

1 XAVIER BECERRA
 Attorney General of California
 2 ALICIA A. BOWER
 Acting Supervising Deputy Attorney General
 3 PETER H. CHANG
 Deputy Attorney General
 4 MARTHA EHLENBACH
 Deputy Attorney General
 5 State Bar No. 291582
 1300 I Street, Suite 125
 6 P.O. Box 944255
 Sacramento, CA 94244-2550
 7 Telephone: (916) 210-7314
 Fax: (916) 324-5205
 8 E-mail: Martha.Ehlenbach@doj.ca.gov
*Attorneys for Defendants Gavin Newsom, Sonia
 9 Angell, and Xavier Becerra*

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 12 RIVERSIDE DIVISION

13
 14 **PCG-SP VENTURE I, LLC,**
 Plaintiff,
 15
 16 v.
 17
 18 **GAVIN NEWSOM, et al.,**
 Defendants.
 19
 20
 21
 22
 23
 24
 25
 26
 27
 28

Case No. 5:20-cv-01138

**DEFENDANTS NEWSOM, ANGELL,
 AND BECERRA'S OPPOSITION TO
 PLAINTIFF'S EX PARTE
 APPLICATION FOR A TEMPORARY
 RESTRAINING ORDER**

Judge: Honorable Jesus Bernal
 Trial Date: Not Set
 Action Filed: June 2, 2020

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	2
I. THE COVID-19 PANDEMIC AND CALIFORNIA’S SWIFT RESPONSE	2
A. The Governor’s State-of-Emergency Proclamation	3
B. The Governor’s Roadmap to Reopen California.....	4
C. California’s Staged Reopening Was Designed to Prevent a Resurgence in COVID-19 Infections.....	5
II. THE PRESENT LAWSUIT.....	6
LEGAL STANDARD	7
ARGUMENT	8
I. THE REQUESTED TRO IS MOOT AND PLAINTIFF HAS FAILED TO DEMONSTRATE IRREPARABLE HARM.	8
II. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.	10
A. The State’s Orders Are a Constitutional Exercise of the Governor’s Emergency Powers to Combat COVID-19.....	11
B. Plaintiff Is Also Unlikely to Succeed Under Traditional Constitutional Analysis.....	14
1. Plaintiff’s Due Process Claim Fails	14
2. Plaintiff’s Equal Protection Claim Fails	16
3. Plaintiff’s Takings Claim Fails	18
C. Plaintiff’s State Law Claims Are Barred by the Eleventh Amendment and Fail on the Merits.	20
III. THE REMAINING FACTORS WEIGH HEAVILY AGAINST ISSUANCE OF A TEMPORARY RESTRAINING ORDER.	22
CONCLUSION.....	23

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

CASES

Akins v. United States
82 Fed. Cl. 619 (2008)..... 19

Alliance for Wild Rockies v. Cottrell
632 F.3d 1127 (9th Cir. 2011)..... 8

Am. Passage Media Corp. v. Cass Commc’ns, Inc.
750 F.2d 1470 (9th Cir. 1985)..... 10

Am. Trucking Ass’ns, Inc. v. City of Los Angeles
559 F.3d 1046 (9th Cir. 2009)..... 7

An Na Peng v. Holder
673 F.3d 1248 (9th Cir. 2012)..... 16

Angelotti Chiropractic, Inc. v. Baker
791 F.3d 1075 (9th Cir. 2015)..... 16

Arizona Dream Act Coal. v. Brewer
757 F.3d 1053 (9th Cir. 2014)..... 9, 10

Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers
941 F.3d 1195 (9th Cir. 2019)..... 9

Best Supplement Guide, LLC v. Newsom, et al.
No. 2:20-cv-00965-JAM-CKD, 2020 WL 2615022
(E.D. Cal. May 22, 2020) *passim*

Brown v. Buhman
822 F.3d 1151 (10th Cir. 2016)..... 9

Caribbean Marine Servs. Co. v. Baldrige
844 F.2d 668 (9th Cir. 1988)..... 10

Chi., B. & Q. R. Co. v. Illinois
200 U.S. 561 (1906) 19

City of Los Angeles v. Cty. of Kern
581 F.3d 841 (9th Cir. 2009)..... 7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

	Page
<i>Coal. for Competitive Elec., Dynegy Inc. v. Zibelman</i> 272 F. Supp. 3d 554 (S.D.N.Y. 2017).....	7
<i>Cross Culture Christian Ctr. v. Newsom</i> ___ F. Supp. 3d ___, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111 (E.D. Cal. May 5, 2020).....	12, 16, 17
<i>Drakes Bay Oyster Co. v. Jewell</i> 747 F.3d 1073 (9th Cir. 2014).....	22
<i>Elim Romanian Pentecostal Church v. Pritzker</i> No. 20-1811, 2020 WL 2517093 (7th Cir. May 16, 2020).....	20
<i>Engquist v. Or. Dept. of Agric.</i> 478 F.3d 985 (9th Cir. 2007).....	15
<i>Farmers Ins. Exch. v. State of California</i> 175 Cal. App. 3d 494 (1985).....	21
<i>FCC v. Beach Commc’ns, Inc.</i> 508 U.S. 307 (1993).....	17
<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.</i> 528 U.S. 167 (2000).....	8-9
<i>Gish v. Newsom</i> No. 5:20-cv-00755-JGB-KKX, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020).....	12, 13
<i>Givens v. Newsom</i> No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224 (E.D. Cal. May 8, 2020).....	7, 12, 17, 21
<i>Guzman v. Shewry</i> 552 F.3d 941 (9th Cir. 2009).....	15
<i>Halverson v. Skagit Cty.</i> 42 F.3d 1257 (9th Cir. 1994).....	14

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	<i>Hartman v. Acton</i>	
4	___ F. Supp. 3d ___, No. 2:20-CV-1952, 2020 WL 1932896 (S.D.	
5	Ohio Apr. 21, 2020).....	14
6	<i>Hotel & Motel Ass’n of Oakland v. City of Oakland</i>	
7	344 F.3d 959 (9th Cir. 2003).....	15-16
8	<i>In re Lowenschuss</i>	
9	67 F.3d 1394 (9th Cir. 1995).....	7
10	<i>Jacobson v. Commonwealth of Massachusetts</i>	
11	197 U.S. 11 (1905)	2, 11, 12, 13
12	<i>Jew Ho v. Williamson</i>	
13	103 F. 10 (C.C.N.D. Cal. 1900)	21
14	<i>Kansas v. Hendricks</i>	
15	521 U.S. 346 (1997)	11
16	<i>Kenneally v. Medical Board</i>	
17	27 Cal. App. 4th 489 (App. 2 Dist. 1994)	21-22
18	<i>Knick v. Twp. of Scott, Penn.</i>	
19	139 S. Ct. 2162 (2019)	18
20	<i>Legacy Church, Inc. v. Kunkel, et al.</i>	
21	___ F. Supp. 3d ___, No. CIV 20-0327 (D.N.M. Apr. 17, 2020).....	16
22	<i>Lockaway Storage v. Cty. of Alameda</i>	
23	216 Cal. App. 4th 161 (2013).....	21
24	<i>Marshall v. United States</i>	
25	414 U.S. 417 (1974)	16
26	<i>Ex parte Martin</i>	
27	83 Cal. App. 2d 164 (1948)	21
28	<i>McGhee v. City of Flagstaff</i>	
	No. CV-20-08081-PCT-GMS, 2020 WL 2308479	
	(D. Ariz. May 8, 2020)	15

