April 28, 2020

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Re: California Highway Patrol's Ban on Protests

Commissioner Stanley and Governor Newsom:

We write on behalf of a coalition of organizations, litigators, and First Amendment scholars to request that the California Highway Patrol eliminate or revise its indefinite ban on protests on state property in order to allow Californians to exercise their First Amendment right to dissent.

On April 20, hundreds of people gathered at the state capitol to protest Governor Newsom's statewide stay-at-home order.[1] Many demonstrated from their cars, while hundreds more congregated on the steps of the capitol building.[2] Following the protest, the California Highway Patrol (CHP) announced that it would indefinitely ban all protests at state facilities and deny permit requests for such gatherings "until public health officials have determined it is safe to gather again."[3]

Protests undoubtedly pose significant health risks amid the coronavirus pandemic, the most significant public health crisis to face the nation in generations. Studies indicate that the virus spreads from person to person, from droplets infected people emit when they cough, sneeze, or talk.[4] And the virus has thus far spread rapidly across the country with devastating effect. The CDC reports that as of April 26, there are 957,875 cases in the United States, including over 42,000 in California.[5] Of those infected nationwide, 53,922 have died.[6] Without a

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[1] Sam Stanton & Hannah Wiley, *California Has a Coronavirus Stay-At-Home Order. So Why Did CHP Permit A Large Protest?*, Sacramento Bee (Apr. 20, 2020), https://www.sacbee.com/article242129761.html.
[2] *Id.*
[3] Sam Stanton, *CHP Bans Protests at California Capitol After Rally Against Newsom's Stay-At-Home Order*, Sacramento Bee (Apr. 22, 2020), https://www.sacbee.com/news/local/crime/article242198781.html.
[4] *See* Philip Anfinrud, et al., *Visualizing Speech-Generated Oral Fluid Droplets with Laser Light Scattering*, New England J. Med. (Apr. 15, 2020), https://www.nejm.org/doi/full/10.1056/NEJMc2007800?query=featured_home; Nell Greenfieldboyce, *Scientists Probe How Coronavirus Might Travel Through The Air*, NPR: Goats and Soda (Apr. 3, 2020), https://www.npr.org/sections/goatsandsoda/2020/04/03/825639323/scientists-probe-how-coronavirus-might-travel-through-the-air.
[5] *Coronavirus Disease 2019: Cases in the US*, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html (last visited Apr. 27, 2020).
[6] *Id.*

vaccine or tested interventions, experts advise that social distancing remains the best defense against the virus.[7]

We do not doubt that CHP's ban on protests is well-intentioned and meant to protect Californians' health. And states are certainly empowered to protect the health and safety of their residents.

But constitutional rights are not suspended in times of crisis or when it is expedient. Even the grave public health risks posed by the coronavirus pandemic do not justify CHP's wholesale and indefinite ban on individuals' exercise of their First Amendment right to peaceably protest at the state capitol and other state facilities. We urge CHP to either eliminate or revise its current ban so that it comports with the Constitution.

Constitutional Infirmity of the Ban on Protests

The First Amendment protects the right of individuals to peaceably protest on California's state capitol grounds and at other state facilities. It provides that the government may not "abridg[e] the freedom of speech . . . or the right of the people peaceably to assemble."[8] Political protests constitute protected speech and enjoy special protection under the First Amendment,[9] especially when they take place in public places traditionally associated with expressive activity.[10] The Supreme Court has explained that certain public places "have immemorially been held in trust for the use of the public" so that the public might assemble, communicate, and discuss public questions, and that such "use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."[11] Among these "traditional public forums" are public parks[12] and state capitol grounds.[13] Accordingly, the First Amendment applies with "particular force" to "march[es] and other protest activities" at California's state capitol, state parks, and other state facilities traditionally associated with expressive activity.[14]

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[7] *See* Helen Branswell, *Some Social Distancing May Be Needed Into 2022 to Keep Coronavirus in Check, New Study Says*, STAT (Apr. 14, 2020), https://www.statnews.com/2020/04/14/some-social-distancing-may-be-needed-into-2022-to-keep-coronavirus-in-check-new-study-says/; Patrice A. Harris, *Our Best Defense Against Covid-19? Science*, STAT (Mar. 27, 2020), https://www.statnews.com/2020/03/27/science-best-defense-against-covid-19/.
[8] U.S. Const. amend. I.
[9] *United States v. Grace*, 461 U.S. 171, 176 (1983) ("There is no doubt that as a general matter peaceful picketing and leafleting are expressive activities involving 'speech' protected by the First Amendment."). *See generally Snyder v. Phelps*, 562 U.S. 443, 452 (2011) ("Speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (alterations and quotation marks omitted) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983))).
[10] *United States v. Baugh*, 187 F.3d 1037, 1042 (9th Cir. 1999) (holding that the First Amendment "applies with particular force" to "march[es] and other protest activities"); *see also Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009) (same).
[11] *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).
[12] *See, e.g.*, *Baugh*, 187 F.3d at 1042.
[13] *Adderley v. Florida*, 385 U.S. 39, 41 (1966).
[14] *Baugh*, 187 F.3d at 1042.

California's ability to restrict those protests "is very limited."[15] It may enforce content-neutral "reasonable time, place, and manner regulations" only where those regulations "are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[16] In addition, any permitting scheme "may not delegate overly broad licensing discretion to a governmental official."[17]

There is no doubt that particularly in times in which there has been such a tragic loss of life in this state and nationally, certain limitations on public protests may be imposed that might not otherwise pass constitutional scrutiny.[18] But it could hardly be clearer that those regulations must be narrowly tailored, which, in two important respects, is precisely what CHP's ban is not.

