Gateway*. This limitation should have been noted in his reports.

218. However, in cross-examination, he continued to insist that there was no intent to mislead, claiming he was "literally" "just quoting the first line" of the study "just so it was clear" "which

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[335] See Kindrachuk Comment from the authors by Dr. Madewell at 12/1236.
[336] *Gateway, supra* note 7 at para 168.
[337] See cross-examination on the 0.7%: Transcript of Proceedings, February 11, 2022, p95/33-p96/40; generally on the 0.7% and the 151 individuals in 4 studies, Transcript of Proceedings, February 11, 2022, p99/1-p108/27; specifically on he "accepts that the asymptomatic component … had 151 in four studies", Transcript of Proceedings, February 11, 2022, p100/28-29. The 4 studies making up the sub-analysis are in eFigure 8 (as referenced in the Madewell Study at p5/17 at Bhattacharya Primary Report at 531/2300), which is Exhibit D to the Dean Affidavit at para 8.(d), see Transcript of Proceedings, February 11, 2022, p107/28-p108/25. Dr. Bhattacharya agrees that eFigure8 that sets out the 4 studies with the 151 individuals "is where the 0.7 percent is from", see Transcript of Proceedings, February 11, 2022, p107/39-p108/16; and on cross-examination on his evidence in Manitoba on this issue in Exhibit 9, MB Vol 1 p122-123, see Transcript of Proceedings, February 11, 2022, p99/13-p100/2.
[338] Transcript of Proceedings, February 11, 2022, p93/23-25.
[339] However, he claimed the "total number of studies is less important than the quality of the studies, as is the total number of people", see Transcript of Proceedings, February 11, 2022, p93/33-41.

study [he] was referring to." [340] It is not clear from a review of the Madewell Study which "line" he is referring to.

219. Further, while he agrees that there was "much less data" in the sub-analysis[341], he nevertheless continues to insist the 151 individuals in 4 studies is not a "limitation" that needed to be noted in his report.[342] Not only that, but, at least as of the time of their Pre-Trial Factum, the HBC et al Applicants were continuing to strongly rely on the results of the Madewell sub-analysis of 151 individual cases, to argue:

> The Respondents do not provide specific evidence that in-home gatherings have resulted in outbreaks of Covid-19. Since the best data on pre-symptomatic and asymptomatic spread reveals that it occurs within households only 0. 7% of the time, it would make sense to ask homeowners to do symptom and temperature checks of all guests and ask their guests not to visit if they are symptomatic.[343]

220. Dr. Kindrahcuk in cross-examination responded that he thinks Dr. Bhattacharya underestimates the role of asymptomatic transmission in disease spread, in particular with the advent of the new variants of concern and their increased transmissibility.[344] He also cautioned, again, about the comment of Dr. Madewell on his own study.[345] Dr. Kindrachuk in his cross-examination also refers to a "subsequent Madewell study which used more sampling and … came up with higher numbers".[346] However, the subsequent Madewell study is not in evidence.[347]

221. In response to Dr. Bhattacharya's claim that "Dr. Kindrachuk does not address" Dr. Bhattacharya's "evidence on the relatively low risk of asymptomatic disease spread drawn from real-world transmission data",[348] Dr. Kindrachuk did discuss the Madewell study[349], and

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[340] Transcript of Proceedings, February 11, 2022, p106/8-10.
[341] Transcript of Proceedings, February 11, 2022, p105/25-36.
[342] Transcript of Proceedings, February 11, 2022, p106/4 re Dr. Bhattacharya does not "think it's a limitation."
[343] Pre-Trial Factum of HBC et al at para 111.
[344] Transcript of Proceedings, February 23, 2022, p26/28-30.
[345] Transcript of Proceedings, February 23, 2022, p34/1-4.
[346] Transcript of Proceedings, February 23, 2022, p34/7-8.
[347] Transcript of Proceedings, February 23, 2022, p52/25-27 and p53/40-p54/2, re Dr. Kindrachuk raised in cross-examination and so proper re-direct, not new subject; and don't believe improper re-direct given Dr. Kindrachuk raised Madewell 2 in cross-examination; and see also "we'll have to discuss what would be expunged" p51/40-41, see also "we'll have to discuss what would be expunged" p51/40-41.
[348] Bhattacharya Surrebuttal Report at 10/24 (p6).
[349] Kindrachuk Report at 12/1236.

specifically provided the link to the social media posting of Dr. Dean and also the above comment of Dr. Madewell.[350]

222. Dr. Dean explained "since the Madewell Study relied on other studies in the literature we were unable to fully separate out asymptomatic index cases from pre-symptomatic index cases."[351] However, she also confirmed Dr. Kindrachuk's opinion that the Qiu Study[352] does separate out asymptomatic and pre-symptomatic index cases[353] in concluding that secondary attack rates from asymptomatic index cases ranged from 0% to 2.8% (9 studies) and that secondary attack rates from pre-symptomatic index cases ranged from 0.7% to 31.8% (10 studies).[354]

223. Dr. Kindrachuk's opinion is consistent with that of Dr. Dean who confirms that while there was a growing body of evidence that asymptomatic individuals are less infectious (than symptomatic and pre-symptomatic) that pre-symptomatic transmission does occur. Further, Dr. Dean explained that even if an asymptomatic person is far less infectious, if a person without symptoms has more contacts than someone who has symptoms then the lower risk of infection from the asymptomatic person may be lost.[355]

224. Dr. Dean concluded her evidence by explaining that knowledge on the transmission of the SARS-Co-V-2 virus has grown and evolved since December 2020 when the Madewell Study noted that some studies report "the timing of peak infectiousness at approximately the period of symptom onset", and that as of the date of her Affidavit in August 2021 there were many peer reviewed articles showing that persons infected with the SARS-CoV-2 virus in the pre-symptomatic period can be highly infectious.[356]

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[350] Kindrachuk Report at 14/1236.
[351] Dean Affidavit at para 8.(d). Dr. Dean explained she had previously provided a short explanation of what the Madewell Study did find on asymptomatic and pre-symptomatic transmission in the social media link from December 29, 2020, which is referenced on p10/1236 of the Kindrachuk Report.
[352] Qiu, X., A. I. Nergiz, A. E. Maraolo, Bogoch, II, N. Low, and M. Cevik. 2021. 'Defining the role of asymptomatic and pre-symptomatic SARS-CoV-2 transmission - a living systematic review', C/in Microbiol Infect (Qiu Study). The Qiu Study included 19 out of 928 identified studies.
[353] Dean Affidavit at para 8.(f).
[354] *Ibid* at para 8.(g). The Qiu Study also found the highest secondary attack rates were in the same household as the index case.
[355] *Ibid* at para 8.(h).
[356] *Ibid.* Dr. Bhattacharyta agrees with all of Dr. Dean's evidence in paragraph 8 of her affidavit, except her evidence on the evolving knowledge on peak of infectiousness, Transcript of Proceedings, February 14, 2022, AM, p5/16-p6/24. In that regard, his evidence is that "when the peak [infectiousness] occurs is still at issue", Transcript of Proceedings, February 14, 2022, AM, p6/36.

F. Morbidity: Community spread and protecting the health care system

225. Dr. Hinshaw explains that with "community spread of the virus" SARS-CoV-2 can spread exponentially if left unchecked. Thus it has been critical over the course of the pandemic for Albertans to follow public health guidance in order to minimize the spread of the virus, reduce the long-term consequences, and reduce the number of hospitalizations and deaths. Otherwise, left unchecked, the SARS-Co-V-2 virus will spread within a population resulting in the exponential growth in the number of people infected. This is illustrated by Alberta's experience with COVID-19 over the last 16 months.[357]

226. Dr. Hinshaw in cross-examination also explained how transmission from those without symptoms can impact community spread and increase the need for more strict measures:

> the recommendation to utilize measures that would reduce the contact of people with each other in society was made when the evidence around the possibility of transmission without symptoms began to become stronger. So, we were seeing examples of -- of transmission happening without symptoms present and realizing that focusing on ill people alone would not be sufficient to stop the -- the widespread transmission of COVID-19 in the population.[358]

227. Dr. Kindrachuk agrees that "NPIs are extremely effective in reducing the spread of SARS-CoV-2 in a population, especially when used in combination, and are indeed necessary to limit exponential spread which could otherwise overwhelm healthcare resources."[359] In his cross-examination, he talked about the importance of morbidity, and the toll put on our health care systems and the impact of that on the long-term health of individuals and populations.[360]

228. Dr. Bhattacharya recognizes that Alberta experienced high community transmission during the COVID-19 pandemic acknowledging "It's been periods of high community spread."[361] His

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[357] Hinshaw Affidavit at para 126; and see at paras 64-67 re COVID-19 and Alberta's health care capacity.
[358] Transcript of Proceedings, April 4, 2022, p52/15-20. See also Transcript of Proceedings, April 4, 2022, p81/6-10 re widespread transmission in wave 2 and vaccinations; Transcript of Proceedings, April 4, 2022, p 89/7 re widespread transmission and importance of following public health guidelines; Transcript of Proceedings, April 5, 2022, p7/24 re widespread transmission and risk to community as a whole; Transcript of Proceedings, April 5, 2022, p13/41-p14/12 re bending curve in Alberta in first wave and second wave and timing of NPIs; Transcript of Proceedings, April 5, 2022, p40/15-22 re widespread transmission in the second wave and implement NPIs to preserve the health care system and minimize deaths; Transcript of Proceedings, April 7, 2022, p34/9-35/6 re widespread transmission and GBD in Alberta not practical.
[359] Kindrachuk Report at 17/1236.
[360] Transcript of Proceedings, February 23, 2022, p39/1-16.
[361] Transcript of Proceedings, February 14, 2022, AM, p34/37-38.

solution to wide spread community transmission[362] and the threat that brings of increased risk of hospitalization and ICU admissions is the GBD and "effective focused protection."[363]

229. Specifically, when asked what Alberta should have done during the second wave and the widespread community transmission in December 2020 as Alberta approached the peak of that wave, he, again, said that Alberta should have followed the GBD/focused protection "from the beginning of the pandemic."[364]

230. Dr. Bhattacharya believes "during times of community transmission, alternate arrangements and resources should be made available. "And a lot of that maybe private resources" from a family member. How long the alternate arrangements would needed to be made for would "depend, of course, on how long the high community spread lasts."[365]

231. He was also asked whether he agreed that if the virus spreads in the community it is going to put more people into hospital and into ICU of all ages. He said it depends on who it spreads amongst, as in his view "the key isn't community spread generally, but … spread among the vulnerable."[366]

232. It is noteworthy that in *Tandon*[367], District Court Judge Koh, stated "even one of the Plaintiffs' expert, Dr. Bhattacharya, concedes that restrictions might be justified "where hospital overcrowding is predicted to occur" because overcrowding and "the unavailability of sufficient medical personnel" "might induce avoidable mortality." Judge Koh cited the following from Dr. Bhattacharya's Reply Declaration from December 7, 2020 in reaching her conclusion about his opinion:

> 15. The clear theoretical implication from these models is that lockdowns *delay* infections; they do not prevent them from occurring altogether. In other words, roughly the same number of people will be infected with or without lockdowns, but lockdowns will spread the infections out over a longer time. This may be beneficial

[362] Transcript of Proceedings, February 10, 2022, p100/9-14.
[363] See Bhattacharya Primary Report at 77/2300 (p37); Transcript of Proceedings, February 10, 2022, p97/36.
[364] Transcript of Proceedings, February 10, 2022, p100/24-32.
[365] Transcript of Proceedings, February 14, 2022, AM, p32/40-33/4.
[366] Transcript of Proceedings, February 14, 2022, AM, p41/5-10; see also Transcript of Proceedings, February 14, 2022, PM, p10/8-9: "reducing community spread simply in and of itself does not necessarily protect vulnerable people" in context of churches refusing to follow restrictions in times of community spread.
[367] *Tandon, supra* note 165 at 26.

> in limited situations where hospital overcrowding is predicted to occur, which might induce avoidable mortality. But society-wide lockdowns are not a tool of disease eradication, and in fact have never in history eradicated a disease. The primary benefit of a lockdown is thus limited in time – a delay in the incidence of cases to avoid a public health emergency, such as the unavailability of sufficient medical personnel in an area to care for COVID-19 patients. [emphasis added] [Dr. Bhattacharya's Reply Declaration in *Tandon v Newsom*, Exhibit 3]

233. Dr. Bhattacharya was shown his Declaration from December 2021, and it was put to him that the Judge in *Tandon* said even the Plaintiffs' expert witness admits that if you have hospital overcrowding predicted to occur, then, as he said in paragraph 15 of his *Tandon* Declaration, lock downs may be a tool that is necessary to address that hospital overcrowding to avoid further mortality, and that this was a fair description of his evidence in *Tandon*.

234. He said it was not because "there are alternate policies that could be followed -- in particular, the Great Barrington Declaration's policy of focussed protection – that could also produce reductions in hospitalizations in ICUs, especially in older populations, who are higher risk for it."[368]

235. As Dr. Bhattacharya admits, the effectiveness of lockdowns is another area in which his views have evolved. In this regard, in *Gateway*, Chief Justice Joyal noted[369] "Dr. Bhattacharya discussed non-pharmaceutical interventions in both his reports and noted that "lockdowns" delay infections into the future rather than preventing them from occurring altogether; and that Dr. Bhattacharya also agreed "that they can be used to reduce the peak number of infections and also agreed that delaying infections until vaccines can be made and made widely available was an approach that could be followed."[370]

236. However, now, Dr. Bhattacharya says that this theoretical delay (and benefit) from lockdowns is not borne out by his own study, published in January 2021 "*Assessing Mandatory Stay-at-Home and Business Closure*".[371]

237. In cross-examination, it was suggested to Dr. Bhattacharya that his expert report in the present matter does not deal with the issue of reducing morbidity at all, and that his report is

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[368] Transcript of Proceedings, February 10, 2022, p103/12-19.
[369] *Gateway, supra* note 7 at para 169.
[370] *Ibid*.
[371] Transcript of Proceedings, February 10, 2022, p103/4-10.

all about reducing mortality. He said he would have to look at his report to answer that, but in his previous reports he had talked about morbidity as well. He also noted morbidity correlates very strongly with mortality rates.[372]

238. In response to the question where in his reports he discusses the issue of how to protect hospitals and ICUs from becoming overwhelmed by wide-spread community transmission, Dr. Bhattacharya pointed to the GBD[373] though he couldn't remember specifically what he had written or where it was in his report.[374] In fact, all Dr. Bhattacharya's Primary Report states is:

> Effective focused protection reduces the number of people who will need hospitalization for COVID-19 infection, since hospitalization risk, like mortality risk, rises sharply with patient age. Thus, if effective focused protection is implemented, the probability of overcrowded hospital systems is greatly reduced.[375]

239. There is absolutely no other evidence in the Primary or Surrebuttal Report's addressing any of "morbidity", "the benefit [theoretical or otherwise] of lockdowns [NPIs] where hospital overcrowding is predicted to occur", or "the impact that widespread community transmission has on hospitals and ICUs." In his two reports, Dr. Bhattacharya does not address how Alberta should have responded in December 2020 or April/May 2021 at the height of Alberta's second and third waves with the real and present threat to health care capacity without putting in place the impugned mandatory restrictions.

240. In Gateway, Chief Justice Joyal noted that:

> … It is only through the reduction of community transmission generally, that the rate of SARS-CoV-2 can be slowed in a community and in so doing, assist in the goal of preventing the overwhelming of the healthcare system and its limited resources. In this regard, Manitoba is right to point out that Dr. Bhattacharya's evidence focusses almost exclusively on mortality with virtually no mention of the impact that widespread community transmission has on hospitals and ICUs.[376]

241. The Chief Justice's finding that Dr. Bhattacharya's evidence contained "virtually no mention of the impact that widespread community transmission has on hospitals and ICUs" was put to Dr.

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[372] Transcript of Proceedings, February 10, 2022, p95/1-3.
[373] Transcript of Proceedings, February 10, 2022, p97/36.
[374] Transcript of Proceedings, February 10, 2022, p97/36-40.
[375] Bhattacharya Primary Report at 77/2300 (p37).
[376] *Gateway, supra* note 7 at para 314; See also *Tandon, supra* note 165 at 28, re "Dr. Bhattacharya's declaration, which focusses on mortality".

Bhattacharya in cross-examination. Dr. Bhattacharya's response was, again, to point to the GBD and effective focussed protection.[377]

242. It is clear from all the evidence that Dr. Bhattacharya has (and had) no other suggestions or solutions to offer for the threat to the healthcare system posed by the high community transmission faced in waves 2 and 3 than to say Alberta should have followed what he called "effective focussed protection". It is not clear why Dr. Bhattacharya thinks this would have helped. He gave no details at all. He had done no studies or investigation. He had conducted no analysis. There was no basis for this suggestion. And there is no credible evidence that it would have helped Alberta achieve its public health care objectives.

G. The Great Barrington Declaration: effective focussed protection and herd immunity[378]

243. In her affidavit, Dr. Hinshaw summarized her October 2020 response to the GBD[379], stating that while it is very appealing for those tired of restrictions and where those at a lower risk of serious outcomes, are keenly feeling the effects of the restrictions, the approach is not achievable with minimal impact for several reasons.

244. First, evidence around long-lasting immunity was still unclear. Second, it was not accurate to say that herd immunity could be achieved with few costs. If infections were allowed to spread unchecked over a short period of time, the hospitalization volume alone would be sufficient to impair the ability of Alberta's acute care system to manage all the other healthcare needs of Alberta's population. Third, the premise that Alberta could successfully shield continuing care facilities and hospitals, and that Alberta would be able to support all those over 60, and

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[377] Transcript of Proceedings, February 10, 2022, p94/41-p104/9.
[378] Dr. Hinshaw paras 225-237, Exhibit X. During his qualification by Mr. Grey, Dr. Bhattacharya explains "basic idea/premise of GBD": Transcript of Proceedings, February 10, 2022, p41/25-p42/6. Dr. Bhattacharya cross on GBD generally, Transcript of Proceedings, February 14, 2022, PM, p11/4-38/33. As in *Gateway, supra* note 6 at para 177, many of Alberta's measures put to him are consistent with focussed protection, Transcript of Proceedings, February 14, 2022, AM, p26/4-p27/27. He agreed some scientists, researchers and policy makers support suppression efforts, Transcript of Proceedings, February 14, 2022, PM, p40/11-13, and some support a dual-track approach of focussed protection and community suppression, Transcript of Proceedings, February 14, 2022, PM, p40/15-18. See also *Gateway* at para 177.
[379] Hinshaw Affidavit at paras 226-232.

presumably also those with high-risk chronic conditions, to stay home with limited activities was unsupported by the evidence.

245. She updated her response to the GBD in her affidavit in July of 2021 explaining that evidence on the strength of immunity continued to be reviewed and reinfection was building. However, the length of time an individual remains immune was still unknown. At that time, only about 2.5% of Alberta's population had detectable antibodies to the virus that causes COVID-19, which implies that the province was a long way from herd immunity. Herd immunity through natural infection would have resulted in significant morbidity and mortality in the population, and stress on the health system regardless of the protections in place for those known to be at risk of serious outcomes.[380]

246. In cross-examination, Dr. Bhattacharya confirmed the GBD approach would never move to mandating restrictions, but instead only relies on recommendations - even if those recommendations are not being followed.[381]

247. Dr. Kindrachuk also addresses herd immunity through natural infection explaining "there are serious concerns regarding the public health outcome of such a strategy."[382] COVID-19 is likely going to become endemic in our communities[383], and "the likelihood for us to be able to reach herd immunity is very, very, very low, it's infinitely small."[384]

248. Dr. Kindrachuk calculates that in Alberta "reaching herd immunity without vaccines would require somewhere between 50-90% of the population to get infected", which "would equate to 22,000-40,000 deaths." However, he further notes "if SARS-Cov-2 was allowed to spread exponentially without NPIs, the real death toll would actually be much higher, as the death rate would necessarily increase for patients who cannot access healthcare resources."[385]

249. For this reason, he explains the importance of having "regard for finite healthcare resources cannot be overstated, as this policy inherently relies on allowing a large fraction of the

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[380] Hinshaw Affidavit at paras 233-237.
[381] Transcript of Proceedings, February 14, 2022, AM, p36/9-12, p36/24-31, and PM p9/21-p10/23.
[382] Kindrachuk Report at 19-21/1236. See also Transcript of Proceeding, February 22, 2022, AM, p56/27-29.
[383] Transcript of Proceedings, February 23, 2022, p40/5-7.
[384] Transcript of Proceedings, February 23, 2022, p41/9-18.
[385] Kindrachuk Report at 20/1236.

population to become infected", otherwise left "[u]nchecked, the spread will rapidly overwhelm healthcare systems."[386]

H. Masks

250. Dr. Hinshaw's evidence is "masks, when worn properly, are a valuable tool in reducing the transmission of SARS-CoV-2".[387] Dr. Kindrachuk's evidence is that masks provide significant protection against transmission.[388]

251. Dr. Kindrachuk disagreed that "cloth masks, or masks generally used by laypeople do not stop aerosol transmission of COVID-19". He explained they provide some protection that is additive to other behaviours.[389] Dr. Kindrachuk also explained in response to questions on mask effectiveness against aerosol transmission that masks would also potentially trap transmission by aggregates of variants in a heterogenous mixture of droplets and aerosols. It is therefore important not to assume the virus is only spread by aerosols as single variants at a time.[390]

252. Dr. Kindrachuk in cross-examination noted Dr. Bhattacharya's previous reliance on masks as effective in influenza and questions the change in his view on their importance.[391]

253. Dr. Bhattacharya[392] and Dr. Kindrachuk[393] agree that there are studies supporting both sides of this argument on the effectiveness of masking. Dr. Kindrachuk acknowledged the effect of masks on transmission of SARS-CoV-2 continues to be controversial.[394] Dr. Kindrachuk explained the evidence on mask effectiveness in his report was in his opinion "the best evidence in support of masking and what is the highest quality evidence that's available at the time of the report."[395]

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[386] *Ibid*.
[387] Hinshaw Affidavit at para 110.
[388] Kindrachuk Report at 10, 15-17/1236.
[389] Transcript of Proceedings, February 22, 2022, AM, p56/27-p57/32.
[390] Transcript of Proceedings, February 22, 2022, AM, p57/39-p58/4 and p57/13-14.
[391] Transcript of Proceedings, February 22, 2022, AM, p56/36-40; and Transcript of Proceedings, February 23, 2022, p28/1-7.
[392] Transcript of Proceedings, February 11, 2022, p65/2-7.
[393] Transcript of Proceedings, February 22, 2022, AM, p58/16-19.
[394] Transcript of Proceedings, February 22, 2022, AM, p58/16-19.
[395] Transcript of Proceedings, February 22, 2022, AM, p59/9-13, also see re-direct Transcript of Proceedings, February 23, 2022, p48/3-14.

254. Dr. Bhattacharya's current view is that it is "an open question" whether masks as used in the community actually have any effect".[396] He does however still acknowledge PPE in hospital and long-term care facilities is good policy. Dr. Bhattacharya also said at the time he wrote his reports he "was not particularly aware of the literature on masks", the way he knows now.[397]

I. Effectiveness of NPIs

255. Dr. Kindrachuk explains that the NPIs "that have been employed" for COVID-19 "have been based on prior experience with similar pathogens", and "historically, we can say that there have been benefits." However, as "we are only 27 months" into COVID-19 then more work will need to be done to better understand the effectiveness of all the different NPI measures employed.[398]

256. Further, while Dr. Kindrachuk explains we cannot be sure to a scientific certainty that NPIs are effective, he points to Dr. Bhattacharya's 2010 working paper on influenza which includes things within Dr. Bhattacharya's "lockdowns," such as masking, hygiene, vaccination, and notes that Dr. Bhattacharya's had been of the view that there was a benefit from those behaviours in reducing the impact of both the seasonal flu and the 2009 influenza pandemic.[399]

257. Dr. Kindrachuk also notes the dramatic drop in influenza cases over the last two years and the correlation with COVID-19 NPIs.[400] He further explains that contrary to the position of Dr. Bhattacharya, NPIs are not binary. It is not a choice between having everyone infected versus completely locking down society.[401]

258. Dr. Bhattacharya's views on the effectiveness of lockdowns have continued to evolve since he co-authored the GBD in October 2020, as his view is that "it was an open question in July 2021" in the literature whether NPIs were effective."[402] Whereas now Dr. Bhattacharya in his

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[396] Transcript of Proceedings, February 11, 2022, p65/30-31.
[397] Transcript of Proceedings, February 14, 2022, AM, p38/35-39.
[398] Transcript of Proceedings, February 23, 2022, p28/9-p28/19.
[399] Transcript of Proceedings, February 23, 2022, p28/30-32.
[400] Transcript of Proceedings, February 23, 2022, p39/36-p40/1.
[401] Transcript of Proceedings, February 23, 2022, p40/24.
[402] Transcript of Proceedings, February 11, 2022, p63/1-13. Dr. Bhattacharya also agreed "trying to assess the effectiveness of NPIs is very difficult, Transcript of Proceedings, February 14, 2022, AM, p10/35-36.

reports, and the Applicants in their argument, rely especially on the following two studies for the conclusion that "lockdowns do not work":

- Savaris et al's Stay-at-Home Policy is a case of exception fallacy, an internet-based ecological study, which was published in *Scientific Reports* in March 2021, but retracted by the editors in December 2021[403]; and

- Assessing Mandatory Stay-at-Home and Business Closure Effects on the Spread of COVID-19, which was published in January 2021, and of which Dr. Bhattacharya is a co-author.[404]

259. The evidence, including cross-examination, shows just how important these papers have been in shaping Dr. Bhattacharya's evolving views on the ineffectiveness of NPIs.[405]

260. The Applicants also continue to argue the papers should be heavily relied on by this Court to find Alberta ignored the relevant literature, which they claim showed in January 2021 that there were no significant benefits on case growth of more restrictive non-pharmaceutical interventions."[406]

261. However, these two studies have not fared well. The Savaris Study was retracted by the editors of *Science Reports* in December 2021. An event so exceptionally rare that Dr.

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[403] Savaris, R. F., Pumi, G., Dalzochio, J., & Kunst, R. (2021), Stay-at-home policy is a case of exception fallacy: an internet-based ecological study. Scientific Reports, 11(1), 5313. https://doi.org/10.1038/s41598-021-84092-1 (Savaris Study). The Savaris Study is footnote 18 at 12/24 (p8) of Dr. Bhattacharya's Alberta Surrebuttal Report and at 141-153/394 of the Bhattacharya Surrebuttal Book of Authorities. The Savaris Study is footnote 3 at 8/27 (p1) to Exhibit 4, which is Dr. Bhattacharya's Manitoba Surrebuttal Report. On cross-examination generally on the Savaris Study, see Transcript of Proceedings, February 10, 2022, p104/38-p120/11.

[404] See unpublished version: Bendavid E, Oh C, Bhattacharya J, Ioannidis JPA. Assessing Mandatory Stay-at-Home and Business Closure Effects on the Spread of COVID-19. Eur J Clin Invest. 2021 Jan 5:e13484. doi: 10.1111/eci.13484. Epub ahead of print. PMID: 33400268 at footnote 48 of the Bhattacharya Primary Report at 56/2300 (p16) and at Tab 48 (895-915/2300); See also Exhibit 6, published version of footnote 48: Bendavid E, Oh C, Bhattacharya J, Ioannidis JPA. Assessing mandatory stay- at- home and business closure effects on the spread of COVID- 19. *Eur J Clin Invest*. 2021;51:e13484. https://doi.org/10.1111/eci.13484, Transcript of Proceedings, February 11, p26/6-10 (i.e. "document 48").

[405] Transcript of Proceedings, February 10, 2022, p112/31-36; Transcript of Proceedings, February 11, 2022, p23/2-3: he said there was "tremendous interest" in the paper, Transcript of Proceedings, February 11, 2022, p25/2; Dr. Bhattacharya was asked if he knew of any criticism of the paper for its use of real world counterfactuals. He was "not sure" he understood "which criticism" was being referred to, Transcript of Proceedings, February 11, 2022, p23/6-24/35.

[406] Pre-Trial Factum of HBC et al at para 134.

Bhattacharya had previously testified, when cross-examined in *Gateway*, that it would be "extraordinary"[407] to actually happen to a published article.

262. While in Exhibit 7, three of the scientists who wrote the article[408] that caused *Science Reports* to retract the Savaris Study were also highly critical of the Assessing Mandatory study.[409] The authors of Assessing Mandatory, including Dr. Bhattacharya, responded to the criticisms of these scientists in Exhibit 7 by publishing Exhibit 8.[410]

263. Dr. Bhattacharya had brought none of this to the Court's attention. Given his and the Applicants' reliance on the studies, in the face of questions on his knowledge of the criticisms of Assessing Mandatory and the retraction of the Savaris Study by a common group of scientists, Dr. Bhattacharya was cross-examined in detail on these reports.

264. In fact, the evidence shows that Dr. Bhattacharya changed how he describes the Savaris Study in his Alberta Surrebuttal Report, dated July 30, 2021, from how he describes it in his Manitoba Surrebuttal Report dated March 31, 2021.[411] In Manitoba he refers to the Savaris Study, as "[p]erhaps the best peer-reviewed study evaluating the efficacy of lockdowns", whereas after he was cross-examined specifically about criticisms of the Savaris Study on May 3 and 4 in *Gateway*[412], he changed his description of the Savaris Study in his Alberta Surrebuttal to just "another study". He testified he remembered editing the language from

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[407] Exhibit 9, MB Vol 2 p124/17.
[408] Exhibit 5, Gideon Meyerowitz-Katz, Lonni Besancon, Antonie Flahault and Raphael Wimmer, "Impact of mobility reduction on COIVD-19 mortality: absence of evidence might be due to methodological issues", *Sci. Rep. 11, 23533*. https://doi.org/10.1038/s41598-021-02461-2 (2021).Transcript of Proceedings, February 11, p15/15-25 (the Savaris Criticism).
[409] Exhibit 7, Besancon L, Meyerowitz-Katz G, Zanetti Chini E, Fuchs H, Flahault A. Challenges in determining causality: An ongoing critique of Bendavid et al's 'Assessing mandatory stay- at- home and business closure effects on the spread of COVID- 19'. *Eur J Clin Invest*. 2021; 51:e13599. https://doi.org/10.1111/eci.13599; Transcript of Proceedings, February 11, 2022, p57/11-21. Exhibit 7 is footnote 2 to Exhibit 8.
[410] Exhibit 8, Bendavid E, Oh C, Bhattacharya J, Ioannidis JPA. Authors Response to Letters to the editor regarding: 'Assessing mandatory stay- at- home and business closure effects on the spread of COVID-19'. *Eur J Clin Invest*. 2021;51:e13553. https://doi.org/10.1111/eci.134553; Transcript of Proceedings, February 11, 2022, p57/23-26. Exhibit 6 is footnote 1 to Exhibit 8.
[411] Exhibit 4, p8/27, which is page 1 of his Manitoba Surrebuttal Report.
[412] See Exhibit 9, MB Vol 2 p119-120, and re "point 6", and the "time lags between rising death rates" see p119/26-120/39, and at p124/16-22.

"best" in his Manitoba Surrebuttal to "another" in his Alberta Surrebuttal[413], and so he clearly knew there was an issue with the criticism of the Savaris in July 2021.

265. In cross-examination, Dr. Bhattacharya explains the "specific reason" he made this edit to this Alberta report was because he "learned after" he wrote "best peer-reviewed study" of "an after-publication comment" that "was put up questioning" whether the Savaris Study took account for the time it takes for the NPIs to have effect on the mortality rate after they are put in place. He referred to this in his cross-examination as the "lag issue" or "lag criticism".[414]

266. He said he "looked into" the lag criticism of the Savaris Study afterwards" and he "thought it was still a good paper, but no longer necessarily the best paper".[415] The edit to "another" "accurately reflects what he thought about the paper"[416], and he did not feel the need to tell this Court about" a dispute between authors … and some other scientists that was still ongoing and had not received any clarification in his mind when he wrote the Alberta [Surrebuttal] Report."[417]

267. Dr. Bhattacharya was also able to identify the Savaris Criticism (Exhibit 5)[418], which is authored by four scientists and was published on line at *Scientific Reports* on December 7, 2021. As Dr. Bhattacharya acknowledges, it is the critique of the Savaris Study that caused its retraction. Three of the scientists who wrote Exhibit 5 were among the group of five scientists who criticized Assessing Mandatory in Exhibit 7.[419]

268. These four scientists' conclusions on the Savaris Study are:

> While the question of whether NPIs can influence COVID-19 deaths is of great importance, <u>the issues we have highlighted seriously weaken the conclusions made by the authors</u>. They found no statistically significant differences between

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[413] Transcript of Proceedings, February 10, 2022, p109/6; Transcript of Proceedings, February 10, 2022, p109/1-3.
[414] Transcript of Proceedings, February 10, 2022, p109/6-26, see also point 6 on Exhibit 9 MB Vol 2 p119-120 re the "lag" issue.
[415] Transcript of Proceedings, February 10, 2022, p109/25.
[416] Transcript of Proceedings, February 10, 2022, p109/30.
[417] Transcript of Proceedings, February 10, 2022, p109/35-37.
[418] Exhibit 5, Savaris Criticism.
[419] Gideon Meyerowitz-Katz, Lonni Besancon, and Antonie Flahault. Dr. Bhattacharya agrees the Savaris Criticism was the reason the editors retracted the Savaris Study, Transcript of Proceedings, February 11, 2022, p16/19-25. Interestingly, there is no mention of the "lag issue" in Exhibit 5. Rather, the criticisms in Exhibit 5 of the Savaris Study are on other issues than the lag point.

> regions on these metrics may simply be a function of the chosen methodology and the inherent limitations of the mobility dataset, and might have little to do with the matter at hand. It appears likely that the methodology could not detect an effective of staying at home on mortality even if one were to exist.[420]

269. As to Dr. Bhattacharya's failure to bring the retraction of the Savaris Study to the Court's attention, the cross-examination[421] shows he "knew that it was retracted" he testified this was "'cause I saw it on -- you know, it was with -- you know, talked about."[422] He said while he did not remember the date he learned it was retracted[423], "it was over the [2021/22] Christmas holidays, could've been after New Years."[424]

270. When he was directly asked why he had not told the Court the Savaris Study had been retracted[425], his varied responses were:

- He had no opportunity to tell the Court the Savaris Study had been retracted[426],
- "There's lots of studies in [his] report", "tens of thousands of papers have been written since then. The literature has moved on",[427]
- He "described … both the scientific issue at hand" [the lag issue], and also the fact that it was retracted before Counsel for Alberta brought it up[428]; and

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[420] Exhibit 5, Savaris Criticism at p6/9 under "Discussion".
[421] Re retraction is "Extraordinary", Transcript of Proceedings, February 10, 2022, p 112/9-12 and p112/24-29; re retractions of published articles has "happened several times during this pandemic", Transcript of Proceedings, February 10, 2022, p116/17-22; re "would have been seen as an absolutely extraordinary thing before the pandemic", now "less extraordinary", Transcript of Proceedings, February 11, 2022, p18/14-17; re only should retract for "scientific fraud", Transcript of Proceedings, February 11, 2022, p18/32 and see Exhibit 9, MB Vol 2 p124/17-19; re "extraordinary things are articles being retracted. That's not what has happened here. What has happened here is a note that this is subject to criticism"; Transcript of Proceedings, February 11, 2022, p19/7-11; re he liked that the Savaris Study used real world counterfactuals, and only one at time to use, Transcript of Proceedings, February 11, 2022, p17/16-18; re Dr. Bhattacharya still thinks the Savaris Study is "correct", Transcript of Proceedings, February 10, 2022, p110/9-10; re "Thinks it's still a paper worth considering", Transcript of Proceedings, February 10, 2022, p110/8; re he would still call it "another" paper today, Transcript of Proceedings, February 10, 2022, p109/19-24, and p115/1-26; re Dr. Bhattacharya discusses "lag" issue, Transcript of Proceedings, February 11, 2022, p17/2; and re he would not retract if editor, not warrant retraction in his opinion, Transcript of Proceedings, February 11, 2022, p17/28-33 and p17/35-p18/2.
[422] Transcript of Proceedings, February 11, 2022, p16/37-38.
[423] Transcript of Proceedings, February 11, 2022, p17/2, p17/7, and p17/10-11.
[424] Transcript of Proceedings, February 11, 2022, p17/10-11 re he knew the Savaris Study had been retracted recently and that the authors did not agree; and Transcript of Proceedings, February 10, 2022, p110/12-15.
[425] Transcript of Proceedings, February 10, 2022, p110/12-41.
[426] Transcript of Proceedings, February 10, 2022, p110/24-25 and p38-41.
[427] Transcript of Proceedings, February 10, 2022, p110/30-32.
[428] Transcript of Proceedings, February 10, 2022, p111/20-22.

- He in fact had told the Court the editors had retracted the Savaris study before it was put to him in cross-examination.[429]

271. However, very clearly, a review of the transcript from February 10 shows that Dr. Bhattacharya never raised the fact that the Savaris Study had been retracted. He did not mention it until it was brought to his attention during cross-examination.[430]

272. In spite of Dr. Bhattacharya's change in enthusiasm for the Savaris Study between March 31 and July 31, 2021, and his claim to have been aware of the December 2021 retraction, the Applicants HBC et al in their Pre-Trial Factum[431], dated September 1, 2021, continue to assert that Dr. Bhattacharya "explains that the best peer-reviewed study evaluating the efficacy of lockdowns was published in March 2021 in Scientific Reports.[432] Even more surprising, these Applicants actually continue to insist in their recently filed Closing Argument that the retracted Savaris Study is still the "best peer-reviewed study".[433]

273. In regard to Dr. Bhattacharya's Assessing Mandatory paper[434], he also did not bring these relevant criticisms to the Court's attention, and he was vague in his responses in cross-examination about questions on this in spite of co-authoring Exhibit 8 in direct response to these criticisms.[435] However, surprisingly Dr. Bhattacharya's evidence is that he was not aware of any criticism of Assessing Mandatory by the same scientists[436] who wrote the

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[429] Transcript of Proceedings, February 10, 2022, p110/41-p111/7.
[430] Transcript of Proceedings, February 10, 2022, p110/12-14.
[431] At para 134.
[432] However, this is footnoted in HBC et al's Pre-Trial Factum to p 8 in the Bhattacharya Surrebuttal Report, which actually states "[a]nother peer-reviewed study evaluating the efficacy of lockdowns was published in the prestigious journal, *Scientific Reports*."
[433] Closing Argument of HBC et al at para 118.
[434] "Assessing Mandatory" is Exhibit 6; and Assessing Mandatory is referred to as "Document 18" in the Transcript of Proceedings, February 11, 2022, p26/6-7; Assessing Mandatory is also footnote 16 to the Bhattacharya Surrebuttal Report 12/24, note the Bhattacharya Surrebuttal Book of Authorities says see Tab 48 of Primary Expert Report (Footnote 48), which is the unpublished working paper version Bhattacharya Primary Report at 895/2300, was published January 2021, not 2020 – see as corrected in cross Transcript of Proceedings, February 10, 2022, p89/22-p90/9.
[435] Dr. Bhattacharya was also shown a document by the same scientists, the title of which included "Assessment of stay-at-home orders", and which was described to him as a criticism of his own Assessing Mandatory paper. However, he said he had "never seen" this document before. Though he recognized the name of one of the scientists (Gideon Meyerowitz-Katz), he did not recognize the others, Transcript of Proceedings, February 11, 2022, p38/5-7.
[436] Gideon Meyerowitz-Katz, Lonni Besancon, and Antonie Flahault [GMK et al].

Savaris Criticism (Exhibit 5) that resulted in the editors' retraction of the Savaris Study.[437] He did though acknowledge seeing Exhibit 7 previously. The conclusions in Exhibit 7 are:

> Overall, we are forced to restate our previous position[438], which is that this paper does not allow us to meaningfully assess the efficacy of NPIs against COVID- 19. It is not possible to know from this study whether restrictive NPIs work, do not work or even how we might define a country's response as more or less 'restrictive'.