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	<i>Miller v. Schoene</i>	
4	276 U.S. 272 (1928)	19
5	<i>Monica Six, et al. v. Newsom, et al.</i>	
6	___ F. Supp. 3d ___, No. 820-cv-00877-JLS-DFM,	
7	2020 WL 2896543 (C.D. Cal. May 22, 2020).....	12, 13, 17
8	<i>Mugler v. Kansas</i>	
9	123 U.S. 623 (1887)	19
10	<i>Munaf v. Geren</i>	
11	553 U.S. 674 (2008)	7
12	<i>Nat’l Org. for Reform of Marijuana Laws v. Gain</i>	
13	100 Cal. App. 3d 586 (1979).....	21
14	<i>Penn Central Transp. Co. v. City of New York</i>	
15	438 U.S. 104 (1978)	20
16	<i>Pennhurst State Sch. & Hosp. v. Halderman</i>	
17	465 U.S. 89 (1984)	20
18	<i>Pharm. Research & Mfrs. of Am. v. Cty. of Alameda</i>	
19	768 F.3d 1037 (9th Cir. 2014).....	7
20	<i>Pike v. Bruce Church, Inc.</i>	
21	397 U.S. 137 (1970)	7
22	<i>Professional Beauty Fed’n of Calif. v. Newsom, et al.</i>	
23	No. 2:20-cv-04275-RGK-AS (C.D. Cal. June 8, 2020)	18
24	<i>Reno Air Racing Ass’n, Inc. v. McCord</i>	
25	452 F.3d 1126 (9th Cir. 2006).....	7
26	<i>Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.</i>	
27	944 F.2d 597 (9th Cir. 1991)	10
28	<i>S. Bay United Pentecostal Church v. Newsom</i>	
	___ F.3d ___, No. 20-55533, 2020 WL 2687079	
	(9th Cir. May 22, 2020).....	<i>passim</i>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

	Page
<i>S. Bay United Pentecostal Church v. Newsom</i> No. 19A1044, __ S. Ct. __ (May 29, 2020)	11
<i>Smith v. Avino</i> 91 F.3d 105 (11th Cir. 1996)	11
<i>Steel Co. v. Citizens for a Better Env’t</i> 523 U.S. 83 (1998)	12
<i>Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency</i> 535 U.S. 302 (2002)	20
<i>TrinCo Inv. Co. v. United States</i> 722 F.3d 1375 (Fed. Cir. 2013)	18
<i>United States v. Caltex</i> 344 U.S. 149 (1952)	18
<i>Will v. Michigan Dep’t of State Police</i> 491 U.S. 58 (1989)	14
<i>Winter v. Natural Res. Def. Council</i> 555 U.S. 7 (2008)	7, 9, 22
<i>Wisconsin Cent. Ltd. v. Pub. Serv. Comm’n</i> 95 F.3d 1359 (7th Cir. 1996)	18
<i>Yee v. City of Escondido</i> 503 U.S. 519 (1992)	19
STATUTES	
California Government Code § 8572.....	6, 21
CONSTITUTIONAL PROVISIONS	
California Constitution Article 1, § 1	6, 21
California Constitution Article 1, § 7	6
California Constitution Article 1, § 19	6, 21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

	Page
U.S. Constitutional Amendment V.....	6
U.S. Constitutional Amendment XI	14, 20, 21
U.S. Constitutional Amendment XIV.....	6
COURT RULES	
Federal Rule of Civil Procedure 65(b)(1).....	7

INTRODUCTION

1
2 The State of California, like the rest of the world, is combating a public health
3 emergency of a magnitude unseen for at least a century. COVID-19, the novel
4 virus spreading throughout the country, is a virulently infectious and deadly disease
5 that has infected more than 1.7 million Americans and killed more than 101,000.
6 The virus has a long incubation period and may be spread unknowingly by
7 individuals with no symptoms who appear healthy. Because the virus is new, there
8 is no vaccine or widely effective treatment for it. Consequently, the primary means
9 to slow the spread of COVID-19 and prevent it from overwhelming our health care
10 system is through physical distancing. Accordingly, California Governor Gavin
11 Newsom proclaimed a state of emergency, and the State Health Officer issued
12 various public health orders to slow the virus’s spread and preserve the health and
13 safety of all Californians.

14 The emergency public health measures imposed to combat COVID-19 have
15 required sacrifices, but California has gradually lifted restrictions as state and local
16 public health officials have carefully monitored the effect of reopening on the
17 virus’s transmission, mortality rates, and hospitals’ capacity to handle COVID-19
18 cases. As part of the State’s staged reopening plan, state and local public health
19 officers first allowed lower-risk businesses and activities to reopen with
20 modifications to protect customers and employees. As of this past Friday, hotels
21 and lodging—along with a number of higher-risk businesses and activities that had
22 not yet been permitted to reopen—are authorized to reopen, consistent with public
23 health guidelines.

24 Plaintiff PCG-SP Venture I, which operates the V Palm Springs hotel in
25 Riverside County, moved for a temporary restraining order (TRO) to reopen the
26 hotel. As a threshold matter, this Court should deny the TRO because, after
27 Plaintiff filed the TRO, the State issued guidance authorizing hotels to reopen. This
28 development forecloses a TRO or other injunctive relief.

1 Plaintiff's claims also fail on the merits. In seeking emergency injunctive
2 relief, the plaintiff always bears a heavy burden. That burden is even heavier
3 where, as here, the party seeks an injunction against bona fide public-health
4 measures adopted in response to an emergency. Plaintiff's claims fail under the
5 framework announced in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S.
6 11 (1905), that applies in a public health crisis like the one California faces now.
7 Indeed, the claims are deficient as a matter of law even under traditional
8 constitutional analysis. And in the unlikely event that it were necessary to analyze
9 any claim under strict scrutiny, the State's public health measures would survive
10 that scrutiny because the State's response is carefully tailored to address the
11 extreme threat posed by COVID-19.

12 Finally, given the careful way in which California is navigating the extreme
13 threat posed by COVID-19, the public interest and balance of the equities weigh
14 heavily against a TRO. While the economic sacrifices that Plaintiff, like so many
15 other Californians, has been asked to make are significant, they are outweighed by
16 the magnitude and severity of the risk to all Californians, and particularly those
17 who are most vulnerable.

18 For these reasons, this Court should deny Plaintiff's application for a TRO.

19 **BACKGROUND**

20 **I. THE COVID-19 PANDEMIC AND CALIFORNIA'S SWIFT RESPONSE**

21 COVID-19 is a highly contagious and deadly disease, which can be readily
22 transmitted when people gather outside the home. *See* Decl. Dr. James Watt (Watt
23 Decl.) at ¶¶ 9–11. COVID-19 has infected more than 6.9 million people and caused
24 the deaths of more than 400,000 people worldwide.¹ In the United States alone,
25 COVID-19 has infected more than 1.9 million people and caused the deaths of

26 _____
27 ¹ See World Health Org., Coronavirus Disease (COVID-19) Pandemic,
28 *available at:* <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
(last accessed June 8, 2020).

