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10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF SAN DIEGO

14 **MIDWAY VENTURE LLC dba PACERS
SHOWGIRLS/PACERS SHOWGIRLS
15 INTERNATIONAL, a California limited
liability company; PETER BALOV, an
16 individual; F-12 ENTERTAINMENT
GROUP INC. dba CHEETAHS, a Nevada
17 corporation, and RICH BUONANTONY, an
individual,**

18 Plaintiffs and Petitioners,

19 v.

21 **COUNTY OF SAN DIEGO, a governmental
agency; WILMA J. WOOTEN, in her
22 official capacity as Public Health Officer,
County of San Diego; GOVERNOR GAVIN
23 NEWSOM, in his official capacity as the
Governor of the State of California; the
24 CALIFORNIA DEPARTMENT OF
PUBLIC HEALTH, a department of the
25 State of California; and DOES 1 through
100, inclusive,**

26 Defendants and
27 Respondents.
28

Case No. 37-2020-00038194

**OPPOSITION OF GOVERNOR
NEWSOM AND CALIFORNIA
DEPARTMENT OF PUBLIC HEALTH
TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: December 16, 2020
Time: 1:30 p.m.
Dept: C-73
Judge: The Honorable Joel R. Wohlfeil
Trial Date: N/A
Action Filed: October 21, 2020

1 **TABLE OF CONTENTS**

2 **Page**

3 Introduction 6

4 Factual and Procedural Background 7

5 I. The COVID-19 Pandemic and This Litigation 7

6 II. The Ongoing Surge in COVID-19 Cases and New State Orders..... 8

7 Legal Standard 10

8 Argument 10

9 I. Plaintiffs Have No Likelihood of Success on the Merits..... 10

10 A. The Orders Challenged in the Complaint Have Been Superseded by
11 Orders Giving Plaintiffs Their Desired Relief, Rendering All
12 Claims Moot..... 11

13 B. Mootness Exceptions Do Not Apply 14

14 C. Any Constitutional Challenges to Previous Orders or to New or
15 Future Orders Lack Merit 15

16 1. The Challenged Orders Are a Permissible Exercise of the
17 State’s Emergency Powers..... 15

18 2. Restrictions on Live Entertainment Are Content-Neutral
19 Time, Place, Manner Regulations that Survive Intermediate
20 Scrutiny 15

21 3. The Equal Protection, Due Process, and Vagueness Claims
22 Fail 18

23 II. Plaintiffs Fail to Satisfy the Remaining Preliminary Injunction Factors 19

24 A. Plaintiffs Cannot Demonstrate Immediate Irreparable Harm 19

25 B. The Balance of Harms Favors Denial of the Motion 20

26 Conclusion 21

1 **TABLE OF AUTHORITIES**

2 **Page**

3 **CASES**

4 *Antietam Battlefield KOA v. Hogan*
5 (D. Md. May 20, 2020) 461 F.Supp.3d 214.....16, 17

6 *Calvary Chapel of Bangor v. Mills*
7 (D. Me. 2020) 459 F.Supp.3d. 27316

8 *City of Tiburon v. Northwestern Pac. R. Co.*
9 (1970) 4 Cal.App3d 160.....10

10 *Daily Journal Corp. v. County of Los Angeles*
11 (2009) 172 Cal.App.4th 155011

12 *Dariano v. Morgan Hill Unified Sch. Dist.*
13 (9th Cir. 2014) 767 F.3d 764.....18

14 *Elim Romanian Pentecostal Church v. Pritzker*
15 (2020) 140 S.Ct. 282312

16 *Elim Romanian Pentecostal Church v. Pritzker*
17 (N.D. Ill. May 13, 2020), 2020 WL 246819416

18 *Gallo v. U.S. Dist. Court for Dist. of Arizona*
19 (9th Cir. 2003) 349 F.3d 1169.....18, 19

20 *Givens v. Newsom*
21 (E.D. Cal. 2020) 459 F.Supp.3d 1302.....16, 17

22 *Grayned v. City of Rockford*
23 (1972) 408 U.S. 104.....19

24 *Halverson v. Skagit County*
25 (9th Cir. 1994) 42 F.3d 1257.....18

26 *Human Life of Washington Inc. v. Brumsickle*
27 (9th Cir. 2010) 624 F.3d 990.....19

28 *Jacobson v. Massachusetts*
(1905) 197 U.S. 1115

Klein v. San Diego County
(9th Cir. 2006) 463 F.3d 1029.....15

Legacy Church, Inc. v. Kunkel
(D.N.M., July 13, 2020, No. CV 20-0327) 2020 WL 3963764.....17

TABLE OF AUTHORITIES

(continued)

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

Page

Lighthouse Fellowship Church v. Northam
(E.D. Va. 2020) 458 F.Supp.3d 418.....16

Lincoln Place Tenants Assn. v. City of Los Angeles
(2007) 155 Cal.App.4th 42511

McCullen v. Coakley
(2014) 573 U.S. 46416

N.Y. State Rifle & Pistol Association, Inc. v. City of New York
(2020) 140 S.Ct. 152512, 13

Olive Lane Industrial Park, LLC v. County of San Diego
(2014) 227 Cal.App.4th 148015

Orin v. Barclay
(9th Cir. 2001) 272 F.3d 1207.....18

OSU Student All. v. Ray
(9th Cir. 2012) 699 F.3d 1053.....11, 18

Pac. Legal Found. v. Cal. Coastal Com.
(1982) 33 Cal.3d 15813

Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.
(9th Cir. 2015) 810 F.3d 631.....13