274. In cross-examination on criticism of Assessing Mandatory, he also acknowledged that Alberta did not have a stay-at-home order during the pandemic.[439] He also agreed that some jurisdictions may have very stringent conditions; and others less so.[440] He further agreed that restrictions may ebb and flow depending on the situation at any given time.[441]

275. Ultimately, the Applicants greatly overstate the importance of individual studies on NPI effectiveness to the legal issues before this Court. As is clear from Alberta's evidence, the issue of the best scientific evidence available at the relevant time, is based on an understanding of the evolving nature of that evidence, and that the determination must be based on a totality of the best available evidence, rather than on any one individual study. The fact that the two studies relied on so heavily by the Applicants have been impugned as they have, further illustrates this point.

J. Higher risk activities and locations

276. Most transmission occurs indoors, especially with poor ventilation. Some activities and locations pose a greater risk.[442] As discussed in Dr. Kindrachuk's review of the transmission

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[437] Transcript of Proceedings, February 11, 2022, p25/18-21.
[438] The "previous position" being restated by GMK et al is a reference to the paper at footnote 3 of Exhibit 7: "*Sample size, timing, and other confounding factors: towards a fair assessment of stay-at-home orders*" by the same scientists. That the GMK et al's "previous position" is referencing GMK et al's Sample size, timing, and other confounding factors is also supported by Exhibit 8, which is Dr. Bhattacharya et al's response to Sample size, timing, and other confounding factors among two other letters (the three letters responded to by Exhibit 8 are footnotes 2-4 of Exhibit 8).
[439] Transcript of Proceedings, February 11, 2022, p41/5-8.
[440] Transcript of Proceedings, February 14, 2022, p40/35-p41/3.
[441] Transcript of Proceedings, February 14, 2022, p40/35-p41/3.
[442] Hinshaw Affidavit at paras 43-45.

risks associated with singing[443], the Alsved Study[444] recently found that the generation of aerosol particles, as determined by particle number emission rates were highest from those singing loudly with exaggerated diction followed by loud singing alone, normal singing, loud talking, normal talking and breathing. Addition of a face mask to those singing loudly reduced particle emission rates to levels found during normal talking. "This explains why gathering in places such as fitness classes, theatres, restaurants, places of worship and choir practice are identified as of particular concern."[445]

277. Dr. Bhattacharya's views on singing are that "it's a complicated story, I think, from the literature I've read".[446]

1. Physical activity venues

278. While Alberta acknowledges that physical activity is important for the physical and mental health of Albertans, the very nature of some types of physical activity can result in forceful droplet expulsion or generate an increased amount of smaller respiratory droplet sizes. Heavy exertion or increased breathing rates occurring from intense exercise can increase the quantity of smaller respiratory particles.[447]

279. A common trait of these outbreaks was high attack rates – meaning that most or all participants in attendance became infected through a single source. Alberta has acknowledged that this sector was likely to be able to stay up to date with guidance and to enforce the measures, which is why they were included early in reopening.[448]

280. Dr. Hinshaw confirmed that in restricting physical activity venues, consideration was given to "the different types of activities and the level of risk". Therefore, "at different times depending on the magnitude of the transmission risk" "certain activities were restricted, such as group fitness, while others such as individual workouts were not."[449]

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[443] Kindrachuk Report at 15/1236.
[444] "Alsved M, Matamis A, Bohlin R, Richter M, Bengtsson P-E, Fraenkel C-J, Medstrand P, Londahl J. 2020. *'Exhaled respiratory particles during singing and talking'*, *Aerosol Sci Technol,* 54: 1245-48"; see Kindrachuk Report at 79/1236.
[445] *Gateway, supra* note 7 at para 56.
[446] Transcript of Proceedings, February 14, 2022, PM, p9/4-5 re Exhibit 11.
[447] Hinshaw Affidavit at para 145.
[448] Hinshaw Affidavit at para 147.
[449] Transcript of Proceedings, April 6, 2022, p120/14-18.

281. Dr. Simmonds explained: there were thirty-three outbreaks associated with Sports and Fitness Facilities between March 1, 2020 – May 15, 2021 with a total of 501 directly associated cases. When separate outbreaks are spawned from the fitness outbreaks, the secondary outbreak cases are not counted towards the fitness outbreak.[450]

282. The overall attack rates of fitness facilities and within sports cohorts have an average attack rate of 24 percent, but some outbreaks have had attack rates as high as 46 percent. Fitness outbreaks have been reported in all zones in the province.

2. Places of worship

283. Faith-based gatherings at places of worship involved prolonged contact in an indoor setting, which could be seen to heighten the risk of virus transmission. The gatherings often involved activities such as singing and ceremonial rituals that also heightened the risk of spread.[451]

284. Dr. Simmonds explains that in Alberta between March 1, 2020 and May 15, 2021 there were 35 outbreaks identified that were associated with places of worship with a total of 704 directly associated cases. When separate outbreaks are spawned from the outbreaks at places of worship, the secondary outbreak cases are not counted towards a place of worship outbreak.[452]

285. Dr. Hinshaw explains Alberta has acknowledged the importance of allowing faith based activities throughout the pandemic. In Alberta, unlike in Manitoba, in person attendance at places of worship was never prohibited by the CMOH Orders. Rather, capacity limitations for places of worship have been instituted in alignment with other restrictions.[453]

286. Dr. Hinshaw along with elected leaders in Alberta met regularly with Faith Leaders to ensure they had access to reliable information in order to support implementing voluntary and mandatory measures, as well as supporting their congregants. The vast majority of Alberta faith communities were excellent partners in the pandemic response and showed great

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[450] Simmonds Affidavit at para 10, Exhibit D.
[451] *Gateway, supra* note 7 at para 264 and see also at para 56; See also *Beaudoin, supra* note 108 at paras 151-152, 226, 233, and 238-239.
[452] Simmonds Affidavit at para 10, Exhibit C, p17/58.
[453] Hinshaw Affidavit at para 142.

innovation in providing services in alignment with measures, such as online and drive-in services.[454]

K. Utility of PCR testing

287. Dr. Hinshaw explains while it is true that a small proportion of people who test positive are not contagious, the policy change to not require isolation if an individual tests positive again within three months of a previous positive result is a change that mitigated this risk. [455]

288. She further explains there is not a clear and reliable guarantee that an individual with a positive result and high CT value[456] is not infectious. These individuals may still have a high and contagious viral load or they may have a low viral load and not be contagious - there is no way to reliably differentiate between these possibilities with a single test result.[457]

289. Dr. Zelyas explains that "the CT value for a positive SARS-CoV-2 rRT-PCR test only represents the amount of viral RNA in a sample at a specific moment in time when the sample was collected; the trajectory of the viral replication (and, accordingly, the stage of infection) cannot be reliably predicted by the CT value at that point in time by itself."[458]

290. Dr. Zelyas disagreed with many of the assertions of Dr. Bhattacharya about PCR testing, especially on the usefulness of CT Values. Dr. Zelyas disagreed that the PCR test "permits too many doublings" and explained that the PCR test is a very sensitive test to look for the RNA of the SARS-CoV-2 virus. If the test is run for fewer cycles, as suggested by Dr. Bhattacharya, it would effectively reduce the sensitivity of the test and reduce the ability to find people who are infected.[459]

291. Although Dr. Zelyas agreed with the general assertion that the more cycles you go through (ie the higher the CT value), the more likely you are to pick up a virus,[460] he confirmed that going

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[454] *Ibid.*
[455] Hinshaw Affidavit at para 118; See also paras 113-120.
[456] CT value, or "cycle threshold" is the number of doublings of DNA in a sample before reaching the threshold used to define a sample as positive or negative. See Zelyas Report at 4/144 (p2) and 141/144.
[457] *Ibid*.
[458] Zelyas Report at 7/144 (p5).
[459] Transcript of Proceedings, February 22, 2022, PM, p18/8-20.
[460] Transcript of Proceedings, February 22, 2022, PM, p18/30-32.

up to 45 cycles is completely appropriate to determine whether or not someone was or is infected.[461]

292. This is because CT values are not validated viral loads, but are subject to significant variability. The variability can be caused by things such as the type of collection that was performed, whether it was a throat or nasal swab, how it was transported to the lab, the transport medium used, the storage conditions, and the quality of the collection. For those reasons it is challenging to interpret CT values and CT values are not reported out.[462]

293. Because of this high variability Dr. Zelyas disagrees with Dr. Bhattacharya's assertion that CT values provide a more accurate assessment of infectiousness. Dr. Zelyas confirmed that using CT values without clinical information would risk misclassifying someone as non-infectious when they could just be on the first day of a very infectious course. He confirmed that CT values should not be made public[463] and that CT values alone should not be relied on to define whether someone is infectious or not.[464]

294. Dr. Zelyas confirmed that it is in the interest of public health to identify every single person virally infected and quarantine them. He further confirmed that it is important to understand how to interpret the test in managing cases and for public health planning.[465] Case counts aren't just important for determining if someone is potentially infectious, but also for contact tracing to limit further spread, and for planning purposes to know the number of cases that are occurring or have occurred.[466]

295. Dr. Zelyas confirmed that it is not common for people to test positive 100 days after becoming infected with COVID-19, and that a typical timeline is probably a few weeks.[467]

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[461] Transcript of Proceedings, February 22, 2022, PM, p19/8-10.
[462] Transcript of Proceedings, February 22, 2022, PM, p23/25-37. It would also be a regulatory violation to report out CT values, as noted in the Zelyas Report at p143/144.
[463] Transcript of Proceedings, February 22, 2022, PM, p23/30-24/13.
[464] Transcript of Proceedings, February 22, 2022, PM, p34/24-25.
[465] Transcript of Proceedings, February 22, 2022, PM, p27/36-41, see also p24/15-22; p32/12-18.
[466] Transcript of Proceedings, February 22, 2022, PM, p27/38- p28/5.
[467] Transcript of Proceedings, February 22, 2022, PM, p26/6-11.

296. Dr. Zelyas agreed that PCR tests do not confirm infectiousness, but disagreed with the statement that PCR tests were never intended to be used to diagnose respiratory illnesses. That is in fact something that PCR tests are designed to be used for.[468]

297. Dr. Zelyas admitted that live culture is probably the best way to determine infectiousness, but noted that it is not a sensitive test, and so a lot of people would be culture negative but still harbouring live virus.[469] In other words, a live culture test, in addition to taking significantly longer than a PCR test, would produce a lot of false negatives.

298. Dr. Zelyas also confirmed that cell culture is not a tenable method for routine clinical diagnostics. There are numerous issues with it in terms of its sensitivity as mentioned, but also because culturing SARS-CoV-2 requires a special containment level 3 laboratory, and very few of these exist in Alberta. It also requires quite a bit of expertise. It is not scalable and so would be impossible to use for routine COVID-19 testing.[470]

L. Outdoor transmission

299. Dr. Hinshaw's evidence is the risk of outdoor transmission is significantly lower than indoor and really requires proximity. However, "while it's absolutely lower risk for people to be infected when they're outdoors, if people are not masked and if they're close, especially if they're talking for a long period of time, if they're shouting or singing in that close proximity with other people, then there is still a risk of transmission even if people are outdoors".[471]

300. Dr. Hinshaw explained that Alberta has always been very clear in communications that the risk of transmission outdoors is much lower than indoor transmission.[472] However, Alberta has seen in case follow-ups, throughout the early waves of COVID when there was follow up on individual cases and contacts, and Alberta did its best to ascertain the most likely source of

[468] Transcript of Proceedings, February 22, 2022, PM, p25/14-17.
[469] Transcript of Proceedings, February 22, 2022, PM, p21/32-36; Transcript of Proceedings, February 22, 2022, PM, p26/27-28; and see also Transcript of Proceedings, February 22, 2022, PM, p30/28-30.
[470] Transcript of Proceedings, February 22, 2022, PM, p29/26-41.
[471] Transcript of Proceedings, April 4, 2022, p38/12-40/40. See also Dr. Simmonds on lower risk of outdoor transmission, Transcript of Proceedings, February 24, AM, 2022, p37/35-p38/19; and re-direct at p53/3-p54/13 that had this knowledge in summer 2020.
[472] Transcript of Proceedings, April 4, 2022, p38/24-25.

infection for those individual, documented cases where transmission occurred when people were outdoors and when they were close together and unmasked.[473]

301. There is still, therefore, a risk of COVID-19 transmission outdoors.[474]

M. COVID-19, children and schools

302. Dr. Hinshaw explains that Alberta closed its schools in the first wave, based on the "precautionary principle" in public health and the uncertainty, early in the pandemic, of the impacts of the virus on children.[475]

303. Dr. Hinshaw's evidence on the severity of illness in children, is that although risk of death is significantly higher in some groups, and while children tend to experience less severe symptoms of the disease (unless they have an underlying condition) [476], "COVID-19 infection is not a significant risk" to "people under the age of 19, with the exception of infants, who have a slightly higher risk. But, in general, children have a very low risk of health outcomes."[477]

304. In respect to transmission by children, Dr. Hinshaw explains while younger children do not drive outbreaks, and are less likely to be infected[478], evidence also supports that children can transmit the virus[479], as well as be infected by others[480], and that older children and teenagers may transmit the virus as efficiently as adults.[481] Accordingly, in periods of high community prevalence, teenagers are a much bigger transmission risk than younger children given the normal behaviours (kissing, smoking, and sharing of food and drink) associated with that age group.[482] Importantly, young adults are more likely to live at home with older adults. Thus, the potential for children to spread the virus has been considered by Alberta in its pandemic response.

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[473] Transcript of Proceedings, April 4, 2022, p38/25-30.
[474] Transcript of Proceedings, April 4, 2022, p38/32-35.
[475] Transcript of Proceedings, April 4, 2022, p65/33-p66/14.
[476] Hinshaw Affidavit at para 59, see Exhibit N.
[477] Transcript of Proceedings, April 4, 2022, p64/36-39.
[478] Hinshaw Affidavit at para 149.
[479] Transcript of Proceedings, April 4, 2022, p64/40-41.
[480] Transcript of Proceedings, April 4, 2022, p64/40-41.
[481] Hinshaw Affidavit at paras 60 and 149.
[482] Hinshaw Affidavit at para 149.

305. "The fact that children thankfully have had such a low comparative risk of severe outcomes is exactly why" Alberta did its "best to keep kids in school in person as much as [it] possibly could beginning in September of 2020 and tried to support activities for kids as much as [it] could until" the "level of community transmission reached such a high peak that any transmission networks" involving children were "part of that bigger community problem", as it is obviously not possible to separate children from their networks and all the people they are connected with.[483]

306. Alberta has also taken a more nuanced approach than suggested by Dr. Bhattacharya's report in differentiating risks associated with different school grades. There are several effective mitigation strategies (including consistent and correct use of masks; physical distancing; handwashing and respiratory etiquette; cleaning and maintaining healthy facilities; and contact tracing in combination with isolation and quarantine) to limit transmission in the school setting.[484]

307. Alberta safely opened K-12 schools for in-person learning with reasonable precautions during the second and third waves of the pandemic with limited closures only when targeted measures became necessary.[485]

N. Reporting COVID-19 deaths

308. The Applicants' evidence and arguments suggest that Alberta's COVID-19 death statistics are "artificially elevated".[486] The evidence shows that this is incorrect.

309. Dr. Balachandra confirmed in his expert report that the primary cause of death as determined by a physician will be listed in part 1 of the death certificate and a contributing cause of death will be listed in part 2. If COVID-19 was present but did not causally contribute to the death, then it would not be listed in the death certificate at all.[487]

310. Dr. Balachandra also confirms that there are cases where two processes cause a death. If either was present alone, the person would have survived, but because both were present at

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[483] Transcript of Proceedings, April 4, 2022, p65/4-9.
[484] Hinshaw Affidavit at para 151.
[485] Hinshaw Affidavit at para 151.
[486] Bhattacharya Primary Report at 46/2300 (p6). See similarly Pre-Trial Factum of HBC et al at para 93, and Expert Report of Dr. Martin Koebel at 32-34.
[487] Balachandra Expert Report at 2.

the same time, the patient died. In such cases a clinical judgement is required for which cause to list in part 1 and which to list in part 2.[488]

311. Patricia Wood, a senior mortality classification specialist at Statistics Canada, confirms that if COVID-19 is listed as the cause of death in part 1, then it will be recorded as a COVID-19 death.[489] If another cause is listed in part 1, then that other cause will be recorded as the cause of death, and it will not be counted as a COVID-19 death.[490]

312. Accordingly, there may well be cases where COVID-19 causes a death, in the sense that the person would not have died but for COVID-19, yet these are not counted as COVID-19 deaths because an additional cause was listed in part 1. In any event, a death is only counted as a COVID-19 death if a physician has determined that COVID-19 is the primary contributing cause of death.

313. Patricia Wood confirmed that Dr. Bhattacharya's statement that Statistics Canada counts COVID-19 and influenza deaths differently, resulting in "artificially elevated" COVID-19 death statistics is incorrect. Even Dr. Bhattacharya admitted on cross-examination that he did not know whether his own statement about this in his expert report was true or not.[491]

VII. SECTION 1 OF THE *CHARTER*

A. General Test

314. Alberta submits that to the extent the Applicants have made out any *prima facie* infringements of their *Charter* rights, those infringements are reasonable limits prescribed by s. 1 of the *Charter* and justifiable under the *Oakes* test. The *Oakes* test framework for the s. 1 analysis is set out at paras 253-255 of Alberta's Pre-Trial Factum.

B. Prescribed by Law

315. Counsel for Ingram argues that the impugned CMOH Orders were not validly passed and therefore are not prescribed by law.[492] However, for the reasons expounded at section I.B.2 of

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[488] Balachandra Expert Report at 1-2.
[489] Affidavit of Patricia Wood at para 6.
[490] *Ibid* at para 7.
[491] Transcript of Proceedings, February 14, 2022, PM, p6/19-21 re cross-examination of Dr. Bhattacharya.
[492] Closing Argument of Ingram at para 201.

this brief,[493] all of the Impugned CMOH Orders were validly passed pursuant to s. 29 of the *PHA* and are therefore prescribed by law.

C. Pressing and Substantial Connection

316. As set out in paras 256-259 of the Alberta's Pre-Trial Factum, Alberta submits that all of the CMOH Orders were passed to address a pressing and substantial objective – protecting public health by reducing the spread of COVID-19.

317. Alberta acted to save lives, prevent serious illness, and stop the spread of COVID-19 from overrunning our healthcare system, which would inevitably lead to far more deaths and serious outcomes, both COVID-19 and non-COVID-19.[494]

318. As Chief Justice Hinkson said in *Beaudoin*:

> An outbreak of a communicable disease is a crisis in which the state is obliged to take measures that affect autonomy of individuals and communities within civil society. The constitutional importance of combating the COVID-19 pandemic has been stated by courts across the country.[495]

319. Similarly, as Chief Justice Joyal stated in *Gateway*:

> The protection of public health has long been acknowledged as a pressing and substantial objective and currently, in the context of the COVID-19 pandemic, that objective has never been more obvious.[496]

320. It is clear that protecting public health by limiting the spread of COVID-19 is a pressing and substantial objective.

D. Rational Connection

321. The government must demonstrate a causal connection between the infringement and the benefit sought. A government need only show that it is reasonable to suppose that the measure in question may further the objective. It does not have to prove that it will absolutely

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[493] Section I.B.2 "The *Bill of Rights* claims and the claim the CMOH Orders are *ultra vires* the purpose of the *Public Health Act".*
[494] See for example Hinshaw Affidavit at paras 163, 235.
[495] *Beaudoin, supra* note 108 at para 224.
[496] *Gateway, supra* note 7 at para 295.

do so. This is not a high threshold. There must, however, be a rational link between the infringing measure and its goal or object.[497]

322. As summarized earlier,[498] there is no dispute that SARS-CoV-2 is spread by respiratory droplets, through close contact and gathering. There is evidence of clusters and outbreaks in places of worship, outdoor gatherings, and of course indoor gatherings.[499]

323. There is a logical and rational link between limiting gathering sizes and reducing the spread of the virus. As Chief Justice Joyal stated in *Gateway*:

> In the present case, I have no difficulty in concluding, based on logic, reason and a common sensical understanding of the evidence… that the measures taken to limit gatherings, including in places of worship, are rationally connected to the goal of reducing the spread of COVID-19. As the evidence has demonstrated, the virus is spread through respiratory droplets. It is reasonable and logical to conclude, as has been suggested, that the risk of transmission is particularly high in gatherings involving close contact for prolonged periods. It is not surprising that outbreaks have occurred in various gatherings, including places of worship.[500]

324. The Applicants make a number of arguments to say that there is no rational connection for some of the Impugned CMOH Order provisions.

1. Asymptomatic Transmission

325. The Applicants argue that there is no rational connection between reducing the spread of COVID-19 and imposing restrictions on asymptomatic people, because the risk of asymptomatic transmission is very low.[501]

326. However, as examined in detail,[502] the actual science shows that there is indeed a significant risk of asymptomatic and pre-symptomatic transmission. Accordingly, there is a rational connection between imposing restrictions on people without symptoms and reducing the spread of the virus.

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[497] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 [*Hutterian Brethren*] at paras 48, 51. **Tab 9 of Alberta's Pre-Trial Factum**.
[498] See section VI.E "Transmission".
[499] See *ibid* and sections VI.J "Higher risk activities and locations", and VI.L "Outdoor transmission".
[500] *Gateway, supra* note 7 at para 297.
[501] Closing Argument of Ingram at para 212; Closing Argument of HBC et al at para 95.
[502] See section VI.E.1 "Asymptomatic and pre-symptomatic transmission".

2. Outdoor restrictions

327. The Applicants also argue that there is no rational connection to prohibiting outdoor gatherings because Alberta hasn't provided evidence of outbreaks from outdoor events.[503] This argument is incorrect for a number of reasons.

328. First, it misstates the legal test. Alberta does not have to provide scientific evidence proving that its restrictions are effective. It merely has to show that it is reasonable to suppose that the measure may further the objective.[504]

329. Second, we know that SARS-CoV-2 is spread by person to person contact, especially when in close proximity and without masks. It is reasonable and logical that since person-to-person contact can still occurs outdoors, reducing the number of people in an outdoor gathering can reduce its spread.

330. Third, there have in fact been confirmed cases of COVID-19 transmission outdoors.[505]

331. Lastly, the separation between outdoor and indoor gatherings is not as clear as the Applicants suggest. Even at outdoor events, people still have to use the bathroom, for example, and a lot of people using the same bathrooms (a confined indoor space) can certainly contribute to the spread of the virus.

3. Choirs

332. The Applicants also argue that there is no rational connection to justify restrictions on church choirs.[506]

333. Churches often involve a large number of people gathered indoors, engaging in singing, and close contact.[507] As set out above, singing is a particularly high risk activity, close contact is high risk, and large numbers of people gathering at one indoor location is also high risk.[508]

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[503] Pre-Trial Factum of HBC et al at para 97; See also Closing Argument of Ingram at para 212.
[504] *Hutterian Brethren, supra* note 497 at para 48; *Taylor v Newfoundland,* 2020 NLSC 125 at paras 405, 438 [*Taylor*] – **TAB 12**.
[505] See section VI.L "Outdoor transmission".
[506] Closing Argument of HBC et al at paras 93-94.
[507] See section VI.J.2 "Places of worship".
[508] *Ibid*.

334. Accordingly, measures taken to limit the size of gatherings and high risk activities in places of worship, including singing in choirs, are rationally connected to the goal of reducing the spread of COVID-19.[509]

335. Additionally, as summarized above,[510] there is evidence of outbreaks occurring at places of worship.

4. PCR Tests don't confirm infectiousness

336. The Applicants argue that basing CMOH Orders on PCR tests is not rationally connected because PCR tests cannot guarantee that a person is infectious, especially at high CT cycles.[511]

337. As summarized above,[512] PCR tests are the gold standard for determining if someone has SARS-CoV-2, which is the virus that causes the disease COVID-19. No CT value ever rules out infectiousness. The PCR test is a point in time test. Even if your viral load is low today it could be because you just got infected, and you may become very infectious over the next few days. PCR tests are the best analytical tool we currently have to determine and control the spread of COVID-19.

338. It is rational and logical to conclude that if someone has the virus that causes COVID-19, there is a much higher risk of them spreading that virus to others than someone who doesn't have the virus. Accordingly there is a rational link between requiring people with a positive PCR test to quarantine, and reducing the spread of the virus.

339. Additionally, there is an important distinction between how PCR tests work on an individual level versus a population level. The evidence shows that for every 100 people who test positive, roughly 4.1 will end up in hospital, 0.8 of those will end up in ICU, and 1 will die.[513] PCR tests were useful to predict the expected increase in hospital and ICU patients, and are

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[509] See also *Gateway, supra* note 7 at para 297.
[510] See section VI.J.2 "Places of worship".
[511] Closing Argument of HBC et al at paras 84-92; Closing Argument of Ingram at 215.
[512] See section VI.K "Utility of PCR testing"; See also Zelyas Report, generally.
[513] See section VI.D.3 "Morbidity".

therefore a particularly useful analytical tool rationally connected to protecting public health by preserving Alberta's healthcare system.

5. No proof that NPIs work

340. Counsel for Ingram argues that there is no proof that NPIs prevent transmission or that fitness facilities have contributed to the spread of COVID-19.[514] As explained above, this misstates the rational connection test, which merely requires that it is reasonable to suppose that a measure may further the objective of reducing spread. Empirical evidence is not required.[515]

341. That said, as summarized in detail above,[516] there is ample evidence to support the effectiveness of all the NPIs in the Impugned CMOH Orders at reducing the spread of COVID-19.

342. Further, there is evidence that fitness facilities are higher risk, and even evidence of outbreaks associated with fitness facilities.[517]

6. Conclusion

343. In conclusion, rational connection is not a high bar. All that has to be shown in this context is that it is reasonable to suppose that the restrictions in the CMOH Orders could reduce the spread of COVID-19.

344. Alberta submits that the evidence establishes that all the impugned measures, whether restricting gatherings, quarantining those who have the virus, requiring masks or social distancing, and prohibiting high risk activities like singing, have a logical connection to reducing the spread of the COVID-19, and therefore protecting the health of Albertans.

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[514] Closing Argument of Ingram at paras 212-220.
[515] *Taylor, supra* note 504 at para 442.
[516] See sections VI.H "Masks" and VI.I "Effectiveness of NPIs".
[517] See section VI.J.1 "Physical activity venues".

E. MINIMAL IMPAIRMENT

345. As outlined at paras 265-271 of Alberta's Pre-Trial Factum, this step asks whether there are less harmful means that are still "equally effective" in achieving the objective in a real and substantial manner.[518]

346. In cases such as this, where issues are scientific or socially complex, and where the CMOH must attempt to balance a number of competing interests, the government may be better positioned than courts to choose amongst a wide range of alternatives, and courts often accord a measure of deference.[519] As noted in *Taylor:*

> It is not an abdication of the court's responsibility to afford the CMOH an appropriate measure of deference in recognition of (1) the expertise of her office and (2) the sudden emergence of COVID-19 as a novel and deadly disease. It is also not an abdication of responsibility to give due recognition to the fact that the CMOH, and those in support of that office, face a formidable challenge under difficult circumstances.[520]

347. For the minimal impairment requirement to be met, the government's decision must be seen to fall within a reasonable range of alternatives.[521] This inquiry is highly contextual, and the situation leading up to the implementation of the impugned CMOH Orders, set out at "III. Alberta's Pandemic Response" above,[522] must be considered.[523]

348. Alberta submits that the Impugned CMOH Orders are minimally impairing for a number of reasons. In summary:

- Throughout the pandemic, public health officials continually monitored and assessed the situation in order to tailor orders to the prevailing circumstances. Alberta relied on voluntary measures where possible, and only imposed mandatory measures when voluntary measures were insufficient. The restrictive CMOH Orders were limited to the periods when the pandemic was at its most dangerous points, cases were surging, and the health care system was under

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[518] *Hutterian Bretheren, supra* note 497 at paras 53-55.
[519] *Gateway, supra* note 7 at paras 299-300, 316; *Taylor, supra* note 504 at paras 457-458.
[520] *Taylor, supra* note 504 at para 464.
[521] *Hutterian Bretheren, supra* note 497 at paras 37, 54; *Gateway, supra* note 7 at para 316.
[522] Paras 127-154 of this brief.
[523] *Gateway, supra* note 7 at paras 298, 301.

enormous strain. Once the measures achieved the desired goal of flattening the curve, restrictions were gradually eased.[524]

- Unlike other jurisdictions, there were no curfews or "shelter in place" orders (sometimes referred to as "lockdowns") which would prevent people from leaving their homes. Further, unlike Manitoba, a full closure of Alberta's religious institutions was never ordered.[525]
- The public health orders were applied regionally if and when possible, so that restrictions could vary with the severity of community transmission.[526]
- There were a number of attempts to minimize the impact of the Orders so as to minimally impair the affected rights. For example, religious services could be delivered online, in vehicles, or in-person with limited numbers, masks, and social distancing. Funerals, weddings, and similar religious ceremonies were permitted with limited numbers. Although outdoor gathering sizes were limited, this did not preclude other means of expression to protest the CMOH Orders, or other important issues, including petitions, emails, social media, or letters to media or politicians.
- And lastly, the impugned CMOH Orders were tailored to the nature of the risk. Places involving greater risk due to prolonged contact were subject to greater restrictions. Places of worship, fitness centers, and gatherings in the home, were treated like similarly high-risk locations.[527]

1. GBD Approach

349. Counsel for HBF et al note that COVID-19 is less serious for younger people and therefore argue that "a less intrusive method of handling COVID-19 would have been layered or focused protection, as recommended by Dr. Bhattacharya".[528] They note that this approach was used in Florida and Sweden[529] and state that "Dr. Hinshaw repeatedly stated that this approach would not work, but never told this Honourable Court why".[530]

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[524] See eg Hinshaw Affidavit at paras 75, 160-165, 232, and 162-224 generally.
[525] Hinshaw Affidavit at para 142.
[526] Hinshaw Affidavit at paras 162, 175.
[527] See eg Hinshaw Affidavit at paras 42-45, 202, 207-208.
[528] Closing Argument of HBC et al at para 100; Pre-Trial Factum of HBC et al at paras 114-119.
[529] Closing Argument of HBC et al at paras 102-106.
[530] *Ibid* at para 101.

350. However, as explained in detail above,[531] the evidence demonstrates that the GBD approach was given thorough consideration by the CMOH[532] and was ultimately determined not to be appropriate for Alberta. It would result in significantly more deaths, as it is not possible to simply separate the vulnerable from the rest of society. Further, while less serious for younger people, COVID-19 causes serious effects for all age groups, and letting it run free in society would undoubtedly cause significantly more deaths and adverse public health effects. These deaths would include both COVID-19 and non-COVID-19 deaths from the inevitable overrunning of Alberta's health care system, as that would hinder Albertans from receiving care for all illnesses.

351. The GBD approach is "not an approach that has been adopted or followed by most governments or their public health officials in Canada or elsewhere in the world" and there is a "very real question" of whether the GBD approach "could ever realistically be a valid and sustainable public health approach".[533] It also "raises significant moral and ethical questions" connected to the risks of knowingly exposing the population to COVID-19.[534]

352. Further, Alberta did focus its protection on the vulnerable wherever possible.[535] Alberta has taken the "position adopted by most other jurisdictions, [which] is that the protection of vulnerable populations cannot occur without also reducing the extent of community transmission overall. It is only through the reduction of community transmission generally that the rate of SARS-CoV-2 can be slowed in a community and in doing so, assist in the goal of preventing the overwhelming of the healthcare system and its limited resources".[536]

353. The CMOH was facing a situation of exponential growth of COVID-19, uncontrolled community spread, a rise in deaths and serious illness, and an impending crisis facing the health care system. The CMOH engaged in a difficult balancing, and tailored measures which Alberta submits fell within a range of reasonable alternatives. In the context in which the

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[531] See section VI.G "The Great Barrington Declaration: effective focussed protection and herd immunity".
[532] See eg Exhibit X of the Affidavit of Dr. Hinshaw, where Dr. Hinshaw engaged in a detailed analysis of the GBD approach.
[533] *Gateway, supra* note 7 at para 307.
[534] *Ibid* at para 313.
[535] See eg Hinshaw Affidavit at para 154.
[536] *Gateway, supra* note 7 at para 314.

CMOH was operating, there is no basis to conclude that any "significantly less intrusive" measure would have been "equally effective" in flattening the curve.[537]

2. Counsel for Ingram Arguments

354. Counsel for Ingram argues that Alberta has failed to provide evidence that the CMOH Orders are minimally impairing, or why limitations on fitness facilities instead of closures would not have been equally effective.[538]

355. However, Alberta has in fact demonstrated that voluntary measures or other limitations were used when possible, and it was only in the limited circumstances where these were insufficient that mandatory measures including business closures were implemented.[539] These measures were only continued for as long as necessary, and once the curve had been flattened and it was reasonable to do so, they were lifted or reduced.[540]

356. Additionally, "in the context of the COVID-19 pandemic, with the prospect of serious illness or death, the margin for error is small … Applying public health measures across the population is often a more effective means than trying to target smaller at risk sub groups".[541]

3. Symptom Checks

357. Counsel for HBC et al has argued that symptom checks would have been a less impairing alternative than "closing" churches or restricting private gatherings.[542] This is based on the incorrect assertion that asymptomatic transmission is extremely low. As previously explained above,[543] SARS-CoV-2 can be transmitted by individuals who are not showing symptoms. Relying on symptom checks would not reduce asymptomatic or pre-symptomatic transmission at all, and therefore could not meet the goal of reducing the spread of COVID-19 in an "equally effective" manner.

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[537] See similarly *ibid* at para 316.
[538] Closing Argument of Ingram at paras 227-229.
[539] Hinshaw Affidavit at paras 21, 23, 98, 170-171, 175, 201.
[540] See eg Hinshaw Affidavit at paras 156-159.
[541] *Taylor, supra* note 504 at para 467.
[542] Pre-Trial Factum of HBC et al at paras 108-111.
[543] See sections VI.E.1 "Asymptomatic and pre-symptomatic transmission" and VII.D.1 "Asymptomatic Transmission".

4. Conclusion

358. In conclusion, the Impugned CMOH Orders minimally impair the rights in issue, as there is no evidence of any "significantly less intrusive" measures that might have been "equally effective" in responding to the real time emergency facing Alberta and its healthcare system.[544]

F. PROPORTIONALITY

359. The final part of the *Oakes* test asks whether the deleterious effects of a measure outweigh the public benefit that may be gained from the measure.[545] The Applicants make 3 main arguments with respect to proportionality. First, NPIs don't work and therefore have limited salutary benefits. Second, the negative effects of the CMOH Orders were significant. And third, no formal cost-benefit was conducted.

360. Most of the Applicants' submissions on the first point are inextricably tied to their contention that the scientific evidence is insufficient to show the salutary benefits of the CMOH Orders. As outlined above in detail,[546] this contention is incorrect. Once the Impugned Orders were implemented, the curve flattened, cases leveled off and then declined. The CMOH Orders did their job, and it is difficult to conceive of a more formidable salutary benefit than protecting the public health of Albertans and saving literally thousands of lives.[547] A similar argument on the lack of salutary effects was considered and rejected in *Gateway*[548] where Chief Justice Joyal noted:

> It was those very limitations found in the impugned PHOs, that – according to the evidence I accept – helped realize the pressing and substantial objectives of protecting public health, saving lives and stopping the expediential growth of the virus from overwhelming Manitoba hospitals and its acute healthcare system.[549]

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[544] See similarly *Gateway, supra* note 7 at paras 316-317.
[545] *Hutterian Brethren, supra* note 497 at para 78.
[546] See sections II. "The Scientific and Emergency Management Evidence" and VI. "The evidence before this Court on SARS-CoV-2 and the COVID-19 pandemic".
[547] See eg Alberta's Pre-Trial Factum at para 272.
[548] *Gateway, supra* note 7 at paras 321-324, 327, 329, 333.
[549] *Ibid* at para 324.

361. On the second point, Alberta acknowledges that the Impugned Orders have caused hardship and inconvenience, including preventing Albertans from practicing their religion in their preferred manner, and limiting their in-person interactions.

362. However, while other issues have arisen during the course of the pandemic, including a deterioration of mental health and increased substance abuse, it is not possible to attribute the causes of these to any public health restrictions, let alone the impugned CMOH Orders.[550] The increased worry, sickness, and death wrought by the COVID-19 pandemic, which we have all witnessed in our neighbours and loved ones, has undoubtedly taken a toll.

363. Additionally, it has long been recognized that the potential to harm one's neighbours provides a reasonable basis for limiting the freedom to manifest one's beliefs, opinions and conscience.[551] Freedoms of religion, expression, assembly, and association must be exercised with due respect for the rights of others, and "subject to such limitations as are necessary to protect public safety, order and health, and the fundamental rights and freedoms of others".[552]

364. The third and final argument of the Applicants is that the Alberta failed to conduct a formal cost-benefit analysis prior to implementing the Impugned Orders. This argument must fail for two reasons.

365. First, s 1 does not require a formal cost-benefit analysis in this context nor scientific proof in an empirical sense, as "it is extremely difficult and perhaps impossible to empirically prove in advance that the potential economic and social costs of the impugned restrictions outweigh the benefits".[553] What is required is that the deleterious effects are not out of proportion to the public good achieved by the measures. As set out above, the CMOH Orders achieve the important societal benefit of protecting the health and safety of others, especially the vulnerable.[554]

366. Further, as noted in *Taylor*:

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[550] See similarly *ibid* at para 332.
[551] *Gateway, supra* note 7 at para 325.
[552] *Ibid*.
[553] *Ibid* at 335; See also *Taylor, supra* note 504 at para 405.
[554] See similarly *Gateway, supra* note 7 at para 327.

> In the context of such a public health emergency, with emergent and rapidly evolving developments, the time for seeking out and analyzing evidence shrinks. Where the goal is to avert serious injury or death, the margin may be narrow. In such a circumstance, the response does not admit of surgical precision. Rather, in public health decision making the "precautionary principle" supports the case for action before confirmatory evidence is available.[555]

367. Second, the CMOH did consider and take into account potential collateral harms and balanced them against the benefits and severity of the pandemic.[556]

368. It is helpful in this final balancing analysis to reiterate that Alberta has also taken a number of steps to minimize any deleterious effects including by (a) funding a number of ameliorative supports,[557] (b) allowing religious services where possible to minimize risks (drive-ins, by video-link, in-person with limited capacity and without singing), (c) allowing gatherings to occur outdoors, and (d) not closing churches.[558] The Orders were in effect for limited duration, and only for as long as necessary to regain control over transmission and alleviate the intense strain on the hospitals and ICUs.[559]

1. Conclusion

369. The task of properly balancing collateral effects is difficult because public health officials and government must balance a wide variety of competing factors.[560] Alberta's necessary but difficult decisions on how to deal with COVID-19 were based on current scientific information and knowledge gathered from Canada and around the world, and the shared knowledge, experience and best practices acquired from Alberta working closely and collaboratively with provincial and federal counterparts across Canada, including epidemiologists, virologists, and other health care professionals.[561]

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[555] *Taylor, supra* note 504 at para 411 (emphasis added).
[556] Hinshaw Affidavit at para 163; See similarly *Gateway, supra* note 7 at paras 330-331.
[557] See Affidavits of Chris Shandro and Darren Hedley, filed July 12, 2021, Hinshaw Affidavit at para 89.
[558] Hinshaw Affidavit at para 142.
[559] See similarly *Gateway, supra* note 7 at para 328.
[560] *Ibid* at para 330.
[561] See similarly *ibid* at para 333-334.

370. Alberta submits that there is more than enough evidence to show that the restrictions were necessary.[562] After the Impugned CMOH Orders were put in place, COVID-19 numbers began to decline, consistent with what modelling predicted.[563]

371. In conclusion, while the Impugned CMOH Orders "may cause some mental anguish to some, … the collective benefit of the population as a whole must prevail".[564] The Applicants' rights "must give way to the common good".[565] When examining the benefits of Alberta's response in the threat of such a deadly pandemic, Alberta submits that the evidence "unquestionably demonstrates that the salutary effects of the limitation[s] far outweigh those effects that may be characterized as deleterious".[566]

VIII. CONCLUSION

372. Accordingly, Alberta submits that any restrictions on the identified *Charter* rights flowing from the Impugned CMOH Orders are justified as a reasonable limit and constitutionally defensible under s. 1 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of July, 2022.