First, CHP's ban restricts substantially more speech than necessary to serve the state's legitimate interest in protecting public health. To determine whether a time, place, and manner restriction is narrowly tailored, courts consider whether a regulation achieves its ends "without restricting substantially more speech than necessary," and whether there are "obvious alternatives that would achieve the same objectives with less restriction of speech.[19] Courts have found time, place, and manner restrictions to be insufficiently tailored where they "exceed[] the scope of the [government's] significant interests."[20] In *Long Beach Area Peace Network v. City of Long Beach*, for example, the Ninth Circuit struck down a city ordinance requiring 24 hours' notice prior to any spontaneous assembly.[21] The city argued the ordinance was necessary to guard against disruptions to the flow of pedestrian and vehicular traffic.[22] The Court struck down the ban because it applied to all assemblies, "irrespective of whether there [was] any possibility that the event [would] interfere with traffic flow."[23]

Here, CHP's ban exceeds California's legitimate interests in protecting public health. Instead of indefinitely banning all protests, there are some obvious alternatives that would achieve California's objective of protecting public health with less restriction of speech. CHP could, for example, condition the issuance of permits on compliance with current social

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[15] *Grace*, 461 U.S. at 177.
[16] *Id.* (internal quotation marks omitted); *see also Long Beach Area Peace Network*, 574 F.3d at 1023.
[17] *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992).
[18] States have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citation omitted). The Supreme Court explicitly upheld states' power to quarantine individuals more than a century ago. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905); *see also Compagnie Francaise de Navigation a Vapeur v. La. State Bd. of Health*, 186 U.S. 380, 387 (1902) ("That . . . the power of the states to enact and enforce quarantine laws for the safety and the protection of the health of their inhabitants has been recognized by Congress, is beyond question."). And courts have long held that protecting public health is a significant government interest. *See, e.g.*, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) ("[T]he Government here has a significant interest in protecting the health, safety, and welfare of its citizen by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs."); *Olsen v. Drug Enf't Admin.*, 878 F.2d 1458, 1462 (D.C. Cir. 1989) (recognizing the protection of "individual health and social welfare" as compelling government interests); *cf. McCullen v. Coakley*, 573 U.S. 464, 486 (2014) (recognizing as a significant government interest "ensuring public safety and order").
[19] *Long Beach Area Peace Network*, 574 F.3d at 1024–25.
[20] *Cuviello v. City of Vallejo*, 944 F.3d 816, 829 (9th Cir. 2019).
[21] 574 F.3d at 1038.
[22] *Id.* at 1036, 1038.
[23] *Id.* at 1038.

distancing guidelines,[24] prohibiting protestors from standing within 6 feet of one another and fining those who do. To protect the health of those working at state facilities, CHP could establish buffer zones around entrances and exits to state facilities, prohibiting protestors from infringing those bubbles. California might also permit individuals to hold in-car protests at state facilities where such protests are feasible.

No doubt, these alternatives would be more difficult to administer than a flat ban on protests. But the First Amendment does not allow the government to sacrifice speech for efficiency where "a substantial portion of the burden on speech does not serve to advance its goals."[25] "The tailoring requirement does not simply guard against an impermissible desire to censor," as "[t]he government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience."[26] "[B]y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrificing speech for efficiency.'"[27]

Second, the ban is indefinite. Indefinite bans on protected speech, like CHP's ban, are generally impermissible. "Like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed where there are inadequate procedural safeguards to ensure prompt issuance of the license."[28] And "[a] scheme that fails to set reasonable time limits on [a] decisionmaker" for deciding whether to license speech "contains the same vice as a statute delegating excessive administrative discretion"—namely, "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion."[29] As one court has explained, an indefinite "moratorium is a total ban, and at a minimum, it is not narrowly tailored."[30]

Recommendations for Bringing the Ban into Compliance with the Constitution

In order to accommodate the First Amendment's heightened protection of political protests in traditional fora, we urge CHP to take the following steps to clarify and tailor its ban on protests:

1. **Issue a Written Policy.** CHP should issue a written policy delimiting the bounds of any prohibition on protests.

2. **Tailor the Ban.** CHP should either revise its ban to issue permits on the condition that protestors comply with social distancing guidelines, or explain why that is not possible. CHP should also address the feasibility of buffer zones to protect the health of state employees.

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[24] *Social Distancing, Quarantine, and Isolation*, Ctrs. for Disease Prevention & Control, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (last visited Apr. 26, 2020).
[25] *McCullen*, 573 U.S. at 486.
[26] *Id.*
[27] *Id.* (alteration marks omitted) (quoting *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795 (1988)).
[28] *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226 (1990), *holding modified by City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004).
[29] *Id.* at 226–27 (citation omitted).
[30] *D'Ambra v. City of Providence*, 21 F. Supp. 2d 106, 113 (D.R.I. 1998).

3. **Expressly Permit In-Car Protests.** To ensure that there are ample alternative avenues for communication, CHP should expressly authorize permits for in-car protests at state facilities, where feasible.

4. **Delimit the Ban's Duration.** CHP should specify the duration of its ban and ensure that it lasts no longer than necessary to protect public health. Alternatively, CHP should establish objective criteria for when the ban will be lifted.

Conclusion

Protecting public health while preserving the freedoms of speech and assembly is no easy task amid a global pandemic. But the First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[31] Our commitment to public debate on public issues has been a lodestar through good times and bad. As our political leaders navigate our collective response to the worst public health crisis in a century, it is critical that we preserve, to the maximum extent possible, opportunities for political dissent. Maintaining the ability for individuals to assemble and protest government actions they disapprove of is an essential service that the First Amendment guarantees to Californians. We urge CHP to eliminate or reconsider its ban on protests.

Sincerely,

Protect Democracy
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[31] *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
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