1 more than 110,000 people.² California recognized early that COVID-19 had the
2 potential to spread rapidly throughout the state. *See* Req. Jud. Not. Supp. Defs.’
3 Opp’n to Pl’s TRO (RJN) Exs. 1, 2. California’s decisive action has slowed the
4 rate of new infections, and the State is now moving through a staged process of
5 reopening businesses and activities, informed by public health experts based on
6 relative risks of transmission involved and the capacity of state and local health
7 systems to respond to any new outbreaks. RJN Exs. 3–11.

8 **A. The Governor’s State-of-Emergency Proclamation**

9 On March 4, 2020, the Governor proclaimed a State of Emergency in
10 California to prepare for and respond to cases of COVID-19 and implement
11 measures to prevent the spread of COVID-19. *See* RJN Ex. 1 at 2. On March 19,
12 2020, the Governor issued Executive Order N-33-20. RJN Ex. 2. This Order
13 directed all California residents to heed the directives of the State’s Public Health
14 Officer relating to COVID-19, and incorporated an order from the State Public
15 Health Officer requiring “all individuals living in the State of California to stay
16 home . . . except as needed to maintain continuity of operations of [specified]
17 federal critical infrastructure sectors.” *Id.* at 1. It also addressed circumstances in
18 which individuals who are not designated “Essential Critical Infrastructure
19 Workers” may leave their houses, such as for “access[ing] such necessities as food,
20 prescriptions, and health care.” *Id.* at 2. In the months since Executive Order N-
21 33-20 was issued, the Governor and the State Public Health Officer have issued
22 new or updated directives to meet the changing circumstances of this crisis.³

23 ///

24 ///

25 _____
26 ² *See* Cases in U.S., available at: <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last accessed June 8, 2020).

27 ³ *See, e.g.*, Stay Home Q&A (last updated June 8, 2020 at 4:02 p.m.),
28 available at: <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (last accessed June 9, 2020) (“Can the Order be changed? Yes. The State Public Health Officer may issue new orders as the public health situation changes.”)

1 **B. The Governor’s Roadmap to Reopen California**

2 On April 28, 2020, the Governor announced a four-stage “Resilience
3 Roadmap” to guide the gradual and safe reopening of the State. *See* RJN Ex. 3 at 1.
4 The Roadmap’s four stages are: safety and preparation (Stage 1); reopening of
5 lower-risk workplaces and other spaces (Stage 2); reopening of higher-risk
6 workplaces and other spaces (Stage 3); and, finally, an end to the emergency orders
7 (Stage 4). *Id.*; *see also* RJN Exs. 4, 5. To implement the Roadmap, the Governor
8 issued Executive Order N-60-20, requiring that Californians continue to comply
9 with the State’s earlier orders, and directing the State Public Health Officer to
10 establish criteria and procedures for local jurisdictions to move more quickly
11 through Stage 2. *Id.*, Ex. 6 at 2.

12 On May 7, 2020, the State Public Health Officer ordered the State to move
13 into Stage 2 based on her review of the data, stating that she would “progressively
14 designate sectors, businesses, establishments, or activities that may reopen with
15 certain modifications, based on public health and safety needs” and at “a pace
16 designed to protect public health and safety.” RJN Ex. 7 at 2. Where sectors are
17 reopened, Californians must “continue at all times to practice physical distancing,
18 minimize their time outside of the home, and wash their hands frequently.” *Id.*

19 Currently, in Stage 2, “retail, related logistics and manufacturing, office
20 workplaces, limited personal services, outdoor museums, child care, and essential
21 businesses can open with modifications.” RJN Ex. 8 at 1. To date, fifty-one
22 counties (including Riverside County) have attested to their readiness to move
23 further ahead through the Resilience Roadmap than is generally permitted
24 statewide—which allowed those counties to determine which additional lower-risk
25 businesses and spaces may reopen, and when they may do so, consistent with
26 public-health guidelines.⁴

27 ⁴ Cal. Dep’t of Public Health, County Variance Info, available at:
28 <https://covid19.ca.gov/roadmap-counties/#top> (last visited June 9, 2020); Cal. Dep’t

1 On June 5, 2020, the California Department of Public Health (CDPH) issued
 2 guidance allowing for the reopening of hotels, lodging, and short-term rentals.⁵ *See*
 3 RJN Ex. 10. The guidance includes a recommended effective date of June 12,
 4 2020, although local public health departments may permit businesses to open
 5 sooner. *Id.*, Exs. 10–11. Therefore, under the state public health orders, the hotel
 6 that Plaintiff operates is currently permitted to reopen if the county deems it
 7 appropriate, based upon the epidemiology and readiness of the county. *Id.*, Ex. 10
 8 at 3.

9 **C. California’s Staged Reopening Was Designed to Prevent a**
 10 **Resurgence in COVID-19 Infections.**

11 Even though the State’s orders have succeeded in “flattening the curve”⁶ and
 12 permitted the State to begin reopening, the virus still poses a grave threat, and
 13 reopening must be managed carefully to avoid a resurgence of infections and death.
 14 *See* Watt Decl. at ¶¶ 11–24. Although the curve has flattened with respect to new
 15 cases and deaths, the crisis is not over, with a spike seen as recently as June 8,
 16 2020.⁷ Average deaths in June remain above 55 per day. *Id.* These numbers, of
 17 course, reflect infections and deaths with the current health orders and limitations in
 18 place. *Id.*

19 The staged reopening plan was designed to balance the reopening of the
 20 California economy while maintaining epidemiologic stability and mitigating risk

21 _____
 22 of Public Health, COVID-19 County Variance Attestation Form, available at:
[https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/County_Variance_Attestation_Form.aspx)
 23 [19/County_Variance_Attestation_Form.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/County_Variance_Attestation_Form.aspx) (last visited June 8, 2020).

24 ⁵ This guidance was released along with guidance for other higher-risk
 25 businesses and activities that had not previously been permitted to reopen under the
 Resilience Roadmap. *See generally* RJN Ex. 10, available at
<https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-113.aspx> (last accessed June
 26 8, 2020).

27 ⁶ “Flattening the curve” is a shorthand reference to using measures (e.g.,
 individual measures, like washing hands or wearing a mask, or governmental
 measures, like the State’s orders) to keep the number of disease cases at a
 manageable level for the relevant health care system.

28 ⁷ *See* COVID-19 Statewide Update: Update for June 9, 2020, available at:
<https://update.covid19.ca.gov> (last accessed June 9, 2020).

1 to vulnerable populations. *See* Watt Decl. at ¶¶ 16, 24. It is constantly being
2 monitored and updated by the California Department of Public Health. *See* RJN
3 Exs. 4–10. Without such a careful and measured approach to reopening, the risk of
4 a resurgence is significant; and with such a resurgence comes the likelihood of
5 significant increases in new cases and deaths, and the potential to overwhelm our
6 health system that California has thus far been able largely to avoid. *See* Watt Decl.
7 at ¶ 16. Also, the risk of a spike in COVID-19 infections increases as travel
8 increases throughout California, which is one of the reasons that public health
9 officials identified businesses such as hotels, which facilitate leisure travel, for the
10 later stages of reopening. *Id.* at ¶ 23.