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ALBERTA and THE CHIEF MEDICAL OFFICER OF HEALTH

Per: _____
for **Nicholas Parker**
Alberta Justice, Constitutional and Aboriginal Law

Per: _____
Nicholas Trofimuk
Alberta Justice, Constitutional and Aboriginal Law

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[562] See sections II. "The Scientific and Emergency Management Evidence", III. "Alberta's Pandemic Response", and VI. "The evidence before this Court on SARS-CoV-2 and the COVID-19 pandemic".
[563] See similarly *Gateway, supra* note 7 at para 334.
[564] *Taylor, supra* note 504 at para 492.
[565] *Ibid.*
[566] *Gateway, supra* note 7 at para 320. See also paras 335-336.

IX. Table of Authorities

TAB

Executive Legislation

SECOND EDITION

John Mark Keyes

LexisNexis

v. Alberta, where the establishment of a utility corridor for a pipeline appeared to be the main purpose for designating a restricted development area, as opposed to any desire to preserve the natural environment.[95]

Fettering Legislative Discretion

Purposive limits also require discretionary powers to be exercised with due consideration for relevant factors. If they are not, their exercise is said to have been fettered. This limit on fettering can be traced back to the *Wednesbury* notions of reasonableness[96] and is directed principally towards decision-making powers. It seeks to ensure that they are exercised in a way that reflects the distinct features of each case in which a decision is to be made.[97] However, it has occasionally been argued that law-making powers cannot be fettered. *Thorne's Hardware* now provides a solid basis for rejecting these arguments in relation to executive legislation. It effectively excludes their application by recognizing that ministers have wide-ranging responsibilities and must be capable of acting for equally wide-ranging reasons, notably those of a political nature.

The Ontario Court of Appeal has also clearly recognized this in *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*.[98] It resoundingly rejected arguments of impropriety with a government minister enacting a hunting regulation under pressure from the premier of the province, lobbyists and the general public. Justice Abella said:

> ... it is irrelevant whether the Premier and/or the Minister were influenced by political expediency, this being a consideration which is an accepted, expected, and legitimate aspect of the political process. Whether one characterizes taking public opinion into account as political expediency or political reality, taking it into account is a valid function of political decision making.
>
> Similarly, attempting to influence the government to change a practice, as OFAH, NOTO, and Robert Schad did, is an accepted feature of our system of government. Where the result of the influence is a regulation, it is the regulation itself, not the motives of the people who enacted it, which is relevant.

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95 [1977] A.J. No. 523, 4 Alta. L.R. (2d) 139 (Alta. C.A.). See also *R. v. Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd.*, [2000] 1 All E.R. 884 at para. 50 (C.A.).

96 *Associated Provincial Picture Houses Ltd. v. Wednesbury*, [1948] 1 K.B. 223 (C.A.).

97 See Chapter 1, "What Is Executive Legislation?", "Quasi-Legislation (Soft Law)", "Limits on the Use of Quasi-Legislation".

98 [2002] O.J. No. 1445 (Ont. C.A.).

> Governments are motivated to make regulations by political, economic, social or partisan considerations. These motives, even when known, are irrelevant to whether the regulation is valid.[99]

In *Western Pulp Inc. v. Roxburgh*, Strayer J. invoked similar reasons to reject an argument that a fisheries variation order was invalid because the official issuing it had acted under the direction of senior departmental officials and with advice from officials in another department. He said:

> If a legislator approves a legislative measure within his jurisdiction, it is not open to the courts to question the motivation of the legislator in doing so. Judges could not, for example, refuse to give effect to the acts of Parliament simply because the majority of members voted as they were told to do by party whips and not out of personal conviction. Similarly, it is irrelevant that the respondents issued the impugned orders because they were directed to do so by those having broader responsibilities or more expertise in respect of health hazards.[100]

Both the *Ontario Federation of Anglers & Hunters* and *Western Pulp* cases follow the reasoning in *Thorne's Hardware* by recognizing the realities of politics and government that form the context for delegating legislative powers to government ministers and officials. Taking account of this context in exercising legislative powers cannot by itself be open to attack on the basis of improper purpose. This ground of review requires analysis of the purposes themselves and it is satisfied if executive legislation advances its authorized purposes. Whatever else it does is of no judicial interest. Improper subdelegation is a different issue, which does not arise as long as delegates retain decisive involvement in exercising their authority and do not wholly surrender it to some other person or body.[101]

Although executive legislative delegates generally have broad discretion about the factors to consider when exercising their powers, this discretion can be narrowed by the enabling legislation. For example, in *Canadian Council for Refugees v. Canada*,[102] the enabling Act authorized the Governor in Council to designate countries "that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture" to which unsuccessful refugee claimants could be sent.[103] It also established a condition precedent that required the Governor in Council to consider four factors bearing on whether a particular country complied with these articles. A failure to consider them would have invalidated the

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[99] *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)*, [2002] O.J. No.1445 at paras. 50-53 (Ont. C.A.).

[100] [1990] F.C.J. No. 1043, 39 F.T.R. 134 at 141 (F.C.T.D.).

[101] See Chapter 11, "Subdelegation and Transformation of Authority".

[102] [2008] F.C.J. No. 1002 at para. 66 (F.C.). See also *Collège Lasalle v. Québec*, [1998] R.J.Q. no 2113 (Que. S.C.).

[103] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 101(2).

regulations. Although the Federal Court of Appeal was prepared to examine whether the Governor in Council had properly interpreted this condition precedent, it also showed considerable deference for her role:

> Once it is accepted, as it must be in this case, that the GIC has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant Articles of the Conventions, there is nothing left to be reviewed judicially. I stress that there is no suggestion in this case that the GIC acted in bad faith or for an improper purpose.[104]

This conclusion was supported by the Regulatory Impact Analysis Statement that accompanied the regulations and recounted the efforts that the Governor in Council had made to consider the four factors, including taking note of the views of the United Nations High Commissioner for Refugees about the country in question. The case thus demonstrates the importance of such statements in determining whether executive legislation is validly made.[105]

DISCRIMINATION

One of the basic principles flowing from the rule of law is that the law is to be applied equally to all. However, the content and implications of this notion of equality are complex. Laws apply to various types of activities and situations and to the many different persons who engage in them. The features that distinguish these activities, situations and persons almost always demand different legal responses. The law as a whole applies in ways that impose different results on different persons. Thus, the notion of equality before the law, and the corresponding injunction against discrimination, must be qualified in some way.[106]

The most prevalent notions of legal equality have developed in the latter part of the 20th century as basic human rights. They are expressed in human rights legislation in most jurisdictions[107] and, in Canada, they are recognized in section 15 of the *Canadian Charter of Rights and*

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[104] *Canadian Council for Refugees v. Canada*, [2008] F.C.J. No. 1002 at para. 78 (F.C.).

[105] See, generally, F. Houle, "Regulatory History Material as an Extrinsic Aid to Interpretation: An Empirical Study on the use of RIAS by the Federal Court of Canada" (2006) 19 C.J.A.L.P. 151.

[106] In *R. v. MacKay*, [1980] S.C.J. No. 79, [1980] 2 S.C.R. 370 at 406 (S.C.C.), the Court held that:

> "equality before the law" does not arise when distinctions are "rationally based and acceptable as a necessary variation from the general principle of universal application of the law to meet special conditions and to attain a necessary and desirable social objective.

[107] See, for example, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6; *Racial Discrimination Act, 1975* (Cth.).

517 F.Supp.3d 922
United States District Court, N.D. California, San Jose Division.

Ritesh TANDON, et al., Plaintiffs,

v.

Gavin NEWSOM, et al., Defendants.

Case No. 20-CV-07108-LHK
|
Signed 02/05/2021

Synopsis

Background: Objectors, who included business owners and a political candidate, brought action in which they challenged validity of COVID-19-related restrictions imposed by California and California county. Objectors then moved for a preliminary injunction.

Holdings: The District Court, Lucy H. Koh, J., held that:

[1] objectors were not likely to succeed on claim that restrictions violated substantive due process;

[2] rational-basis review applied to equal-protection challenge asserted by objectors who were business owners;

[3] rational basis existed for the restrictions;

[4] restrictions did not, based on both intermediate and strict scrutiny, infringe on First Amendment rights of free speech and assembly;

[5] political candidate's claim that the restrictions violated First Amendment rights of free speech and assembly was not rendered moot by the occurrence of the general election;

[6] rational-basis review applied to challenge to restrictions that was based on freedom of religion under the First Amendment; and

[7] a preliminary injunction enjoining the restrictions would not be in the public interest.

Motion denied.

West Headnotes (63)

[1] **Evidence** Official Proclamations and Orders

District court, when considering plaintiffs' motion for a preliminary injunction in their action challenging the validity of COVID-19-related restrictions imposed by California and California county, would take judicial notice of a state order lifting a regional stay-at-home order, a county order confirming that the regional stay-at-home order was no longer in effect, and county's revised directive for gatherings; documents were public records that were proper subjects of judicial notice. Fed. R. Evid. 201(b).

[2] **Evidence** Official Proclamations and Orders

District court, when considering plaintiffs' motion for a preliminary injunction in their action challenging the validity of COVID-19-related restrictions imposed by California and California county, would not take judicial notice of World Health Organization (WHO) report addressing the use of PCR tests; courts were not permitted to take judicial notice of the truth of the contents of a document. Fed. R. Evid. 201(b).

[3] **Evidence** Public records and documents in general

Public records are proper subjects of judicial notice. Fed. R. Evid. 201(b).

1 Cases that cite this headnote

[4] **Evidence** As establishing truth of facts or matters noticed in general

Courts are not permitted to take judicial notice of the truth of the contents of a document. Fed. R. Evid. 201(b).

[5] **Injunction** Admissibility

District court, when considering plaintiffs' motion for a preliminary injunction in their action challenging the validity of COVID-19-related restrictions imposed by California and California county, would deny plaintiffs' motion to supplement the record; if plaintiffs were submitted to supplement the record, defendants would also have to be accorded an equal opportunity to add evidence on additional developments, but since the COVID-19 pandemic was rapidly evolving, the process of submitting additional evidence had to end.

[6] **Injunction** Grounds in general; multiple factors

A plaintiff seeking a preliminary injunction must establish that she is likely to succeed on the merits, that she is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in her favor, and that an injunction is in the public interest.

[7] **Injunction** Extraordinary or unusual nature of remedy

Injunction Clear showing or proof

A preliminary injunction is an extraordinary and drastic remedy and is one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.

[8] **Injunction** Grounds in general; multiple factors

Serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest.

[9] **Constitutional Law** Substantive Due Process in General

The substantive component of the Due Process Clause 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. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[10] **Health** State and local regulations

When a state exercises its police powers to enact emergency health measures, courts will uphold them unless (1) the measures have no real or substantial relation to public health, or (2) the measures are beyond all question a plain, palpable invasion of rights secured by fundamental law.

[11] **Civil Rights** Public accommodations or facilities

COVID-19-related restrictions imposed on businesses such as restaurants, gyms, and hair salons by California and California county bore a real and substantial relation to public health, as relevant to determining if business owners seeking a preliminary injunctions against the restrictions were likely to succeed on the merits of claim that restrictions violated substantive due process; in coming up with the restrictions, which included limits on indoor gatherings and mandates on spacing of tables for outdoor dining, state considered objective risk criteria related to spread of COVID-19. U.S. Const. Amend. 14.

1 Cases that cite this headnote

[12] **Civil Rights** Public accommodations or facilities

Constitutional Law Particular Subjects and Regulations

Constitutional Law Public health

Health Quarantine

COVID-19-related restrictions imposed on businesses such as restaurants, gyms, and hair salons by California and California county, which included limits on indoor gatherings and mandates on spacing of tables for outdoor

dining, were not a plain, palpable invasion of rights secured by fundamental law, as relevant to determining if business owners seeking a preliminary injunctions against the restrictions were likely to succeed on the merits of claim that restrictions violated substantive due process; despite argument that restrictions infringed on business owners' right to earn a living, the right to earn a living is not a fundamental liberty interest that had been traditionally protected by the substantive component of the Due Process Clause. U.S. Const. Amend. 14.

3 Cases that cite this headnote

[13] **Constitutional Law** Similarly situated persons; like circumstances

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike. U.S. Const. Amend. 14.

[14] **Constitutional Law** Licenses and Regulation

Constitutional Law Restaurants; food and drink

Constitutional Law Other particular issues and applications

Owners of businesses subject to COVID-19-related restrictions imposed by California and California county, which restrictions included limits on indoor gatherings and mandates on spacing of tables for outdoor dining, were not part of suspect class, and thus rational-basis review applied to business owners' equal-protection challenge to the restrictions. U.S. Const. Amend. 14.

6 Cases that cite this headnote

[15] **Constitutional Law** Statutes and other written regulations and rules

Rational-basis review in equal-protection analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices; accordingly, regulations must be upheld against an equal-protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. U.S. Const. Amend. 14.

5 Cases that cite this headnote

[16] **Constitutional Law** Equal protection

Constitutional Law Rational Basis Standard; Reasonableness

On rational-basis review, the burden is on plaintiffs claiming an equal-protection violation to negate every conceivable basis which might support the classification. U.S. Const. Amend. 14.

[17] **Constitutional Law** Statutes and other written regulations and rules

On rational-basis review in an equal-protection challenge, courts must uphold the classification as long as it finds some footing in the realities of the subject addressed by legislation. U.S. Const. Amend. 14.

5 Cases that cite this headnote

[18] **Constitutional Law** Licenses and Regulation

Constitutional Law Other particular issues and applications

Health Quarantine

Rational basis existed for COVID-19-related restrictions that California and California county imposed on businesses, which included limits on indoor gatherings and mandates on spacing of tables for outdoor dining, and thus restrictions did not violate equal protection; stemming the spread of COVID-19 was unquestionably a compelling government interest, restrictions were carefully tailored to the risk attendant to each business, and despite argument that it was not rational to place restrictions on entire population, many non-vulnerable people died or became seriously ill after being infected with COVID-19. U.S. Const. Amend. 14.

[19] **Constitutional Law** Licenses and Regulation

Constitutional Law Other particular issues and applications

Health Quarantine

It was rational for California's and California county's COVID-19-related restrictions to distinguish between businesses, as relevant to determining if rational basis existed for the restrictions so as not to violate equal protection; despite argument that a facial salon, for example, should not face harsher restrictions than a doctor's or dentist's office, there were many legitimate reasons to expect that medical offices would be better trained in preventing the spread of disease than non-medical offices, and the restrictions were carefully tailored to the risks attendant to each business. U.S. Const. Amend. 14.

[20] **Constitutional Law** Licenses and Regulation

Constitutional Law Other particular issues and applications

Health Quarantine

It was rational for California's COVID-19-related restrictions on businesses, which included limits on indoor gatherings and mandates on spacing of tables for outdoor dining, to distinguish between counties based on prevalence of COVID-19, as relevant to determining if rational basis existed for the restrictions so as not to violate equal protection; if a gathering took place in a county where there was a high prevalence of infection, the likelihood of coming into contact with someone who was infected and able to spread COVID-19 was increased. U.S. Const. Amend. 14.

[21] **Constitutional Law** Licenses and Regulation

Constitutional Law Other particular issues and applications

Health Quarantine

It was rational for California's and California county's COVID-19-related restrictions, which included limits on indoor gatherings and mandates on spacing of tables for outdoor dining, to be based on PCR tests, as relevant to determining if rational basis existed for the restrictions so as not to violate equal protection; although PCR tests did not capture spread as accurately as they would if they were given to the entire population, they did an adequate job in assessing disease spread and determining whether to tighten or loosen restrictions, and California had a wider testing program than other states, which made the prevalence rate more reliable. U.S. Const. Amend. 14.

[22] **Constitutional Law** Right of Assembly

Constitutional Law Particular Issues and Applications in General

Health Quarantine

COVID-19-related restrictions that California and California county imposed on private gatherings, which were content-neutral, did not, based on intermediate scrutiny, infringe on First Amendment rights of free speech and assembly; restrictions were within government's constitutional power, restrictions were unrelated to suppression of free expression, and restrictions were not greater than essential to promote compelling governmental interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system. U.S. Const. Amend. 1.

[23] **Constitutional Law** Mootness

Political candidate's claim that COVID-19-related restrictions imposed by California and California county as to indoor and outdoor gatherings violated First Amendment rights of free speech and assembly was not rendered moot by the occurrence of the general election; candidate had expressed his intent to run again at the next election and had stated that he needed to meet with advisors, donors, and constituents

to support his next campaign in the coming months, during which the restrictions were likely to remain in effect, and candidate's challenge was a controversy evading review since the election season that just ended was too short for the controversy to be fully litigated before the end of the election season. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

[24] **Federal Courts** Nature of dispute; concreteness

Federal courts may adjudicate only actual, ongoing cases or controversies. U.S. Const. art. 3, § 2, cl. 1.

[25] **Federal Courts** Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

As is relevant to constitutional provision that federal courts may adjudicate only actual, ongoing cases or controversies, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed. U.S. Const. art. 3, § 2, cl. 1.

[26] **Federal Courts** Rights and interests at stake

Federal Courts Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

A case becomes "moot" when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. U.S. Const. art. 3, § 2, cl. 1.

[27] **Federal Courts** Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

There is an exception to the mootness doctrine if a case is capable of repetition, yet evading review; under that exception, cases for prospective relief can go forward despite abatement of the underlying injury where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. U.S. Const. art. 3, § 2, cl. 1.

[28] **Constitutional Law** Mootness

Political candidate's claim that COVID-19-related restrictions imposed by California and California county as to indoor and outdoor gatherings violated First Amendment rights of free speech and assembly was a "controversy evading review," as was relevant to determining if the occurrence of the election rendered the controversy moot; the election season that just ended was too short for the controversy to be fully litigated before the end of the election season. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

[29] **Federal Courts** Inception and duration of dispute; recurrence; "capable of repetition yet evading review"

To be an action capable of repetition, as is relevant to exception to the mootness doctrine if a case is capable of repetition, yet evading review, a plaintiff must establish a reasonable expectation that he will be subjected to the same action or injury again. U.S. Const. art. 3, § 2, cl. 1.

[30] **Federal Courts** Elections, voting, and political rights

A political candidate who has brought an election-related action and is seeking to avoid a finding that the occurrence of the election rendered the action moot can establish a reasonable expectation that he will be subjected to the same action or injury again, as is relevant to exception to the mootness doctrine if a case is capable of repetition, yet evading review, if the candidate subsequently announces an intent

to seek office in a future election. U.S. Const. art. 3, § 2, cl. 1.

[31] **Constitutional Law** Mootness

Political candidate's claim that COVID-19-related restrictions imposed by California and California county as to indoor and outdoor gatherings violated First Amendment rights of free speech and assembly was a "controversy capable of repetition," as was relevant to determining if the occurrence of the election rendered the controversy moot; candidate had announced an intent to seek office in a future election. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

[32] **Constitutional Law** Content-Based Regulations or Restrictions

Constitutional Law Strict or exacting scrutiny; compelling interest test

If a law restricting speech is content based, which means that it is a law that targets speech based on its communicative content, then the law must satisfy strict scrutiny on a First Amendment challenge, which means that the government must prove that they law is narrowly tailored to serve a compelling government interest. U.S. Const. Amend. 1.

[33] **Constitutional Law** Governmental disagreement with message conveyed

Constitutional Law Strict or exacting scrutiny; compelling interest test

Laws restricting speech must satisfy strict scrutiny on a First Amendment challenge if they are facially content neutral, but cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message the speech conveys. U.S. Const. Amend. 1.

[34] **Constitutional Law** Freedom of Speech, Expression, and Press

If a law restricting speech does not suppress expression out of concern for its likely communicative impact, the law must satisfy intermediate scrutiny, as opposed to strict scrutiny, on a First Amendment challenge. U.S. Const. Amend. 1.

[35] **Constitutional Law** Content-Based Regulations or Restrictions

Government regulation of speech is "content based" and thus must satisfy strict scrutiny on a First Amendment challenge if the law applies to particular speech because of the topic discussed or the idea or message expressed. U.S. Const. Amend. 1.

[36] **Constitutional Law** Content-Based Regulations or Restrictions

The crucial first step in determining whether a law is content based and thus must satisfy strict scrutiny on a First Amendment challenge is to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys. U.S. Const. Amend. 1.

[37] **Constitutional Law** Content-Neutral Regulations or Restrictions

Constitutional Law Narrow tailoring requirement; relationship to governmental interest

Where a restriction on speech does not, on its face, discriminate on the basis of content, the restriction is "content neutral" and needs only to satisfy intermediate scrutiny, as opposed to strict scrutiny, on a First Amendment challenge; accordingly, blanket bans applicable to all speakers are content neutral. U.S. Const. Amend. 1.

[38] **Constitutional Law** Right of Assembly

Constitutional Law Particular Issues and Applications in General

California's COVID-19 restrictions on private gatherings were "content neutral," as was relevant to determining level of scrutiny to apply to challenge to restrictions based on First Amendment rights of free speech and assembly; restrictions applied to all gatherings regardless of the speech to be shared at that gathering. U.S. Const. Amend. 1.

[39] **Constitutional Law** Right of Assembly

Constitutional Law Particular Issues and Applications in General

California county's COVID-19 restrictions prohibiting indoor gatherings and imposing limits on outdoor gatherings as to people and space were "content neutral" and needed only to satisfy intermediate scrutiny, as opposed to strict scrutiny, on challenge to restrictions based on First Amendment rights of free speech and assembly; restrictions applied regardless of purpose of the gatherings. U.S. Const. Amend. 1.

[40] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

Under intermediate scrutiny, a content-neutral regulation restricting speech is justified (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. U.S. Const. Amend. 1.

[41] **Constitutional Law** Particular Issues and Applications in General

Health Quarantine

COVID-19-related restrictions that California and California county imposed on private gatherings were within government's constitutional power, as was relevant to determining if the restrictions, which were content neutral, survived intermediate scrutiny in challenge to restrictions based on First Amendment rights of free speech and assembly. U.S. Const. Amend. 1.

[42] **Constitutional Law** Exercise of police power; relationship to governmental interest or public welfare

A restriction on speech is within the government's constitutional powers if the government can constitutionally regulate the subject in question, as is relevant to whether restriction survives intermediate scrutiny on a First Amendment challenge. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[43] **Constitutional Law** Right of Assembly

Constitutional Law Particular Issues and Applications in General

Health Quarantine

COVID-19-related restrictions that California and California county imposed on private gatherings furthered compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system, as was relevant to determining if the restrictions, which were content neutral, survived intermediate scrutiny in challenge to restrictions based on First Amendment rights of free speech and assembly. U.S. Const. Amend. 1.

[44] **Constitutional Law** Right of Assembly

Constitutional Law Particular Issues and Applications in General

Health Quarantine

Compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing

the overwhelming of the healthcare system, which were interests that were furthered by the restrictions that California and California county imposed on private gatherings, were unrelated to the suppression of free expression, as was relevant to determining if the restrictions, which were content neutral, survived intermediate scrutiny in challenge to restrictions based on First Amendment rights of free speech and assembly; restrictions were blanket bans applicable to all gatherings and did not prevent the expression of any particular message or viewpoint. U.S. Const. Amend. 1.

[45] **Constitutional Law** Right of Assembly

Constitutional Law Particular Issues and Applications in General

Health Quarantine

Any incidental restriction on speech and assembly from the COVID-19-related restrictions that California and California county imposed on private gatherings was no greater that what was essential to the furtherance of the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system, as was relevant to determining if the restrictions, which were content neutral, survived intermediate scrutiny in challenge to restrictions based on First Amendment rights of free speech and assembly; Court of Appeals had held the some of California's restrictions at issue were narrowly tailored in context of strict scrutiny, and restrictions promoted compelling government interests that would be achieved less effectively absent the restrictions. U.S. Const. Amend. 1.

[46] **Constitutional Law** Narrow tailoring requirement; relationship to governmental interest

When determining if a content-neutral law restricting speech survives intermediate scrutiny on a First Amendment challenge, the law need not be the least restrictive or least intrusive means of achieving the governmental interest; rather, the law must promote a substantial government interest that would be achieved less effectively absent the regulation and the means chosen must not be substantially broader than necessary to achieve the government's interest. U.S. Const. Amend. 1.

[47] **Constitutional Law** Right of Assembly

Constitutional Law Particular Issues and Applications in General

Health Quarantine

COVID-19-related restrictions that California and California county imposed on private gatherings did not, under strict scrutiny, infringe on First Amendment rights of free speech and assembly, even if restrictions were content based rather than content neutral; restrictions were narrowly tailored to further compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system. U.S. Const. Amend. 1.

[48] **Constitutional Law** Right of Assembly

Constitutional Law Particular Issues and Applications in General

Health Quarantine

COVID-19-related restrictions that California and California county imposed on private gatherings were narrowly tailored to further compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system, as was relevant to determining if the restrictions, assuming they were content based, survived strict scrutiny in challenge that was based on First Amendment rights of free speech and assembly; restrictions limited attendance at gatherings, restrictions placed stricter limits on indoor gatherings than outdoor gatherings, and state-level restrictions placed stricter limits on gatherings in counties where COVID-19 was more prevalent. U.S. Const. Amend. 1.

[49] **Constitutional Law** Neutrality; general applicability

Constitutional Law Strict scrutiny; compelling interest

As is relevant to determining whether a law prohibits the free exercise of religion, a law that is neutral and of general applicability must only pass "rational basis review," meaning that it need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice; by contrast, a law that is not neutral and generally applicable must survive "strict scrutiny," meaning that it must be justified by a compelling government interest and must be narrowly tailored to advance that interest. U.S. Const. Amend. 1.

[50] **Constitutional Law** Neutrality; general applicability

As is relevant to rule that a law that allegedly prohibits the free exercise of religion and that is neutral and of general applicability need only pass rational-basis review to withstand challenge based on freedom of religion under the First Amendment, a law is not "neutral" if the object of a law is to infringe upon or restrict practices because of their religious motivation. U.S. Const. Amend. 1.

[51] **Constitutional Law** Neutrality; general applicability

Where laws make no reference to any religious practice, conduct, belief, or motivation, they are "facially neutral," as is relevant to rule that a law that allegedly prohibits the free exercise of religion and that is neutral and of general applicability need only pass rational-basis review to withstand challenge based on freedom of religion under the First Amendment. U.S. Const. Amend. 1.

[52] **Constitutional Law** Neutrality; general applicability

As is relevant to rule that a law that allegedly prohibits the free exercise of religion and that is neutral and of general applicability need only pass rational-basis review to withstand challenge based on freedom of religion under the First Amendment, a law is not "generally applicable" if it, in a selective manner, imposes burdens only on conduct motivated by religious belief. U.S. Const. Amend. 1.

[53] **Constitutional Law** Health Care

California's COVID-19-related restrictions that prohibited indoor gatherings and limited outdoor gatherings to three households or fewer were "neutral" as to religion, as was relevant to determining the level of review applicable to challenge to restrictions that was based on freedom of religion under the First Amendment; state's object was not to restrict religious gatherings because they were religious in nature, but rather because they were gatherings, and state's restrictions made no reference to any religious practice, conduct, belief, or motivation. U.S. Const. Amend. 1.

1 Cases that cite this headnote

[54] **Constitutional Law** Health Care

California's COVID-19-related restrictions that prohibited indoor gatherings and limited outdoor gatherings to three households or fewer were "generally applicable," as was relevant to determining the level of review applicable to challenge to restrictions that was based on freedom of religion under the First Amendment; state's restrictions applied to all gatherings, whether religious or secular. U.S. Const. Amend. 1.

[55] **Constitutional Law** Neutrality; general applicability

Under rational-basis review of a law challenged under the Free Exercise Clause, courts must uphold the law if it is rationally related to a legitimate government purpose. U.S. Const. Amend. 1.

[56] **Injunction** Irreparable injury

Injunction Adequacy of remedy at law

Injunction Recovery of damages

"Irreparable harm," as it relates to rule that a plaintiff seeking a preliminary injunction must show that she is likely to suffer irreparable harm in the absence of an injunction, is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages.

[57] **Injunction** Irreparable injury

Monetary injury alone is insufficient to show "irreparable harm," as relevant to determining if a preliminary injunction is warranted.

[58] **Injunction** Other particular businesses or occupations

Injunction Health

Owner of gym and owner of facial bar demonstrated that they were likely to suffer "irreparable harm" in the absence of a preliminary injunction against COVID-19-related restrictions imposed by California and California county, where the two owners claimed that they had been or would be driven out of business by the restrictions.

[59] **Civil Rights** Preliminary Injunction

The loss of First Amendment freedoms for even minimal periods of time constitutes "irreparable injury," as relevant to determining if a preliminary injunction is warranted. U.S. Const. Amend. 1.

[60] **Injunction** Equitable considerations in general

The balance-of-equities factor of the test for determining if a preliminary injunction is warranted focuses on the effect of each party of the granting or withholding of the requested relief. U.S. Const. Amend. 1.

[61] **Injunction** Public interest considerations

The public-interest inquiry used to determine if a preliminary injunction is warranted primarily addresses impact on non-parties rather than parties.

[62] **Injunction** Injunctions Sought by Government in General

Injunction Injunctions against government entities in general

When the government is a party, the analysis of the balance-of-equities factor and the public-interest factor in the test for determining if a preliminary injunction is warranted merges.

[63] **Injunction** Health

A preliminary injunction against COVID-19-related restrictions imposed by California and California county would not be in the public interest; restrictions were carefully designed to slow the spread of COVID-19, protect high-risk individuals, and prevent the overwhelming of the healthcare system, and if the court overrode the public health officials and enjoined the restrictions, then more deaths, more serious illnesses, and more strain on California's already overburdened healthcare system would result.

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ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 18

LUCY H. KOH, United States District Judge

Plaintiffs Ritesh Tandon, Terry and Carolyn Gannon, Jeremy Wong, Karen Busch, Maya Mansour, Dhruv Khanna, Frances Beaudet, Julie Evarkiou, and Connie Richards (collectively, "Plaintiffs") sue Defendants Gavin Newsom, the Governor of California; Xavier Becerra, the Attorney General of California; Sandra Shewry, the Acting State Director of the California Department of Public Health; Erica S. Pan, Acting State Public Health Officer of the California; Jeffrey V. Smith, County Executive of Santa Clara County; and Sara H. Cody, Health Officer and Public Health Director of Santa Clara County (collectively, "Defendants"). Plaintiffs bring five claims challenging Defendants' COVID-19 restrictions: (1) violation of the right to free speech and assembly protected by the First and Fourteenth Amendments; (2) violation of the right to free exercise and assembly protected by the First and Fourteenth Amendments; (3) violation of the right to earn a living under the Due Process Clause of the Fourteenth Amendment; (4) violation of the Equal Protection Clause of the Fourteenth Amendment; and (5) violation of the prohibition on unconstitutionally vague criminal laws.

Before the Court is Plaintiffs' motion for a preliminary injunction. Plaintiffs argue that they are likely to succeed on the merits of their first four claims, they are likely to face irreparable harm absent an injunction, and the public interest favors an injunction. Having considered the parties' submissions and oral arguments, the relevant law, and the record in this case, the Court DENIES Plaintiffs' motion for a preliminary injunction.

I. BACKGROUND

A. The COVID-19 Pandemic

1. The Emergence and Spread of COVID-19

In December of 2019, the novel coronavirus SARS-CoV-2 emerged in the Chinese city of Wuhan. Watt Decl. Exh. 3. That coronavirus spread rapidly worldwide, causing a disease known as Coronavirus Disease 2019 ("COVID-19"). Watt Decl. Exh. 12. On February 7, 2020, about two months after COVID-19 had first been detected in China, Patricia Dowd, a 57-year-old woman living in Santa Clara County, died of COVID-19, becoming the first known COVID-19 death in the United States. Cody Decl. ¶ 10.

There have been 104 million confirmed cases of COVID-19 and 2.2 million deaths ***933** from COVID-19 worldwide as of February 3, 2021. *See WHO Coronavirus Disease (COVID-19) Dashboard*, World Health Organization, *available at* https://covid19.who.int/.[1] In the United States, as of February 3, 2021, there have been 26 million confirmed cases of COVID-19 and 445,000 deaths; both are the highest numbers of any nation in the world. *See COVID Data Tracker*, Centers for Disease Control and Prevention, *available at* https://covid.cdc.gov/covid-data-tracker/#datatracker-home [hereinafter "*CDC COVID Data Tracker*"]. The United States is projected to face a death toll as high as the number of Americans that were killed in battle in World War II. Rutherford Decl. ¶ 26. Public health experts have stated that the pandemic is the worst in at least one hundred years. *Id.* ¶¶ 26, 42; Cody Decl. ¶ 71.

Since the pandemic began, the United States has experienced three waves of COVID-19. Currently, the country is in its third wave, the worst wave yet by far. Rutherford Decl. ¶ 109. In recent weeks, case counts and deaths have repeatedly shattered records. On January 8, 2021, more than 314,000 confirmed cases were reported in the United States, a record number. *See CDC COVID Data Tracker.*

California ("the State") has been particularly affected by the pandemic. As of February 3, 2021, there have been 3.2 million confirmed cases of COVID-19, the highest number of any state in the country, and more than 41,000 deaths, the second most of any state in the country. *See CDC COVID Data Tracker*; *Tracking COVID-19 in California*, California for All, *available at* https://covid19.ca.gov/state-dashboard/. In Santa Clara County, as of February 3, 2021, there have been 102,836 confirmed COVID-19 cases, and 1,433 people have died from COVID-19. Johns Hopkins University, *COVID-19 Status Report*, *available at* https://bao.arcgis.com/covid-19/jhu/county/06085.html.

California has been particularly impacted during the current wave of the pandemic, when cases and deaths have repeatedly shattered records. From November 16, 2020 to December 16, 2020, the number of new cases per day jumped from 9,890 to 53,711. *See CDC COVID Data Tracker.* Deaths have spiked as well. Prior to the current wave, the record number of deaths per day was 219 on August 1, 2020. *Id.* However, during the current wave, the record number of deaths per day was 764 on January 22, 2021, or almost four times the previous record. *Id.*

The current wave of the pandemic has also strained hospital capacity. In recent weeks, the State and various counties, including Santa Clara County, had 0 percent remaining ICU capacity. *See About COVID-19 Restrictions*, California For All, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last accessed January ***934** 19, 2021); COVID-19 Hospitalizations Dashboard, County of Santa Clara Emergency Operations Center, *available at* https://www.sccgov.org/sites/covid19/Pages/dashboard-hospitals.aspx. As a result of the current wave, Los Angeles County recently released a memorandum directing that patients not be transported if they go into cardiac arrest and cannot be revived in the field. *See EMS Transport of Patients in Traumatic and Nontraumatic Cardiac Arrest*, *available at* http://file.lacounty.gov/SDSInter/dhs/1100458_Directive_6revTransportofTraumaticandNontraumaticCardiacArrest.pdf.

As of February 3, 2021, Santa Clara County, which has a population of 1.9 million, has 5 percent remaining ICU capacity, which corresponds to just 16 ICU beds. COVID-19 Hospitalizations Dashboard, County of Santa Clara Emergency Operations Center, *available at* https://www.sccgov.org/sites/covid19/Pages/dashboard-hospitals.aspx; Cody Decl. ¶ 5.

2. How COVID-19 Spreads

COVID-19 is highly contagious. Lipsitch Decl. ¶ 20. It has a reproduction rate of 2 to 6, meaning that, if uncontrolled, each person with COVID-19 spreads it to between two and six others. *Id.* This reproduction rate causes the number of COVID-19 infections to multiply exponentially. *Id.* If a virus has a reproduction rate of more than one, the epidemic will grow, and disease and death in the population will increase. Stoto Decl. ¶¶ 10, 12; Watt Decl. ¶ 26.

COVID-19 is transmitted when an individual is exposed to a sufficient dose of the virus to overcome the body's defenses. Watt Decl. ¶ 33. COVID-19 is primarily spread through respiratory droplets from an infected person's nose or mouth. Rutherford Decl. ¶¶ 28–33, Watt Decl. ¶¶ 25–32. Although transmission by contact with an object on which the virus is present is believed to be possible, it is rare. Rutherford Decl. ¶ 31; Watt Decl. ¶ 29.

Instead, individuals are likely to be exposed to a sufficient dose of the virus to be infected when they are in close proximity with an infected person for an extended period of time, which permits viral droplets or particles to move from the infected person to others. Watt Decl. ¶¶ 33, 37–44; Rutherford Decl. ¶ 74. The higher the dose of the virus to which someone is exposed, the more likely they are to become seriously ill. Rutherford Decl. ¶ 34.

COVID-19 can be spread by individuals exhibiting no symptoms. About 40 percent of those who are infected are asymptomatic, but asymptomatic people can still spread the virus. Cody Decl. ¶ 9; Rutherford Decl. ¶ 28; Watt Decl. ¶¶ 30–31; Reingold Decl. ¶ 23. Furthermore, even individuals who develop symptoms are believed to be most contagious the day before they develop symptoms. Watt Decl. ¶ 32.

Because COVID-19 can be spread by individuals who are asymptomatic or presymptomatic, it is difficult to control. Watt Decl. ¶ 32. Many people who are infected are not aware that they are sick, so they do not take the appropriate precautions, such as isolating themselves at home. Rutherford Decl. ¶ 28; Watt Decl. ¶ 32. In addition, people who are healthy are often not able to determine by mere observation whether others they are with are sick. Watt Decl. ¶ 39.

Individuals are likely to be exposed to a sufficient dose of the virus to be infected when they are in close proximity with an infected person for an extended period of time, which permits viral droplets or particles to move from the infected person to others. Watt Decl. ¶¶ 33, 37–44. Accordingly, gatherings, which bring individuals from different households together for an extended period of time, are particularly ***935** risky settings for the transmission of COVID-19. *Id.*; Rutherford Decl. ¶¶ 60, 76–77; Cody Decl. ¶¶ 34–35.

The more time that a non-infected person spends in close proximity to an infected person, the higher the likelihood that viral particles will move from the infected person to the non-infected person. Watt Decl. ¶¶ 33, 37–44. For this reason, the

risk of COVID-19 transmission increases with the duration of the gathering. Rutherford Decl. ¶ 78; Watt Decl. ¶ 43.

The higher the number of households that gather together, the higher potential there is for the virus to spread. Watt Decl. ¶ 42; Rutherford Decl. ¶ 77. This is because having a larger gathering increases the number of people who can be infected, and those people can then infect others. Watt Decl. ¶ 42. In addition, having a larger gathering increases the likelihood that a person who is infected with COVID-19 is present. *Id.*; Cody Decl. ¶ 34. Furthermore, the likelihood that an infected person is present is increased further where a gathering takes place in a county in which there is a high prevalence of infection. *Id.*; Rutherford Decl. ¶ 81; Stoto Decl. ¶¶ 10, 18.

Indoor gatherings are particularly dangerous because in an indoor environment with limited ventilation, the virus disperses less easily and can remain in the air for a long period of time, which allows it to accumulate into doses large enough to overcome the immune system. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. One study found that the likelihood of transmitting COVID-19 was 18.7 times greater in a closed environment than in an open environment. Watt Decl. ¶ 44. Accordingly, the CDC advises that activities are safer when they are held in outdoor spaces. Cody Decl. ¶ 31. However, even outdoor gatherings carry a risk that the virus will be transmitted, especially when individuals are in close proximity for an extended period. Rutherford Decl. ¶ 77.

Singing, chanting, shouting, loud talking, and sustained conversations present particularly high risks of infection because they involve vocalization, which increases the number of droplets or particles that emit from an infected individual and the distance those droplets or particles can travel. Rutherford Decl. ¶¶ 29, 79; Reingold Decl. ¶¶ 20–22; Cody Decl. ¶ 35. Although droplets will normally fall to the ground within six feet, droplets can travel double that length, or twelve feet, if a person is singing or speaking loudly. Rutherford Decl. ¶ 29. For these reasons, after a choir rehearsal in Washington attended by 61 people, 32 people were confirmed COVID-19 cases, 20 people were probable COVID-19 cases, 3 people were hospitalized, and 2 people died. Reingold Decl. ¶ 22; Cody Decl. ¶ 36.

Wearing face coverings and maintaining at least six feet of physical distance diminish the risk of infection. Watt Decl. ¶¶ 38, 45–46, 48. However, a significant risk of infection remains, particularly when people get together for extended periods and in environments with limited ventilation, such as indoors. *Id.*; Rutherford Decl. ¶¶ 60, 76–77, 84. Accordingly, wearing a face covering and physical distance are measures that should be taken in addition to, not instead of, refraining from lengthy interactions. Rutherford Decl. ¶ 60; Watt Decl. ¶ 50.

In sum, because the virus spreads when droplets or particles move from an infected person to a non-infected person, gatherings are particularly likely to lead to viral spread. Gatherings are especially likely to lead to the spread of COVID-19 when: (1) the duration of time that the gathering is held increases; (2) the number of people and households gathering increases; (3) ***936** the rate of COVID-19 in the community increases; (4) the gathering is held indoors; and (5) the gathering involves vocalization, such as loud speaking or singing. Although wearing a face covering and physical distancing diminish the risk of spreading COVID-19, a significant risk of infection remains, especially when gatherings are held indoors.

Because of the dangers of gatherings, at least 30 California counties experiencing increases in their COVID-19 cases identified gatherings as a cause of the rise in cases. Watt Decl. ¶ 41. In Sacramento, 71 cases of COVID-19 were linked to a church that held large indoor services and smaller services in private homes. Cody Decl. ¶ 37. In Maine, an indoor wedding attended by 62 people resulted in more than 180 infections, including among people living at a long-term healthcare facility and at a jail. *Id.* Eight people who did not attend the wedding died. *Id*. In Michigan, 187 infections were connected to an indoor bar and restaurant with a live DJ and an open dance floor. *Id.* Of the total cases traced back to the restaurant, 144 were people who had been to the venue, and 43 were family members, friends, and other contacts who had not. *Id.*

When California has put restrictions on gatherings into place, there has been a decrease in cases. *Id.* ¶¶ 62, 93. The County has also seen a decrease in cases when gatherings have been restricted. Cody Decl. ¶ 19. For example, when the County first issued a shelter-in-place order, the case count was doubling every five days. *Id.* By contrast, after the County implemented its order, the case count was doubling every three and a half months. *Id.* The County estimates that its shelter in place orders prevented 80 percent of the infections that would have occurred. *Id.* ¶ 20. One study estimates that without the stay at home orders at the outset of the pandemic,

ten times as many people would have become infected with COVID-19. Maldonado Decl. ¶ 15.

3. The Effects of COVID-19

COVID-19 results in a wide range of symptoms, from none at all to severe illness and death. Watt Decl. ¶ 21. COVID-19 can cause pneumonia, respiratory failure, other organ failure, cardiovascular events, strokes, seizures, and death. Rutherford Decl. ¶ 21; Watt Decl. ¶ 22; Reingold Decl. ¶ 14.

The risk of severe illness from COVID-19 increases steadily with age. Watt Decl. ¶ 22; Reingold Decl. ¶ 15.[2] However, many younger people have become seriously ill and died from COVID-19. About twenty percent of those who have died of COVID-19 in the United States have been younger than 65 years old. Lipsitch Decl. ¶ 28. In addition, nearly two thousand people who have died of COVID-19 were younger than 30 years old as of February 3, 2021. *See CDC COVID Data Tracker.*

Indeed, people of any age with underlying conditions and pregnant women are at increased risk of severe illness from COVID-19. *Id.*; Rutherford Decl. ¶ 99. Underlying conditions that increase the risk of serious illness include cancer, chronic kidney disease, chronic obstructive pulmonary disease, heart conditions, immunocompromised state, obesity, severe obesity, pregnancy, sickle cell disease, smoking, and type 2 diabetes mellitus. Reingold Decl. ¶ 15. Underlying conditions that might increase the risk of serious illness ***937** include asthma (moderate to severe), cerebrovascular disease, cystic fibrosis, hypertension or high blood pressure, immunocompromised state, neurologic conditions, liver disease, being overweight, pulmonary fibrosis, thalassemia, and type 1 diabetes mellitus. *Id.*

The CDC has found that approximately six in ten Americans have been diagnosed with a subset of the COVID-19 underlying conditions. Specifically, six in ten Americans have been diagnosed with at least one of the following: heart disease, cancer, chronic lung disease, stroke, Alzheimer's disease, diabetes, or chronic kidney disease. Reingold Decl. ¶ 17. Moreover, four in ten Americans have been diagnosed with more than one of these conditions. *Id.* These conditions are more common in communities of color and low-income communities. Lipsitch Decl. ¶ 28.

Approximately 15 percent of COVID-19 patients require hospitalization. Rutherford Decl. ¶ 22. Although a minority of COVID-19 patients require hospitalization, a high number of overall infections results in a high number of hospitalizations. Lipsitch Decl. ¶ 17. As a result of the number of patients who require hospitalization, COVID-19 outbreaks have created a public health crisis of the highest magnitude. Rutherford Decl. ¶ 26; Reingold Decl. ¶ 13. The hospital system is so full that it cannot provide appropriate treatment for people who have COVID-19 or otherwise treatable conditions. Rutherford Decl. ¶ 26.

Even individuals who are not hospitalized can face serious and long-term effects from COVID-19, including cardiovascular, neurologic, renal, and respiratory damage, psychiatric effects, and loss of limbs from blood clotting. Cody Decl. ¶ 7; Han Decl. ¶ 20; Watt Decl. ¶ 23; Rutherford Decl. ¶¶ 23–25, 97. For example, the National Collegiate Athletic Association found that college football players who had recovered from asymptomatic or mildly symptomatic COVID-19 infections had a high rate of myocarditis, which can lead to cardiac arrest with exertion. Rutherford Decl. ¶ 25. Much remains unknown about the effects of a COVID-19 infection, as it typically takes years for scientists to fully analyze a new virus. Rutherford Decl. ¶ 16; Watt Decl. ¶ 18.

There is currently no cure or generally effective treatment for COVID-19. Rutherford Decl. ¶ 38; Watt Decl. ¶ 24. Patients who have trouble breathing can receive breathing and blood oxygenation assistance. *Id.* However, when it is not possible to administer sufficient oxygen through an external device, patients must be intubated and provided breathing assistance using a ventilator. *Id.* Although the treatments have improved since the beginning of the pandemic, there are still many deaths even with the improved treatments. Rutherford Decl. ¶ 40.

Although the first COVID-19 vaccines were approved on December 11, 2020 and December 18, 2020, access to the vaccines remains limited in most communities to health care workers and older adults. In the meantime, prior to the widespread availability of the vaccine, the strategies recommended by the vast consensus of public health experts include stay at home orders, physical distancing requirements, and limitations on gatherings. Rutherford Decl. ¶ 50; Stoto Decl. ¶ 15; Watt Decl. ¶¶ 51–52; Reingold Decl. ¶ 27; Cody Decl. ¶ 75; Maldonado Decl. ¶¶ 13, 18.

B. The State's and the County's Response to COVID-19

1. The State's Response

Since the start of the pandemic, the State's restrictions have constantly evolved based on the scientific understanding of how COVID-19 spreads, the level of ***938** spread of COVID-19 in the State, and the extent to which the State's hospitals and ICUs lacked capacity.

On March 4, 2020, Governor Newsom proclaimed a State of Emergency in California. Haddad Decl. Exh. 6.[3] Two weeks later, as the first wave of COVID-19 was spreading, Governor Newsom issued Executive Order N-33-20, the Stay at Home Order, which required "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." Haddad Decl. Exh. 7.

On April 28, 2020, as the first wave of infections came to an end, Governor Newsom announced a "Resilience Roadmap," which outlined four stages for reopening: (1) safety and preparation; (2) reopening of lower-risk workplaces and other spaces; (3) reopening of higher-risk workplaces and other spaces; and (4) ending the Stay at Home Order. Haddad Decl. Exh. 9.

During the summer of 2020, there was a second, and bigger, wave of COVID-19 infections and deaths. Watt Decl. ¶ 66. On July 13, 2020, the State tightened restrictions, ordering closures of bars, pubs, brewpubs, breweries, restaurants, wineries, tasting rooms, family entertainment centers, movie theaters, zoos, museums, and cardrooms. Haddad Decl. Exh. 10 at 5–6; Watt Decl. ¶¶ 74–75. In counties that had heightened infection rates, the State also ordered the closure of indoor operations of houses of worship, offices for non-critical infrastructure sectors, personal care services, hair salons, barbershops, gyms, fitness centers, and malls. *Id.* at 6. As a result of these restrictions, the infection rate decreased significantly. Watt Decl. ¶ 76.

On August 28, 2020, the Governor announced the Blueprint for a Safer Economy ("the Blueprint"), which is an umbrella designation for the COVID-related restrictions enacted by the State. Haddad Decl., Exh. 11. Some of the Blueprint's restrictions are being challenged by Plaintiffs in this case.

The Blueprint is a framework that prescribes restrictions based on the risk tier of the county. *Id.* Counties are assigned to the widespread tier, the substantial tier, the moderate tier, and the minimal tier. *Id.* Counties are assigned to a tier based on: (1) the average number of cases per 100,000 residents over a seven-day period; (2) the average percentage of COVID tests that come back positive over a seven-day period; and (3) the health equity metric, which looks at case counts and positivity rates in the County's most disadvantaged neighborhoods, as measured by voting participation, tree coverage, and retail density. *Id.*; Watt Decl. ¶ 76; Kurtz Decl. ¶¶ 17, 22–24.

The Blueprint's restrictions differ based on the tier the county is in. In assigning activities to each tier, the State considered eight objective factors, which are associated with the likelihood that a given activity will result in the spread of COVID-19: (1) the ability to accommodate face covering wearing at all times; (2) the ability to physically distance between individuals of different households; (3) the ability to limit the number of people per square foot; (4) the ability to limit the duration of exposure; (5) the ability to limit the amount of mixing of people from different households; (6) the ability to limit the amount of physical interactions; (7) the ability to optimize ventilation; and (8) the ability to ***939** limit activities that are known to increase the possibility of viral spread, such as singing, shouting, and heavy breathing. Kurtz Decl. ¶ 20.

The Blueprint assigns activities to tiers as follows. Counties in the widespread tier are subject to the most severe restrictions. Haddad Decl. Exh. 12. No indoor gatherings are permitted, and outdoor gatherings are limited to three households maximum. *Id.* Restaurants, wineries, cardrooms, gyms, museums, zoos, movie theaters, and family entertainment centers can operate outdoors only. *Id.* Retail and shopping centers can operate at a maximum of 25 percent capacity. *Id.* Houses of worship also can operate outdoors only. In addition, on November 21, 2020, the State added a curfew for counties in the widespread tier, who must stop "non-essential" activities between 10 p.m. and 5 a.m.

In the substantial tier, gatherings are "strongly discouraged" but permitted indoors with up to three households. *Id.* Shopping centers can operate at a maximum of 50 percent capacity. *Id.* Museums and zoos can operate at a maximum of 25 percent capacity. *Id.* Restaurants and movie theaters can operate indoors at a maximum of 25 percent capacity or 100 people, whichever is fewer. *Id.* Gyms can operate at a maximum of 10 percent capacity. *Id.* Houses of worship can operate indoors at a maximum of 25 percent capacity. *Id.*

In the moderate tier, gatherings are "strongly discouraged" but permitted indoors with up to three households. *Id.* Shopping centers can operate, but they must close their common areas and reduce the capacity of their food courts. *Id.* Museums and zoos can operate at a maximum of 50 percent capacity. *Id.* Restaurants and movie theaters can operate indoors at a maximum of 50 percent capacity or 200 people, whichever is fewer. *Id.* Gyms, cardrooms, and wineries can operate at a maximum of 25 percent capacity. *Id.* Houses of worship can operate indoors at a maximum of 50 percent capacity. *Id.*

The Blueprint originally set attendance limits for houses of worship in the substantial tier at either 25 percent capacity or 100 people, whichever is fewer, and for houses of worship in the moderate tier at either 50 percent capacity or 200 people, whichever is fewer. Haddad Decl. Exh. 12. However, the fixed 100 and 200 person attendance limits were enjoined by the Ninth Circuit on January 22, 2021. *See South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1150-52, .[4]

In every tier, the Blueprint allows modified operation of critical infrastructure sectors, including healthcare, emergency services, the food and agriculture supply chain, the energy sector, water and wastewater management, transportation, communications and information technology, critical manufacturing, financial services, chemical and hazardous materials, defense, and industrial, commercial, residential, and sheltering facilities and services. *Id.*

On top of the Blueprint, the State's Department of Public Health issued guidance on gatherings on October 9, 2020. Dunn Decl. Exh. 32. The State banned indoor gatherings and limited outdoor gatherings to no more than three households in a two hour period, provided that the venue permitted at least six feet of distance and people wore face coverings. *Id.*; Watt Decl. ¶ 81.

***940** On November 13, 2020, the State updated its ban on gatherings. Dunn Reply Decl. Exh. 4. In the widespread tier, indoor gatherings were banned and outdoor gatherings were limited to no more than three households. *Id.*

Beginning in November, a third, and bigger, wave of COVID-19 infections and deaths started. On December 3, 2020, the State issued a new Regional Stay at Home Order, which created five regions in the State and added additional restrictions if the region's ICU capacity dropped below 15 percent. Dunn Reply Decl. Exh. 7. The Regional Stay at Home Order required "[a]ll individuals living in the Region [to] stay home or at their place of residence except as necessary to conduct activities associated with the operation, maintenance, or usage of critical infrastructure." *Id.* Accordingly, under the Regional Stay at Home Order, all gatherings were banned. *Id.* However, outdoor worship and outdoor political expression were permitted. *Id.*

On December 4, 2020, several Bay Area counties, including Santa Clara County, adopted the Regional Stay at Home Order's restrictions even though the counties had not yet met the criteria set by the State. Dunn Reply Decl. Exh. 8. The restrictions went into effect in Santa Clara County on December 6, 2020 at 10:00 p.m. *Id*. On December 15, 2020, the Bay Area region's ICU capacity dropped below 15 percent, making the Regional Stay at Home Order mandatory in Santa Clara County. On January 25, 2021, the State ended the Regional Stay at Home Order. ECF No. 61 Exh. 1. However, the State's Blueprint restrictions remain in place.

2. The County's Response

Like the State's restrictions, the County's restrictions have been modified as the scientific understanding of COVID-19 has progressed, as the spread of COVID-19 in the County has changed, and as the County's hospital and ICU capacity has changed.

Following the State's declaration of a State of Emergency, on March 16, 2020, the County issued a shelter-in-place order directing all individuals to stay at their place of residence except to perform limited essential activities. Cody Decl. ¶¶ 11, 13. All businesses, except certain essential businesses, were directed to cease operations, except certain minimum basic operations. *Id.* ¶ 13. All gatherings of any number were prohibited, except with members of an individual's own household. *Id.*

On March 31, 2020, the County issued an updated shelter-in-place order that extended through May 3, 2020. *Id.* ¶ 15. The Order included: (1) mandatory social distancing requirements; (2) additional restrictions on essential businesses requiring them to limit the number of people in the business and disinfect high touch surfaces; and (3) a prohibition on the use of playgrounds, dog parks, and public recreational areas. *Id.* ¶ 17.

On April 29, 2020, the County issued a revised shelter-in-place order that extended most shelter-in-place restrictions

through May 31, 2020. *Id.* ¶ 22. Then, on May 18, 2020, the County issued a revised shelter-in-place order that extended most of the restrictions. *Id.* ¶ 23. However, based on the progress the County had made in slowing the spread of COVID-19, this order allowed a limited number of businesses and activities to resume operations with safety precautions in place. *Id.* ¶ 24.

On June 1, 2020, the County amended the May order. Based on the progress the County and the Bay Area had made in slowing the spread of COVID-19, this amendment allowed additional businesses and activities to resume operations and ***941** allowed certain outdoor activities to resume with restrictions. *Id.* ¶ 27.

On July 2, 2020, the County issued a new order. *Id.* ¶ 38. Based on the County's increased capacity to implement widespread testing and contain the virus, the County transitioned from a shelter-in-place order to a longer-term harm reduction model. *Id.* ¶ 39. The order allowed most activity, travel, and business operations to resume with significant limitations to reduce the spread of the virus. *Id.* ¶ 40. Indoor and outdoor gatherings were allowed, but with face covering requirements and attendance limits. *Id.* ¶ 42.

Following the July 2 order, the County issued the three orders being challenged in this case: (1) the Mandatory Directive for Gatherings; (2) the Mandatory Directive for Personal Care Services Businesses; and (3) the Mandatory Directive for Outdoor Dining, Wineries, Bars, and Smoking Lounges ("Mandatory Directive for Outdoor Dining").

On July 8, 2020, after COVID-19 cases in the County rose, the County issued a Mandatory Directive for Gatherings, which prohibited indoor gatherings regardless of size and allowed outdoor gatherings of up to 60 people with face coverings and physical distancing. *Id.* ¶ 43. On July 14, 2020, the County issued three directives:

- an Updated Mandatory Directive for Gatherings, which limited indoor and outdoor gatherings,
- a Mandatory Directive for Personal Care Services Businesses, which prohibited any personal services on the face or neck because the client could not wear a face covering, and
- a Mandatory Directive for Outdoor Dining, which prohibited indoor dining and required restaurants to situate tables such that tables were at least 10 feet apart. Dunn Decl. Exh. 40, 42, 44.

On September 5, 2020, the County revised the Mandatory Directive for Gatherings by relaxing some of its restrictions on outdoor gatherings. Cody Decl. ¶ 52. On October 4, 2020, the County revised the Mandatory Directive for Outdoor Dining, Wineries, Bars, and Smoking Lounges by broadening the definition of an outdoor facility to include those that have at least 50 percent of the perimeter open to the outdoors if covered, and 25 percent if uncovered. *Id.* ¶ 53. On October 4, 2020, the County also updated the Personal Care Services Directive, which permitted personal services on the face or neck as long as the provider of the service wore an N95 mask. On October 5, 2020, the County issued a revised risk reduction order, which superseded the July 2 order. *Id.* ¶ 57.

On October 13, 2020, the County modified the Mandatory Directive for Gatherings. Bussey Decl. Exh. B. For gatherings that were permitted by the State, the County limited indoor gatherings to a maximum of 100 people, while outdoor gatherings were limited to a maximum of 200 people as long as they could maintain social distancing. *Id*. On November 16, 2020, the County modified the Mandatory Directive for Gatherings. Bussey Decl. Exh. A. Unlike the October 13, 2020 version of the Mandatory Directive for Gatherings, the November 16, 2020 version prohibited indoor gatherings while maintaining the 200 person limit on outdoor gatherings. *Id.*

On October 13, 2020, the County also modified the Mandatory Directive for Outdoor Dining by broadening the definition of an outdoor facility to include those that were completely uncovered, like a courtyard, and by allowing indoor dining at the limits permitted by the Blueprint. Cody ***942** Decl. ¶ 62. On November 17, 2020, the County modified the Mandatory Directive for Outdoor Dining by prohibiting indoor dining and indoor wine tasting. *Id.* ¶ 66.

On December 4, 2020, the County adopted the State's Regional Stay at Home Order even though the County had not yet met the criteria set by the State. Dunn Reply Decl. Exh. 8. On December 15, 2020, the Regional Stay at Home order became mandatory in the County. On January 25, 2021, the State ended the Regional Stay at Home Order. ECF No. 61 Exh. 1. However, the State's Blueprint restrictions and the County's restrictions remain in place. On January 25, 2021, the County issued a modified Mandatory Directive for Gatherings. ECF No. 61 Exh. 3. Like the November 16, 2020 version of the Mandatory Direction, the current Mandatory

Directive for Gatherings prohibits indoor gatherings. *Id.* However, the County continues to permit outdoor gatherings with an attendance limit of 200 people. *Id.*

3. Efforts Targeted at Vulnerable Populations

In addition to these community-wide restrictions, the State and the County have also taken measures that are targeted towards protecting populations that are especially vulnerable to severe illness from COVID-19, including the elderly and residents of long-term care facilities.

In January 2020, about a month after COVID-19 was first detected and before any COVID-19 cases had been detected in the State, the State began issuing guidelines and directives that required long-term care facilities to undertake precautions. Steinecker Decl. ¶ 12. These precautions have included routine testing, screening residents, limiting visitations, enhanced sanitation, and mask wearing requirements. Steinecker Decl. ¶¶ 19–24; Tovmasian Decl. ¶¶ 12–16, 24.[5]

Beginning in March 2020, the State has required licensed residential care facilities for the elderly and adult residential facilities to take measures that prevent the spread of COVID-19, including: (1) screening residents and staff for COVID-19 symptoms every day; (2) excluding employees who display symptoms of COVID-19; (3) cleaning and disinfecting high-touch surfaces; (4) requiring employees and residents to wash their hands upon entering the facility; (5) limiting entry only to individuals who need entry for prevention, containment, and mitigation measures; (6) requiring staff to wear face coverings at all times and remind residents that they are required to wear face coverings as much as practically possible; and (7) requiring training of staff on prevention and control measures. Tovmasian Decl. ¶¶ 12–16, 24.

The State also requires facilities to engage in testing practices. Tovmasian Decl. ¶¶ 18–21, Steinecker Decl. ¶ 15, 19. Facilities are required to test new residents prior to moving into the facility, current residents who were treated off-site, new staff prior to starting, and current staff after returning from a leave of absence. *Id.* ¶ 18. Facilities with a COVID-19 case must retest all residents and staff every 14 days until no new cases are identified in two sequential rounds of testing. *Id.* ¶ 20. Facilities without a COVID-19 case must conduct surveillance testing of 10 percent of all staff every 14 days and testing of residents who display symptoms or have been exposed to someone who has tested positive. ***943** *Id.* ¶ 19. If a resident or staff member tests positive, they are isolated and anyone who may have been exposed to them is quarantined. Tovmasian Decl. ¶ 21.

The County has also taken steps to protect vulnerable populations, including targeted outreach to distribute personal protective equipment, establishment of more testing locations in vulnerable communities, and partnerships with community-based organizations. Garcia Decl. ¶ 14. In addition, the County has taken measures to prevent the spread of COVID-19 inside long-term care facilities, including implementing regular staff and resident testing, providing infection control protocols, and visiting facilities to make recommendations on how best to implement infection control. Han Decl. ¶ 9. The County has also taken steps to prevent the spread of COVID-19 inside jails, including implementing regular testing, providing personal protective equipment, contact tracing, and reducing the jail population. *Id.* ¶ 10. Finally, the County has implemented measures to prevent spread inside homeless shelters by housing homeless individuals in motels and finding permanent housing for formerly homeless residents and making regular testing available. *Id.* ¶ 11.

C. Procedural History

On October 13, 2020, Plaintiffs Ritesh Tandon, Terry and Carolyn Gannon, Jeremy Wong, Karen Busch, Maya Mansour, Dhruv Khanna, Frances Beaudet, Julie Evarkiou, and Connie Richards brought suit against Defendants Gavin Newsom, the Governor of California; Xavier Becerra, the Attorney General of California; Sandra Shewry, the Acting State Director of the California Department of Public Health; Erica S. Pan, Acting State Public Health Officer of the California; Jeffrey V. Smith, County Executive of Santa Clara County; and Sara H. Cody, Health Officer and Public Health Director of Santa Clara County. ECF No. 1.

Plaintiffs' Complaint alleged five claims: (1) violation of the right to free speech and assembly protected by the First and Fourteenth Amendments; (2) violation of the right to free exercise and assembly protected by the First and Fourteenth Amendments; (3) violation of the right to earn a living under the Due Process Clause of the Fourteenth Amendment; (4) violation of the Equal Protection Clause of the Fourteenth Amendment; and (5) violation of the prohibition on unconstitutionally vague criminal laws. ECF

No. 1 ¶¶ 122–160. Plaintiffs sought declaratory and injunctive relief. ECF No. 1.

On October 22, 2020, Plaintiffs filed a motion for a preliminary injunction. ECF No. 18 ("Mot."). On November 18, 2020, County Defendants and State Defendants each filed an opposition to Plaintiffs' motion for a preliminary injunction. ECF No. 28 ("County Opp'n"); ECF No. 30 ("State Opp'n").

On November 25, 2020, the United States Supreme Court stayed New York's COVID-related restrictions on houses of worship in *Roman Catholic Diocese v. Cuomo*, —— U.S. ——, 141 S. Ct. 63, 208 L.Ed.2d 206 (2020). The Court requested that Plaintiffs address the United States Supreme Court's decision in their reply and Defendants address the decision in a supplemental brief. ECF No. 38. On December 7, 2020, Plaintiffs filed a reply. ECF No. 39 ("Reply"). On December 11, 2020, Defendants filed a supplemental brief addressing the United States Supreme Court's decision. ECF No. 40 ("Supp. Brief"). On December 17, 2020, the Court held a hearing on Plaintiffs' motion for a preliminary injunction. ECF No. 46.

On December 21, 2020, State Defendants filed a statement of recent decision in ***944** *Harvest Rock Church v. Newsom*, Case No. 20-cv-06414-JGB, 2020 WL 7639584 (C.D. Cal. Dec. 21, 2020), and in *South Bay United Pentecostal Church v. Newsom*, Case No. 20-cv-00865-BAS, 2020 WL 7488974 (S.D. Cal. Dec. 21, 2020). ECF No. 47. On December 23, 2020, State Defendants filed a statement of recent decision in *Disbar Corporation d/b/a 58 Degrees & Holding Co. v. Newsom*, Case No. 20-cv-02473, 2020 WL 7624950 (E.D. Cal. Dec. 22, 2020), and in *Mitchell v. Newsom*, Case No. 20-cv-08709, 509 F.Supp.3d 1195, (C.D. Cal. Dec. 23, 2020). ECF No. 53. On December 28, 2020, Plaintiffs filed a statement of recent decision in *Agudath Israel of America v. Cuomo*, 983 F.3d 620 (2d. Cir. 2020). ECF No. 54. On December 31, 2020, State Defendants filed a statement of recent decision in *Gish v. Newsom*, Case Nos. 20-55455, 20-56324, 2020 WL 7752732 (9th Cir. Dec. 23, 2020), and *South Bay United Pentecostal Church v. Newsom*, 983 F.3d 383 (9th Cir. 2020). ECF No. 58. On December 31, 2020, Plaintiffs filed a statement of recent decision in *Monclova Christian Academy v. Toledo-Lucas County Health Department*, 984 F.3d 477 (6th Cir. 2020). ECF No. 59. On January 29, 2021, County Defendants filed a statement of recent decision in *South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 985 F.3d 1128, (9th Cir. Jan. 22, 2021); *Harvest Rock Church v. Newsom*, No. 20-56357, 985 F.3d 771, (9th Cir. Jan. 25, 2021); and *Gateway City Church v. Newsom*, No. 20-cv-08241-EJD, 2021 WL 308606 (N.D. Cal. Jan. 29, 2021).

[1] **[2]** On January 28, 2021, Plaintiffs filed a motion to supplement the record with, or take judicial notice of, four recent documents: (1) a January 25, 2021 order issued by the State of California, lifting the Regional Stay at Home Order; (2) a January 25, 2021 order issued by the County, confirming that the Regional Stay at Home Order is no longer in effect; (3) a January 25, 2021 revised directive for gatherings issued by the County; and (4) a January 13, 2021 report issued by the World Health Organization, addressing the use of PCR tests. ECF No. 61. On February 1, 2021, Defendants filed a joint opposition in part. ECF No. 63. Defendants did not object to the Court taking judicial notice of the January 25, 2021 documents, but objected to the Court taking judicial notice of the January 13, 2021 report. *Id.*

[3] **[4]** **[5]** The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Public records are proper subjects of judicial notice. *See, e.g.*, *United States v. Black*, 482 F.3d 1035, 1041 (9th Cir. 2007). However, to the extent any facts in documents subject to judicial notice are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee*, 250 F.3d at 689. The Court GRANTS Plaintiff's motion to take judicial notice of the January 25, 2021 documents because these documents are public records that are proper subjects of judicial notice. However, the Court DENIES Plaintiff's motion to take judicial notice of the January 13, 2021 report because courts are not permitted to take judicial notice of the truth of the contents of a document. *Hadley v. Kellogg Sales Company*, 273 F. Supp. 3d 1052, 1061 (N.D. Cal. 2017). Finally, the Court DENIES Plaintiff's motion to supplement the record because if Plaintiffs are permitted to supplement the record, Defendants would also have to be accorded an equal opportunity to add evidence on additional developments. Because the COVID-19 pandemic is rapidly evolving, the process ***945** of submitting additional evidence must end.

II. LEGAL STANDARD

[6] **[7]** "A plaintiff seeking a preliminary injunction must establish that [she] is likely to succeed on the merits, that [she] is likely to suffer irreparable harm in the absence of

preliminary relief, that the balance of equities tips in [her] favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). As the parties seeking the injunction, Plaintiffs bear the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). "A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.' " *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

III. DISCUSSION

Plaintiffs' motion for preliminary injunction requests that this Court enjoin the following State and County restrictions:

Business Plaintiffs

- Maya Mansour ("Mansour"), the owner of a skincare bar, seeks to enjoin the County's Personal Care Services Directive, which requires her to equip her staff with N95 masks, on the grounds that it violates her rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

- Dhruv Khanna ("Khanna"), the owner of a winery business, seeks to enjoin the State's Blueprint, which limits outdoor gatherings to three households, and the County's Mandatory Directive for Gatherings, which limits outdoor gatherings not prohibited by the State to 200 people, on the grounds that it violates his rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

- Frances Beaudet ("Beaudet"), a restaurant owner, seeks to enjoin the County's Mandatory Directive for Outdoor Dining, which prohibits her from seating diners indoors, on the grounds that it violates her rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

- Julie Evarkiou ("Evarkiou"), a salon owner, seeks to enjoin the State's Blueprint, which limits the capacity of her salon, prohibits indoor gatherings, and limits outdoor gatherings to three households, on the grounds that it violates her rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

- Connie Richards ("Richards"), the former owner of a fitness center, seeks to enjoin the State's Blueprint, which limits the capacity of her fitness center and prohibits its operation indoors, on the grounds that it violates her rights under the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment.

Free Speech Plaintiffs

- Ritesh Tandon ("Tandon"), a congressional candidate in 2020 who intends to run in 2022, seeks to enjoin the County's Mandatory Directive for Gatherings, which prohibits him from holding indoor political events with more than 100 people or outdoor political events with more than 200 people, on the grounds that it ***946** violates his free speech and assembly rights under the First and Fourteenth Amendments.

- Terry and Carolyn Gannon ("the Gannons"), who hold gatherings at their home to discuss matters of public policy, seek to enjoin the State's Blueprint, which prohibits indoor gatherings and limits outdoor gatherings to three households, on the grounds that it violates their free speech and assembly rights under the First and Fourteenth Amendments.

Free Exercise Plaintiffs

- Pastor Jeremy Wong ("Wong") and Karen Busch ("Busch"), each of whom hold Bible studies, theological discussions, collective prayer, and musical prayer at their homes, seek to enjoin the State's Blueprint, which prohibits indoor gatherings and limits outdoor gatherings to three households, on the grounds that it violates their free exercise and assembly rights under the First and Fourteenth Amendments.

Mot. at ii–iii.

[8] The Court first briefly describes the restrictions at issue. Then, the Court analyzes each preliminary injunction factor in turn: (1) a likelihood of success on the merits; (2) irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the party's favor; and (4) that an injunction is in the public interest. *Winter*, 555 U.S. at 20, 129 S.Ct. 365.[6]

A. The Restrictions at Issue

Plaintiffs' motion requires the Court to address five restrictions: (1) the State's Blueprint; (2) the State's guidance on gatherings; (3) the County's Mandatory Directive for Gatherings, which applies to certain gatherings not banned by the State; (4) the County's Personal Care Services Directive; and (5) the County's Outdoor Dining Directive. Each of these restrictions has been updated several times, including during

the course of this litigation. In the Background section above, *supra* Section I-B, the Court described these updates in detail. Below, the Court briefly highlights the restrictions at issue in the instant motion.

The State's Blueprint, which the California Department of Public Health issued on August 28, 2020, is a framework for the State's COVID-19 related restrictions that prescribes restrictions based on the tier in which the county is located. Haddad Decl. Exh. 12. At the most severe or widespread tier, the Blueprint prohibits indoor private gatherings of individuals outside the immediate household and restricts outdoor private gatherings to three households. *Id.* Similarly, the State's guidance on private gatherings, which the California Department ***947** of Health updated on November 13, 2020, prohibits indoor gatherings of individuals outside the immediate household and restricts outdoor private gatherings to three households in the widespread tier. Dunn Reply Decl. Exh. 4 (stating that "[g]atherings that include more than 3 households are prohibited" and "gatherings must be outdoors for counties in the [widespread] tier"). Thus, the Court refers to the Blueprint's restrictions on gatherings at the widespread tier and the State's guidance on gatherings at the widespread tier as "the State's private gatherings restrictions."

Importantly, the State permits unlimited attendance at outdoor worship services, outdoor political events, and outdoor cultural ceremonies like funerals and weddings. As the Ninth Circuit found in *South Bay*, outdoor worship services are particularly viable in year-round warm climates like California's. *Id.* ("Given the obvious climatic differences between San Diego in the winter and say, New York, the ... allowance for outdoor services is much more than 'lip service' to the demands of the First Amendment."). The State's Blueprint also allows indoor worship services in the substantial, moderate, and minimal tiers. Specifically, at the substantial tier, the State allows indoor services at 25 percent capacity. *South Bay*, 985 F.3d at 1150–52 – —— . At the moderate and minimal tiers, the State allows indoor services at 50 percent capacity. *Id.* The County imposes the same limits for the same tiers.

Santa Clara County's Mandatory Directive for Gatherings prohibits all indoor gatherings of individuals outside the immediate household when the County is in the Blueprint's widespread tier. Bussey Decl. Exh. A. However, the County's Mandatory Directive for Gatherings limits outdoor worship services, outdoor political events, and outdoor cultural ceremonies like funerals and weddings to 200 people regardless of the County's Blueprint tier. Bussey Decl. Exh. A, Exh. G (stating that "[o]utdoor gatherings may not exceed 200 people under any circumstances"). In addition, the County "requires that ... gatherings take place in an area large enough to allow for social distancing of all attendees." Cody Decl. ¶ 61. Thus, the County's Mandatory Directive for Gatherings applies to gatherings not regulated by the State's private gatherings restrictions.[7] The Court refers to the County's Mandatory Directive for Gatherings as "the County's private gatherings restrictions."

The County's Personal Care Services Directive applies to services that "involve close, often physical contact between service providers and clients." Bussey Decl. Exh. H. The Personal Care Services Directive requires workers to wear N95 masks when "the client cannot wear a face covering." *Id.* The County's Mandatory Directive for Outdoor Dining prohibits indoor dining and requires that outdoor tables be spaced at least ten feet apart. Bussey Decl. Exh. I.

***948** Finally, the Court notes that Plaintiffs' free exercise claims do not challenge restrictions on houses of worship. *See* Tr. of Dec. 17, 2020 Hearing at 21:15–19, ECF No. 60 (The Court: "Are any of these plaintiffs houses of worship, or alleging restrictions on houses of worship? It seems like it's more focused on private gatherings that have religious purposes, like Bible studies in the home." Plaintiffs' Counsel: "I think that's right, Your Honor."). Instead, Plaintiffs challenge restrictions on private gatherings inside and outside their homes. Specifically, Plaintiffs Jeremy Wong and Karen Busch seek to enjoin the restrictions insofar as they (1) ban indoor religious gatherings at their homes, including Bible studies, theological discussions, collective prayer, and musical prayer; and (2) limit outdoor religious gatherings at their homes to three households." Mot. at iii (emphasis added). Thus, the instant motion is distinct from other lawsuits that have challenged restrictions on attendance at houses of worship. *See, e.g.*, *Roman Catholic Diocese of Brooklyn v. Cuomo*, —— U.S. ——, 141 S. Ct. 63, 66, 208 L.Ed.2d 206 (2020) (enjoining 10- to 25-person cap on services at houses of worship); *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 985 F.3d 1128, 1150–52 – ——, (9th Cir. Jan. 22, 2021) (enjoining 100- to 200-person cap on same); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1231 (9th Cir. 2020) (enjoining 50-person cap on same); *Harvest Rock Church, Inc. v. Newsom*, No. 20-56357, 985 F.3d 771, 772–75 – ——, (9th Cir. Jan. 25, 2021) (O'Scannlain, J., specially concurring) (collecting cases).

B. Plaintiffs are not likely to succeed on the merits of their claims.

Plaintiffs move for a preliminary injunction on four of their five claims: (1) violation of the Fourteenth Amendment's substantive due process right to earn a living; (2) violation of the Fourteenth Amendment's Equal Protection Clause; (3) violation of the First Amendment's right to free speech and assembly; and (4) violation of the First Amendment's right to free exercise and assembly. The Court discusses Plaintiffs' likelihood of success on the merits of each of these claims.

1. Plaintiffs are not likely to succeed on the merits of their Due Process claims.

Plaintiffs Mansour, Khanna, Beaudet, Evarkiou, and Richards are business owners who argue that the State's and County's COVID-related restrictions on their businesses violate their rights to make a living under the Due Process Clause of the Fourteenth Amendment. Specifically, Mansour, who runs a facial bar, challenges the County's Personal Care Services Directive. Mot. at ii. Khanna, who owns a winery, challenges the State's and the County's private gatherings restrictions. *Id.* Beaudet, who owns a restaurant, challenges the County's Mandatory Directive for Outdoor Dining. *Id.* Evarkiou, the owner of a hair salon, challenges the State's private gatherings restrictions and the Blueprint's restrictions on hair salons. *Id.* Richards, a former gym owner, challenges the Blueprint's restrictions on gyms. *Id.*

[9] Plaintiffs contend that the State's and County's COVID-related restrictions on their businesses violate their right to earn a living, as protected by the substantive component of the Due Process Clause. Mot. at 21. "The substantive component of the Due Process Clause 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." *Engquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 996 (9th Cir. 2007) (quotation omitted).

***949** However, as Plaintiffs concede, the right to earn a living is not a fundamental liberty interest that has been traditionally protected by the substantive component of the Due Process Clause. As the Ninth Circuit has explained, "[s]ubstantive due process has ... been largely confined to protecting fundamental liberty interests such as marriage, procreation, contraception, family relationships, child rearing, education and a person's bodily integrity, which are 'deeply rooted in this Nation's history and tradition.' " *Franceschi v. Yee*, 887 F.3d 927, 937 (9th Cir. 2018) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977)). Neither the United States Supreme Court nor the Ninth Circuit "has [ ]ever held that the right to pursue work is a fundamental right." *Sagana v. Tenorio*, 384 F.3d 731, 743 (9th Cir. 2004). Rather, the Ninth Circuit has held that the right to pursue one's profession is not a fundamental right protected by the Due Process Clause. *See Franceschi*, 887 F.3d at 937.

Because no fundamental right is at issue here, judicial review is "narrow." *Sagana*, 384 F.3d at 743. The Court "do[es] not require that the government's action actually advance its stated purposes, but merely look[s] to see whether the government *could* have had a legitimate reason for acting as it did." *Id.* (quoting *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 66 (9th Cir. 1994) (emphasis in original)).

[10] When a state exercises its police powers to enact emergency health measures, courts will uphold them unless (1) the measures have no real or substantial relation to public health, or (2) the measures are "beyond all question" a "plain, palpable invasion of rights secured by [ ] fundamental law." *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 37, 25 S.Ct. 358, 49 L.Ed. 643 (1905).

Plaintiffs contend that *Jacobson* does not apply to this case for two reasons. First, Plaintiffs argue that *Jacobson* does not apply because the public health emergency has lasted for several months. Mot. at 16–17. However, Plaintiffs have not cited a single case that states that *Jacobson* does not apply if a public health emergency lasts for several months. Indeed, many courts have applied *Jacobson* to COVID-related restrictions despite the length of the pandemic. *See, e.g.*, *Big Tyme Investments, LLC v. Edwards*, 985 F.3d 456, 465–66, (5th Cir. 2021) (January 13, 2021 opinion, rejecting the plaintiffs' argument that the district court erred in applying *Jacobson*); *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020) ("[T]he district court appropriately looked to *Jacobson* for guidance, and so do we."); *Delaney v. Baker*, 511 F. Supp. 3d 55, 71–72, (D. Mass. 2021) (January 6, 2021 opinion applying *Jacobson*). Second, Plaintiffs argue that *Jacobson* does not apply because *Jacobson* arose in the context of substantive due process, whereas this case raises First Amendment claims as well. Mot. at 17. However, the Court only applies *Jacobson* in the context of Plaintiffs'

substantive due process claim. Therefore, the Court continues with its *Jacobson* analysis.