11 **II. THE PRESENT LAWSUIT**

12 Plaintiff filed suit on June 2, 2020. Compl., ECF No. 1. The complaint
13 alleges that Plaintiff is a California company that operates the V Palm Springs
14 Hotel in Riverside County. *Id.* at ¶ 17. Plaintiff claims that directives from the
15 State and from Riverside County required the hotel to close. *Id.* at ¶¶ 22–33. As a
16 result, Plaintiff allegedly faces “numerous difficulties with respect to its financial
17 obligations” and an “existential threat to its collective survival and business
18 operations.” *Id.* at ¶ 32. Plaintiff asserts eight causes of action under: (1) the
19 Dormant Commerce Clause of the U.S. Constitution; (2) the Fourteenth
20 Amendment to the U.S. Constitution (due process); (3) the Fourteenth Amendment
21 to the U.S. Constitution (equal protection); (4) the Fifth Amendment to the U.S.
22 Constitution (takings); (5) Article I, section 1, of the California Constitution (right
23 to liberty); (6) Article I, section 7, of the California Constitution (due process); (7)
24 Article I, section 19, of the California Constitution (takings); and (8) California
25 Government Code section 8572 (commandeering private property or personnel).
26 Compl. at ¶¶ 5–41.

27 On June 4, 2020, Plaintiff filed an application for a TRO to “set aside and hold
28 unlawful” the State’s public-health orders, enjoin their enforcement, and award

1 damages. TRO App., ECF No. 8 at 35–36. In the application for a TRO, Plaintiff
2 only addresses alleged violations of the Due Process Clause, the Equal Protection
3 Clause, the Takings Clause, and the asserted state-law claims. *Id.* at 13–24.⁸

4 LEGAL STANDARD

5 TROs are emergency measures intended to preserve the status quo pending a
6 full hearing on the injunctive relief requested. Fed. R. Civ. Proc. 65(b)(1); *see Reno*
7 *Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006). Such relief
8 is an “extraordinary and drastic remedy,” *Munaf v. Geren*, 553 U.S. 674, 690
9 (2008), hinging on “a significant threat of irreparable injury that must be imminent
10 in nature.” *Givens v. Newsom*, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224,
11 at *3 (E.D. Cal. May 8, 2020) *appeal docketed*, No. 20-15949 (9th Cir. May 19,
12 2020) (internal citations omitted).

13 Plaintiffs seeking temporary injunctive relief must demonstrate that (1) they
14 are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in
15 the absence of preliminary relief, (3) the balance of equities tips in their favor, and
16 (4) an injunction is in the public interest. *Am. Trucking Ass’ns, Inc. v. City of Los*
17 *Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Natural Res. Def.*
18 *Council*, 555 U.S. 7 (2008)). Alternatively, Plaintiff must show that there are

19 ⁸ Plaintiff does not address the claim under the Dormant Commerce Clause
20 in the TRO application and has therefore waived any argument regarding that
21 claim. *See generally* TRO App.; *see In re Lowenschuss*, 67 F.3d 1394, 1402 (9th
22 Cir. 1995) (“An issue not discussed in a brief... is deemed to be waived.”).
23 Regardless, that claim would fail on the merits. Plaintiff, an in-state entity, lacks
24 prudential standing because the injury alleged (the closure of a California hotel) is
25 not “marginally related to the purposes underlying” the Dormant Commerce
26 Clause. *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 847 (9th Cir. 2009); *see*
27 *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 582
28 (S.D.N.Y. 2017), *aff’d sub nom. Coal. for Competitive Elec., Dynegy Inc. v.*
Zibelman, 906 F.3d 41 (2d Cir. 2018). The State’s orders are nondiscriminatory
because they apply equally to potential guests of the hotel who are from California
and from out-of-state. *See Pharm. Research & Mfrs. of Am. v. Cty. of Alameda*,
768 F.3d 1037, 1041 (9th Cir. 2014) (a “statute that treats all private companies
exactly the same does not discriminate against interstate commerce”). Finally, even
assuming an unequal burden, the orders are constitutional because they serve a
“legitimate local public interest” and the burdens do not clearly exceed the local
benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *see Background*,
I.A, I.C, *supra*.

1 “serious questions going to the merits” *and* a “balance of hardships that tips *sharply*
2 towards the plaintiff,” in addition to irreparable harm. *Alliance for Wild Rockies v.*
3 *Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (emphasis added).

4 **ARGUMENT**

5 Plaintiff is not entitled to injunctive relief. First, the requested TRO, which
6 seeks to enjoin a prohibition Defendants allegedly imposed on operating hotels, is
7 moot in light of the recently issued state guidance that permits hotels to reopen so
8 long as the local county public health officer (who is not a defendant in this action)
9 determines that reopening is advisable based on current conditions. In light of this
10 new guidance, and given the dearth of specific evidence in the TRO showing that
11 Plaintiff is likely to experience irreparable harm in the absence of a TRO, this Court
12 should find that extraordinary relief is not warranted.

13 Even if the requested TRO were not moot, Plaintiff is not likely to succeed on
14 the merits. This is particularly true in light of the current public health crisis and
15 the constitutional standard applicable to the Governor’s exercise of his emergency
16 powers to combat that crisis. But the claims are also not likely to succeed under a
17 traditional constitutional analysis.

18 Also, Plaintiff has not shown that the remaining factors warrant an injunction.
19 To the contrary, any economic harm to Plaintiff absent a temporary restraining
20 order is greatly outweighed by the significant risk of severe harm to the public if
21 California’s careful, evidence-based efforts toward gradual reopening are disrupted.
22 For all of these reasons, Plaintiff’s application should be denied.

23 **I. THE REQUESTED TRO IS MOOT AND PLAINTIFF HAS FAILED TO** 24 **DEMONSTRATE IRREPARABLE HARM.**

25 As a threshold matter, the recently issued state public health guidance for
26 hotels renders the interim relief that Plaintiff seeks moot. Mootness occurs when
27 “subsequent events make it absolutely clear that the allegedly wrongful behavior
28 could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw*

1 *Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000). Government officials are
2 presumed to act in good faith when they repeal legislation or otherwise cease
3 challenged conduct, such that a plaintiff must establish a “reasonable expectation”
4 that the challenged conduct is likely to recur. *Bd. of Trs. of Glazing Health &*
5 *Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (addressing
6 mootness in the context of a repeal of challenged legislation).

7 Plaintiff’s TRO seeks to enjoin Defendants “from prohibiting Plaintiff’s
8 operation of its hotel business . . . on the basis that said activity does not fall . . .
9 within a category of businesses otherwise permitted by Defendant Governor
10 Newsom to reopen.” TRO App., ECF No. 8 at 3. But the California Department of
11 Public Health has issued guidance for the safe reopening of hotels. RJN Exs. 10,
12 11. Accordingly, the operative executive orders and state public health orders
13 permit Plaintiff’s hotel to reopen, subject to a determination by the local county
14 public health officer that reopening is advisable based on current conditions. *Id.*
15 The concern that the hotel will “reach a point of never being able to recover” as a
16 result of the State’s orders, TRO App. at 12, is moot, in addition to being
17 unsupported by competent evidence as explained below. *See Bd. of Trs. of Glazing*
18 *Health*, 941 F.3d at 1198.⁹

19 Plaintiff has also failed to show a likelihood of irreparable harm, which further
20 forecloses a TRO or other injunctive relief. A plaintiff seeking temporary
21 injunctive relief must “demonstrate that irreparable injury is *likely* in the absence of
22 an injunction.” *Winter*, 555 U.S. at 22 (emphasis in original). Irreparable harm is
23 “traditionally defined as harm for which there is no adequate legal remedy, such as
24 an award of damages.” *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068
25 (9th Cir. 2014). A plaintiff cannot obtain temporary injunctive relief without

26 ⁹ Also, Plaintiff has sued State officials. *See generally* Compl. Thus,
27 whether local public health officers advise reopening is irrelevant to the mootness
28 issue because they are not before the court: any quibble that Plaintiff has with local
orders cannot be “redressed by a favorable judicial decision” on the TRO. *Brown v.*
Buhman, 822 F.3d 1151, 1166 (10th Cir. 2016) (citation omitted).