As United States Supreme Court Chief Justice Roberts wrote last year, "[w]hen [public] officials 'undertake to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' " *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring) (quoting *Marshall v. United States*, 414 U.S. 417, 427, 94 S.Ct. 700, 38 L.Ed.2d 618 (1974)). "Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, ***950** and expertise to assess public health and is not accountable to the people." *Id.* (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985)).

Every court to have addressed the issue of whether COVID-related restrictions violated substantive due process rights has concluded that the plaintiffs were not likely to succeed on the merits of their substantive due process claims. *See Slidewaters LLC v. Washington Dep't of Labor & Industries*, 2020 WL 3130295, at *4 (E.D. Wash. June 12, 2020) (concluding that water park was not likely to succeed on the merits of its substantive due process claims); *Best Supplement Guide, LLC v. Newsom*, 2020 WL 2615022, at *6 (E.D. Cal. May 22, 2020) (concluding that gym owners were not likely to succeed on the merits of substantive due process claims); *Open Our Oregon v. Brown*, 2020 WL 2542861, at *2 (D. Ore. May 19, 2020) (collecting cases and explaining that businesses' motion for a preliminary injunction should be denied because "[a]t this stage, this Court is inclined to side with the chorus of other federal courts in pointing to *Jacobson [v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, 25 S.Ct. 358, 49 L.Ed. 643 (1905)] and rejecting similar constitutional claims brought by Plaintiffs challenging similar COVID-19 restrictions in other states"). Plaintiffs do not cite a single case holding otherwise.

The Court comes to the same conclusion as the other courts. Below, the Court analyzes the two elements that the United States Supreme Court set forth in *Jacobson*: (1) whether the measures bear a real or substantial relation to public health, and (2) whether the measures are "beyond all question" a "plain, palpable invasion of rights secured by [ ] fundamental law." *Jacobson*, 197 U.S. at 30, 25 S.Ct. 358.

a. The State's and the County's restrictions bear a real and substantial relation to public health.

[11] As to the first *Jacobson* element, the restrictions on Defendants' businesses bear a real and substantial relation to public health. Every court has also concluded that COVID-19 related restrictions bear a real and substantial relation to public health, and Plaintiffs do not cite a single case holding otherwise. *See, e.g.*, *Bimber's Delwood, Inc. v. James*, 496 F. Supp. 3d 760, 776–78 – ——, (W.D.N.Y. Oct. 21, 2020) (concluding that the plaintiffs could not show that New York's COVID-19 related restrictions on businesses, including bars and restaurants, did not bear a real or substantial relation to public health); *Altman v. County of Santa Clara*, 464 F. Supp. 3d 1106, 1124 (N.D. Cal. 2020) (explaining that the Court "easily concludes" that a shelter in place order bears a real and substantial relationship to the public health goals of reducing COVID-19 transmission and preserving health care resources).

This Court comes to the same conclusion as the other courts. Specifically, the Court finds that (1) the State's Blueprint; (2) the State's private gatherings restrictions; (3) the County's private gatherings restrictions; (4) the County's Personal Care Services Directive; and (5) the County's Mandatory Directive for Outdoor Dining bear a real and substantial relation to public health. The Court discusses each in turn below. Before doing so, the Court notes that the Background Section I-A-2, *supra*, describes at great length the ways in which COVID-19 is spread. Below the Court just highlights a few examples for each set of restrictions.

First, the State's Blueprint bears a real and substantial relation to public health. In designing the Blueprint and coming up with restrictions for each tier, the State ***951** considered eight objective risk criteria related to the spread of COVID-19: (1) the ability to accommodate face covering wearing at all times; (2) the ability to physically distance between individuals of different households; (3) the ability to limit the number of people per square foot; (4) the ability to limit the duration of exposure; (5) the ability to limit the amount of mixing of people from different households; (6) the ability to limit the amount of physical interactions; (7) the ability to optimize ventilation; and (8) the ability to limit activities that are known to increase the possibility of viral spread, such as singing, shouting, and heavy breathing. Kurtz Decl. ¶ 20. Because the State has sorted activities based on the risk that they result in the spread of COVID-19,

the State's restrictions bear a real and substantial relation to public health, including the interests of slowing the spread of COVID-19, protecting high-risk individuals.

Second, the State's and the County's private gatherings restrictions bear a real and substantial relation to public health. The State and the County limit gatherings because gatherings bring people from different households together for an extended period of time and thus are a main source of COVID-19 spread. Watt Decl. ¶¶ 33, 37–44. The State and the County impose stricter limits on indoor gatherings because indoor gatherings are much more likely to spread COVID-19 than outdoor gatherings. Haddad Decl. Exh. 12 (prohibiting indoor gatherings but allowing indoor gatherings in the widespread tier); Bussey Decl. Exhs. A, G (prohibiting indoor gatherings but permitting outdoor gatherings of up to 200 people). Furthermore, the State's private gatherings restrictions are more stringent in counties with higher rates of transmission, where gatherings are more likely to include someone who has COVID-19. *See* Haddad Decl. Exh. 12 (State Blueprint, prohibiting indoor gatherings in the widespread tier and permitting indoor gatherings of three households in the substantial tier).

Third, the Personal Care Services Directive bears a substantial relation to slowing the spread of COVID-19 because of the unique dangers that personal care services can play in the spread of COVID-19. COVID-19 is much more likely to be spread when persons are in close proximity for an extended period of time, such as during the time a personal care service is performed. Watt Decl. ¶¶ 33, 37–44. Furthermore, personal care services often take place inside, where COVID-19 transmission is much more likely to occur. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. In addition, the personal care services implicated do not permit the client to wear a face covering, and face coverings help to avoid the transmission of COVID-19. Watt Decl. ¶¶ 38, 45–46, 48. Thus, it is rational for the County to impose additional restrictions on personal care services, including requiring workers to wear N-95 masks. Dunn Decl. Exh. 42. The County might reasonably require workers to wear more protective masks because clients cannot wear masks at all during the services, which puts workers at a significantly higher risk of contracting COVID-19. *See* Bhatia Reply Decl. ¶ 65 (explaining that workers bear the burden of infection risk in workplace settings).

Fourth, the Mandatory Directive for Outdoor Dining bears a substantial relation to slowing the spread of COVID-19 because of the unique dangers of indoor dining in spreading COVID-19. COVID-19 is much more likely to be spread inside than outside. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. Furthermore, COVID-19 is much more likely to be spread when persons are in close proximity for an extended ***952** period of time, such as during a meal. Watt Decl. ¶¶ 33, 37–44. In addition, while dining, people cannot wear face coverings, which help to avoid the transmission of COVID-19. *Id.* ¶¶ 38, 45–46, 48. Given these circumstances, the County may legitimately require that dining only take place outdoors and that tables be spaced 10 feet away from each other. Dunn Decl. Exh. 44. Thus, the State's and the County's restrictions at issue bear a real and substantial relation to public health and satisfy the first *Jacobson* element. *Jacobson*, 197 U.S. at 30, 25 S.Ct. 358 (explaining that courts should uphold emergency public health restrictions unless they do not bear a "real or substantial relation" to public health).

b. The State's and County's restrictions are not a plain, palpable invasion of rights secured by fundamental law.

[12] As to the second *Jacobson* element, Plaintiffs have not shown that the State's and County's restrictions are "beyond all question" a "plain, palpable invasion of rights secured by [ ] fundamental law." *Id.* Every court considering challenges to COVID-related restrictions has similarly concluded that the restrictions are not a plain, palpable invasion of rights secured by fundamental law. *See, e.g.*, *Bimber's Delwood, Inc.*, 496 F.Supp.3d at 780–81, (concluding that the plaintiffs could not show that New York's COVID-related restrictions on businesses, including bars and restaurants, were a plain, palpable invasion of rights secured by fundamental law); *Altman*, 464 F. Supp. 3d at 1124 (concluding that county's shelter in place order did not effect a plain, palpable invasion of the plaintiffs' Second Amendment rights). Plaintiffs do not cite a single case to the contrary.

The Court comes to the same conclusion here. As explained above, the right to earn a living is not a fundamental liberty interest that has been traditionally protected by the substantive component of the Due Process Clause. *See Franceschi*, 887 F.3d at 937; *Sagana*, 384 F.3d at 743. Thus, the State's and County's restrictions are not a "plain, palpable invasion of rights *secured by ... fundamental law.*" *Jacobson*, 197 U.S. at 30, 25 S.Ct. 358 (emphasis added). Because Plaintiffs have not satisfied both elements of *Jacobson*, Plaintiffs have not

shown that they are likely to succeed on their substantive due process claims.

2. Plaintiffs are not likely to succeed on the merits of their Equal Protection claims.

Plaintiffs Mansour, Khanna, Beaudet, Evarkiou, and Richards also argue that the COVID-related restrictions on their businesses violate their rights under the Equal Protection Clause of the Fourteenth Amendment.

[13] "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (quoting *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)).

[14] The United States Supreme Court has held that business owners are not a suspect class. *See Williamson v. Lee Optical*, 348 U.S. 483, 489, 491, 75 S.Ct. 461, 99 L.Ed. 563 (1955) (concluding that a regulation on opticians would be subject to rational basis review). For this reason, other courts considering Equal Protection challenges to COVID-related restrictions brought by business owners have concluded that no suspect class is implicated. *See, e.g.*, ***953** *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020) (applying rational basis review to an Equal Protection challenge brought by fitness center owners); *Six v. Newsom*, 462 F. Supp. 3d 1060, 1072 (C.D. Cal. 2020) (concluding that "California's essential/non-essential [business] distinction does not disadvantage a suspect class"). Not surprisingly, Plaintiffs concede that Plaintiffs are not members of a suspect class pursuant to United States Supreme Court and Ninth Circuit precedent. *See* Mot. at 21 (stating that rational basis review applies).[8]

[15] **[16]** **[17]** Because Plaintiffs are not part of a suspect class, the Court must apply rational basis review and determine whether the restrictions are rationally related to a legitimate government interest. *Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008) ("In cases ... involving rational basis review, a state actor's classification comports with the Equal Protection Clause so long as it is 'rationally related to a legitimate state interest' ") (quotation omitted). "[R]ational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' " *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quoting *FCC v. Beach Comms., Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993)). Accordingly, regulations "must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 320, 113 S.Ct. 2096. The "burden is on [Plaintiffs] to negat[e] every conceivable basis which might support [the classification]." *Id.* (quotation omitted). Thus, courts must uphold the classification as long as it "find[s] some footing in the realities of the subject addressed by legislation." *Id.* at 321, 113 S.Ct. 2096.

Under these deferential standards, every court considering Equal Protection challenges brought by business owners to COVID-related restrictions has upheld the restrictions, and Plaintiffs do not cite a single case to the contrary. *See, e.g.*, *Big Tyme Investments, LLC v. Edwards*, 985 F.3d 456, 465–66, (5th Cir. 2021) (rejecting Equal Protection challenge brought by bar owners to COVID-related restriction prohibiting consumption of alcohol at bars); *League of Independent Fitness Facilities & Trainers, Inc. v. Whitmer*, 814 F. App'x 125, 128 (6th Cir. 2020) (rejecting an Equal Protection challenge brought by fitness center owners to COVID-related restrictions closing their fitness centers).

[18] The Court comes to the same conclusion in the instant case for two reasons. First, there are multiple compelling government interests at stake. Second, the State's and County's restrictions are rationally related to those government interests.

As to the multiple compelling government interests, the Supreme Court, the Ninth Circuit, and even Plaintiffs agree on this point. The Supreme Court has held that "stemming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese*, 141 S. Ct. at 67. ***954** The Ninth Circuit has concluded that the State has compelling interests "in reducing community spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of its healthcare system as a result of increased hospitalizations." *South Bay*, 985 F.3d at 1142, .

Moreover, Plaintiffs concede that the State has a strong interest in preventing hospitals from being overwhelmed. *See* Mot. at 1 ("Governor Newsom was correct to focus on the risk

that hospitals would be overrun"), 15 (acknowledging "the compelling interest in preventing hospitalizations and deaths resulting from COVID-19"). Even one of Plaintiffs' experts, Dr. Bhattacharya, concedes that restrictions might be justified "where hospital overcrowding is predicted to occur" because overcrowding and "the unavailability of sufficient medical personnel" "might induce avoidable mortality." Bhattacharya Reply Decl. ¶ 15.

Thus, the State and the County have compelling interests in slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system. These compelling government interests are far greater than the legitimate government interest required for the rational basis review that the Court must undertake here.

The Court must now consider whether the restrictions applicable to Plaintiffs' businesses are rationally related to these compelling government interests. Plaintiffs present four arguments as to why the restrictions applicable to their businesses are irrational. First, Plaintiffs contend that they are just as capable of implementing social distancing measures as other businesses not subject to as stringent regulations. Second, Plaintiffs argue that they should not be treated more harshly because of the county in which they are located. Third, Plaintiffs contend that the State's restrictions are irrational because they base restrictions on PCR tests. Finally, Plaintiffs argue that it is irrational to impose restrictions on the whole population when only a subset is vulnerable to severe illness from COVID-19. The Court addresses each of these arguments in turn.

a. It is rational for the State and the County to distinguish between businesses.

[19] First, Plaintiffs argue that Plaintiffs are "just as capable, if not more so, of implementing social distancing measures applicable to other businesses not subject to as stringent regulations." Mot. at 22. For example, Mansour argues that her facial salon should not face harsher restrictions than a doctor's or dentist's office. *Id.* However, as the County points out, there are many legitimate reasons that the County might reasonably expect medical offices to be better trained in preventing the spread of disease than non-medical offices. Cody Decl. ¶¶ 55–56. In general, the State's and the County's distinctions between different kinds of businesses are rational because the State and the County have carefully tailored their restrictions to the risks attendant to each business. *See* Section III-B-1-a, *supra* (explaining that the State's and the County's private gatherings restrictions, Personal Care Services Directive and Mandatory Directive for Outdoor Dining bear a substantial relation to the public health interest of slowing the spread of COVID-19, protecting high-risk individuals, and preventing the overwhelming of hospitals).

b. It is rational for the State and the County to distinguish between counties.

[20] Plaintiffs argue that their businesses should not be treated more harshly ***955** because of the county in which they are located. Mot. at 22. However, it is rational for the State to restrict activities based on the prevalence of the coronavirus in a particular county. If a gathering takes place in a county where there is a high prevalence of infection, the likelihood of coming into contact with someone who is infected and able to spread COVID-19 is increased. Watt Decl. ¶ 42; Rutherford Decl. ¶ 81; Stoto Decl. ¶¶ 10, 18. Accordingly, restricting activities based on the prevalence of the coronavirus in a particular county is not irrational.

c. It is rational for the State to rely on PCR tests.

[21] Plaintiffs outline three reasons that it is irrational for the State's restrictions to be based on PCR tests. Mot. at 23–24. First, PCR tests are taken from a portion of the population that is more likely to test positive, including people who have been referred to testing, people who are experiencing symptoms, and people who are essential workers. Bhattacharya Decl. ¶ 27. Second, PCR tests result in a high number of false positives. *Id.* ¶¶ 28–30. Third, PCR tests do not detect risk variations between people testing positive who are likely to face mortality and people testing positive who are not. *Id.* ¶ 32; Bhatia Decl. ¶ 37. Plaintiffs thus contend that the State should use hospitalization rates, not PCR tests, in determining whether to loosen or tighten restrictions. Bhatia Decl. ¶¶ 47–49.

However, Plaintiffs are incorrect in three respects. First, even Plaintiffs' expert concedes that PCR tests are the gold standard for measuring the presence of infection in the community. Bhattacharya Reply Decl. ¶ 7. Although PCR tests will not capture spread as accurately as they would if they were given to the entire population, they do an adequate job in assessing disease spread and determining

whether to tighten or loosen restrictions. *Id.* ¶ 105; Stoto Decl. ¶¶ 19, 22; Lipsitch Decl. ¶¶ 38–39. In addition, California has a wider testing program than other states, which makes the prevalence rate more reliable. Rutherford Decl. ¶ 105; Lipsitch Decl. ¶ 35. The County of Santa Clara also has a robust testing program with broader community access and greater testing capacity than other communities. Reingold Decl. ¶ 30; Lipsitch Decl. ¶ 35.

Second, although Plaintiffs argue that the State should use hospitalization rates, hospitalization rates suffer from several downfalls. Indeed, hospitalization rates lag infections in the community by several weeks. Rutherford Decl. ¶ 55; Stoto Decl. ¶ 23; Lipsitch Decl. ¶ 44; Maldonado Decl. ¶¶ 25–26. Thus, hospitalization rates show spread from several weeks ago, not recent spread. *Id.* In addition, hospitalization rates have often underestimated the severity of the pandemic. For instance, hospitalization rates can be lower at times when hospital capacity is strained and many patients who would otherwise be hospitalized are not being taken to the hospital. Stoto Decl. ¶ 23. As the Ninth Circuit recently explained in *South Bay*, "paramedics in Los Angeles County have been instructed to conserve oxygen in treating patients and not to bring patients to the hospital who have little chance of survival." 985 F.3d at 1135, . Similarly, hospitalization rates do not capture the spread of the virus outside of hospitals. The spread of the virus outside of hospitals is a public health issue because patients who are not hospitalized with COVID-19 can face long-term effects. Cody Decl. ¶ 7; Han Decl. ¶ 20; Watt Decl. ¶ 23; Rutherford Decl. ¶¶ 23–25, 97. Undoubtedly, there are limits to any criteria that might be used, including PCR tests. However, the Court merely concludes that the State did not act irrationally in choosing to use PCR tests given ***956** the problems with using hospitalization rates.

Third, although Plaintiffs' experts argue that PCR tests are flawed because they do not detect risk variations between people testing positive who are likely to face mortality and people testing positive who are not, COVID-19 is dangerous to all populations. In the next section, the Court discusses extensively how vulnerable populations live and work with non-vulnerable populations. *See* Section III-A-2-d, *infra.* Thus, detecting COVID-19 cases among non-vulnerable people is important to protecting vulnerable populations. Accordingly, it is not irrational for the State to focus on PCR tests.

d. It is rational for the State to place restrictions on the general population, not just the vulnerable.

Plaintiffs argue that the State's and County's strategies are irrational because they have not tried to focus on vulnerable populations, such as the elderly. One of Plaintiffs' medical experts, Dr. Bhattacharya, is one of three scientists who drafted the Great Barrington Declaration, which proposes that COVID-19 be allowed to spread among young, healthy people while governments focus on preventing vulnerable people from getting it. Bhattacharya Reply Decl. ¶ 31; Lipsitch Decl. ¶ 15. Plaintiffs' other expert, Dr. Bhatia, who signed the Great Barrington Declaration, proposes that the State and the County should focus exclusively on vulnerable populations. Bhatia Decl. ¶¶ 73–84.[9]

However, Plaintiffs' argument suffers from three flaws. First, the State and the County have already put in place measures to protect the vulnerable. Second, it is rational for the State and the County to place restrictions on the entire population because even individuals who are not specifically vulnerable to COVID-19 can become seriously ill and die from the virus. Finally, it is rational for the State and the County to place restrictions on the entire population because vulnerable individuals have extensive contact with non-vulnerable individuals in long-term care facilities, multigenerational homes, and workplaces. The Court addresses each of these issues in turn.

First, the State and the County have already put extensive measures into place to protect vulnerable people, including the measures recommended by Plaintiffs' experts. Plaintiffs' experts recommend: (1) site infection control and prevention practices; (2) routine health care worker screenings; (3) prohibiting staff from coming to work sick; (4) outbreak response; (5) training; (6) monitoring; and (7) testing asymptomatic health care workers. Bhatia Decl. ¶¶ 88–89. The State's and County's long-term care facilities already implement these measures and others to slow the spread of COVID-19.

***957** The State has issued guidelines and directives that required long-term care facilities to undertake precautions, including (1) cleaning and disinfecting high-touch surfaces; (2) screening residents for COVID-19 symptoms every day; (3) excluding employees who display symptoms of COVID-19; (4) requiring employees and residents to wash their hands upon entering the facility; (5) limit entry only to

individuals who need entry for prevention, containment, and mitigation measures; (6) requiring staff to wear face coverings at all times and remind residents that they are required to wear face coverings as much as practically possible; and (7) requiring training of staff on prevention and control measures. Tovmasian Decl. ¶¶ 12–16, 24; Steinecker Decl. ¶¶ 10, 19–24. The State also requires facilities to engage in testing, including surveillance testing even if they do not currently have a positive COVID-19 case. Tovmasian Decl. ¶¶ 18–21, Steinecker Decl. ¶ 15, 19. The County has also taken targeted measures to protect vulnerable populations. Those measures include implementing regular staff testing in long-term care facilities, providing infection control protocols, and visiting facilities to make recommendations on how best to implement infection control. Han Decl. ¶ 9; Garcia Decl. ¶ 14.

Second, it is rational for the State and the County to place restrictions on the entire population because many non-vulnerable people die or become seriously ill after being infected with COVID-19. About twenty percent of those who have died of COVID-19 in the United States have been younger than 65 years old. Lipsitch Decl. ¶ 28. In addition, nearly two thousand people who have died of COVID-19 are younger than 30 years old. *See CDC COVID Tracker.*

Additionally, Dr. Bhattacharya's declaration, which focuses on mortality, ignores the serious long-term effects that plague many non-vulnerable people who have recovered from COVID-19. Bhattacharya Decl. ¶¶ 32–39. Young people are at risk for serious and long-term effects from COVID-19, including cardiovascular, neurologic, renal, and respiratory damage, psychiatric effects, and loss of limbs from blood clotting. Cody Decl. ¶ 7; Han Decl. ¶ 20; Watt Decl. ¶ 23; Rutherford Decl. ¶¶ 23–25, 97. For example, college football players who had recovered from asymptomatic or mildly symptomatic COVID-19 infections were found to have a high rate of myocarditis, which can lead to cardiac arrest with exertion. Rutherford Decl. ¶ 25.

In addition, many young people have underlying conditions. As discussed above, *supra* Section I-A-3, chronic medical conditions are largely a subset of COVID-19 underlying conditions. Yet, approximately six in ten Americans have been diagnosed with at least one chronic medical condition, and four in ten have been diagnosed with more than one chronic medical condition. Reingold Decl. ¶ 17. Moreover, in Latino and African-American communities, a higher percentage of residents have diabetes, which make them more susceptible to becoming severely ill from COVID-19. Garcia Decl. ¶ 13. Simultaneously, a lower percentage of Latino and African-American community members have healthcare coverage, meaning that they are less able to get care if infected with COVID-19. *Id.*

Third, it is rational for the State and the County to place restrictions on the entire population because vulnerable people have extensive contact with non-vulnerable individuals in long-term care facilities, multigenerational homes, and essential workplaces. The Court addresses each of these settings in turn.

Looking at care facilities, vulnerable people who live in care facilities are in ***958** close contact on a regular basis with the staff, who live in the community. Rutherford Decl. ¶ 116; Stoto Decl. ¶ 35. Thus, higher levels of community spread can lead to spread in care facilities. Rutherford Decl. ¶ 116; Han Decl. ¶ 14. Accordingly, a recent report showed that COVID-19 cases in nursing homes have tracked the community spread of COVID-19 since September of 2020. Lipsitch Decl. ¶ 26. For example, in La Crosse, Wisconsin, researchers were able to trace COVID-19 clusters at two nursing homes, which caused two deaths, back to gatherings and parties at three local universities. Cody Decl. ¶ 37.

In addition, many vulnerable people live in multigenerational households. Garcia Decl. ¶ 8; Lipsitch Decl. ¶ 25. According to one study, 20 percent of Americans live in a multigenerational home. Maldonado Decl. ¶ 21. Vulnerable people are especially likely to live or work with less vulnerable people in communities of color, immigrant communities, and low-income communities. Garcia Decl. ¶ 8. In these communities, people often live in crowded homes, making it difficult for them to isolate from other household members. *Id.* As Plaintiffs' expert acknowledges, older people living with working-age adults have a higher risk of COVID-19 than older people living with other older people. Bhattacharya Reply Decl. ¶ 54. Because older people live and work with younger people, COVID-19 cases in older people track with COVID-19 cases in younger people. Rutherford Decl. ¶ 96.

Plaintiffs' expert suggests that vulnerable people who live in multigenerational households could temporarily live in another setting, such as empty hotel rooms that have been provided for homeless populations. Bhattacharya Reply Decl. ¶ 54. However, even where the County has offered to provide separate housing or other support for vulnerable individuals who live with other household members, many

factors lead them to be uncomfortable or unwilling to accept it. For example, some vulnerable individuals distrust the government, while others are unwilling to separate from their family members, for whom they might provide childcare and other support. Garcia Decl. ¶ 12. For example, many older people are the primary caregivers for their grandchildren. Maldonado Decl. ¶ 17.

Furthermore, many vulnerable people also work at essential jobs, increasing their potential exposure to COVID-19. Garcia Decl. ¶¶ 9–10. Even those who are vulnerable are often themselves breadwinners in their family, which means that they have to work outside the home to support their families. *Id.* ¶ 13. This is especially true in communities of color and low-income communities. *Id.* ¶ 13.

Plaintiffs' expert also suggests that older people who work could be permitted to work from home. Bhattacharya Reply Decl. ¶ 53. However, this proposal ignores the reality that many older people work in essential jobs, where working from home is not possible. Garcia Decl. ¶¶ 9–10. Although Plaintiffs' expert proposes that those who cannot work from home be able to take a funded 3 to 6 month sabbatical, Plaintiffs' expert does not address the distrust of the government and unwillingness to accept help that persists, particularly in communities of color and low-income communities that have more essential workers. Garcia Decl. ¶ 12.

In sum, because of the numerous connections between the vulnerable and other members of the community, COVID-19 spread in the community results in COVID-19 spread among the vulnerable. For these reasons, the vast majority of public health experts reject an approach that would focus solely on vulnerable populations without limiting spread in the community. Stoto Decl. ¶ 14; Lipsitch Decl. ***959** ¶ 15; Maldonado Decl. ¶ 20. A strategy that solely focused on vulnerable people without addressing community spread would result in increased COVID-19 spread, hospitalizations, and deaths. Lipsitch Decl. ¶ 24; Rutherford Decl. ¶¶ 115–117. For example, in Maine, an indoor wedding attended by 62 people resulted in more than 180 infections, including among people living at a long-term healthcare facility and at a jail. Cody Decl. ¶ 37. Eight people who did not attend the wedding died. *Id*. In Michigan, 187 infections were connected to an indoor bar and restaurant with a live DJ and an open dance floor. *Id.* Of the total cases traced back to the restaurant, 144 were people who had been to the venue and 43 were family members, friends, and other contacts who had not. *Id.*

The downfalls of a targeted strategy can be seen in the example of Sweden. Sweden tried to implement an approach targeted towards the elderly and nursing homes, and as a result, seven percent of residents in nursing homes in Stockholm died. Lipsitch Decl. ¶ 27; Rutherford Decl. ¶¶ 115–117. Thus, Sweden is now implementing policies directed at slowing community spread. Lipsitch Decl. ¶ 27.

Because Plaintiffs have not met the high bar of demonstrating that the State's and County's restrictions are irrational, Plaintiffs have not shown that they are likely to succeed on the merits of their Equal Protection claims.

3. Plaintiffs are not likely to succeed on the merits of their free speech and assembly claims.

[22] Plaintiffs Tandon and the Gannons argue that the State's and the County's private gatherings restrictions violate their First and Fourteenth Amendment rights to free speech and assembly. As explained above in Section III-A, *supra*, the State prohibits indoor gatherings and limits private outdoor gatherings to three households or fewer. However, the State's private gatherings restrictions do not apply to the political campaign events Tandon wishes to hold. Accordingly, Tandon's gatherings are limited only by the County's private gatherings restrictions, which prohibit indoor gatherings[10] and limit outdoor gatherings to 200 people. Bussey Decl. Exhs. A, G.

The Court first considers whether Tandon's claims are moot now that the 2020 election has passed. After concluding that Tandon's claims are not moot, the Court analyzes the merits of Plaintiffs' free speech claims. As Plaintiffs note, "[t]he right of peaceable assembly is a right cognate to th[at] of free speech." Mot. at 12 (quoting *De Jonge v. State of Oregon*, 299 U.S. 353, 364, 57 S.Ct. 255, 81 L.Ed. 278 (1937)); *accord Kuchenreuther v. City of Milwaukee*, 221 F.3d 967, 972 n.16 (7th Cir. 2000) ("We evaluate free speech and free assembly claims under the same analysis."). Indeed, Plaintiffs' freedom of assembly argument cites freedom of speech cases. Mot. at 12–18 (citing, *e.g.*, *Reed*, 576 U.S. 155, 135 S.Ct. 2218). Thus, the Court's analysis of Plaintiffs' free speech claims applies equally to Plaintiffs' free assembly claims.

a. Tandon's free speech and assembly claims are not moot.

[23] The State and the County argue that Tandon's claims are moot because the 2020 election has passed. State Opp'n at 7–8; County Opp'n at 8–9. The Court disagrees ***960** because Tandon has expressed his intent to run in 2022, and Tandon has stated that he needs to meet with advisors, donors, and constituents to support his 2022 campaign in the coming months, while the State and the County restrictions are likely to remain in effect.

[24] **[25]** **[26]** "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). "An 'actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Alvarez v. Smith*, 558 U.S. 87, 92, 130 S.Ct. 576, 175 L.Ed.2d 447 (2009) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975)). "A case becomes moot 'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.' " *Porter v. Jones*, 319 F.3d 483, 489 (9th Cir. 2003) (quoting *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001)).

[27] However, there is an exception to the mootness doctrine if a case is "capable of repetition, yet evading review." *Lewis*, 494 U.S. at 481, 110 S.Ct. 1249. Under this exception, cases for prospective relief can go forward "despite abatement of the underlying injury ... where the following two circumstances [are] simultaneously present: '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.' " *Id.* (quoting *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (per curiam)).

[28] The Court concludes that these two circumstances are met in this case. First, Tandon's challenge is a "controversy evading review" because the 2020 election was too short to be fully litigated before it ended. *Wolfson v. Brammer*, 616 F.3d 1045, 1054 (9th Cir. 2010). "Election cases often fall within this exception, because the inherently brief duration of an election is almost invariably too short to enable full litigation on the merits." *Porter*, 319 F.3d at 490 (concluding that an election challenge was a controversy evading review); *see also Wolfson*, 616 F.3d at 1054 (same); *Joyner v. Mofford*, 706 F.2d 1523, 1527 (9th Cir. 1983) (same).

[29] **[30]** "To satisfy the second requirement, that the action is capable of repetition, [a candidate] must establish a reasonable expectation that he will be subjected to the same action or injury again." *Wolfson*, 616 F.3d at 1054. A candidate can meet this requirement even after the election has passed where the candidate "has subsequently announced an intent to seek office in a future election." *Id.* at 1055; *see also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) (concluding that a challenge to self-financing rules was capable of repetition yet evading review where the election had passed but the candidate subsequently announced an intent to self-finance another bid for a House seat).

[31] The County argues that Tandon's claims are moot because Tandon has not expressed an intent to seek office in a future election. County Opp'n at 8. However, in a sworn declaration, Tandon states that he is "planning for another Congressional run in 2022." Tandon Reply Decl. ¶¶ 5–6. Thus, Tandon "has subsequently announced an intent to seek office in a future election," which means that he can establish a reasonable expectation that he will be subject to the same action or injury again. *Wolfson*, 616 F.3d at 1055.

***961** The County argues that the likelihood that Tandon will face the same action or injury again is "remote and speculative" because it is unclear what level of community transmission of COVID-19, and what restrictions on gatherings, will exist leading up to the 2022 election. County Opp'n at 9. However, Tandon states in his declaration that he will need to meet with advisors, donors, and constituents in the coming months, while the restrictions remain in place. Tandon Reply Decl. ¶¶ 5–6. Thus, the Court concludes that Tandon's claim is not moot and proceeds to consider the free exercise and free speech claims on the merits.

b. Plaintiffs are not likely to succeed on the merits of their free speech and assembly claims.

The First Amendment, incorporated against the states by the Fourteenth Amendment, prohibits states "from enacting laws 'abridging the freedom of speech, ... or the right of the people peaceably to assemble.' " *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1020–21 (9th Cir. 2009) (quoting U.S. Const. amend. I). Under the First Amendment, "certain types of speech enjoy special status." *Id.* at 1021. In particular, "[p]olitical speech is core First Amendment

speech, critical to the functioning of our democratic system," so it " 'rest[s] on the highest rung of the hierarchy of First Amendment values.' " *Id.* (quoting *Carey v. Brown*, 447 U.S. 455, 467, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980)).

[32] **[33]** **[34]** To evaluate a free speech claim, the Court must first decide whether a law restricting speech is content based or content neutral. *Recycle for Change v. City of Oakland*, 856 F.3d 666, 669 (9th Cir. 2017). "Content-based laws," which are "those that target speech based on its communicative content," must satisfy strict scrutiny, meaning that "the government [must] prove[ ] that they are narrowly tailored to serve compelling government interests." *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).In addition, laws must satisfy strict scrutiny if they are facially content neutral, but "cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* at 164, 135 S.Ct. 2218 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). However, if "a law does not 'suppress[ ] expression out of concern for its likely communicative impact,' " the law must only satisfy intermediate scrutiny. *Recycle for Change*, 856 F.3d at 669–70 (quoting *United States v. Swisher*, 811 F.3d 299, 314 (9th Cir. 2016) (en banc)).

Accordingly, for the reasons discussed below, the Court reaches the following conclusions. First, the State's and the County's private gatherings restrictions are content neutral. Second, because the State's and the County's private gatherings restrictions are content neutral, the Court applies intermediate scrutiny and concludes that the restrictions satisfy intermediate scrutiny. Finally, in the alternative, even assuming that the State's and the County's private gatherings restrictions are not content neutral, the Court applies strict scrutiny and concludes that these restrictions satisfy strict scrutiny.

i. The State's and the County's private gatherings restrictions are content neutral.

[35] **[36]** **[37]** "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163, 135 S.Ct. 2218. "The 'crucial first step' in determining whether a law is content based is to 'consider ***962** whether a regulation of speech on its face draws distinctions based on the message a speaker conveys." *Recycle for Change*, 856 F.3d at 670 (quoting *Reed*, 576 U.S. at 163, 135 S.Ct. 2218). "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose." *Reed*, 576 U.S. at 163, 135 S.Ct. 2218. Where a restriction "does not, on its face, discriminate on the basis of content," the restriction is content neutral. *Recycle for Change*, 856 F.3d at 670. Accordingly, "blanket bans applicable to all speakers are content neutral." *Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286, 1295 & n.5 (9th Cir. 2015).

Courts have concluded that the State's COVID-related restrictions are blanket bans that are thus content neutral. In *Givens v. Newsom*, an individual who wished to protest and a congressional candidate who wished to hold a rally sought permits for in-person gatherings at the State Capitol. 459 F. Supp. 3d 1302, 1308 (E.D. Cal. 2020), *appeal dismissed*, 830 Fed.Appx. 560 (9th Cir.). However, their permits were denied due to the State's COVID-related restrictions on mass gatherings. *Id.* The individual and the congressional candidate sought a temporary restraining order and argued that the restrictions violated their First Amendment rights. *Id.* at 1307, 1309. The district court rejected their application for a temporary restraining order and concluded that "[t]he State's order, and the resulting moratorium on permits, are, beyond question, content-neutral." *Id.* at 1312. The district court emphasized the fact that the "temporary moratorium on all permits for in-person gatherings applies to all applicants." *Id.* (emphasis omitted). The same reasoning applies to the gatherings restrictions here.

[38] The Gannons challenge the State's private gatherings restrictions. In counties at the most severe or widespread tier, these restrictions prohibit indoor private gatherings of individuals outside the immediate household and restrict outdoor private gatherings to three households. *See supra* Section III-A; Haddad Decl. Exh. 12; Dunn Reply Decl. Exh. 4. Specifically, the State defines gatherings as "social situations that bring together people from different households at the same time in a single space or place." *Id.* The State's private gatherings restrictions are content neutral because they apply to all gatherings regardless of the speech to be shared at that gathering. *Recycle for Change*, 856 F.3d at 670 ("Here, the Ordinance is content neutral because it does not, on its face, discriminate on the basis of content ...."). Indeed, the State's private gatherings restrictions are blanket bans on all gatherings, and blanket bans are content neutral.

Santa Monica Nativity Scenes Comm., 784 F.3d at 1295 & n.5 (holding that "blanket bans applicable to all speakers are content neutral").

[39] Tandon challenges the County's private gatherings restrictions. As discussed in Section III-A above, the County's private gatherings restrictions: (1) prohibit indoor gatherings, which are also banned by the State's private gatherings restrictions; (2) limit all outdoor gatherings to 200 people; (3) and require that the outdoor space must be large enough to permit attendees to maintain six feet of distance. *Id.* Thus, regardless of the County's Blueprint tier, the County limits to 200 outdoor gatherings that are "an event, assembly, meeting, or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and in a coordinated fashion—like a wedding, banquet, conference, religious service, festival, fair, ***963** party, performance, movie theater operation, barbecue, protest, or picnic." Bussey Decl. Exhs. A, G. The State's private gatherings restrictions do not regulate these gatherings. These County restrictions apply regardless of the purpose of the gathering. *Id.* The County's private gatherings restrictions are thus akin to blanket bans applicable to all speakers, which are content neutral. *Santa Monica Nativity Scenes Comm.*, 784 F.3d at 1295 & n.5 (holding that "blanket bans applicable to all speakers are content neutral."). Accordingly, the restrictions challenged by Tandon are also content neutral.

Plaintiffs argue that the State's and the County's private gatherings restrictions are not content neutral because their gatherings are being treated more harshly than other activities. Reply at 7. Plaintiffs assert that, while their indoor gatherings are prohibited, "the State and County have allowed people to gather indoors at airports, shopping centers, retail stores, hair salons, tattoo parlors, body art venues, piercing stores, pet grooming outlets, and more, so long as those present can maintain six feet of distance." *Id.* For example, Plaintiffs point out that Tandon could get a tattoo indoors, but could not gather indoors with his supporters for a political event. *Id.*

Plaintiffs' argument is unpersuasive for two reasons. First, the Ninth Circuit has recently rejected a similar argument. Second, the Court's independent review confirms that the commercial activities to which Plaintiffs point are distinct from Plaintiffs' private gatherings.

In *South Bay*, the Ninth Circuit concluded that the socially distanced commercial activities to which Plaintiffs point had a lower risk of spreading COVID-19 than gatherings. Specifically, the Ninth Circuit's decision upheld the Blueprint's restrictions on houses of worship, which prohibit indoor worship services in counties in the widespread tier, and concluded that the Blueprint's restrictions were narrowly tailored to slow the spread of COVID-19, protect high-risk individuals from infection, and prevent the overwhelming of the healthcare system. 985 F.3d at 1144–47 – —— . The plaintiffs argued that the State's restrictions were not narrowly tailored because the State permitted numerous non-religious activities, including grocery and retail shopping and personal care services. *Id.* at 1143–44, at *11.

Rejecting the plaintiffs' argument, the Ninth Circuit concluded that worship services were distinct from, and more likely to spread COVID-19 than, socially distanced commercial activities. The Ninth Circuit explained that, in commercial settings, "patrons typically have the intention of getting in and out of grocery and retail stores as quickly as possible." *Id.* at 1144, at *12. By contrast, "the very purpose of a worship service is to congregate as a community." *Id.* The Ninth Circuit also explained that ventilation was better in some commercial settings such as grocery stores, which are equipped with high-functioning air conditioning systems that increase air flow. *Id.* Finally, the Ninth Circuit emphasized the plethora of mandatory industry regulations aimed at preventing the spread of COVID-19 that applied to the grocery, retail, personal care services, and film industries, among others. *Id.* at 1144–47 – ——. These restrictions included use of plexiglass, frequent disinfection of commonly used surfaces, and frequent testing of workers, including in the film industry. *Id.*

In the instant case, the Court also concludes that the socially distanced commercial activities cited by Plaintiffs are different in kind from Plaintiffs' gatherings. Indeed, "evidence suggests that ***964** gatherings may pose a higher risk of transmission than other kinds of activities that remain subject to different restrictions." Cody Decl. ¶ 59. Plaintiffs' gatherings are markedly more risky in at least six different ways: (1) people are together for a longer time; (2) singing, chanting, shouting, loud talking, and sustained conversations are more likely to occur; (3) ventilation is poorer; (4) masking and social distancing are less likely; (5) private gatherings are not required to implement safety measures mandated by health and safety codes and industry regulations; and (6) large numbers of people may be in the same place at the same time. The Court addresses each distinction in turn.

First, people at Plaintiffs' gatherings are together for a longer time. In commercial environments, such as retail and grocery stores, "when people from different households are together in a grocery store, they are together for a shorter duration of time as compared to attendees at a coordinated gathering where attendees linger." Cody Decl. ¶ 59. Further, grocery shoppers may be less likely to be in close proximity to other shoppers, as opposed to attendees at a gathering who have social connections to one another. *See also South Bay*, 985 F.3d at 1144–45, (explaining that grocery stores are distinct from house of worship services because "patrons typically have the intention of getting in and out of grocery and retail stores as quickly as possible."). Thus, the risk of transmission is generally less in a setting with brief contact between individuals as compared to a setting such as a gathering that promotes sustained contact. The risk of transmission "increases with the duration of the gathering, whether it takes place indoors or outdoors." Rutherford Decl. ¶ 78. The main mechanism for COVID-19 transmission is an infected person exposing others to virus-containing droplets or aerosols. *Id.* ¶ 79.

Second, unlike people in commercial gatherings, people at Plaintiffs' gatherings often have social connections to one another and are coming together for the purposes of being together. Cody Decl. ¶ 59; Rutherford Decl. ¶ 82. At Plaintiffs' gatherings, people are likely to be in extended conversations. Rutherford Decl. ¶ 82. "Even sustained conversations between individuals, when they are in close proximity in indoor spaces, or in outdoor spaces in which social distance is not maintained, carry increase risk of transmission." Rutherford Decl. ¶ 79. In some environments —such as a Bible study or political event—people might even sing or chant. By contrast, singing, chanting, shouting, and loud talking are uncommon in commercial environments, like grocery and retail stores. Singing, chanting, shouting, and loud talking are more likely to spread COVID-19 because they produce more viral droplets and particles—and project those droplets further. Rutherford Decl. ¶¶ 29, 79; Reingold Decl. ¶¶ 20–22; Cody Decl. ¶ 35. For instance, Plaintiffs propose Bible study groups and gatherings to debate policy issues—gatherings which "involve groups of unrelated individuals from different households or 'bubbles' coming together for the purpose of being together and engaging in extended conversation and interaction in close proximity to one another." Rutherford Decl. ¶ 82.

Third, ventilation tends to be poorer at Plaintiffs' gatherings. "There is in particular heightened transmission risk from indoor gatherings taking place in buildings that have poor air circulation, such as in private homes." Rutherford Decl. ¶ 76. By contrast, some commercial activities take place in large spaces. Others include systems that increase ventilation. For example, "grocery stores are 'almost always' equipped with high-functioning air conditioning systems that increase ventilation ***965** and air flow." *South Bay*, 985 F.3d at 1144, . Others take place outdoors. *See* Dunn Decl. Exh. 23 (stating that some personal care services are permitted to take place outdoors). In environments with better ventilation, the virus disperses more easily, preventing it from accumulating into doses large enough to overcome the immune system. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. Ventilation is important even where people properly wear face coverings. "The increased risk of transmission resulting from vocalization and other activities involving increased exhalation force that are commonly engaged in during gatherings *is reduced but not eliminated* where all of the participants wear face coverings." Rutherford Decl. ¶ 80 (emphasis added).

Fourth, masking and social distancing are less likely at Plaintiffs' gatherings than in commercial settings. Under the State's restrictions, commercial environments require masking and social distancing, a requirement that can be enforced by commercial workers. *See* Haddad Decl. Exh. 9. On the other hand, at Plaintiffs' gatherings, it is "uncertain whether participants in these gatherings would maintain social distancing and face coverings during the entirety of the gatherings." Rutherford Decl. ¶ 84. Indeed, many gathering spaces in the home—such as kitchen tables and living rooms —do not provide six feet of distance between persons. "[T]he closer the proximity between individuals who gather, and the longer they are in close proximity, the more opportunity there is for the virus to be transmitted via droplets or aerosolized particles containing the virus." Rutherford Decl. ¶ 74.

Fifth, Plaintiffs' gatherings are not part of a regulated industry. By contrast, commercial retail environments are subject to mandatory industry guidance, which include creation of a COVID-19 prevention plan, cleaning and disinfecting of frequently used surfaces, and screening of workers. Haddad Decl. Exh. 9; Dunn Decl. Exhs. 17–27; *see also South Bay*, 985 F.3d at 1144–45, (explaining that commercial activities were distinct from worship services because they included "plexiglass at checkout, frequent disinfection of commonly used surfaces such as shopping carts, and the closure of any areas that encourage congregating"). Personal care services are also subject to

mandatory industry guidance. Dunn Decl. Exhs. 23, 24, 42. For example, workers must wear a secondary barrier, like goggles or a face shield, in addition to a mask, when providing services on clients who cannot wear a mask. *Id.* As to filming, "this sector is *more strictly* regulated than many others." *South Bay*, 985 F.3d at 1146, (emphasis in original). For example, "filming in the state resumed only after the studios and unions reached an agreement concerning safety guidelines." *Id.* That agreement requires tri-weekly testing. *Id.* In addition, there are special protocols for makeup, hair styling, costumes, and props. *Id.* These restrictions lower the risk that COVID-19 will be spread. Moreover, the State can enforce industry guidance, including by imposing a misdemeanor conviction, $1,000 fine, and six months imprisonment. *See* Dunn Decl. Exhs. 2, 3 (referencing Cal. Gov't Code § 8665); Cal. Gov't Code § 8665.

Sixth, Plaintiffs' gatherings can involve many more people than commercial interactions. Some commercial settings, such as personal care services, involve only "small numbers of individuals interacting." *Id.* The more people who are together, the more likely it is that COVID-19 will be spread. Watt Decl. ¶ 42; Rutherford Decl. ¶ 77.

***966** Accordingly, the State's and the County's private gatherings restrictions are content neutral and need only satisfy intermediate scrutiny. *Recycle for Change*, 856 F.3d at 669–70 (applying intermediate scrutiny to a content neutral regulation). The Court next considers whether the State's and the County's private gatherings restrictions satisfy intermediate scrutiny.

ii. The State's and County's content neutral restrictions satisfy intermediate scrutiny.

[40] Under intermediate scrutiny, a regulation is justified "[1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Wilson v. Lynch*, 835 F.3d 1083, 1096 (9th Cir. 2016) (quoting *United States v. O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). The Court addresses each element in turn.

(a) The State's and County's restrictions are within the constitutional power of the government.

[41] **[42]** The State's and the County's private gatherings restrictions are within the constitutional power of the government. A restriction is within the government's constitutional powers if the government can constitutionally regulate the subject in question. *Wilson*, 835 F.3d at 1096; *United States v. Tomsha-Miguel*, 766 F.3d 1041, 1048 (9th Cir. 2014). Plaintiffs do not argue that the State or the County is prohibited from regulating private gatherings. Accordingly, the Court concludes that the State's and the County's private gatherings restrictions are within the constitutional power of the government.

(b) The State's and County's restrictions further the compelling interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system.

[43] The State's and the County's private gatherings restrictions are directed to slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system. As discussed above, *supra* Section III-B-2, the Court concludes that these are compelling government interests.

(c) Slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system are unrelated to the suppression of free expression.

[44] Slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system are unrelated to the suppression of free expression. As explained above, the State's and the County's private gatherings restrictions are blanket bans applicable to all gatherings. *See* Section III-B-3-b-i, *supra.* Thus, the State's and the County's private gatherings restrictions do not prevent the expression of any particular message or viewpoint. Accordingly, the Court concludes that the compelling government interests at issue here are unrelated to the suppression of free expression. *Tomsha-Miguel*, 766 F.3d at 1048 (9th Cir. 2014) (concluding that a statute was unrelated to the suppression of free expression

because the statute "does not prevent the expression of any particular ***967** message or viewpoint") (quotation omitted).

(d) The incidental restriction on speech and assembly is no greater than is essential to slow the spread of COVID-19, protect high-risk individuals from infection, and prevent the overwhelming of the healthcare system.

[45] **[46]** Finally, the Court considers whether the State's and the County's private gatherings restrictions are "no greater than is essential to the furtherance of" the compelling government interests at stake here. *Wilson*, 835 F.3d at 1096 (quotation omitted). In the context of content neutral laws, a regulation need "not [be] ... the least restrictive or least intrusive means" of achieving the governmental interest. *Ward*, 491 U.S. at 798, 109 S.Ct. 2746. Rather, the regulation must "promote[ ] a substantial government interest that would be achieved less effectively absent the regulation .... [and] the means chosen [must] not [be] substantially broader than necessary to achieve the government's interest." *Id.* at 799–800, 109 S.Ct. 2746.

The Court concludes that the State's and the County's private gatherings restrictions are no greater than is essential to slow the spread of COVID-19, protect high-risk individuals, and prevent the overwhelming of the healthcare system for the following three reasons. First, the Ninth Circuit has held that some of the State's restrictions are narrowly tailored in the context of strict scrutiny, a higher standard than the intermediate scrutiny at issue here. Second, the Court's independent review of the State's and the County's private gatherings restrictions confirms they promote compelling government interests that would be achieved less effectively absent the restrictions. Finally, the State's and the County's private gatherings restrictions are not substantially broader than necessary to achieve the compelling government interests at issue here.

First, in *South Bay*, the Ninth Circuit concluded that some of the State's restrictions were narrowly tailored to achieve the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the healthcare system from being overwhelmed. *South Bay*, 985 F.3d at 1142–47 – ——.[11] The Ninth Circuit analyzed the State's restrictions on houses of worship in the widespread tier, which prohibit indoor worship services, but permit outdoor worship services with no limit on attendance. *Id.* at 1140–41, at *8.[12] The Ninth Circuit explained that these restrictions were narrowly tailored to slow the spread of COVID-19 because the State had used objective factors to evaluate the risk that COVID-19 would be spread by specific activities, including services at houses of worship. *Id.* at 1142–44 – ——. The State's analysis had concluded that services at houses of worship were more likely to spread COVID-19 than other activities, such as grocery shopping, retail shopping, and ***968** personal care services. *Id.* at 1143–47 – ——. Accordingly, the Ninth Circuit concluded that some of the Blueprint's restrictions satisfied the narrow tailoring requirement in the context of strict scrutiny, a higher threshold than the narrow tailoring requirement in the context of intermediate scrutiny. *See Ward*, 491 U.S. at 798, 109 S.Ct. 2746. Thus, if the Ninth Circuit held that the Blueprint's restrictions satisfied strict scrutiny, certainly the restrictions would satisfy the lower intermediate scrutiny.

Second, the State's and the County's private gatherings restrictions promote the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system, which would be achieved less effectively absent the restrictions. Indeed, gatherings are especially likely to result in the spread of COVID-19. Watt Decl. ¶¶ 42–44, Rutherford Decl. ¶¶ 60, 76–77; Cody Decl. ¶¶ 34–35. Gatherings are particularly risky because COVID-19 is often spread when individuals are in close proximity with an infected person for an extended period of time, which allows a sufficient dose of viral droplets or particles to move from an infected person to others. Rutherford Decl. ¶ 31; Watt Decl. ¶¶ 29, 33. The risk for gatherings, especially indoor gatherings, remains high even when attendees socially distance, wear face coverings, and use sanitizer. Watt Decl. ¶ 44, Rutherford Decl. ¶¶ 60, 75–77. COVID-19 is 18.7 times more likely to be transmitted in a closed environment than in an open-air environment. Watt Decl. ¶ 44. Summarizing the risks of indoor private gatherings, Dr. George Rutherford, Professor of Epidemiology and Biostatistics at the U.C. San Francisco School of Medicine, explains:

> As discussed, the proposed indoor gatherings would have a substantial risk of transmission, including because of the heightened risks involved in gatherings that bring together individuals from different households who are not regularly in contact with each other, gatherings that take place indoors, the likely close proximity of the individuals engaged in the activity, and the interaction and vocalization between individuals in close proximity to one another that would be expected at a gathering of this nature.

Rutherford Decl. ¶ 83.

Therefore, the consensus of public health experts is that limits on gatherings are essential to slow the spread of COVID-19. Rutherford Decl. ¶ 50; Stoto Decl. ¶ 15; Watt Decl. ¶¶ 51–52; Reingold Decl. ¶ 27; Cody Decl. ¶ 75; Maldonado Decl. ¶¶ 13, 18. Because of the unique dangers of gatherings in spreading COVID-19, slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system would be achieved less effectively without the State's and County's restrictions.

Third, the State's and the County's private gatherings restrictions are not substantially broader than necessary to achieve the compelling government interests in slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system for the following three reasons.

One, the State's and the County's private gatherings restrictions limit attendance. Haddad Decl. Exh. 12 (State Blueprint, limiting gatherings in counties in the widespread tier to three households outdoors); ECF No. 61 Exh. 3 (County's restrictions, limiting gatherings to 200 people outdoors). Limits on attendance are necessary because the bigger a gathering is, the more risk there is that COVID-19 ***969** will be spread. Watt Decl. ¶ 42. A bigger gathering increases the risk of spreading COVID-19 because it increases the number of people who can be infected and the likelihood that an infected person is present. *Id.*

Two, the State's and the County's private gatherings restrictions are significantly more restrictive of indoor gatherings than of outdoor gatherings. *See* Haddad Decl. Exh. 12 (State Blueprint, prohibiting indoor gatherings but allowing outdoor gatherings in counties in the widespread tier); ECF No. 61 Exh. 3 (County's restrictions, prohibiting indoor gatherings and permitting outdoor gatherings of 200 people or fewer). This distinction is aligned with the way that COVID-19 spreads. One study found that the likelihood of transmitting COVID-19 was 18.7 times greater in a closed environment than in an open-air environment. Watt Decl. ¶ 44. COVID-19 is more easily spread indoors because the virus disperses less easily indoors and can remain in the air for a longer period of time, which allows it to accumulate into large enough doses to infect people. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. Accordingly, the CDC advises that activities are safer when they are held in outdoor spaces. Cody Decl. ¶ 31. Following this guidance, the State and the County allow outdoor activities that are banned indoors. For instance, singing, chanting, and shouting—activities that generate droplets and aerosols—are allowed outdoors if participants wear face coverings and socially distance by at least six feet. Watt Decl. ¶ 81.

Three, the State's private gatherings restrictions are more restrictive of gatherings in counties with greater spread of COVID-19. *See* Haddad Decl. Exh. 12 (State Blueprint, permitting only outdoor gatherings with three households in the widespread tier and indoor gatherings with three households in the substantial tier). This tiered system recognizes that the more people are infected in a county, the more likely a gathering in that county has an infected person present. Rutherford Decl. ¶ 81. The tiered system thus imposes stricter restrictions in higher risk counties. By the same token, the tiered system minimizes restrictions in counties with lower prevalence of infection.

Thus, the Court concludes that the State's and County's private gatherings restrictions are no greater than are essential to slow the spread of COVID-19, protect high-risk individuals from infection, and prevent the overwhelming of the healthcare system. In sum, although the State's and the County's private gatherings restrictions are significant, the restrictions are being imposed to address the worst public health crisis in one hundred years, and " 'narrow' in the context of a public health crisis is necessarily wider than usual." *Givens*, 459 F. Supp. 3d at 1313 (concluding that California's ban on gatherings was a content neutral restriction that survived intermediate scrutiny). Thus, the Court concludes that the State's and the County's private gatherings restrictions satisfy intermediate scrutiny.

iii. Even assuming that the State's and the County's private gatherings restrictions are content based, they are narrowly tailored to serve a compelling government interest.

[47] Even assuming that the State's and the County's private gatherings restrictions are content based, they nevertheless are constitutional because they are narrowly tailored to serve a compelling government interest and thus satisfy strict scrutiny. *Reed*, 576 U.S. at 163, 135 S.Ct. 2218. The Court first considers whether the restrictions serve

a compelling government ***970** interest then discusses whether the restrictions are narrowly tailored.

(a) Slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system are compelling government interests.

As discussed above, *supra* Section III-B-2, the Court concludes that the State and the County have compelling government interests in slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system.

(b) The State's and the County's private gatherings restrictions are narrowly tailored.

[48] The State's and the County's private gatherings restrictions are narrowly tailored to slow the spread of COVID-19, protect high-risk individuals, and prevent the overwhelming of hospitals for three reasons. First, both the Ninth Circuit and other district courts have held that some of the Blueprint's restrictions are narrowly tailored. Second, the Court's independent review of the State's and County's restrictions confirms they are narrowly tailored. Third, Plaintiffs' proposed alternatives to the State's and the County's private gatherings restrictions are insufficient to halt the spread of COVID-19.

First, on January 22, 2021, the Ninth Circuit concluded that the Blueprint's restrictions on houses of worship in the widespread tier, which prohibit indoor worship services but permit outdoor worship services with no limit on attendance, were narrowly tailored to achieve the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from infection, and preventing the overwhelming of the healthcare system. *South Bay*, 985 F.3d at 1140–41, 1142–47 – ——. .[13] The Ninth Circuit explained that these restrictions are narrowly tailored because the State used objective factors to evaluate the risk that COVID-19 would be spread by specific activities, including services at houses of worship. *Id.* at 1142–44 – ——, at . The State's analysis concluded that services at houses of worship were more likely to spread COVID-19 than other activities, such as grocery shopping, retail shopping, and personal care services. *Id.* at 1143–47 – ——.

Other district courts analyzing the same restrictions have also concluded that they are narrowly tailored to achieve the compelling government interest of slowing the spread of COVID-19. *See Harvest Rock Church v. Newsom*, Case No. EDCV 20-6414-JGB, 2020 WL 7639584, at *9 (C.D. Cal. Dec. 21, 2020), *aff'd in part and rev'd in part*, 985 F.3d 771, (9th Cir. 2021) ("California's Blueprint is ... painstakingly tailored to address the risks of [COVID-19] transmission specifically"); *South Bay*, Case No. 20-CV-00865-BAS-AHG, 985 F.3d 771, 769–70, (S.D. Cal. Dec. 21, 2020), *aff'd*, 985 F.3d 1128, (9th Cir. 2021) (concluding that "California did exactly what the narrow tailoring requirement mandates—that is, California has carefully designed the different exemptions to match its goal of reducing community spread").

In the instant case, the Court similarly concludes that the State's and the County's private gatherings restrictions are narrowly tailored to reduce community spread, ***971** protect high-risk individuals, and prevent the healthcare system from being overwhelmed. As the Ninth Circuit emphasized, the State public health officials who were designing the Blueprint considered eight objective risk criteria related to the spread of COVID-19: (1) the ability to accommodate face covering wearing at all times; (2) the ability to physically distance between individuals of different households; (3) the ability to limit the number of people per square foot; (4) the ability to limit the duration of exposure; (5) the ability to limit the amount of mixing of people from different households; (6) the ability to limit the amount of physical interactions; (7) the ability to optimize ventilation; and (8) the ability to limit activities that are known to increase the possibility of viral spread, such as singing, shouting, and heavy breathing. Kurtz Decl. ¶ 20.

Here, Plaintiffs propose private gatherings. Applying these objective factors, private gatherings are very risky for the spread of COVID-19. All eight of these factors show that private gatherings greatly risk the spread of COVID-19. At private gatherings, people often do not use face coverings (Factor 1). Nor do people maintain physical distancing (Factor 2) or limit the number of people per square foot (Factor 3). The time spent in close proximity to others is longer than in public settings (Factor 4), allowing a sufficient dose of viral droplets or particles to move from one person to others. Watt Decl. ¶¶ 42–44; Rutherford Decl. ¶¶ 60, 76–77; Cody Decl. ¶¶ 34–35. People from different households mix (Factor 5) and physically interact (Factor 6). Ventilation is limited indoors (Factor 7). Watt Decl. ¶ 44; Rutherford

Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. Activities such as shouting can be involved, especially in gatherings like the political rallies that Tandon wishes to hold (Factor 8). Even where face coverings and strict physical distancing are used, indoor gatherings involve six of the other eight factors that correspond to a higher risk of spreading COVID-19, and outdoor gatherings involve five of the other eight factors. Thus, as the vast consensus of public health experts believes, gatherings must be limited in order to slow the spread of COVID-19. Rutherford Decl. ¶ 50; Stoto Decl. ¶ 15; Watt Decl. ¶¶ 51–52; Reingold Decl. ¶ 27; Cody Decl. ¶ 75; Maldonado Decl. ¶¶ 13, 18.

Second, as discussed above, the Court's independent review of the State's and the County's private gatherings restrictions confirms that the restrictions are narrowly tailored for three reasons: (1) they limit attendance at gatherings; (2) they place stricter limits on indoor gatherings than outdoor gatherings; and (3) the State's restrictions place stricter limits on gatherings in counties where COVID-19 is more prevalent. *See* Section III-B-3-b-iii-(d), *supra.*

Finally, Plaintiffs' two less restrictive alternatives are insufficient to reduce community spread, protect high risk individuals, and prevent the healthcare system from being overwhelmed. Plaintiffs first propose focusing on vulnerable populations, but the Court has already explained why that would be insufficient to meet the compelling government interests at stake. *See* Section III-B-2-d, *supra.* Plaintiffs also propose indoor gatherings with face coverings and physical distancing. However, as the Court explained more fully in Section III-B-3-b-i, *supra*, even when people wear face coverings and physically distance, a significant risk of infection remains, particularly when people get together for extended periods and in environments with limited ventilation, such as indoors. Watt Decl. ¶¶ 38, 45–46, 48; Rutherford Decl. ¶¶ 60, 76–77, 84.

***972** Moreover, the State's and County's experience bears out the importance of not only wearing a face covering and social distancing but also limiting gatherings. At least 23 of 30 California counties experiencing increases in their COVID-19 cases identified gatherings as a cause of the rise in cases. Watt Decl. ¶ 41. By contrast, when the State has put restrictions on private gatherings into place, there has been a decrease in cases. *Id.* ¶¶ 62, 93. The County has also seen a decrease in cases when gatherings have been restricted. Cody Decl. ¶ 19. Accordingly, the State's and County's restrictions are the least restrictive alternative that will reduce community spread, protect high risk individuals, and prevent the healthcare system from being overwhelmed.

Three recent United States Supreme Court and the Ninth Circuit decisions did not address the restrictions at issue in the instant motion. Instead, those decisions struck down the imposition, without consideration of capacity limits, of small attendance limits on large houses of worship. By contrast, Plaintiffs in the instant case do not challenge restrictions on houses of worship. *See* Tr. of Dec. 17, 2020 Hearing at 21:15–19, ECF No. 60 (The Court: "Are any of these plaintiffs houses of worship, or alleging restrictions on houses of worship? It seems like it's more focused on private gatherings that have religious purposes, like Bible studies in the home." Plaintiffs' Counsel: "I think that's right, Your Honor."). Instead of restrictions on houses of worship, Plaintiffs challenge restrictions on private gatherings, including gatherings at private homes. Private homes are significantly smaller and less ventilated spaces than the large houses of worship at issue in those three cases, which the Court now addresses.

In *Roman Catholic Diocese v. Cuomo*, the United States Supreme Court analyzed whether New York's COVID-related restrictions on houses of worship violated the free exercise of religion. 141 S. Ct. at 66. The restrictions at issue used a color-coded tiered system to assess coronavirus risk and limited attendance at services to 10 people in "red" zones and 25 people in "orange" zones. *Id.* Yet in the same zones, "essential businesses" such as acupuncture facilities, campgrounds, and garages "could admit as many people as they wished." *Id.* Because the New York restrictions "single[d] out houses of worship for especially harsh treatment," the United States Supreme Court concluded that the restrictions were not neutral and generally applicable. *Id.* (quoting *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217).[14] Furthermore, because the New York restrictions imposed limits on worship services that were not tethered to the capacity of the houses of worship, the United States Supreme Court concluded that the New York restrictions were not narrowly tailored. *Id.* at 67.

Subsequently, in *Dayton Valley*, the Ninth Circuit considered a Nevada directive that prohibited attendance of more than 50 people at indoor worship services, but permitted casinos, bowling alleys, retail businesses, restaurants, and arcades to operate at 50 percent of their fire-code capacity. 982 F.3d at 1230. Because the Nevada directive "treat[ed] numerous secular activities and entities significantly better than religious worship services," the Ninth Circuit concluded

that the directive was not neutral and generally applicable. ***973** *Id.* at 1233. The Ninth Circuit also held that the 50-person attendance limit on all houses of worship was not narrowly tailored because Nevada had not tied attendance limits to the size of the house of worship. *Dayton Valley*, 982 F.3d at 1234.

Similarly, in *South Bay*, the Ninth Circuit considered the Blueprint's restrictions on houses of worship, which are not at issue in the instant case. At the widespread tier, houses of worship in counties in the widespread tier can only hold religious services outdoors, but commercial entities such as grocery stores and retail stores can operate indoors. *Id.* at 1141–42. Because there were "different capacity restrictions on religious services relative to non-religious activities and services," the Ninth Circuit held that the Blueprint's restrictions on houses of worship were not neutral and generally applicable. *Id.* at 1141–43 – ——, . The Ninth Circuit later enjoined the Blueprint's 100 and 200 person attendance limits on houses of worship in the substantial and moderate tiers because these limits were not tied to the size of the house of worship. 985 F.3d at 1150–52 – —— .

The restrictions at issue here, which prohibit private gatherings, are distinguishable from the restrictions at issue in those cases, which restricted services at houses of worship. Indeed, the Gannons seek to hold gatherings at their private home, which is a significantly smaller space than the large houses of worship at issue in *Roman Catholic Diocese*, *Dayton Valley*, and *South Bay*, and thus more likely to lead to the spread of COVID-19. Watt Decl. ¶ 42. In a smaller space, attendees are likely to be in higher density and more proximity to one another. "[T]he closer the proximity between individuals who gather, and the longer they are in close proximity, the more opportunity there is for the virus to be transmitted via droplets or aerosolized particles containing the virus." Rutherford Decl. ¶ 74. Moreover, smaller spaces have more limited ventilation, which increases the likelihood that COVID-19 will spread. Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 60, 76–77; Reingold Decl. ¶ 20; Cody Decl. ¶ 29. In addition, at private gatherings, it is "uncertain whether participants in these gatherings would maintain social distancing and face coverings during the entirety of the gatherings." Rutherford Decl. ¶ 84. *See supra* Section III-B-3-b-i (analyzing private gatherings in more detail).

The County's private gatherings restrictions are also distinguishable from the restrictions at issue in *Roman Catholic Diocese*, *South Bay*, and *Dayton Valley*. Unlike the large houses of worship in those cases, Tandon has not shown that the County's private gathering restrictions[15] are disproportionate to the space in which he plans to hold gatherings.

In sum, the Court concludes that the State's and the County's private gatherings restrictions are content neutral and satisfy intermediate scrutiny. In the alternative, even assuming that the State's and the County's private gatherings restrictions are not content neutral, these restrictions nonetheless satisfy strict scrutiny because they are narrowly tailored to reduce community spread, protect high risk individuals, and prevent the healthcare system from being overwhelmed. Thus, Plaintiffs have not shown that they are likely to succeed on their free speech and assembly claims.

***974 4. Plaintiffs are not likely to succeed on the merits of their free exercise and assembly claims.**

Plaintiffs Wong and Busch argue that the State's private gatherings restrictions violate their First and Fourteenth Amendment rights to free exercise and assembly by preventing them from holding Bible studies at their homes.[16] As discussed above, the State's private gatherings restrictions prohibit indoor gatherings and limit outdoor gatherings to three households or fewer. *See* Section III-A, *supra.* The Court notes that the State does not limit the number of attendees at any outdoor house of worship service.

[49] As a general matter, "[t]he Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment ... provides that 'Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*[.]' " *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 876–77, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) (quoting U.S. Const., amend. I). To determine whether a law prohibits the free exercise of religion, courts must first determine whether the law "is neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). "[A] law that is neutral and of general applicability" must only pass rational basis review, meaning that it "need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* By contrast, a law that is not neutral and generally applicable must survive strict scrutiny, meaning that it "must be justified by a compelling

government interest and must be narrowly tailored to advance that interest." *Id.* at 531–32, 113 S.Ct. 2217.

Below, the Court concludes that the State's private gatherings restrictions are (1) neutral and generally applicable; and (2) rationally related to a legitimate government interest. Moreover, the Court finds that even assuming the restrictions are not neutral and generally applicable, they would satisfy strict scrutiny.

a. The State's private gatherings restrictions are neutral and generally applicable.

[50] **[51]** A law is not neutral "if the object of a law is to infringe upon or restrict practices because of their religious motivation." *Lukumi*, 508 U.S. at 533, 113 S.Ct. 2217. "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Id.* Therefore, where laws "make no reference to any religious practice, conduct, belief, or motivation, they are facially neutral." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015).

[52] A law is not generally applicable if it, "in a selective manner[,] impose[s] burdens only on conduct motivated by religious belief." *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. Accordingly, "[a] law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect." ***975** *Stormans*, 794 F.3d at 1079 (citing *Lukumi*, 508 U.S. at 542–46, 113 S.Ct. 2217). "Neutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Id.* at 531, 113 S.Ct. 2217.

[53] As explained above, for counties in the widespread tier, the State's private gatherings restrictions prohibit all indoor gatherings and limit outdoor gatherings to three households. Haddad Decl. Exh. 12; Dunn Reply Decl. Exh. 4. The State's private gatherings restrictions define gatherings as "social situations that bring together people from different households at the same time in a single space or place." *Id.*

The State's private gatherings restrictions are neutral for two reasons. For one, the State's object is not to restrict religious gatherings because they are religious in nature, but because they are gatherings. *Lukumi*, 508 U.S. at 523, 113 S.Ct. 2217. For another, the State's restrictions "make no reference to any religious practice, conduct, belief, or motivation." *Stormans*, 794 F.3d at 1076.

[54] The State's private gatherings restrictions are also generally applicable. The State's private gatherings restrictions apply to *all* gatherings, whether religious or secular. *Lukumi*, 508 U.S. at 543, 113 S.Ct. 2217. Thus, the State's private gatherings restrictions are neutral and generally applicable.

Resisting this conclusion, Plaintiffs rely on the same body of case law, already described by the Court above, *supra* Section III-B-3-b-iii, which held that certain COVID-related restrictions on *houses of worship* were neither neutral nor generally applicable. *See Roman Catholic Diocese*, 141 S. Ct. at 67; *South Bay*, 985 F.3d at 1140–41, ; *Dayton Valley*, 982 F.3d at 1233. Those cases are inapposite. They addressed restrictions that singled out houses of worship and treated them less favorably than secular entities. By contrast, the State's private gatherings restrictions treat religious and secular gatherings alike and make no reference to religion. Haddad Decl. Exh. 12; Dunn Reply Decl. Exh. 4.

At least one court of appeals panel has distinguished *Roman Catholic Diocese* on similar grounds. In *Commonwealth* ex rel. *Danville Christian Academy v. Beshear*, religious schools brought a Free Exercise Clause challenge to a Kentucky order prohibiting in person instruction at all public and private schools, religious or not. 981 F.3d 505, 507 (6th Cir. 2020), *injunction denied without prejudice*,[17] —— U.S. ——, 141 S. Ct. 527, 208 L.Ed.2d 504 (2020).[18] ***976** The district court granted a preliminary injunction, but the Sixth Circuit granted a stay of the preliminary injunction and concluded that the plaintiffs were unlikely to succeed on the merits of their Free Exercise claim. *Id.* The Sixth Circuit emphasized that the order "applies to all public and private elementary and secondary schools in the Commonwealth, religious or otherwise; it is therefore neutral and of general applicability and need not be justified by a compelling government interest." *Id.* at 509. The Sixth Circuit distinguished *Roman Catholic Diocese* because the restrictions at issue in that case "appl[ied] specifically to houses of worship." *Id.*[19] Furthermore, "the order at issue in *Roman Catholic Diocese* treated schools, factories, liquor stores, and bicycle repair shops, to name only a few, 'less harshly' than houses of worship." *Id.* This same reasoning applies to the State's private gatherings restrictions. Like Kentucky's restrictions on schools, which incidentally burdened religious schools, the

State's private gatherings restrictions incidentally burden the religious gatherings that Plaintiffs seek to hold. In sum, recent case law only underscores that the State's private gatherings restrictions—unlike restrictions invalidated elsewhere—are neutral and generally applicable.

With little case law to support them, Plaintiffs last argue that their in-home gatherings are being treated more harshly than other activities, such as filming, going to laundromats, and visiting hotels. Mot. at 20; Reply at 14. Plaintiffs specifically assert that some filming can take place in a home even where Bible studies are banned. Reply at 14. Plaintiffs contend that these exempted activities inflict identical or increased health risks. Mot. at 20. Thus, Plaintiffs argue that the Blueprint is underinclusive, treating comparable secular activities more favorably.

However, to determine whether a restriction is underinclusive, courts must compare religious conduct with "analogous non-religious conduct." *Lukumi*, 508 U.S. at 546, 113 S.Ct. 2217. As explained above, the Court concludes that private gatherings are distinct from, and more likely to spread COVID-19 than, socially distanced commercial activities. *See* Section III-B-3-b-i, *supra*. Recognizing the unique dangers of gatherings, the State has treated all gatherings, religious and non-religious, alike. Haddad Decl., Exh. 12. The fact that the State treats dissimilar activities differently is of no import. Because the State treats all gatherings, religious and secular, the same, the State's private gatherings restrictions are neutral and generally applicable.

b. The State's private gatherings restrictions are rationally related to a legitimate government interest.

[55] Because the State's private gatherings restrictions are neutral and generally applicable, they need only satisfy rational basis review. *Lukumi*, 508 U.S. at 531, 113 S.Ct. 2217. Under rational basis review, courts must uphold laws "if they are rationally related to a legitimate government purpose." *Stormans*, 794 F.3d at 1084. As explained above, the Court has already found that the State's private gatherings restrictions are rationally related ***977** to a legitimate government interest. *See* Section III-B-2, *supra*.

c. The State's private gatherings restrictions are narrowly tailored to achieve a compelling government interest

In the alternative, even assuming the State's private gatherings restrictions are not neutral and generally applicable, they still are narrowly tailored to achieve the compelling government interests of slowing the spread of COVID-19, protecting high-risk individuals from illness, and preventing the overwhelming of the healthcare system. The Court has already found that the State's private gatherings restrictions are narrowly tailored to achieve these compelling government interests. *See* Section III-B-3-b-iii, *supra*. Accordingly, Plaintiffs have not shown that they are likely to succeed on the merits of their free exercise claims.

C. Only some Plaintiffs are likely to suffer irreparable harm in the absence of an injunction.

[56] For the Court to grant a preliminary injunction, a plaintiff must show that she is likely to suffer irreparable harm in the absence of an injunction. *Winter*, 555 U.S. at 20, 129 S.Ct. 365. "[I]rreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Az. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017).

The Court discusses Plaintiffs' allegations of irreparable harm in three groups: (1) Plaintiffs who claim monetary injury; (2) Plaintiffs who have been or are under threat of being driven out of business; and (3) Plaintiffs who suffer loss of political and religious freedoms.

[57] First, Plaintiffs Khanna, Beaudet, and Evarkiou are business owners who claim monetary injury. *See* Khanna Decl. ¶ 7 (stating that the State and the County orders have led to a loss of revenue and profits for Khanna's winery business); Beaudet Decl. ¶ 3 (stating that Beaudet's restaurant has suffered significant losses); Evarkiou Decl. ¶ 5 (stating that Evarkiou's salon has lost revenue). Monetary injury alone is insufficient to show irreparable harm. *Az. Dream Act Coal.*, 855 F.3d at 978. Thus, Plaintiffs Khanna, Beaudet, and Evarkiou have not shown that they are likely to suffer irreparable harm in the absence of an injunction.

[58] Second, Richards, the gym owner, and Mansour, the facial bar owner, claim that they have been or will be driven out of business. Richards Reply Decl. ¶ 4 (stating that she has been driven out of business by COVID-related restrictions); Mansour Decl. ¶ 7 (stating that "it is unclear whether [her] business will ever recover from [the restrictions]"). The Ninth Circuit has concluded that "[t]he threat of being driven out of business is sufficient to establish irreparable harm.' " *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019)

(quoting *Am. Passage Media Corp. v. Cass Commc'ns, Inc.*, 750 F.2d 1470, 1474 (9th Cir. 1985)). Accordingly, Plaintiffs Richards and Mansour have shown that they are likely to suffer irreparable harm.

[59] Finally, Plaintiffs Tandon, the Gannons, Busch, and Wong claim loss of their political and religious freedoms under the First Amendment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Moreover, courts have held that plaintiffs challenging COVID-related restrictions on religious freedoms are likely to suffer irreparable harm in the ***978** absence of an injunction. *See Roman Catholic Diocese*, 141 S. Ct. at 67–68 (concluding that, in the absence of injunctive relief, New York's COVID-19 related restrictions on houses of worship would cause irreparable harm); *South Bay*, 2021WL 222814, at *16 ("We agree that South Bay is suffering irreparable harm by not being able to hold worship services in the Pentecostal model to which it subscribes."); *Dayton Valley*, 982 F.3d at 1234 (holding that Nevada's restrictions on houses of worship would cause irreparable harm). Because Plaintiffs Tandon, the Gannons, Busch, and Wong claim loss of their political and religious freedoms, they have shown that they are likely to suffer irreparable harm in the absence of an injunction.

D. An injunction would not be in the public interest.

[60] **[61]** **[62]** The final preliminary injunction factor requires that plaintiffs show that the balance of equities tips in their favor and that an injunction would advance the public interest. *Winter*, 555 U.S. at 20, 129 S.Ct. 365. The balance of equities factor focuses on "the effect of each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24, 129 S.Ct. 365. By contrast, "[t]he public interest inquiry primarily addresses impact on non-parties rather than parties." *League of Wilderness Defs./Blue Mountains Biodiversity Project. v. Connaughton*, 752 F.3d 755, 756 (9th Cir. 2014) (quoting *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)). When the government is a party, the analysis of these two factors merges. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009)). Thus, the Court must consider what "public consequences" would result from issuing an injunction. *See Winter*, 555 U.S. at 24, 129 S.Ct. 365 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982)).

[63] Here, an injunction would not be in the public interest. In reaching this conclusion, the Court covers well-trodden ground. In *South Bay*, the Ninth Circuit affirmed a district court's conclusion that enjoining the Blueprint's restrictions on houses of worship in the widespread tier would not be in the public interest. *See South Bay*, 985 F.3d at 1149–51 – ——, . The Ninth Circuit explained that if an injunction were granted, "the public will be further endangered by both the virus and the collapse of the state's health system." *Id.* at 1150, at *17. The Ninth Circuit stated that "it is difficult to see how allowing more people to congregate indoors will do anything other than lead to more cases, more deaths, and more strains on California's already overburdened healthcare system." *Id.*

The Court agrees. The Court has concluded that the State's and County's restrictions, including the State's and the County's private gatherings restrictions, the County's Personal Care Services Directive, and the County's Mandatory Directive for Outdoor Dining, are carefully designed to slow the spread of COVID-19, protect high-risk individuals, and prevent the overwhelming of the healthcare system. *See* Section III-B-1-a, *supra.* If the Court overrode the State's and County's public health officials and enjoined these restrictions, then more deaths, more serious illnesses, and more strain on California's already overburdened healthcare system would result. The Court discusses each harm in turn.

First, if the Court enjoined the State's and County's restrictions, some people in the State and the County would be at increased risk of dying from COVID-19. As of February 3, 2021, COVID-19 has ***979** killed over 445,000 people in the United States. The disease has not spared the young or the old. Twenty percent of those who have died of COVID-19 in the United States have been younger than 65 years old, and nearly two thousand people who have died of COVID-19 were younger than 30 years old as of February 3, 2021. Lipsitch Decl. ¶ 28; Rutherford Decl. ¶ 97; *CDC COVID Data Tracker.* In total, the United States is projected to face a death toll as high as the number of Americans that were killed in battle in World War II. Rutherford Decl. ¶ 26.