1 producing evidence to make this showing. *See Caribbean Marine Servs. Co. v.*
2 *Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (a plaintiff “must demonstrate
3 immediate threatened injury as a prerequisite to preliminary injunctive relief.”);
4 *Am. Passage Media Corp. v. Cass Commc’ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir.
5 1985) (reversing the entry of a preliminary injunction because the movant had not
6 shown irreparable harm). Such evidence must be more than “affidavits [that] are
7 conclusory and without sufficient support in facts.” *Am. Passage Media Corp.*, 750
8 F.2d at 1473.

9 Here, Plaintiff cannot demonstrate irreparable harm based on the single,
10 conclusory affidavit attached to the TRO. Decl. Greg Grossman Supp. TRO App.,
11 ECF No. 8-2. The declaration contains almost no information regarding the length
12 of time that Plaintiff could continue to maintain the V Palm Springs Hotel without
13 experiencing severe financial hardship. *See generally id.* Thus, any harm
14 experienced from the temporary closure of the hotel would be compensable in
15 damages and is therefore not irreparable. *See Arizona Dream Act Coal. v. Brewer*,
16 757 F.3d 1053 at 1068; *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental,*
17 *Inc.*, 944 F.2d 597, 603 (9th Cir. 1991).

18 **II. PLAINTIFF HAS NOT SHOWN A LIKELIHOOD OF SUCCESS ON THE**
19 **MERITS.**

20 Plaintiff’s TRO application must be denied because Plaintiff has not
21 demonstrated a likelihood of success on any of the claims. Plaintiff’s challenge
22 fails under the framework applied in extraordinary circumstances like the one
23 California is facing during the COVID-19 pandemic. And even outside the
24 emergency context, the claims are deficient as a matter of law under traditional
25 standards of constitutional analysis.

26 ///

27 ///

28 ///

1 **A. The State’s Orders Are a Constitutional Exercise of the**
2 **Governor’s Emergency Powers to Combat COVID-19.**

3 In an extraordinary public-health crisis such as the COVID-19 pandemic, the
4 State has broad emergency powers that it may exercise to protect public health, and
5 courts should afford deference to temporary actions taken to curb the spread of a
6 dangerous disease and mitigate its effects. As the Supreme Court has long
7 recognized, “a community has the right to protect itself against an epidemic of
8 disease which threatens the safety of its members.” *Jacobson v. Commonwealth of*
9 *Massachusetts*, 197 U.S. 11, 25 (1905); *see also Kansas v. Hendricks*, 521 U.S.
10 346, 356-57 (1997) (recognizing the continuing vitality of *Jacobson*). “Our
11 Constitution principally entrusts ‘the safety and the health of the people’ to the
12 politically accountable officials of the States,” and such officials’ public health
13 judgments “should not be subject to second-guessing” in court where—as here—
14 they “act in areas fraught with medical and scientific uncertainties.” *S. Bay United*
15 *Pentecostal Church v. Newsom*, No. 19A1044, __ S. Ct. __, 2020 WL 2813056, at
16 *2 (May 29, 2020) (Roberts, C.J., concurring) (*quoting, inter alia, Jacobson*, 197
17 U.S. at 38).

18 The framework set out in *Jacobson* recognizes that, “under the pressure of
19 great dangers,” constitutional rights may be reasonably restricted “as the safety of
20 the general public may demand.” *Jacobson*, 197 U.S. at 29. Emergency orders
21 issued to protect public health during the current crisis should be upheld unless they
22 have “no real or substantial relation” to legitimate public health ends or are “beyond
23 all question, a plain, palpable invasion” of constitutional rights. *Id.* at 31. This
24 deferential standard recognizes that, in a public health crisis, “it is no part of the
25 function of a court . . . to determine which one of two modes was likely to be the
26 most effective for the protection of the public against disease.” *Id.* at 30. Rather,
27 “governing authorities must be granted the proper deference and wide latitude
28 necessary for dealing with . . . emergenc[ies].” *Smith v. Avino*, 91 F.3d 105, 109

1 (11th Cir. 1996), *abrogated on other grounds*, *Steel Co. v. Citizens for a Better*
2 *Env't*, 523 U.S. 83 (1998).

3 Under *Jacobson*, Plaintiff's claims fail as a matter of law. As the Ninth
4 Circuit has recognized, the State's orders have a real and substantial relation to
5 legitimate public health ends: "We're dealing here with a highly contagious and
6 often fatal disease for which there presently is no known cure." *S. Bay United*
7 *Pentecostal Church v. Newsom*, __ F.3d __, No. 20-55533, 2020 WL 2687079, at
8 *1 (9th Cir. May 22, 2020); *see also Givens*, 2020 WL 2307224, at *4 ("[T]he
9 State's stay at home order bears a real and substantial relation to public health.").
10 And—as shown more fully below—the orders are not "beyond all question" a
11 "plain, palpable invasion" of fundamental constitutional rights. *Jacobson*, 197 U.S.
12 at 31.

13 Plaintiff's TRO application ignores *Jacobson*. *See generally* TRO App.
14 Numerous federal courts, applying *Jacobson*, have already concluded that similar
15 challenges to the State's public health orders are unlikely to succeed on the merits.
16 *See, e.g., S. Bay United Pentecostal Church*, 2020 WL 2813056, at *1 (Roberts,
17 C.J., concurring) (declining to enjoin enforcement of the orders' ban on in-person
18 religious services); *Best Supplement Guide, LLC v. Newsom, et al.*, No. 2:20-cv-
19 00965-JAM-CKD, 2020 WL 2615022, at *3–7 (E.D. Cal. May 22, 2020)
20 (concluding that the State's orders are a "constitutional response to an
21 unprecedented pandemic"); *Givens*, 2020 WL 2307224, at *3–5 (applying *Jacobson*
22 to conclude that the plaintiffs were unlikely to succeed on their challenge to the
23 stay-at-home orders); *Monica Six, et al. v. Newsom, et al.*, __ F. Supp. 3d __, No.
24 820-cv-00877-JLS-DFM, 2020 WL 2896543 at *1–7 (C.D. Cal. May 22, 2020)
25 (same); *Cross Culture Christian Ctr. v. Newsom*, __ F. Supp. 3d __, No. 2:20-cv-
26 00832-JAM-CKD, 2020 WL 2121111, at *3–5 (E.D. Cal. May 5, 2020) (the State's
27 orders "bear a real and substantial relation to public health"); *Gish v. Newsom*, No.
28 5:20-cv-00755-JGB-KKX, 2020 WL 1979970, at *4–5 (C.D. Cal. Apr. 23, 2020),

1 *appeal docketed*, No. 20-55445 (9th Cir. Apr. 28, 2020) (performing a similar
2 analysis).