Second, if the Court enjoined the State's and County's restrictions, some people in the State and the County would be at increased risk of serious illness from COVID-19. COVID-19 can cause pneumonia, respiratory failure, other organ failure, cardiovascular events, strokes, and seizures. Rutherford Decl. ¶ 21; Watt Decl. ¶ 22; Reingold Decl. ¶ 14. Although the risk of severe illness from COVID-19 increases steadily with age, many younger people have

become seriously ill from COVID-19. Watt Decl. ¶ 22; Reingold Decl. ¶ 15. For example, the National Collegiate Athletic Association found that college football players who had recovered from asymptomatic or mildly symptomatic COVID-19 infections had a high rate of myocarditis, which can lead to cardiac arrest with exertion. Rutherford Decl. ¶ 25. People of any age with certain underlying conditions and pregnant women are at increased risk of severe illness from COVID-19. *Id.*; Rutherford Decl. ¶ 99. Approximately six in ten Americans have been diagnosed with a chronic medical condition, and four in ten have been diagnosed with more than one of these conditions. Reingold Decl. ¶ 17. The conditions are more common in, and the related burden of COVID-19 deaths is likely to fall on, communities of color and low-income communities. Lipsitch Decl. ¶ 28; Garcia Decl. ¶¶ 9–15.

Third, if the Court enjoined the State's and County's restrictions, the strain on California's already overburdened healthcare system would increase further. Even one of Plaintiffs' experts, Dr. Bhattacharya, concedes that restrictions might be justified "where hospital overcrowding is predicted to occur" because overcrowding and "the unavailability of sufficient medical personnel" "might induce avoidable mortality." Bhattacharya Reply Decl. ¶ 15. In their briefs, Plaintiffs concede that the State can act to permit the healthcare system from being overwhelmed. *See* Mot. at 1 ("Governor Newsom was correct to focus on the risk that hospitals would be overrun"), 15 (acknowledging "the compelling interest in preventing hospitalizations and deaths resulting from COVID-19").

Plaintiffs and Plaintiffs' experts relied on the now obsolete premise that California hospitals never reached their capacities. Mot. at 1, 9; Reply at 20; Bhattacharya Decl. ¶ 21; Bhatia Decl. ¶ 32, Bhattacharya Reply Decl. ¶¶ 13–17; Bhatia Reply Decl. ¶ 31. Since Plaintiffs' motion and declarations were submitted, the virus has surged in California, and California's hospitals have been overburdened. At times, the State and various counties, including Santa Clara County, have had 0 percent remaining ICU capacity. *See About COVID-19 Restrictions*, California For All, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last accessed January 19, 2021); COVID-19 Hospitalizations Dashboard, County of Santa Clara Emergency Operations Center, available at https://www.sccgov.org/sites/covid19/Pages/dashboard-hospitals.aspx. As the Ninth Circuit explained on January 22, 2021, "paramedics in Los Angeles have been instructed to conserve oxygen in treating patients and not to ***980** bring patients to the hospital who have little chance of survival." *South Bay*, 985 F.3d at 1135 . Accordingly, the State's and County's restrictions will prevent overwhelming the healthcare system.

In response, Plaintiffs make two arguments as to why an injunction would still be in the public interest. Neither carries the day. First, Plaintiffs argue that an injunction is necessary to halt violations of their constitutional rights. *See Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights."). However, the Court above has found that Plaintiffs' constitutional rights have not been violated. Moreover, religious worship is widely available to Plaintiffs at houses of worship. Specifically, the State permits houses of worship to hold outdoor worship services with no attendance limits in the widespread tier. *South Bay*, 2021 WL 222814, at *16–*17. Outdoor gatherings and worship services are particularly viable in year-round warm climates like California's. *See id.* ("Given the obvious climatic differences between San Diego in the winter and say, New York, the ... allowance for outdoor services is much more than 'lip service' to the demands of the First Amendment."). In addition, even in the widespread tier, there are no limits on indoor activities "other than worship services" at houses of worship. *Gateway City Church*, 2021 WL 308606, at *16–*17 (N.D. Cal. Jan. 29, 2021).[20] For example, individual parishioners are permitted to interact with clergy inside houses of worship. *Id.* at *14.

As for the lower three tiers, indoor worship services are permitted at houses of worship. Specifically, houses of worship can hold indoor worship services at 25 percent capacity in the substantial tier and 50 percent capacity in the moderate and minimal tiers. *South Bay*, 985 F.3d at 1149–51 – ____, .

Plaintiffs also can hold small gatherings at their homes. In the widespread tier, Plaintiffs can hold outdoor gatherings including up to three households. Haddad Decl. Exh. 12. In the substantial, moderate, and minimal tiers, Plaintiffs can hold indoor gatherings of up to three households. *Id.* As a political candidate, Tandon can hold even outdoor gatherings of up to 200 people even in the widespread tier. Bussey Decl. Exhs. A, G.

Second, Plaintiffs argue that an injunction would prevent other harms associated with COVID-related restrictions, including mental health issues, substance abuse, hunger, and

negative impacts on children's development. Bhattacharya Reply Decl. ¶ 37–41; Bhatia Decl. ¶ 95. However, some of these harms are at least partially due to the pandemic itself. For example, even if the Court enjoined COVID-related restrictions, private individuals, businesses, and organizations might choose to continue their quarantines, such that people would continue to experience the harms referenced by Plaintiffs. In fact, Plaintiffs' expert emphasizes the extent to which many individuals have made self-quarantine decisions in parallel to the State's and County's restrictions. Bhatia Reply Decl. ¶¶ 60, 62–63. In addition, if the Court enjoined ***981** the restrictions, the pandemic will worsen, serious illnesses and death would increase, which could further exacerbate the issues to which Plaintiffs point.

Given the unique risks of gatherings in spreading COVID-19; the deaths and serious illnesses that result from COVID-19; and the overwhelming strain on the healthcare system, the Court finds that enjoining the State's and County's restrictions on Plaintiffs' gatherings and on Plaintiffs' businesses would not be in the public interest. Therefore, Plaintiffs have not carried their burden of demonstrating that an injunction is in the public interest.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Plaintiffs' motion for a preliminary injunction.

IT IS SO ORDERED.

All Citations

517 F.Supp.3d 922, 114 Fed. R. Evid. Serv. 1397

Footnotes

1 The Court takes judicial notice of the most recently reported numbers of COVID-19 infections and deaths. The Court may take judicial notice of matters that are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Courts take judicial notice of information found on government agency websites, such as the number of COVID-19 infections and deaths. *See Paralyzed Veterans of Am. v. McPherson*, 2008 WL 4183981, at *5–6 (N.D. Cal. Sept. 9, 2008) (citing circuit and district court cases). However, to the extent any facts are subject to reasonable dispute, the Court will not take judicial notice of those facts. *See Lee v. City of L.A.*, 250 F.3d 668, 689 (9th Cir. 2001) ("A court may take judicial notice of matters of public record .... But a court may not take judicial notice of a fact that is subject to reasonable dispute.") (internal quotation marks omitted), *overruled on other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

2 The CDC previously stated that those in specific age thresholds were more at risk for severe illness. Watt Decl. ¶ 22. However, the CDC now warns that the risk of severe illness increases steadily as a person ages, and it is not only those over 65 who are most at risk. *Id.*

3 The parties include the State and the County restrictions at issue in this case as exhibits to their declarations. The Court cites to these restrictions throughout the order by citing to the exhibits.

4 The appellants in *South Bay* have asked the United States Supreme Court for an emergency writ of injunction. *See* Emergency Application for Writ of Injunction Relief Requested before Sunday January 31, 2021, No. 20-746 (U.S. filed Jan. 25, 2021). That application is pending.

5 The declaration of Lilit Tovmasian addresses the State's policies for licensed residential care facilities for the elderly and adult residential facilities, which are considered non-medical facilities. Tovmasian Decl. ¶ 3. By contrast, the declaration of Heidi Steinecker addresses the State's policies for skilled nursing facilities, which are considered medical facilities. Steinecker Decl. ¶ 10.

6 Under Ninth Circuit precedent, " 'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011); *accord Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018) (holding that these factors are "on a sliding scale"). Thus, "when the balance of hardships tips sharply in the plaintiff's favor, the plaintiff need demonstrate only 'serious questions going to the merits.' " *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (quoting

All. for the Wild Rockies, 632 F.3d at 1135). In this case, the Court concludes that the balance of hardships does not tip sharply in Plaintiffs' favor. *See* Section III-C, *infra* (analyzing the balance of the hardships and the public interest, which merge when the government is a party). Accordingly, the Court does not consider whether Plaintiffs have demonstrated serious questions going to the merits.

7 When Plaintiffs filed the instant motion, Plaintiffs challenged the County's 100 person limit on indoor gatherings and 200 person limit on outdoor gatherings. Mot. at ii. However, on November 16, 2020, before Defendants filed their opposition to the instant motion, the County released an updated Mandatory Directive for Gatherings that prohibited indoor gatherings when the County is in the widespread tier, but did not change the 200 person limit on outdoor gatherings. Bussey Decl. Exh. A (stating that "all indoor gatherings are currently prohibited"); Exh. G (stating that "[o]utdoor gatherings may not exceed 200 people under any circumstances"). Regardless of whether Plaintiffs challenge the County's 100 person limit or the County's prohibition on indoor gatherings in the widespread tier, the Court's analysis is the same.

8 In their reply brief, Plaintiffs argue that the restrictions should be subject to "rational basis 'with a bite' " because the State's and County's regulations have resulted in the closure or restriction of hundreds of thousands of businesses. Reply at 15. However, Plaintiffs do not cite to, and the Court has not found, United States Supreme Court or Ninth Circuit precedent holding that rational basis "with a bite" would apply in these circumstances. Moreover, even if the Court considers the restrictions under the rational basis "with a bite" standard, the Court would still uphold the restrictions because they are supported by ample scientific evidence regarding the ways in which COVID-19 spreads.

9 As the State and the County stress, the vast majority of public health experts embrace restrictions on gatherings. Although Plaintiffs' experts do not, this does not mean that the State's and County's restrictions are irrational. In fact, in *Jacobson*, where mandatory vaccination for smallpox was at issue, the United States Supreme Court acknowledged that "some physicians of great skill and repute[ ] do not believe that vaccination is preventive of smallpox." *Jacobson*, 197 U.S. at 34, 25 S.Ct. 358. However, the Court nevertheless rejected the plaintiff's challenge and noted that "most members of the medical profession" disagreed with these physicians about the importance of vaccination. *Id.* at 34–35, 25 S.Ct. 358. "The possibility that the belief may be wrong ... is not conclusive; for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases." *Id.* at 35, 25 S.Ct. 358. The same is true here.

10 In the instant motion, Tandon challenged the County's 100 person limit on indoor gatherings. Mot. at ii; *see supra* footnote 7. However, before Defendants filed their opposition to the instant motion, the County updated its restrictions to prohibit all indoor gatherings. Bussey Decl. Exh. A (stating that "all indoor gatherings are currently prohibited").

11 Following the Ninth Circuit's opinion in South Bay, the Ninth Circuit decided *Harvest Rock Church v. Newsom*, which followed *South Bay*. 985 F.3d at 771–72, (9th Cir. 2021).

12 At the time of the Ninth Circuit's opinion in *South Bay*, the Regional Stay at Home Order remained in effect. However, the Ninth Circuit considered not only the restrictions in the Regional Stay at Home Order but also the restrictions in the Blueprint. *South Bay*, 985 F.3d at 1140 n.20, ("Because the State considered the same neutral risk criterial in formulating both the Regional Stay at Home Order and the Blueprint ... we consider the framework as a whole.").

13 Following the Ninth Circuit's opinion in South Bay, the Ninth Circuit decided *Harvest Rock Church v. Newsom*, which followed *South Bay*. 985 F.3d 771, 771–72, (9th Cir. 2021).

14 Furthermore, in *Roman Catholic Diocese*, the record included "statements made in connection with the challenged rules, [which could] be viewed as targeting the 'ultra-Orthodox [Jewish] community.' " 141 S. Ct. at 66. By contrast, here, Plaintiffs have not pointed to any evidence that the State enacted its generally applicable private gatherings restrictions in order to target religious groups.

15 As discussed in footnote 7 *supra*, after Plaintiffs filed the instant motion, the County released an updated Mandatory Directive for Gatherings that prohibited indoor gatherings and permitted only outdoor gatherings of up to 200 people.

16 On January 29, 2021, another court in this district enjoined: (1) the Blueprint's 100 and 200 person limits on services at houses of worship in the substantial and moderate tiers, and (2) the State's restrictions on other activities within houses

of worship, such as a parishioner interacting with clergy. *See* *Gateway City Church v. Newsom*, 2021 WL 308606, at *16–*17 (N.D. Cal. Jan. 29, 2021). As explained above, the instant motion does not raise any restrictions regarding houses of worship. *See* Section III-A, *supra.*

17 On December 17, 2020, the United States Supreme Court declined to enjoin the Sixth Circuit's decision in *Beshear.* —— U.S. ——, 141 S. Ct. 527, 208 L.Ed.2d 504 (2020). The United States Supreme Court noted that Kentucky students would be going on holiday break starting the following day, December 18, 2020, and school would not resume until January 4, 2020. *Id.* The United States Supreme Court stated that "[u]nder all the circumstances, especially the timing and the impending expiration of the Order, we deny the application without prejudice to the applicants or other parties seeking a new preliminary injunction if the Governor issues a school-closing order that applies in the new year." *Id.*

18 Following the Sixth Circuit's decision in *Beshear*, another panel of the Sixth Circuit concluded that an Ohio county's order prohibiting instruction in schools, including religious schools, was not neutral and generally applicable. *See* *Monclova Christian Academy, et al. v. Toledo-Lucas County Health Department*, 984 F.3d 477, 479–82 (6th Cir. 2020). *Monclova* reached that conclusion by comparing schools to other comparable secular actors, an analysis that *Beshear* did not engage in. *Id.* at 979–82. The *Monclova* panel justified its analysis in part by citing to Justice Gorsuch's dissent from the United States Supreme Court's decision not to grant injunctive relief. *Id.* at 479–81.

19 Conversely, following the United States Supreme Court's decision in *Roman Catholic Diocese*, the Second Circuit concluded that New York's restrictions were not neutral because they "explicitly impos[ed] on 'houses of worship' restrictions inapplicable to secular activities." *Agudath Israel of America v. Cuomo*, 983 F.3d 620, 631 (2d. Cir. 2020). The State's restrictions at issue here do not explicitly impose restrictions on religious gatherings that are not imposed on secular gatherings—rather, all gatherings are subject to the same restrictions.

20 *Gateway City Church* enjoined "the Blueprint's restrictions on activities at places of worship *other than worship services.*" *Gateway City Church*, 2021 WL 308606, at *17 (emphasis added). As the *Gateway City Church* Court explained, activities other than worship services do not involve "people of separate households gathering in close proximity for extended periods of time." *Id.* at *14. Rather, these activities involve individual parishioners from different households—or multiple members of the same household—interacting with clergy in a way that "likely involve[s] no more risk than certain personal care services." *Id.*

R.K. v. Lee

Decided Oct 22, 2021

3:21-cv-00725

10-22-2021

R.K. et al., Plaintiffs, v. GOVERNOR BILL LEE, in his official capacity as GOVERNOR OF TENNESSEE et al., Defendants.

WAVERLY D. CRENSHAW, JR. CHIEF UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

WAVERLY D. CRENSHAW, JR. CHIEF UNITED STATES DISTRICT JUDGE

Pending before the Court is Plaintiffs' fully briefed Motion for Preliminary Injunction. (Doc. Nos. 4, 4-1, 34, 35, 39, 45, 52, 54-1[1], 59, 80, 81, 82, 83). Plaintiffs seek relief for themselves and a class of similarly situated disabled public-school students. Specifically, they request an order enjoining Governor Lee from enforcing Executive Order No. 84, which gives parents a unilateral right to opt their children out of temporary universal mask mandates imposed by the Williamson County Board of Education ("Williamson County") and the Franklin Special School District ("Franklin").[2] Plaintiffs allege that the Executive Order violates the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 *et seq.*, and Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794. *1

1

[1] The Court granted leave for the Tennessee Chapter of the American Academy of Pediatrics and the American Academy of Pediatrics to file an Amicus Brief in Support of Plaintiffs' Motion for Preliminary Injunction. (

[2] The Court will refer to the schools together as "the Williamson County and Franklin school systems."

On September 24 and October 5, 2021, with notice to all parties, the Court issued a temporary injunction pending an evidentiary hearing on Plaintiffs' motion. (Doc. Nos. 30, 69). On October 5 and 13, 2021, the Court held an evidentiary hearing. At the hearing, the Court heard testimony from Dr. Sara Cross, Dr. Marilyn Augustyn, Dr. Jason Abaluck, Dr. Jay Bhattacharya, Ms. Rachel Suppé, and R.K.'s mother.[3] Dr. Cross, Dr. Augustyn, Dr. Abaluck, and R.K.'s mother testified on behalf of Plaintiffs. Dr. Bhattacharya and Ms. Suppé testified on behalf of Governor Lee. All parties filed post-hearing briefs. (Doc. Nos. 80, 81, 82, 83).

[3] For the reasons stated on the record at the preliminary injunction hearing, Dr. Cross, Dr. Augustyn, Dr. Abaluck, and Dr. Bhattacharya all satisfy the expert witness standards under Federal Rule of Evidence 702, and the Court will give weight to their testimony accordingly.

Having applied the credible evidence to the factors for issuance of a preliminary injunction, the Court finds all of the factors favor Plaintiffs. Pending trial, Governor Lee is enjoined from enforcing Executive Order No. 84, as extended by Executive Order No. 89, in Williamson County or allowing

parents to opt out of either the Williamson County Board of Education or Franklin Special School System's mask mandates.

I. FINDINGS OF FACT[4]

[4] The Court bases its factual findings on the credible and cogent evidence presented at the preliminary injunction hearing as well as the affidavits and declarations in the record. The Court has expanded on the preliminary findings made in its Memorandum Opinion and Order issuing temporary injunctive relief. (

A. *Executive Order No. 84*

On August 16, 2021, Governor Lee issued Executive Order No. 84, which states, in part, that "a student's parent or guardian shall have the right to opt out of any order or requirement for *2 a student in kindergarten through twelfth-grade to wear a face covering at school, on a school bus, or at school functions, by affirmatively notifying in writing the local education agency or personnel at the student's school." *See* Exec. Order No. 84, State of Tennessee (August 16, 2021). There is no requirement that parents have a reason to opt out. (*Id.*). On September 30, 2021, Governor Lee extended the Executive Order through November 5, 2021 at 11:59 p.m. (*See* Doc. Nos. 50, 50-2).[5]

[5] For the sake of consistency, the Court will refer to Governor Lee's Order as Executive Order No. 84 rather than Executive Order No. 89, which extended the original Executive Order No. 84 through November 5, 2021. (

Plaintiffs are public-school students at high risk for severe COVID-19 infection due to their underlying health conditions. (Doc. No. 4-1 at 2, 4; *see also* Doc. Nos. 4-3 ¶ 7, 4-6 ¶¶ 13, 19; Doc. No. 82 at 2). They are seeking, as a "reasonable accommodation, " unrestricted enforcement of the Williamson County and Franklin school systems' mask mandates to help protect themselves and other children who "are medically vulnerable to severe outcomes should they become infected with COVID-19." (*Id.* ¶ 12; *see also* Doc. No. 4-3 ¶ 13; Doc. No. 82 at 2). Plaintiffs also seek protection against discrimination under the ADA and Section 504. (Doc. No. 4-1 at 10; *see also* Doc. No. 82 at 1).

Plaintiff R.K. is a 13-year-old seventh grader in Williamson County with Down syndrome. (Doc. No. 4-1 at 5; *see also* Doc. Nos. 1 ¶ 12, 4-3 ¶ 2). R.K.'s mother is a board-certified physician in both allergy and immunology. (Hr'g Tr., Doc. No. 77 at 13:6-7). She also treats children who are infected with COVID-19. (*Id.* at 13:24-14:14). The Court finds R.K.'s mother highly knowledgeable and credible on the subjects of COVID-19, its effect on disabled children, and mitigation efforts. R.K.'s mother persuasively testified that R.K. is "four times more likely to be hospitalized and ten times more likely to die as a result [COVID-19] as compared with the general population." (Doc. No. 4-3 ¶ 3; *see also* Hr'g Tr., Doc. No. 77 49:13-51:7; Hr'g Ex. 3). *3

Concerned about the rising number of COVID-19 cases in Williamson County, R.K.'s mother kept R.K. home from school to keep her "safe at a time when the number of cases were skyrocketing." (Hr'g Tr., Doc. No. 77 at 31:14-20). Although R.K. has now been attending classes in person, her mother remains concerned about her health due to the large percentage of unmasked students and staff. (*See* Doc. No. 4-3 ¶ 10). R.K.'s mother credibly testified that even if her daughter wears a mask, she "is not fully protected from others spreading the virus to her, in particular if the others are not wearing masks in high percentages." (Hr'g Tr., Doc. No. 77 at 21:24-22:5). R.K.'s mother has therefore "instructed R.K.'s teachers to help [R.K.] keep her distance as best as possible so as to try to lessen the risk that her teachers might spread COVID-19 to her as they also have a high mask opt-out rate." (*Id.* ¶ 12). But these requests, she says, "do nothing to mitigate the true

danger that [R.K.] is in [because of] the number of unmasked students, teachers, and staff at her school." (*Id.*).

R.K.'s mother also credibly testified that virtual schooling options, if offered by Williamson County, would not be a healthy alternative for R.K. According to R.K.'s mother, R.K. "really struggled emotionally" and "lost all of her typical friends" when attending school online during the 2020 school year. (Hr'g Tr., Doc. No. 77 at 40:21-24). Because R.K. struggled with her happiness and overall emotional well-being, R.K.'s mother returned R.K. to school in person toward the end of the 2020-2021 school year. (*Id.* at 21:6-10). She did so because Williamson County had imposed a temporary universal mask mandate that, in conjunction with other mitigation measures, had been effective in keeping COVID-19 cases low within the school. (*Id.* at 21:11-13). After R.K.'s mother allowed R.K. to attend school in-person, however, she learned that Williamson County amended its mask mandate to comply with Executive Order No. 84, and that the school was therefore "not going to continue the same level of
4 precautions that they had the *4 prior year." (*Id.* at 21:15-19). R.K.'s mother believes that Executive Order No. 84 violates R.K.'s "right to be safe and her right to health in a public-school setting, " (*Id.* at 26:17-18), because more students do not wear masks.

Plaintiff W.S. is a seven-year-old second grader at Franklin with type-1 diabetes. (Doc. No. 4-1 at 6; *see also* Doc. Nos. 4-4 ¶¶ 2-3, 70-1 at 9:18-20). According to W.S.'s mother, W.S. was infected with COVID-19 at school due to inadequate mask wearing compounded by Executive Order No. 84. (*See* Doc. No. 4-4 ¶ 8; *see also* Doc. No. 70-1 at 22:25-23:3). W.S.'s infection "required 14 straight intensive hours of effort and consultation with her treating physician to regulate her blood sugar levels back to a normal range." (Doc. No. 1 ¶ 13; *see also* Doc. No. 4-4 ¶¶ 7-9; Doc. No. 70-1 at 27:22-28:1). W.S. is not old enough to be vaccinated, and her mother believes that many of W.S.'s classmates have opted out of wearing masks. (Doc. No. 4-4 ¶¶ 7, 10). W.S.'s mother remains concerned "that [W.S.] may be reinfected if her school does not universally require masks for all students and teachers." (*Id.*; *see also* Doc. No. 70-1 at 32:7-13).

B. *COVID-19 in Children with Underlying Health Conditions*

Those with underlying health conditions, including children such as R.K. and W.S., are at an increased risk for severe infection, hospitalization, or death from COVID-19. (Doc. No. 4-6 ¶ 13; *see also* Hr'g Tr., Doc. No. 77 at 38:4-6, 50:17-18). The Centers for Disease Control (CDC) has found that "children with medical complexity, with genetic, neurologic, metabolic conditions, or with congenital heart disease can be at increased risk for severe illness from COVID-19." CDC, COVID-19: People with Certain Medical Conditions (May 13, 2021), https://www.cdc.gov/coronavirus/2019-ncov-need-extra-precauations/people-with-medical-conditions.html. "[C]hildren with obesity, diabetes, asthma or chronic lung disease, sickle
5 cell *5 disease, or immunosuppression can also be at increased risk for severe illness from COVID-19." *Id.*; (*see also* Doc. Nos. 4-5, 4-6).

Plaintiffs presented strong and persuasive expert testimony regarding the adverse effect of COVID-19 on children with underlying health conditions. Dr. Cross is a board-certified infectious disease physician who practices at Regional One Health in Memphis. (Hr'g Tr., Doc. No. 77 at 73:8-13; 76:10-12). She also was appointed by Governor Lee to the Tennessee Coronavirus Task Force. (*Id.* at 77:9-14). Dr. Cross, R.K.'s mother, and Dr. Elizabeth Williams, [6] in a sworn statement, confirmed the heightened risk to disabled students. These experts noted that "at least one" child with a preexisting condition placing them at a heightened risk for serious COVID-19 infection "is present in

nearly every classroom in Williamson County." (Doc. No. 4-6 ¶ 16; *see also* Hr'g Tr., Doc. No. 77 at 25:1-10).

[6] Plaintiffs provided a sworn declaration from Dr. Elizabeth Williams. (

Experts also remarked that the spread of the Delta variant, which is twice as contagious as prior variants, poses an especially foreboding threat to children with underlying conditions. (Doc. Nos. 4-5 ¶ 8, 4-6 ¶ 6; *see also* Hr'g Tr., Doc. No. 77 at 87:3-8). Dr. Cross and R.K.'s mother agree that the Delta variant is more contagious than prior variants and "causes more severe disease." (Hr'g Tr., Doc. No. 77 at 26:22-27:1; 87:3-8, 12-13; *see also* Doc. No. 4-6 ¶ 19). Recently, children accounted for 36% of all COVID-19 cases in Tennessee. (Doc. No. 4-1 at 5). And case counts continue to remain high in Williamson County. (Doc. Nos. 4-3 ¶ 9, 4-6 ¶ 6). Williamson County schools had dozens of staff members and more than one hundred students in isolation with a confirmed positive case of COVID-19 every week from September 3, 2021 through October 8, *6 2021. *See* Williamson County Schools, COVID-19 Numbers 2021-22 (October 8, 2021), https://www.wcs.edu/Page/8641.

C. *Masks as an Effective Mitigation Measure*

It is hard to find a corner of American society that has not been impacted by COVID-19 since March 2020, and schools are no exception. According to the Centers for Disease Control ("CDC") the virus' ubiquity is due, in part, to the ease with which it spreads when people cough, sneeze, or even talk. See CDC, Scientific Brief: SARS-CoV-2 Transmission (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html; (see also Doc. Nos. 4-5 ¶ 11, 4-6 ¶ 8). Because of the ease with which the virus spreads, the American Academy of Pediatrics strongly recommends "universal masking for students, teachers, and support staff . . . because masks are a safe, effective, and critical infection control measure." (Doc. No. 54-1 at 6; *see also id.* at 7 (citing CDC, Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2, (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html)).

The CDC has found that masks are effective in reducing the spread of COVID-19. (*See* Doc. No. 4-6 ¶ 25 (citing D.K. Chu et al., *Physical distancing, face masks, and eye protection to prevent person-to-person transmission of SARS-CoV-2 and COVID-19: A systematic review and meta-analysis*. 395 The Lancet 1973-87 (2020)); *see also* CDC, Science Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2 (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/masking-science-sars-cov2.html). *7

Health experts and school officials in Tennessee agree that masks are effective. (*See* Doc. No. 4-5 ¶¶ 12-17). R.K.'s mother credibly testified that masking is "readily available, " "highly effective, " and "the easiest prevention strategy" for schools to implement. (Hr'g Tr., Doc. No. 77 at 18:19-20). Dr. Cross similarly testified that "[b]ased on [her] extensive research . . . masks are the most effective method of preventing transmission of" COVID-19. (*Id.* at 79:10-12; *see also id.* at 115:1-3). Dr. Cross relies upon several studies, including one case where two symptomatic hairstylists, who were infected with COVID-19 but were wearing masks, closely interacted with 139 clients for an average of fifteen minutes. (*Id.* at 85:1-7; *see also* Hr'g Ex. 8). Dr. Cross noted that researchers interviewed 67 clients following exposure and found that "none of them developed infection." (*Id.* at 85:6-11). Dr. Cross also references another study that analyzed the effect of masks on COVID-related mortality. (*Id.* at 82:1-17; *see also* Hr'g Ex. 6). In that study, researchers found "that countries experiencing low mortality adopted . . . mask mandates very early in the pandemic." (*Id.* at

82:9-11). Researchers then compared these countries to ones without mask mandates and found a 48.3% variance in mortality. (*Id.* at 82:15-16). According to Dr. Cross, "[t]he only thing that these countries [with lower mortality rates] did was implement a mask mandate early." (*Id.* at 82:16-17; *see also* Hr'g Ex. 7 (similarly concluding that mask mandates were effective in reducing COVID-19)).

Plaintiffs offered additional compelling expert testimony on the effectiveness of masks by Dr. Marilyn Augustyn and Dr. Jason Abaluck. Dr. Augustyn is a board-certified physician in both pediatrics as well as developmental and behavioral pediatrics at the Boston University School of Medicine. (*Id.* at 124:7-19; *see also* Doc. No. 59-3). Dr. Jason Abaluck is an econometrician and Professor at the Yale University School of Management. (Hr'g Tr., Doc. No. 77 at 181:1-12). He is also the lead author of a study on COVID-19 and mask-use, The Impact of Community
8 Masking *8 on COVID-19: A Cluster-Randomized Trial in Bangladesh. (*Id.* at 181:20-25; *see also* Hr'g Ex. 23) (hereinafter "the Bangladesh study").

As with Dr. Cross and R.K.'s mother, Dr. Augustyn and Dr. Abaluck logically and effectively explained that masks were effective as a mitigation measure. Dr. Augustyn agreed that "[t]o avoid further closure of schools with deleterious consequences, mask wearing by children is necessary." (Hr'g Tr., Doc. No. 77 at 173:1-3 (quoting Hr'g Ex. 16)). She did so based on her expertise in developmental pediatrics, even after weighing the potential effect of masks on a child's development. (*Id.* at 130:15-131:1). Dr. Augustyn testified that masks do not meaningfully inhibit pediatric developmental processes. (*Id.*). Dr. Abaluck stated that masks had a statistically significant effect on reducing symptomatic COVID-19 infection. (*Id.* at 201:1-5). In making this conclusion, Dr. Abaluck relied on his Bangladesh study. (*Id.* at 181:20-25; *see also* Hr'g Ex. 23). Dr. Abaluck and his team designed the study as a "cluster-randomized trial, " in which they took 600 villages and "randomized 300 of those villages to receive an intensive treatment designed to increase masking in order to potentially protect them against COVID." (Hr'g Tr., Doc. No. 77 at 182:25-183:5). The study concluded that, for villages where mask use increased by around 30%, COVID rates "fell by about 9 percent in the treatment group." (*Id.* at 191:23; *see also id.* at 191:16- 22). Overall, the Court was impressed with the expert testimony of Dr. Cross, Dr. Augustyn, and Dr. Abaluck as to the efficacy of masks in reducing the spread of COVID-19. (*See* Doc. Nos. 4-6 ¶¶ 25, 28; 54-1 at 6-9; Hr'g Tr., Doc. No. 77 at 26:14-27:24; 141:17-23; 191:9-23).

Indeed, even Governor Lee has admitted that "[i]f you want to protect your kid from the [COVID-19] virus or from quarantine, the best way to do that is to have your kid in school with a mask." Kimberlee Kruesi, Health Chief: Children now 36% of Tennessee's virus cases, AP NEWS (Aug. 25, 2021), https://apnews.com/article/health-
9 coronavirus-pandemic-tennessee- *9 32b7ff0dc540a2b11cc8c736c67020fe#:~:text=Mark%20Humphrey%2C%20File)-, NASHVILLE%2C%20Tenn., Commissioner%20Lisa%20Piercey%20said%20Wednesday.

The Tennessee Department of Education agrees, noting that masking is a "[p]roven mitigation" strategy and is "effective" in controlling "the spread of COVID-19." Tenn. Dept. of Ed., FAQs related to COVID-19's Effect on Tennessee Schools (Sept. 7, 2021), https://www.tn.gov/content/dam/tn/education/health-&-safety/FAQs%20for%20COVID-19%20Effect%20on%20Schools.pdf; (*see also* Hr'g Ex. 28). Ms. Rachel Suppé, Deputy General Counsel at the Tennessee Department of Education, testified on behalf of Governor Lee that she had no reason to doubt the effectiveness of masks in schools as a mitigation measure. (Oct. 13 Hr'g Tr. at 92:11-21; 115:18-21). And

according to Dr. Cross, who was appointed by Governor Lee to Tennessee's Coronavirus Task Force, "the failure to implement a universal masking policy in schools will likely lead to extremely high rates of transmission of COVID-19 in the classroom setting." (Doc. No. 4-5 ¶¶ 4, 20; *see also* Hr'g Tr., Doc. No. 77 at 105:2-6).

Oddly, Governor Lee offered the expert testimony of Dr. Jay Bhattacharya for the opposite conclusion: that masks were not effective in reducing the spread of COVID-19 and that schoolchildren are not at high risk for infection. Dr. Bhattacharya is a professor of health policy at Stanford Medical School. (Oct. 13 Hr'g Tr. at 3:24-4:2). He opined that "the medical and epidemiological literature" shows that: (1) children are at low risk of death from COVID-19; (2) "children are less efficient at spreading the disease to adults than adults are at spreading the infection to children or each other"; (3) "there is no high-quality evidence that requiring children to wear masks has any appreciable effect on the likelihood that teachers or other school staff will acquire COVID-19 disease"; and (4) that wearing
10 masks causes harm to a child's learning and *10 development. (Doc. No. 42 ¶ 80; *see also* Doc. No. 68-1 57:2-25; 66:11-67:5; Oct. 13 Hr'g Tr. 13:20-14:3; 18:22-19:5; 20:16-22; 22:16-23).

Dr. Bhattacharya relied upon Dr. Abaluck's Bangladesh study to conclude that masks were ineffective. (Doc. No. 42 ¶ 59; *see also* Doc. No. 68-1 33:23-35:24; Hr'g Ex. 23). Dr. Bhattacharya believes that Dr. Abaluck's study shows "no statistically significant difference in the symptomatic seroprevalence of COVID-19 disease in the villages with cloth masks and the control villages." (Oct. 13 Hr'g Tr. at 29:4-11; *see also* Doc. No. 42 ¶ 59). According to Dr. Bhattacharya, "[t]he villages assigned control masks had a slightly lower symptomatic seroprevalence rate than the control villages (0.76% vs. 0.69%), with a statistical confidence bound that included zero effect and no measured difference in hospitalization or mortality." (Doc. No. 42 ¶ 59).

However, Dr. Bhattacharya's expert testimony is troubling and problematic for several reasons. First, Dr. Bhattacharya's conclusions conflicted with those of the study's lead author and designer, Dr. Abaluck. He cogently testified that the study comes to the opposite conclusion to what Dr. Bhattacharya opines. According to Dr. Abaluck, the Bangladesh study was specifically designed to examine the effect of masks on COVID-19 rates. The study found that when masks use increased by approximately 30%, "rates of COVID fell by about 9 percent." (Hr'g Tr., Doc. No. 77 at 191:10-15). To Dr. Abaluck and his team, this result shows that masks had a statistically significant effect on reducing symptomatic COVID-19 infection. (*Id.* at 201:1-5). Importantly, Dr. Bhattacharya failed to credibly address this finding. Further, Dr. Abaluck's testimony is consistent with that of other experts, who credibly testified that masks reduce the spread of COVID-19. (*See* Hr'g Tr., Doc. No. 77 at 26:14-27:24; 141:17-23; 191:9-23).

Second, Dr. Bhattacharya is not qualified to make several of his conclusions. He conceded that he does not practice medicine, is not board-certified
11 in any medical field, and did not complete *11 an infectious disease residency. (Doc. No. 68-1 at 13:6-14). Nevertheless, Dr. Bhattacharya purported to comment on a child's risk of spreading infection or dying from COVID-19. (*See* Oct. 13 Hr'g Tr. 13:20-14:3; 18:22-19:5; 20:16-22; 22:16-23).

Third, Dr. Bhattacharya's testimony is replete with contradictions that undercut his credibility. For example, Dr. Bhattacharya claimed that, "[g]enerally in scholarship . . . you never say proof of a negative." (Doc. No. 68-1 at 24:8-18). Dr. Bhattacharya stressed that the absence of evidence is not the same as claiming evidence has "no impact." (*Id.*). Yet, his opinions regarding the Bangladesh study clearly violate this scholarly principle. Dr. Bhattacharya concluded there was "no measured difference in hospitalization or mortality." (Doc. No. 42 ¶ 59; *see also* Oct. 13

Hr'g Tr. at 70:17-71:2). But Dr. Abaluck credibly explained that the study, in fact, did not examine hospitalization or mortality because such data does not exist. (Hr'g Tr., Doc. No. 77 at 212:22- 213:7). Dr. Abaluck believes that Dr. Bhattacharya's use of the term "no measured difference" was "designed to deliberately mislead readers into thinking that we tested whether there were differences in hospitalizations or mortality, when in fact we could not conduct that test because we could not get this data. He worded this statement in a way that seems designed to mislead." (*Id.* at 213:9-13). The Court need not determine whether this is true or not because, at the very least, it gives the Court great hesitation to give significant weight to Dr. Bhattacharya's opinion.

In its amicus brief, the AAP highlighted additional inconsistencies by Dr. Bhattacharya that trouble the Court. (*See* Doc. No. 54-1). The AAP suggests that many of the studies relied upon by Dr. Bhattacharya occurred "prior to the rise of the Delta variant . . . and at a time when children were frequently not tested due to testing shortages and the perception that asymptomatic or minimally symptomatic individuals were at low risk for transmission or serious consequences." (*Id.* at 10-11). The AAP also points out that Dr. Bhattacharya conveniently fails to cite to evidence
12 *12 establishing that "the absence of randomized controlled trials undermines the value of evidence" supporting masking in schools due to COVID-19. (*Id.* at 11). The AAP echoes Dr. Abaluck's conclusion that Dr. Bhattacharya substantially misrepresents the findings of the Bangladesh study. (*Id.*).

Finally, Dr. Bhattacharya's expert testimony regarding the effect of masks on pediatric development also gives the Court great hesitation about relying on his opinion. Dr. Bhattacharya opined that there "is ample evidence of some physical and developmental harms to children that accrue from wearing masks." (Doc. No. 42 ¶ 73). To support this conclusion, he relied on a survey of parents and pediatricians finding that "a substantial fraction of children required to wear masks experience immediate physical side-effects, including speaking difficulties, changes in mood, discomfort breathing, headache, and cutaneous disorders (i.e., face rashes)." (*Id.* ¶ 75 (citing Assathiany R. et al., Face Masks in Young Children During the COVID-19 Pandemic: Parents' and Pediatricians' Point of View. Front Pediatr. 2021 Jun. 23;9:676718.doi: 10.3389/fped.2021.676718. PMID: 34249814; PMCID: PMC8260829)). But substantial record evidence runs counter to these conclusions. For example, Dr. Augustyn credibly questioned whether the parental survey on which Dr. Bhattacharya relied contained weak, convenient samples. (Hr'g Tr., Doc. No. 77 at 137:13-25). And the AAP similarly suggests that Dr. Bhattacharya unreliably utilizes observational evidence, such as the parental survey study, ignores substantial peer-reviewed evidence, and instead "highlights two non-peer-reviewed analyses that support his preexisting hypothesis." (Doc. No. 54-1 at 12, 15).

In short, the Court is not persuaded by, or confident in, Dr. Bhattacharya's expert opinion. He oversimplified the conclusions of the Bangladesh study, suggesting he may have been apt to do so with other studies upon which he relied. He
13 offered opinions regarding the pediatric effects *13 of masks on children, a discipline on which he admitted he was not qualified to speak. (*See* Doc. No. 115 at 3-7; *see also* Oct. 13 Hr'g Tr. at 45:15-46:3). His demeanor and tone while testifying suggest that he is advancing a personal agenda. At this stage of the proceedings, the Court is simply unwilling to trust Dr. Bhattacharya.

D. *Mask Mandates in the Williamson County and Franklin School Systems Before and After Executive Order No. 84*

The Williamson County and Franklin school systems each imposed universal mask mandates early in the COVID-19 pandemic, including during the 2020-2021 school year. (*See* Golden

Aff., Doc. No. 37 ¶ 3; *see also* Doc. No. 80 at 5). The mandates "required masks to be worn by students, staff, and visitors at all grade levels inside all buildings and on buses." (*Id.*; s*ee also* Doc. No. 80 at 5).