3 Plaintiff’s suggestion that the State’s Roadmap is unnecessary, *see* TRO App.
4 at 8, lacks evidentiary support. It is apparent that COVID-19 has spread rapidly
5 within California, has caused thousands of deaths, and continues to pose a serious
6 threat. *See* RJN Exs. 1, 10; Watt Decl. at ¶¶ 9–22. Without the State’s measured
7 approach to reopening, the State risks an increase in new cases and deaths, and the
8 number of cases could overwhelm the health system. Watt Decl. at ¶¶ 16–17. The
9 progress that the State has made in managing the crisis is evidence of the efficacy
10 of the directives, not evidence that those measures are unnecessary. *See Best*
11 *Supplement*, 2020 WL 2615022, at *3 (“Plaintiffs wholly fail to grapple with the
12 possibility that the health of their neighbors is a symptom of the stay at home
13 orders, rather than evidence that the restrictions aren’t needed.”); *Monica Six*, 2020
14 WL 2896543, at *4 (finding that the plaintiffs’ argument that the Stay-at-Home
15 Order is unnecessary because infection and hospitalization rates are much lower
16 than originally predicted “fails to account for the possibility that numbers are lower
17 *because* of the Stay-at-Home Order.” (emphasis in original)).

18 As the Supreme Court has cautioned, it is not for the judiciary to second-guess
19 which public health policies are “likely to be the most effective for the protection of
20 the public against disease.” *Jacobson*, 197 U.S. at 30; *see also S. Bay United*
21 *Pentecostal Church v. Newsom*, 2020 WL 2813056, at *2 (Roberts, C.J.,
22 concurring). Plaintiff has not identified any constitutional infringement by the State
23 under traditional constitutional analysis, *see infra* Section II.B, so they certainly
24 have not identified any action that is unconstitutional under the “minimal scrutiny
25 required where executive action is [taken] in response to an emergency.” *Gish*,
26 2020 WL 1979970, at *3. Given the public health emergency caused by the
27 COVID-19 pandemic—and the deference afforded to public health officials

28 ///

1 responding to such an emergency—Plaintiff is unlikely to succeed on any claims in
2 this lawsuit.

3 **B. Plaintiff Is Also Unlikely to Succeed Under Traditional**
4 **Constitutional Analysis.**

5 Plaintiff has failed to show any likelihood of success on the merits even under
6 a traditional constitutional analysis.¹⁰

7 **1. Plaintiff’s Due Process Claim Fails**

8 The State’s emergency orders do not violate Plaintiff’s procedural or
9 substantive due process rights.

10 First, binding precedent squarely forecloses Plaintiff’s procedural due process
11 argument that “hearings” and appellate rights are necessary before the State
12 imposes broadly applicable public health orders. TRO App. at 17. Governmental
13 decisions that “affect large areas and are not directed at one or a few individuals do
14 not give rise to the constitutional procedural due process requirements of individual
15 notice and hearing; general notice as provided by law is sufficient.” *Halverson v.*
16 *Skagit Cty.*, 42 F.3d 1257, 1261 (9th Cir. 1994). Thus, the issuance of the
17 emergency orders provided all the notice that was needed under the Due Process
18 Clause. *See Best Supplement*, 2020 WL 2615022, at *5 (rejecting a similar
19 argument that pre-deprivation process is required before enactment and
20 enforcement of laws of general applicability); *accord, Hartman v. Acton*, ___ F.
21 Supp. 3d ___, No. 2:20-CV-1952, 2020 WL 1932896, at *8 (S.D. Ohio Apr. 21,
22 2020) (Ohio order issued to combat COVID-19 did not violate due process because
23 it “was a generally applicable order affecting thousands of businesses, and not a
24 decision targeting an individual or single business”).

25 ///

26 _____
27 ¹⁰ Also, Plaintiff’s suit against the State Defendants in their official capacities
28 is “no different than a suit against the state itself,” and the damages claims are
therefore barred under the Eleventh Amendment. *Will v. Michigan Dep’t of State*
Police, 491 U.S. 58, 71 (1989).

1 A substantive due process claim would fare no better. To the extent such an
2 argument is based on Plaintiff's claim under the Takings Clause, that argument fails
3 for the same reasons that the takings claims fails. *See infra*, Argument, II.B.3.

4 To the extent the claim rests on a right to engage in a chosen profession,
5 although courts have recognized a right to pursue one's occupation, "all cases
6 recognizing such a right have dealt with a complete prohibition on the right to
7 engage in a calling, and not a sort of brief interruption." *Guzman v. Shewry*, 552
8 F.3d 941, 954 (9th Cir. 2009). Here, the State's orders impose no more than a
9 temporary interruption to the activities of certain businesses. RJN Exs. 2–11.

10 Even if Plaintiff could establish that the orders implicate the right to pursue a
11 profession protected by substantive due process, the claim could not succeed
12 without a showing that the State's orders are "arbitrary and lacking a rational
13 basis." *Engquist v. Or. Dept. of Agric.*, 478 F.3d 985, 997 (9th Cir. 2007). As
14 Chief Justice Roberts and the Ninth Circuit have already recognized, the State's
15 orders do in fact have a rational basis, as a response to the COVID-19 pandemic. *S.*
16 *Bay United Pentecostal Church*, 2020 WL 2813056, at *1–2; *S. Bay United*
17 *Pentecostal Church*, 2020 WL 2687079, at *1. Multiple courts have already
18 rejected similar due process challenges for this reason. *See, e.g., Best Supplement*,
19 2020 WL 2615022, at *6; *McGhee v. City of Flagstaff*, No. CV-20-08081-PCT-
20 GMS, 2020 WL 2308479, at *5–6 (D. Ariz. May 8, 2020). Thus, the due process
21 claim is not likely to succeed.

22 Plaintiff also appears to argue that the state orders violate due process by
23 being impermissibly vague. TRO App. at 16–17. Plaintiff does not, however,
24 explain how the orders are vague as applied to hotels. *Id.* Indeed, Plaintiff's
25 assertion that the orders prohibit its hotel from operating undercut any suggestion
26 that there is uncertainty as to the orders' application to hotels and lodging. *Id.* at 19
27 (stating that Plaintiff's business "was required to shut down"). The orders plainly
28 are not "impermissibly vague," *Hotel & Motel Ass'n of Oakland v. City of Oakland*,

1 344 F.3d 959, 971 (9th Cir. 2003), because they include sufficient detail about the
2 nature of the activities that are allowed and prohibited. RJN Exs. 2, 6–7, 11.

3 **2. Plaintiff’s Equal Protection Claim Fails**

4 Plaintiff is not likely to succeed on the equal protection claim because the
5 State’s orders easily survive rational basis review. “Under rational basis review,
6 legislation that does not draw a distinction along suspect lines such as race or
7 gender passes muster under the Equal Protection Clause so long as there is any
8 reasonably conceivable state of facts that could provide a rational basis for the
9 classification.” *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1085 (9th Cir.
10 2015) (citation and internal quotation omitted). And, when government officials
11 “act in areas fraught with medical and scientific uncertainties,” their discretion
12 “must be especially broad”: courts should be cautious not to “second-guess” public
13 officials’ medical and scientific judgments. *Marshall v. United States*, 414 U.S.
14 417, 427 (1974); *see S. Bay United Pentecostal Church*, 2020 WL 2813056, at *2.

15 Here, the state has drawn distinctions between different types of business and
16 imposed greater restrictions on activities that public health officials have
17 determined present more serious risks to public health as a result of the COVID-19
18 pandemic. *See Watt Decl.* at ¶¶ 16–22. The staged reopening of California’s
19 economy, likewise, is being undertaken through a risk-based analysis permitting
20 local jurisdictions to move at a faster pace based on demonstrated stability and
21 readiness criteria. *See Watt Decl.* at ¶¶ 16–17. As other courts have recognized,
22 the State’s orders bear a “real and substantial relation to public health.” *Cross*
23 *Culture*, 2020 WL 2121111, at *4. Drawing such risk-based distinctions is a
24 rational exercise of the State’s authority, particularly given the obvious threat posed
25 by COVID-19. *Cf. An Na Peng v. Holder*, 673 F.3d 1248, 1258–59 (9th Cir. 2012)
26 (upholding, under rational basis review, a distinction based on assessed risk to
27 public safety); *Legacy Church, Inc. v. Kunkel, et al.*, __ F. Supp. 3d __, No. CIV
28 20-0327 JB/SCY, 2020 WL 1905586 at *36 n.12 (D.N.M. Apr. 17, 2020)

1 (upholding, in the context of the COVID-19 pandemic, restrictions on activities that
2 “entail bringing large groups of people into close proximity—precisely the
3 environment in which a highly contagious disease proliferates”).

4 There is no merit to Plaintiff’s suggestion that the State’s orders are subject to
5 strict scrutiny. *See* TRO App. at 14. On the contrary, they are neutral, generally
6 applicable orders that (as demonstrated in the discussion of the merits of Plaintiff’s
7 other constitutional claims) do not implicate fundamental rights, and are therefore
8 subject to rational basis review. *See FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307,
9 313 (1993); *cf. Cross Culture*, 2020 WL 2121111, at *7 (determining that, in the
10 context of a Free Exercise claim, the State’s orders were “neutral laws of general
11 applicability” that were subject to rational basis review). They easily survive
12 rational basis review. *See generally* Background, I.A.

13 Even if the orders were subject to strict scrutiny, they would survive it. The
14 State has a compelling interest in protecting the public from the spread of COVID-
15 19. California’s swift and decisive measures instructing residents to stay at home
16 and prohibiting public gatherings have allowed the State to slow the spread of the
17 disease. *See Best Supplement*, 2020 WL 2615022, at *3 (“undisputed information
18 about COVID-19 and its transmission” explained why certain temporary closures
19 were necessary); *Monica Six*, 2020 WL 2896543, at *4 (noting that physical
20 distancing is “critical to slowing down the spread of the virus”). Without these
21 measures, hospitals and health care providers could quickly become overwhelmed.
22 RJN Exs. 3–5; *See Watt Decl.* at ¶¶ 10–24. The State plainly has a compelling
23 interest in implementing its public health measures and orders.

24 The orders are also narrowly tailored to serve the State’s compelling interest in
25 avoiding the spread of COVID-19 because the virus is highly contagious and the
26 facilities that have been subject to restrictions, such as churches, salons, and hotels,
27 pose particular risks. *See Watt Decl.* at ¶¶ 17–24; *Givens*, 2020 WL 2307224, at *6
28 (noting that “the only fool-proof way to prevent the virus from spreading at in-

1 person gatherings” was to “prohibit[] in-person gatherings”). Narrow tailoring is
2 further evidenced by the temporary and flexible nature of the orders. The Governor
3 and the State Public Health Officer have carefully deployed a staged reopening, and
4 the State has provided guidance to hotels regarding reopening while mitigating and
5 managing the public health risks. *See* Background, I.B, *supra*; *see also* RJN Exs.
6 10–11.

7 **3. Plaintiff’s Takings Claim Fails**

8 Plaintiff’s Takings Clause claim is not likely to succeed for four reasons.

9 First, as a matter of law, the takings claim is not a basis on which Plaintiff can
10 obtain a TRO. *See Knick v. Twp. of Scott, Penn.*, 139 S. Ct. 2162, 2179 (2019)
11 (“As long as just compensation remedies are available—as they have been for
12 nearly 150 years—injunctive relief will be foreclosed.”); *see also Wisconsin Cent.*
13 *Ltd. v. Pub. Serv. Comm’n*, 95 F.3d 1359, 1369 (7th Cir. 1996) (“With the question
14 being one of monetary compensation, a [Takings Clause] plaintiff would be hard
15 pressed to demonstrate either irreparable harm or an inadequate remedy at law.”);
16 RJN Ex. 12 (*Professional Beauty Fed’n of Calif. v. Newsom, et al.*, No. 2:20-cv-
17 04275-RGK-AS, at * 12 (C.D. Cal. June 8, 2020) (denying the plaintiff’s
18 application for a TRO and noting that “damages—not injunctive relief—are the
19 proper remedy for a taking.”)).

20 Second, “the Supreme Court has consistently held that the doctrine of
21 necessity”—which obviates the need for compensation under the Takings Clause—
22 applies “when there is an imminent danger and an actual emergency giving rise to
23 actual necessity.” *TrinCo Inv. Co. v. United States*, 722 F.3d 1375, 1378 (Fed. Cir.
24 2013) (collecting cases); *see, e.g., United States v. Caltex*, 344 U.S. 149, 151–56
25 (1952). Even assuming an otherwise compensable taking occurred—which it did
26 not—such “imminent danger” and “actual emergency” are plainly present here.
27 *See, e.g., S. Bay United Pentecostal Church*, 2020 WL 2813056, at *1–2
28 (describing the threat presented by COVID-19). Under the circumstances, the

1 operation of Plaintiff’s hotel before a local health officer has analyzed local
2 conditions is itself a threat to public health and safety because it risks spreading a
3 deadly disease. *Cf. Miller v. Schoene*, 276 U.S. 272, 277 (1928) (upholding a
4 Virginia statute providing for the uncompensated destruction of cedar trees to
5 prevent the spread of disease).

6 Also, even if the Court were to analyze the State’s orders under a traditional
7 regulatory-takings framework, there has been no regulatory taking here.
8 Government regulation requires compensation when, considering the purpose of the
9 regulation and the extent to which it deprives the owner of economic use of the
10 property, “the regulation has unfairly singled out the property owner to bear a
11 burden that should be borne by the public as a whole.” *Yee v. City of Escondido*,
12 503 U.S. 519, 522–23 (1992). The State has not singled out Plaintiff to bear a
13 burden that should be borne by the public as a whole: on the contrary, the State has
14 asked the entire public to share the burden of protecting public health. And if
15 policies regulating every aspect of public life—such as the State’s orders here—
16 were held to constitute regulatory takings, there would be no obvious reason that
17 (for example) all general macroeconomic policies would not constitute regulatory
18 takings as applied to those businesses they disadvantaged.