For the 2021-2022 school year, recognizing that their schools were reaching a "crisis point" due to the rapid spread of new COVID-19 cases, both school systems renewed implementation of universal mask mandates for all students, staff, and visitors, except for those who have a medical condition or sincerely held religious belief. (*See* Doc. Nos. 1-1, 23, 24, 26, 27, 36, 37, 80 at 5). When they did so, their focus was on returning children to in-person education amidst an ongoing, historic, and deadly pandemic. Franklin based its 2021-2022 mandate on several objective, science-based, and "important factors, " including: (1) the quadrupling of new COVID cases in Franklin students and staff between Week 1 and Week 2; (2) that children 11 and younger remain ineligible for a COVID-19 vaccine; (3) according to the CDC, Williamson County has been in the "high range for community transmission since July 22, "; and (4) the Delta variant "spreads more easily than previous variants, and can be spread by vaccinated individuals." *See* Franklin Special School District, Messages from the Director (August 20, 2021), https://www.fssd.org/about-us/fssd-together-2021#fs-panel-13348. *14

On September 20, 2021, recognizing the continued threat of COVID-19 and the rise of the Delta variant, each school system extended their respective mask mandates until at least mid-January 2022. (Doc. Nos. 23, 24, 26, 27, 36, 37, 80 at 5). In extending its temporary universal mask mandate, Williamson County noted that "COVID numbers in the schools had declined since the mandate was implemented, and a majority of the Board determined that continuation of the mandate through the end of the semester would be the best approach and would limit disruption to school operations." (Doc. No. 23 at 1-2). Similarly, Franklin noted that "[u]niversal masking, in conjunction with other mitigation strategies, remains the best way to ensure a safe learning environment for all children." (Doc. No. 26 at 2).

Following Governor Lee's Executive Order, however, both Williamson County and Franklin amended their temporary universal mask policies to allow for voluntary parental opt-out. (Doc. Nos. 23, 24, 26, 27). Williamson County school officials noted that the Governor's Order turned their existing temporary universal mask mandate into a "Swiss cheese model." (Doc. No. 59 at 3 (citing WCBOE hearing on Sept. 20, 2021, available at https://www.youtube.com/watch?v=t3mB3jcxTws (last visited Oct. 15, 2021))). After the schools amended their mask mandates to comply with Governor Lee's order, as many as 13, 231 children- nearly 32% of the student body- opted out of Williamson County's amended masking policy. Williamson County Schools, COVID-19 Numbers 2021-22 (September 10, 2021), https://www.wcs.edu/Page/8598. Approximately 200 Franklin students, or 10% of the student body, similarly opted out.[7] *15

[7] Although Franklin has not published its opt-out rates, the school's counsel confirmed this figure on the record in open court on September 20, 2021. (

II. LEGAL STANDARD

"The purpose of a preliminary injunction is to preserve the status quo until a trial on the merits." *Southern Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 848 (6th Cir. 2017) (citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981)). However, "a preliminary injunction is an extraordinary and drastic remedy, " which should "only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* (internal citations and quotations omitted); *see also Munaf v. Geren*, 553 U.S. 674, 689-90 (2008); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008).

In order to determine whether to issue a preliminary injunction under Rule 65, federal courts must consider the following four factors: "(1) whether the moving party has shown a likelihood of success on the merits; (2) whether the moving party will be irreparably injured absent an injunction; (3) whether issuing an injunction will harm other parties to the litigation; and (4) whether an injunction is in the public interest." *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) (citing *Nken v. Holder*, 556 U.S. 418 (2009)); "These factors are not prerequisites but are factors that are to be balanced against each other." *Jones v. Caruso*, 569 F.3d 258, 265 (6th Cir. 2009).

III. CONCLUSIONS OF LAW

Having considered the entire record, and relying on the credible evidence, the Court concludes that each of the required, traditional preliminary injunction factors favor Plaintiffs. The Court will
16 discuss each factor in turn.[8] *16

[8] Governor Lee appears to have abandoned his argument that the doctrine of laches bars Plaintiffs from relief. (

A. *Standing*

As an initial matter, Governor Lee argues that Plaintiffs have no standing to challenge Executive Order No. 84. (Doc. No. 45 at 9; *see also* Doc. No. 83 at 3-5). Under the Constitution, judicial power "extends only to 'Cases' and 'Controversies.'" *Spokeo v. Robins*, 136 S.Ct. 1540, 1547 (2016) (quoting U.S. Const. Art. III, § 2). Thus, the concept of "[s]tanding 'ensure[s] that federal courts do not exceed their authority' and 'limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong.'" *Tenn. v. United States Dep't of State*, 931 F.3d 499, 507 (6th Cir. 2019) (quoting *Spokeo*, 136 S.Ct. at 1547).

To establish standing, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)). Governor Lee challenges prongs one and two of the requisite standing inquiry.

First, the Governor argues that Plaintiffs' alleged injury is too conjectural to constitute an injury in fact because it is impossible to "wholly eliminate the risk" of COVID-19 infection. (Doc. No. 45 at 4-5 (citing Cross Dep., Doc. No. 39-2, at 19:20-20:8, 31:15-23); *see also* Doc. No. 83 at 3-4). The Governor suggests that, because COVID-19 is so pervasive, the real issue is whether Plaintiffs can identify a connection between positive COVID-19 case counts and Executive Order No. 84 itself. (*See* Doc. No. 45 at 6). Governor Lee also argues
17 that, in light of falling COVID-19 *17 case counts, the "risks associated with COVID cases in [Williamson] County have lessened substantially, including before there was any masking requirement. (Doc. No. 83 at 4-5).

But the Governor's arguments overlook that "[s]tanding can derive from imminent, rather than actual injury" when "the threatened injury is real, immediate, and direct." *Crawford v. United States Dep't of the Treasury*, 868 F.3d 438, 454 (6th Cir. 2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)). Here, Plaintiffs correctly argue that their risk of contracting potentially life-threatening COVID-19 is sufficiently imminent, regardless of when the risk "materializes, " because of the "Swiss cheese effect" created by Executive Order No. 84. (Doc. No. 59 at 4-5). The record before the Court establishes that the imminent threat of COVID-19 is "real, immediate, and direct" in Plaintiffs' schools in light of Executive Order No. 84. *Crawford*, 868 F.3d at 454. After Governor Lee implemented the order, nearly one in every three children opted out of Williamson County's amended masking policy. Williamson County

Schools, COVID-19 Numbers 2021-22 (September 10, 2021), https://www.wcs.edu/Page/8598. Approximately one in every ten Franklin students similarly opted out.

Tellingly, Dr. Cross and R.K.'s mother, in her role as an expert in immunology, agreed that: (1) it is likely at least one high-risk, disabled student exists in every classroom in Williamson County; and (2) an increase in unmasked students, brought about by Executive Order No. 84, would likely contribute to an increase in COVID-19 cases. (*See* Hr'g Tr., Doc. No. 77, at 25:1- 10; *see also* Doc. No. 4-5 ¶¶ 4, 20). The potential for increased infection is therefore real. Indeed, case rates are still at serious levels in Williamson County, as dozens of staff members and more than one hundred students have been in isolation with a confirmed positive case of COVID-19 every week from September 3, 2021 through October 8, 2021.
18 *See* Williamson County Schools, *18 COVID-19 Numbers 2021-22 (October 8, 2021), https://www.wcs.edu/Page/8641. Accordingly, the Court finds that Plaintiffs have established a sufficiently imminent injury in fact.

Second, Governor Lee argues that Plaintiffs' alleged injury is not fairly traceable to Executive Order No. 84. (Doc. No. 45 at 6; *see also* Doc. No. 83 at 4). Specifically, the Governor argues that Plaintiffs cannot prove a causal relationship between the number of unmasked children and Governor Lee's order. (Doc. No. 83 at 6). Rather, he argues that "[m]ultiple contingencies with independent actors preclude any alleged injury from being traceable to" Executive Order No. 84. (*Id.*). The Governor highlights one such contingency: that students who opted out due to the Executive Order would have to independently choose to attend school in order to expose Plaintiffs to COVID-19. (Doc. No. 45 at 7). He concludes that students with COVID are likely staying home and thus not infecting other students. (*Id.*).

Once again, well-settled legal precedent controls and cuts against the Governor's arguments. It has long been true that traceability "is not synonymous with causation sufficient to support a claim." *Parsons v. United States Dep't of Justice*, 801 F.3d 701, 715 (6th Cir. 2015). Plaintiffs need not show that Executive Order No. 84 legally caused their alleged injuries; rather, they need only show that their injuries are "fairly traceable." *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 133 (2014); *see also Spokeo*, 136 S.Ct. at 1547. The credible evidence proves that unmasked, asymptomatic individuals can carry and transmit COVID-19. (*See* Hr'g Tr., Doc. No. 77 at 183:6-12). There is no reason to believe that asymptomatic students who have COVID would stay home from school, let alone know they are infected in the first place. (*See id.*).

Two Tennessee federal courts have reached the same conclusion based upon sound rationale. Those courts have found that that, for purposes of
19 standing, disabled schoolchildren with *19 underlying, high-risk medical conditions have a sufficiently imminent injury that was fairly traceable to Governor Lee's Executive Order No. 84. *See S.B. v. Lee*, __ F.Supp.3d __, 2021 WL 4755619, at *7-8 (E.D. Tenn. Oct. 12, 2021); *G.S. v. Lee*, __ F.Supp.3d __, 2021 WL 4268285, at *8 (W.D. Tenn. Sept. 3, 2021). Facing a similar challenge to Executive Order No. 84 in the Eastern District of Tennessee, for example, Governor Lee argued that disabled students could not establish standing because the lack of a universal mask mandate in the Knox County Public Schools was not "fairly traceable" to the executive order. *S.B.*, 2021 WL 4755619, at *8. Judge Greer rejected the Governor's argument because "[t]he record-from the pleadings, to the parties' briefs, to the evidentiary hearing-therefore smacks of an injury traceable to Governor Lee's executive order because it shows that the executive order foreclosed the Knox County Board of Education from adopting a mask

mandate, the alleged reasonable accommodation that Plaintiffs request under the ADA." *Id.*; *see also G.S.*, 2021 WL 4268285, at *9 (likewise finding that disabled students demonstrated their alleged harm was fairly traceable to Executive Order No. 84 because the order "was the catalyst for [schools] to be unable to" impose mask requirements to protect disabled students).

Here, the record compels the same conclusion. The Williamson County and Franklin school systems have conceded that Executive Order No. 84 severely limits the accommodations they are able to provide for their students. (*See* Doc. Nos. 80 at 5; 81 at 3-4). This is at least compelling circumstantial evidence, if not direct evidence, that Executive Order No. 84 is fairly traceable to Plaintiffs' alleged harm. Whereas in *S.B.*, plaintiffs alleged that the executive order hypothetically precluded the Knox County schools from implementing a universal mask mandate in the first place, Plaintiffs here argue that Executive Order No. 84 limits mask mandates that *already exist.* Indeed, neither Williamson County nor
20 Franklin opposed the Court's issuance of *20 temporary injunctive relief. (*See* Doc. No. 30 at 7; *see also* Doc. Nos. 15, 26). Nor do the schools challenge Plaintiffs' request for continued injunctive relief, as such relief would "be entirely consistent with the policy" already adopted by the schools. (Doc. No. 81 at 3; *see also* Doc. No. 80 at 5). That Williamson County and Franklin schools repeatedly admit that Executive Order No. 84 impedes their ability to fully enforce the mask mandates they have adopted since the beginning of the pandemic is itself enough for the Court to find that Plaintiffs' alleged harm is fairly traceable to Executive Order No. 84.

Accordingly, the Court finds that Plaintiffs have sufficiently established that their alleged injury is fairly traceable to Executive Order No. 84. Plaintiffs have therefore satisfied the "irreducible constitutional minimum of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

B. *Likelihood of Success on the Merits*

The Court turns now to Plaintiffs' likelihood of success on the merits. The United States Constitution enshrines the principle that federal law is "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Courts have consistently found that this clause of the Constitution, better known as the Supremacy Clause, "supplies an important 'rule of decision,' which instructs that courts 'must not give effect to state laws that conflict with federal laws.'" *Torres v. Precision Industries, Inc.*, 938 F.3d 752, 754 (6th Cir. 2019) (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)). Thus, where a state law interferes with federal law, it is invalid. Here, Plaintiffs argue that Executive Order No. 84 violates federal law, namely the ADA and Section 504 of the Rehabilitation Act. (*See* Doc. No. 4-1 at 10-11). The Court agrees that there is a high and substantial likelihood that Plaintiffs will prevail on
21 their claims under the ADA and Section 504. *21

Title II of the ADA states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132; *see also Wilson v. Gregory*, 3 F.4th 844, 859 (6th Cir. 2021). Section 504 similarly provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .." 29 U.S.C. § 794(a). In the Sixth Circuit, claims brought under the ADA and Section 504 "share the same substantive standard, " and Courts review each as if brought under the ADA. *Zibbell v. Mich. Dep't of Human Servs.*, 313 Fed.Appx. 843, 849 (6th Cir. 2009).

Plaintiffs argue that Executive Order No. 84 and the resulting amended, weakened mask policies "have nullified the rights of students with disabilities to enjoy safe, fundamental, and non-discriminatory access to their public institutions." (Doc. No. 4-1 at 3). As a result, Plaintiffs argue that they are likely to succeed on the merits of their failure to accommodate claim because: (1) under the ADA and Section 504, they are qualified individuals with disabilities who are entitled to reasonable accommodations and protections from unlawful discrimination; and (2) Executive Order No. 84 denies them their federal right and opportunity to participate in and access the educational services of their public-school districts guaranteed under the ADA and Section 504. (*Id.* at 10-11).

To establish a failure to accommodate claim, Plaintiffs must show that: "(1) [they are] disabled; (2) [they were] 'qualified' to take part in the 'services, programs, or activities' of the public entity; (3) [they were] 'excluded from participation in' or 'denied the benefits of' such 'services, programs, or activities'; and (4) this exclusion or denial occurred 'by reason of' [their] 22 *22 disability." *Keller v. Chippewa Cty., Michigan Bd. of Commissioners*, No. 20-2086, __ Fed.Appx. __, 2021 WL 2411873, at *4 (6th Cir. June 14, 2021) (citing 42 U.S.C. § 12132); *see also Ability Ctr. of Greater Toledo*, 385 F.3d 901, 909-10 (6th Cir. 2004). The Court will examine each element.

Governor Lee does not contest the first two elements of a failure to accommodate claim. Even if he did, there is sufficient evidence that Plaintiffs satisfy these elements. First, Plaintiffs have medical conditions that render them disabled under the ADA. *See* 42 U.S.C. § 12102(1)(A) (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities"). And second, because Plaintiffs are public school students in either the Williamson County or Franklin school systems, they are "qualified to take part in their respective school's 'services, programs, or activities.'" *G.S.*, 2021 WL 4268285, at *5 (citing 42 U.S.C. § 12102 and *Moorer v. Baptist Memorial Health Care Sys.*, 398 F.3d 469, 479 (6th Cir. 2005)); *see also ARC of Iowa v. Reynolds*, __ F.Supp.3d __, 2021 WL 4166728, at *10 (S.D. Iowa Sept. 13, 2021) (finding that, because plaintiffs were students, they were "thus entitled to participate in the programs, services, and activities of their schools").

Instead, Governor Lee challenges the third and fourth elements of a failure to accommodate claim: whether Plaintiffs were excluded from the programs, services, and activities of their schools because of their disability. *See Keller*, 2021 WL 2411873, at *4; (*see also* Doc. No. 16 at 12). Again, the Court concludes that Plaintiffs satisfy these elements.

1. Exclusion from School Programs

Title II of the ADA focuses on "access to services, programs, and activities." *Babcock v. Michigan*, 812 F.3d 531, 535 (6th Cir. 2016). To determine whether Plaintiffs have been excluded from, or denied the benefits of, their school programs in 23 violation of the ADA, federal courts must *23 examine whether Plaintiffs were denied "meaningful access." *Keller*, 2021 WL 2411873, at *4. To determine whether Plaintiffs were denied "meaningful access, " courts "must look to the regulations that are applicable to Title II-and more specifically to 42 U.S.C. § 12132." *S.B.*, 2021 WL 4755619, at *13 (citing *Blum v. Bacon*, 457 U.S. 132, 141 (1982)).

Under the ADA's implementing regulations, "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150. "Section 35.150 'primarily concerns physical, or structural, impediments to public access.'" *S.B.*, 2021 WL 4755619, at *13 n.13 (quoting 28 C.F.R. § 35.150(b)). However, "the invisible barrier that COVID-19 places between [disabled students] and their classrooms

[is] necessarily [no] different from a physical barrier that a stairwell places between wheelchair-bound students and their classrooms[.]" *Id.* "'After all, if [a] child cannot get inside the school,' for whatever the reason, then 'he cannot receive instruction there' and 'he may not achieve the sense of independence conducive to academic (or later to real-world) success.'" *Id.* (Greer, J.) (citing *Fry v. Napoleon Cmty. Schs.*, 137 S.Ct. 743, 756 (2017)).

ADA implementing regulations also require that a public entity "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of the disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). Relying upon Section 130(b)(7), courts within the Sixth Circuit have found that the ADA requires that a public entity make a reasonable accommodation to students. *S.B.*, 2021 WL 4346232, at *13-15; *see also Ability Ctr. of Greater Toledo*, 385 F.3d at 907; *G.S.*, 2021 WL 4268285, at *6. Indeed, the school systems here had done so through their temporary
24 universal *24 mask mandates before Executive Order No. 84 went into effect. (*See* Doc. No. 37 ¶ 3; *see also* Doc. No. 80 at 5).

The Governor presents two main arguments as to why Executive Order No. 84 neither excludes nor denies Plaintiffs access to school programs under the ADA or its implementing regulations. First, the Governor argues that Plaintiffs have already been afforded reasonable accommodations. (*See* Doc. No. 45 at 11). Second, he argues that universal mask mandates are not legally required because masks are scientifically ineffective and would therefore "fundamentally alter" both school programs and the policy rationale behind Executive Order No. 84. (*See id.* at 12).

a. Reasonable Accommodations

According to the Governor, universal masking is legally unnecessary because Plaintiffs' schools already provide other reasonable accommodations, such as virtual school, enhanced ventilation, and social distancing. (Doc. No. 45 at 11; *see also* Doc. No. 83 at 2, 6). And unless Executive Order No. 84 precludes each of these alternative accommodations, the Governor argues, "Plaintiffs are not denied meaningful access." (Doc. No. 45 at 11; *see also* Doc. No. 83 at 2, 6). The Governor also argues that Plaintiffs are entitled only to a "reasonable" accommodation - of which Plaintiffs' schools already provide several - not the "best possible" accommodation. (Doc. No. 45 at 11). In sum, the Governor argues that because Plaintiffs are afforded other accommodations, Plaintiffs cannot identify a program or activity to which they have been excluded because of Executive Order No. 84, especially considering Plaintiffs are currently attending school in person. (Doc. No. 45 at 11; *see also* Doc. No. 83 at 5).

"'The hallmark of a reasonable accommodation is effectiveness.'" *S.B.*, 2021 WL 4755619, at *15 (quoting *Wright v. N.Y. State Dep't of Corrs.*, 831
25 F.3d 64, 72 (2d Cir. 2016)); *25 *see also Keller*, 2021 WL 2144873, at *4 (applying *Wright* in determining whether plaintiff has been excluded from the programs of a public entity in violation of the ADA). Put simply, a reasonable accommodation "need not be 'perfect' [nor] the one 'most strongly preferred' by [plaintiffs]." *S.B.*, 2021 WL 4755619, at *15 (citing *Keller*, 2021 WL 2411873, at *4). Rather, a reasonable accommodation "must be effective enough to 'adequately address' a disabled individual's 'unique needs.'" *Id.* (citing *EEOC v. Ford Motor Co.*, 752 F.3d 634, 646 (6th Cir. 2014), *vacated en banc on other grounds*, 782 F.3d 753 (6th Cir. 2015)). When it comes to COVID-19, there is no silver bullet solution. Instead, it is the constellation of multiple mitigation strategies - masks, social-distancing, and hand hygiene among others - that reduce the virus's life-threatening impact.

This Court agrees that "[a] universal masking requirement instituted by a school is a reasonable modification that would enable disabled students to have equal access to the necessary in-person school programs, services, and activities." *ARC of Iowa*, 2021 WL 4166728, at *11. Executive Order No. 84 effectively eliminates masking as a tool to mitigate COVID-19. In the challenge to Executive Order No. 84 in the Eastern District of Tennessee, Judge Greer found that:

> [T]he record evidence-i.e., the evidence that infections among school-age children have been meteorically rising since the new school year began in Knox County, that students in Knox County are not wearing masks or practicing social distancing, and that the Knox County Board of Education has no immediate oversight over its own social-distancing policy-leads to only one conclusion: the accommodations currently in place against COVID-19 in Knox County Schools are too hazardously ineffective to address Plaintiffs' unique needs.

S.B., 2021 WL 4755619, at *17. Similarly, here, based on the record currently before the Court, COVID-19 case counts at Plaintiffs' schools remain high. As discussed above, case rates are still at serious levels in Williamson County, as dozens of staff members and more than one hundred students have been in isolation with a confirmed positive case of COVID-19 every week
26 from *26 September 3, 2021 through October 8, 2021. *See* Williamson County Schools, COVID-19 Numbers 2021-22 (October 8, 2021), https://www.wcs.edu/Page/8641. Indeed, because of rising and current case rates, the Williamson County and Franklin school systems renewed the universal mask mandates instituted in the prior school year to create a safe school environment. (*See* Doc. No. 37 ¶ 3; *see also* Doc. Nos. 23, 24, 26, 27, 36, 80 at 5).

Moreover, given the current case rates, other mitigation measures by the Williamson County and Franklin school systems are alone insufficient without a corresponding temporary universal mask mandate. Dr. Cross explained that alternative mitigation measures, such as ventilation and social distancing, are not as effective in curbing the spread of COVID-19 as they would be along with universal masking. (*See* Hr'g Tr., Doc. No. 77 at 98:21-99:5; 115:4-18; *see also* Hr'g Ex. 12). R.K.'s mother agreed and also testified that virtual schooling would not be a healthy alternative for her daughter. (Hr'g Tr., Doc. No. 77 at 40:21-24). W.S.'s mother similarly testified that virtual schooling was ineffective for her daughter. (Doc. No. 33 ¶ 3-8). Therefore, the Court finds that the record establishes that the current mitigation measures, without masking, are ineffective at this juncture to curb the spread of COVID-19.

Disabled public school students are excluded from educational programs where they "cannot attend in-person learning at their schools without the very real threat to their lives because of their medical vulnerabilities." *ARC of Iowa*, 2021 WL 4166728, at *11; *see also S.B.*, 2021 WL 4755619, at *22. This is because public entities must offer educational services that are readily accessible to disabled students. *See* 28 C.F.R. § 35.150. Public entities must also provide reasonable accommodations to students "where necessary to avoid discrimination on the basis of the disability." 28 C.F.R. § 35.130(b)(7). Governor Lee, Williamson County, and Franklin are public entities for purposes of the ADA. *See* 42 U.S.C. §
27 12131(1). And here, the Governor's *27 Executive Order No. 84 turned the Williamson County and Franklin school systems' existing temporary universal mask mandates into a "Swiss cheese model" that weakened their overall COVID-19 mitigation efforts. (Doc. No. 59 at 3 (citing WCBOE hearing on Sept. 20, 2021, available at https://www.youtube.com/watch?v=t3mB3jcxTws (last visited Oct. 15, 2021)); *see also* Doc. Nos. 80 at 5; 81 at 3-4, 7).

Accordingly, based on the record before the Court, the Williamson County and Franklin school systems appear to be restricted by Executive Order No. 84 from giving Plaintiffs the effective accommodation of a temporary universal mask mandate for all students and teachers. Plaintiffs have therefore shown that Executive Order No. 84 makes "in-person learning at schools available only under conditions that are dangerous to children with disabilities." *ARC of Iowa*, 2021 WL 4166728, at *11; *see also S.B.*, 2021 WL 4755619, at *22.

b. The "Fundamentally Alter" Analysis

Alternatively, Governor Lee attempts to sidestep the ADA's "reasonable accommodation" requirement by arguing against the effectiveness of mask mandates in schools. (Doc. No. 45 at 12; *see also* Doc. No. 83 at 8-9). Section 130(b)(7) provides an exception to making reasonable accommodations where a public entity can "'can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.'" *Waskul v. Washtenaw Cty. Cmty. Mental Health*, 979 F.3d 426, 463 (6th Cir. 2020) (quoting 28 C.F.R. § 35.130(b)(7)). Here, the Governor argues that a universal mask mandate would "'fundamentally alter' the policy choice set forth in [Executive Order No. 84] and is by definition not reasonable." (Doc. No. 45 at 12). Specifically, Governor Lee argues that scientific studies do not support the "efficacy of universal mask mandates in schools." (*Id.*; *see also* Doc. No. 83 at 8-9). [28] *28

As an initial matter, the Court is simply not in a position to usurp the Williamson County and Franklin school systems' authority to implement mask mandates. Indeed, the Tennessee legislature has explicitly vested local school boards with the authority to "[m]anage and control all public schools established or that may be established under its jurisdiction." Tenn. Code Ann. § 49-2-203(a)(2). Here, recognizing that their schools were reaching a "crisis point" due to the rapid spread of new COVID-19 infections, both the Williamson County and Franklin school systems implemented temporary universal mask mandates for all students, staff, and visitors, except for those who have a medical condition or sincerely held religious belief. (*See* Doc. Nos. 1-1, 23, 24, 26, 27). The schools relied upon objective, science-based factors to impose the mask mandates, which were identical to those effectively imposed earlier in the pandemic. (*See* Doc. No. 37 ¶ 3 (noting that Williamson County schools imposed mask mandates during the 2020-2021 school year); *see also* Doc. Nos. 1-1, 23, 24, 26, 27, 80, 81; Franklin Special School District, Messages from the Director (August 20, 2021), https://www.fssd.org/about-us/fssd-together-2021#fs-panel-13348 (discussing objective measures upon which the school board relied)).

In short, the Williamson County and Franklin school systems are in the best position to impose mitigation measures for the schools within their respective jurisdictions. *See* Tenn. Code Ann. § 49-2-203(a)(2). This includes temporary universal mask mandates, and the Court declines to disturb the schools' careful judgment in this regard. *See Dahl v. Bd. of Trustees of Western Mich. Univ.*, No. 21-2945, __ F. 4th __, 2021 WL 4618519, at *6 (6th Cir. Oct. 7, 2021) (finding that a public educational institution "may still require plaintiffs to wear masks" because of its ameliorative effect on the spread of COVID-19).

Further, as explained above, the persuasive and credible evidence before the Court establishes the importance of masks as a safe and effective tool to fight the deadly COVID-19 [29] *29 pandemic. There is no persuasive or credible evidence that universal masking would fundamentally alter school programs. The proper inquiry here is whether the existing reasonable accommodations are effective without masking. *See S.B.*, 2021 WL 4755619, at *22. In this Court's judgment, they are not. The record establishes that current accommodations are ineffective. Plaintiffs have established that they were excluded from

Williamson County's and Franklin's services, programs, and activities "when viewed in [their] entirety, [are not] readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.130.

2. Requisite Discrimination Under the ADA

Plaintiffs must next establish that they were excluded from their schools' programs *because* of their disability. *See* 42 U.S.C. § 12132 (emphasis added). Governor Lee argues that Plaintiffs cannot establish such discrimination under a failure to accommodate theory because they cannot show "animus against the protected group was a significant factor in the position taken by [the decisionmakers]." (Doc. No. 9-10 (citing *Anderson v. City of Blue Ash*, 798 F.3d 338, 357 (6th Cir. 2015))). Specifically, the Governor argues that Executive Order No. 84 was motivated not by animus but by a reasonable decision "to allow parents to decide what is best for their children." (Doc. No. 45 at 10).

The Governor's argument is not supported by well-established legal precedent. Under the ADA, Plaintiffs may bring discrimination claims under a failure to accommodate theory. *See S.B.*, 2021 WL 4755619, at *12-13 (citing *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 460 (6th Cir. 1997)). And Plaintiffs may support failure to accommodate claims through evidence of unintentional, rather than intentional, discrimination. *Id.* (citing *Ability Ctr. of Greater Toledo*, 385 F.3d at 908-09). Here, Plaintiffs argue that in-person learning is neither safe nor readily accessible to them because of Executive Order No. 84. (*See* Doc. No. 4-1 at 10- *30 11; *see also* Doc. Nos. 1-1, 4-3, 4-4, 4-5, 4-6). Specifically, Plaintiffs argue that Governor Lee's order discriminates against them by reason of their disability, forcing them to face a prevalent threat of infection every time they access public educational programs and services. (Doc. No. 4-1 at 11-12; *see also* Doc. Nos. 1-1, 4-5, 4-6).

The credible evidence supports Plaintiffs' claims. The application of Executive Order No. 84 operates to discriminate against Plaintiffs and other disabled students. For example, R.K.'s mother reiterated her testimony that her daughter's Down syndrome means she is "four times more likely to be hospitalized and ten times more likely to die as a result of [COVID-19] as compared with the general population." (Doc. No. 4-3 ¶ 3; *see also* Hr'g Tr., Doc. No. 77 49:13-51:7; Hr'g Ex. 3). Dr. Cross agreed, noting that Plaintiffs' conditions place them "at risk of contracting COVID-19" with greater severity. (Doc. No. 77 90:10-20). Plaintiffs have therefore established that, because of Executive Order No. 84, they have been excluded from full and active participation in their schools' programs "by reason of" their disabilities. 42 U.S.C. § 12132.

3. Exhaustion

Governor Lee also maintains that Plaintiffs have failed to exhaust their administrative remedies as required under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*. (*See* Doc. No. 83 at 2, 11). Specifically, the Governor argues that Plaintiffs' parents have failed to discuss potential accommodations with their respective children's Individualized Education Program ("IEP") or Section 504 teams, as required by the IDEA. (*Id.*).

But the Governor's exhaustion argument is no more persuasive now than it was when the Court rejected it upon issuing temporary injunctive relief. (*See* Doc. No. 30 at 13-14). The Governor is correct that, under the IDEA, "an 'individualized education program,' called IEP for short, serves as the 'primary vehicle' for providing each child with" the "free and appropriate *31 public education" ("FAPE") required under the Act. *ARC of Iowa*, 2021 WL 4166728, at *7 (citing *Fry v. Napoleon Cmty. Schs.*, 580 U.S. __, 137 S.Ct. 743, 749, 197 L.Ed.2d 46 (2017)); *see also S.B.*, 2021 WL 4755619, at *6 (finding that the Governor, relying on the same argument,

"does not convince the Court that the IDEA's exhaustion requirement applies"). However, as the Court has already found, the IDEA is inapplicable to this case. The IDEA is simply not meant to "limit the rights, procedures, and remedies available under" the ADA or Section 504. *S.B.*, 2021 WL 4755619, at *6 (citing *Fry*, 137 S.Ct. at 756). Indeed, if "the remedy sought [by Plaintiffs] is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required." *Id.* (citing *Fry*, 137 S.Ct. at 754).

In this case, Plaintiffs' remedy is not for the denial of a FAPE. Rather, as discussed above, Plaintiffs seek relief from the educational harm caused by Executive Order No. 84 itself. (*See* Doc. No. 4-1 at 10-11). Rejecting the same argument by the Governor, Judge Lipman similarly concluded that the IDEA exhaustion requirement was inapplicable because Plaintiffs sought relief from the harm caused by Executive Order No. 84 in preventing access to educational programs. *G.S.*, 2021 WL 4268285, at *10-12. Here, the Governor has not presented any evidence that would make the Court disagree with this sound approach. Governor Lee's order restricts the protections that would otherwise be afforded by the Williamson County and Franklin school systems' temporary universal mandatory mask mandates. (*See* Doc. No. 4 at 1; *see also* Doc. No. 4-1 at 10- 11). Plaintiffs' claims therefore lie outside of the ambit of the IDEA. *See S.B.*, 2021 WL 4755619, at *6-7. Accordingly, the Court rejects Governor Lee's exhaustion arguments.

For the foregoing reasons, and based on all the evidence before the Court, Plaintiffs have established a likelihood of success on the merits of their failure to accommodate claim and are entitled to the anti-discrimination protections in the ADA and Section 504. *32

C. *Irreparable Harm*

Having established a likelihood of success on the merits, Plaintiffs must next establish that they are likely to face irreparable harm absent an injunction. *Vitolo*, 999 F.3d at 360 (citing *Nken*, 556 U.S. at 434). Because the Court has already found that Plaintiffs preliminarily established irreparable harm when issuing temporary injunctive relief, Plaintiffs must now show that such harm would continue absent an injunction. (*See* Doc. No. 30 at 15-16).

Here, Plaintiffs have established that, were Executive Order No. 84 to remain in effect, they would continue to be subject to irreparable harm because they would remain at an increased exposure to severe illness-and possibly death-merely by accessing educational opportunities in their respective school buildings. (Doc. No. 4-1 at 12-13; *see also* Doc. No. 82 at 9). The record before the Court establishes that, due to the continuing COVID-19 case count in Williamson County, including at Plaintiffs' schools, along with the significant number of students who had opted out pursuant to Governor Lee's Executive Order, Plaintiffs have been denied access to a safe, in-person educational experience. (*See* Doc. No. 1 ¶¶ 56-78; *see also* Doc. No. 4-1 at 12- 13). As R.K.'s mother testified, her "daughter is at higher risk to be one of those 13 real individual human children" who died in Tennessee in August. (Doc. No. 77 at 65:6-10). This risk, she says, is "too much for [her] family." (*Id.* at 65:12).

Similarly, W.S.'s mother remains "concerned that [W.S.] may be reinfected if [the Franklin school system] does not universally require masks for all students and teachers." (Doc. No. 4-4 ¶ 10; *see also* Doc. No. 70-1 at 32:7-13). And according to Dr. Cross, "the failure to implement a universal masking policy in schools will likely lead to extremely high rates of transmission of COVID-19." (Doc. No. 4-5 ¶ 20). In short, disabled students are at a significantly higher risk for *33 severe infection and are exposed at a higher rate following Executive Order No. 84 is, by itself, an irreparable harm that justifies continued injunctive relief. (*See* Doc. No. 4-6 ¶¶ 13, 19).

This finding is consistent with the Western and Eastern Districts of Tennessee decisions on irreparable harm. In the Western District, Judge Lipman concluded that because plaintiffs pled that "school has been in session for more than 3 weeks, a significant number of the student body has already opted-out of the county-wide mask mandate, and the number of students infected with COVID-19 or exposed, warranting quarantine continues to rise, " plaintiffs were "denied the benefits of an in-person public education." *G.S.*, 2021 WL 4268285, at *12. And in the Eastern District, Judge Greer concluded that disabled students were being irreparably harmed because of the lack of a universal mask mandate. *S.B.*, 2021 WL 4755619, at *23-26. The same remains true in Williamson County.

Accordingly, the Court finds that Plaintiffs face irreparable harm to justify immediate injunctive relief, and that this factor weighs in their favor.

D. *Harm to Others and the Public Interest*

The Court must finally balance any harm with the public interest. *Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that when the government opposes injunctive relief, the third and fourth elements for a preliminary injunction merge); *see also S.B.*, 2021 WL 4755619, at *27; *G.S.*, 2021 WL 4268285, at *12-13; *ARC of Iowa*, 2021 WL 4166728, at *12. The Governor maintains the same argument as the one the Court already rejected when issuing a temporary injunction: that the public interest weighs against an injunction because "[g]ranting an injunction subverts the democratic process" and improperly interferes with the "individualized choice of thousands of parents in Williamson County." (Doc. No. 16 at 16-17). Plaintiffs respond that there would be no harm suffered by the Governor because the public
34 is benefitted by: (1) enforcement of the ADA; *34
(2) protection of public health; (3) a reduced risk and spread of COVID-19 among schools; and (4) reduced strain on hospital resources for those requiring care. (Doc. No. 4-1 at 14). The Court agrees.

As discussed above, the elected Williamson County and Franklin school systems have statutory authority to impose temporary universal mask mandates to protect their constituencies and to support public health. (*See* Doc. Nos. 1-1, 23, 24, 26, 27); *see also* Tenn. Code Ann. § 49-2-203(a)(2) (providing the authority for schools to "[m]anage and control all public schools established or that may be established under its jurisdiction"). Public health is certainly in the public interest. *See G.S.*, 2021 WL 4268285, at *13 (citing *Neinast v. Bd. of Trs. of the Columbus Metro. Library*, 346 F.3d 585, 594 (6th Cir. 2003)). As the Court previously found, the public interest also favors injunctive relief because it is "served by the enforcement of the ADA." *Wilborn ex rel. Wilborn v. Marin*, 965 F.Supp.2d 834, 848 (M.D. Tenn. 2013); *see also Hostettler v. Coll. of Wooster*, 895 F.3d 844, 853 (6th Cir. 2018).

In sum, the record before the Court establishes that temporary universal mask mandates adopted by the Williamson County and Franklin school systems have been, and likely would continue to be, effective in curbing the spread of COVID-19. (Doc. Nos. 1-1, 4-5 ¶ 12, 4-6 ¶ 20, 23, 24, 26, 27). Importantly, neither the Williamson County nor Franklin school system opposes the continued issuance of injunctive relief, as doing so would "be entirely consistent with the policy adopted by" the schools. (Doc. No. 81 at 3; *see also* Doc. No. 80 at 5).[9] Accordingly, the Court finds that the public interest favors continued injunctive relief.
35 *35

9 The Court recognizes that the Williamson County and Franklin school systems object to an indefinite universal mask mandate that would preclude them from amending current mitigation efforts or imposing new ones as the COVID-19 pandemic ebbs and flows. (

IV. CONCLUSION

For the foregoing reasons, Plaintiffs have established that they are entitled to a preliminary injunction against Governor Lee's Executive Order No. 84 under Federal Rule of Civil Procedure 65. *See* Fed.R.Civ.P. 65. Executive Order No. 84 violates federal law and must yield. Accordingly, Plaintiffs' Motion for a Preliminary Injunction (Doc. No. 4) will be granted.

36 An appropriate Order will enter. *36 *See* Doc. No. 65; *see also* Doc. Nos. 54, 54-1). *See* Fed.R.Evid. 702; *see also United States v. Frazier*, 442 F.Supp.3d 1012, 1016 (M.D. Tenn. 2020); *Norsworthy v. Beard*, 87 F.Supp.3d 1164, 1180-84 (N.D. Cal. 2015) (accepting medical expert's testimony under Rule 702 in ruling on a plaintiff's motion for injunctive relief). *See* Doc. No. 30). For the sake of clarity, the Court will recite some of those findings here, and, where applicable, expand those findings based on the enhanced record. *See* Doc. Nos. 50, 50-2). *See* Doc. No. 4-6). Plaintiffs did not seek to qualify Dr. Williams as an expert at the preliminary injunction hearing even though it appears that she would qualify under Federal Rule of Evidence 702. *See* Fed.R.Evid. 702. *See* Doc. No. 18). *See* Doc. No. 16 at 5-7); *see also Rose v. Delta Airlines, Inc.*, No. 15-13567, 2016 U.S. Dist. LEXIS 44423, at *17-18 (E.D. Mich. Apr. 1, 2016) (discussing abandonment in the context of an ADA and Section 504 case). Even had Governor Lee maintained such an argument, it would be unsuccessful. For the reasons stated in the Court's prior opinion issuing temporary injunctive relief, Governor Lee cannot establish either: (1) lack of diligence by Plaintiffs in bringing suit, or (2) prejudice. (*See* Doc. No. 30 at 13-14 (citing *Kehoe v. Component Sales Inc. v. Best Lighting Prods.*, 796 F.3d 576, 585 (6th Cir. 2015)); *see also State ex rel. Elvis Presley Intern. Memorial Foundation v. Crowell*, 733 S.W.2d 89, 101 (Tenn. Ct. App. 1987) (reciting the same elements)). *See* Doc. Nos. 34 at 9, 35 at 4, 80 at 4-5, 81 at 3-4). The Court clarifies that nothing in this opinion is meant to inhibit a school's authority, under Tennessee law, to impose or amend appropriate mitigation measures, including temporary universal mask mandates. *See* Tenn. Code Ann. § 49-2-203(a)(2).