19 But that is not the law. When the government exercises its police powers to
20 protect the safety, health, and general welfare of the public, no compensable taking
21 has occurred. *See Chi., B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 594 (1906) (“[T]he
22 legislature may make police regulations, although they may interfere with the full
23 enjoyment of private property, and though no compensation is given.” (quotation
24 omitted)); *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008) (“Property seized
25 and retained pursuant to the police power is not taken for a ‘public use’ in the
26 context of the Takings Clause.”); *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)
27 (“[A] prohibition . . . upon the use of property for purposes that are declared, by
28 valid legislation, to be injurious to the health, morals, or safety of the community,

1 cannot in any just sense, be deemed a taking or an appropriation of property for the
2 public benefit.”). In this light, “the character of the governmental action” weighs
3 decisively against any regulatory taking here: the State’s orders are a paradigmatic
4 example of a “public program adjusting the benefits and burdens of economic life
5 to promote the common good.” *Penn Central Transp. Co. v. City of New York*, 438
6 U.S. 104, 124 (1978).

7 Finally, Plaintiff has not presented evidence showing that a regulatory taking
8 has occurred under *Penn Central*. A temporary prohibition on the use or enjoyment
9 of property is not a per se compensable taking. *See Tahoe-Sierra Pres. Council,*
10 *Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 334–35 (2002) (holding that a
11 32-month moratorium on property development did not constitute a per se taking).
12 And the conclusory affidavit submitted with the TRO does not sufficiently address
13 “the economic impact of [the State’s orders] on [Plaintiff],” or “the extent to which
14 the [State’s orders have] interfered with [Plaintiff’s] distinct investment-backed
15 expectations” *See Penn Central*, 438 U.S. at 124, or what those investment-backed
16 expectations actually are. The evidence does not support a right to the
17 extraordinary relief that Plaintiff requests.

18 Thus, Plaintiff’s takings claim is unlikely to succeed.

19 **C. Plaintiff’s State Law Claims Are Barred by the Eleventh**
20 **Amendment and Fail on the Merits.**

21 Plaintiff also alleges that the State’s orders violate the California Constitution.
22 Compl. at ¶¶ 99–129; TRO App. at 20–22. All of the state-law claims are barred
23 under the Eleventh Amendment. “A federal court’s grant of relief against state
24 officials on the basis of state law, whether prospective or retroactive . . . conflicts
25 directly with the principles of federalism that underlie the Eleventh Amendment.”
26 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also*
27 *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093, at
28 *1 (7th Cir. May 16, 2020) (“[P]laintiffs-appellants may not obtain injunctive relief

1 against the Governor in federal court on the basis of” state law); *Best Supplement*,
2 2020 WL 2615022, at *7 (holding that state-law claims challenging the State orders
3 “are barred by the Eleventh Amendment”).

4 Also, Plaintiff’s state-law claim under Article I, section 1, of the California
5 Constitution fails on the merits. “The guarantees of that section are not absolute
6 and do not operate as a curtailment on the basic power of the Legislature to enact
7 reasonable police regulations.” *Nat’l Org. for Reform of Marijuana Laws v. Gain*,
8 100 Cal. App. 3d 586, 598 (1979). As explained, the State’s orders are a reasonable
9 police-power regulation. Indeed, federal courts already rejected substantially
10 identical claims on the merits. *Givens*, 2020 WL 2307224, at *9; *accord Best*
11 *Supplement*, 2020 WL 2615022, at *7. Plaintiff cites *Jew Ho v. Williamson*, 103 F.
12 10 (C.C.N.D. Cal. 1900) and *Ex parte Martin*, 83 Cal. App. 2d 164 (1948), TRO
13 App. at 20–21, but courts have already found that those cases are “distinguishable
14 and of little precedential value,” when considering the State’s orders issued to
15 prevent the spread of COVID-19. *Givens*, 2020 WL 2307224, at *9.

16 The remaining state-law claims are also unlikely to succeed. Plaintiff’s claims
17 based on Article I, section 19, of the California Constitution (Compl. at ¶¶ 117–
18 124) and Government Code section 8572 (Compl. at ¶¶ 125–127) fail for the same
19 reasons as the federal takings claim. *See Lockaway Storage v. Cty. of Alameda*, 216
20 Cal. App. 4th 161, 183 (2013) (“[T]he takings clause in the California Constitution”
21 (Article I, section 19) “is construed congruently with the federal clause.”); *Farmers*
22 *Ins. Exch. v. State of California*, 175 Cal. App. 3d 494, 502 (1985) (applying a
23 takings analysis under Article I, section 19 to determine whether compensation was
24 due under Government Code section 8572). And Plaintiff concedes that
25 “California’s constitutional guarantee of equal protection and the Fourteenth
26 Amendment’s guarantee of equal protection are substantially equivalent and
27 analyzed in similar fashion.” Compl. at ¶ 112 (*citing Kenneally v. Medical Board*,

28 ///

1 27 Cal. App. 4th 489 (App. 2 Dist. 1994)). Thus, Plaintiff’s state-law equal
2 protection claim (Compl. at ¶¶ 110–116) fails with the federal claim.

3 For all of these reasons, Plaintiff’s state-law claims fail on the merits and
4 cannot support the grant of a TRO.

5 **III. THE REMAINING FACTORS WEIGH HEAVILY AGAINST ISSUANCE OF A**
6 **TEMPORARY RESTRAINING ORDER.**

7 The remaining injunction factors—the balance of equities and the public
8 interest—also favor the State Defendants.¹¹ *See Winter*, 555 U.S. at 20. Any
9 economic impact that Plaintiff might have suffered as a result of the State’s public-
10 health orders is far outweighed by the potential harm to public health if the orders
11 were abruptly lifted. *See Background, I.A, I.C, supra*. Such a disruption could
12 permit COVID-19 to spread, infecting thousands of people and killing many of
13 them. *See id.* Also, an order requiring the reopening of hotels would interfere with
14 the careful reopening of California businesses that is already underway and will
15 continue so long as sufficient progress is being made in containing the virus. This
16 process was designed to minimize and mitigate the risks of reopening. *See id.* The
17 State’s orders allow a gradual reopening after county public health officials have
18 evaluated local conditions, acknowledging differences in local jurisdictions’ ability
19 to safely progress through the various stages of reopening. RJN Exs. 8-11; *see*
20 *Watt. Decl.* at ¶¶ 15–24. The public interest in ensuring the careful, gradual
21 reopening of the California economy, through orders that allow flexibility to
22 respond to local spikes in the disease, greatly outweighs any harm caused to
23 Plaintiff, who seeks to depart from the status quo.

24 ///

25 ///

26 ///

27 _____
28 ¹¹ These two factors merge when the government is a party. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

The Court should deny Plaintiff's application for a temporary restraining order.

Dated: June 9, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
ALICIA A. BOWER
Acting Supervising Deputy Attorney
General
PETER H. CHANG
Deputy Attorney General

/s/ Martha Ehlenbach

MARTHA EHLENBACH
Deputy Attorney General
*Attorneys for Defendants Gavin
Newsom, Sonia Angell, and Xavier
Becerra*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

Case Name: **PCG-SP Venture I LLC v. Newsom, et al.**
No. **5:20-cv-01138 JGB-KK**

I hereby certify that on **June 9, 2020**, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

- **DEFENDANTS NEWSOM, ANGELL, AND BECERRA’S OPPOSITION TO PLAINTIFF’S EX PARTE APPLICATION FOR A TEMPORARY RESTRAINING ORDER**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **June 9, 2020**, at Sacramento, California.

Danielle Jones
Declarant

/s/ Danielle Jones
Signature