Packingham v. North Carolina
(2017) 137 S. Ct. 173017

Rancho de Calistoga v. City of Calistoga
(9th Cir. 2015) 800 F.3d 1083.....19

Rosebrock v. Mathis
(9th Cir. 2014) 745 F.3d 963.....12

Santa Monica Baykeeper v. City of Malibu
(2011) 193 Cal.App.4th 153814

Santa Monica Food Not Bombs v. City of Santa Monica
(9th Cir. 2006) 450 F.3d 1022.....12

Tahoe Keys Property Owners’ Assn. v. State Water Resources Control Board
(1994) 23 Cal.App.4th 145910, 19, 20, 21

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(continued)

Page

Viejo Bancorp, Inc. v. Wood
(1989) 217 Cal.App.3d 200.....15

Ward v. Rock Against Racism
(1989) 491 U.S. 78117

Weise v. Becerra
(E.D. Cal. 2018) 306 F. Supp. 3d 1190.....19

Wilson & Wilson v. City Council of Redwood City
(2011) 191 Cal.App.4th 155911

Younger v. Superior Court
(1978) 21 Cal.3d 10211

CONSTITUTIONAL PROVISIONS

United States Constitution

 First Amendment..... *passim*

 Fifth Amendment19

1 **FACTUAL AND PROCEDURAL BACKGROUND**

2 **I. THE COVID-19 PANDEMIC AND THIS LITIGATION**

3 As set forth in the State Defendants’ TRO Opposition, in response to the ongoing COVID-
4 19 public health emergency, the State Defendants—Governor Gavin Newsom and the California
5 Department of Public Health (CDPH)—have imposed restrictions for settings that are at a high
6 risk of spreading a disease carried through aerosolized droplets. (TRO Opp. 7-11; see also
7 Declaration of P. Patty Li (Li Decl.), Ex. F, Declaration of Dr. James Watt, ¶¶ 15-75.) The
8 currently operative framework for these public health restrictions is the Blueprint for a Safer
9 Economy (Blueprint), which places every county in the State in one of four tiers based on the
10 COVID-19 transmission rates.¹ Restrictions on businesses and activities are greater in tiers with
11 greater transmission, and lower in tiers with lower transmission.²

12 Plaintiffs own and operate two adult entertainment establishments, known as Pacers and
13 Cheetahs, located in San Diego County. (Compl. ¶¶1-4.) Both establishments have onsite
14 restaurants. (*Id.* ¶ 15.) Having been closed since March 2020 in accordance with State and
15 County health orders, Pacers and Cheetahs each reopened at some point in September 2020. (*Id.*
16 ¶¶ 13, 22, 23.) Plaintiffs submitted reopening plans to the County of San Diego but proceeded to
17 reopen prior to receiving the required approvals. (*Id.* ¶¶ 21-23.)

18 In October 2020, the County issued cease and desist orders directing Pacers and Cheetahs
19 to come into compliance with the relevant State and local health orders. (Compl. ¶¶ 25, 28; TRO
20 App., 11-12.) Plaintiffs filed their Complaint on October 21, 2020, suing Governor Newsom,
21 CDPH, the County, and the County’s Public Health Officer. Plaintiffs contended that
22 Defendants’ “orders, actions, and directives” have enacted a “ban” on live adult entertainment
23 that violates their rights of free expression, equal protection, and due process under the state and
24 federal constitutions. (Complaint ¶¶ 5, 9, 29, 33.) Plaintiffs then sought a TRO, which this Court
25 issued on November 6, 2020, temporarily enjoining Defendants “from enforcing the provisions

26 ¹ Cal. Dept. Pub. Health, Order of the State Public Health Officer at 1-2, Aug. 28, 2020,
27 https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/8-28-20_Order-Plan-Reducing-COVID19-Adjusting-Permitted-Sectors-Signed.pdf (last visited
28 Dec. 4, 2020).

² *Ibid.*

1 [of] the cease and desist orders, or any other related orders, that prevent Plaintiffs from being
2 allowed to provide adult entertainment subject to the least restrictive means to further
3 Defendants’ response to control the spread of COVID.” (TRO, 2.)

4 **II. THE ONGOING SURGE IN COVID-19 CASES AND NEW STATE ORDERS**

5 The pandemic began resurging nationwide in October 2020, and the number of new cases,
6 hospitalizations, and deaths have again begun to increase substantially.³ As of the date of this
7 filing, the United States has seen the worst daily infection rates over the course of the pandemic,
8 with the number of positive infections climbing to over 189,000 per day.⁴ Approximately 14
9 million Americans have been infected and more than 275,000 have died, including more than
10 19,400 Californians.⁵ The numbers in California also are spiking: The number of daily positive
11 tests has nearly quintupled in less than a month—to more than 22,000 positive tests per day—and
12 the number of hospitalizations has more than tripled.⁶

13 Worsening COVID-19 positivity rates placed San Diego County in Tier 1 (purple), the most
14 restrictive tier under California’s Blueprint for a Safer Economy, as of November 14, 2020.⁷ In
15 response, Plaintiff Pacers moved its operations outdoors. (See Declaration of Trever Shamshoian
16 ISO Ptf.’ Supp. Br., ¶ 6.) The record does not make clear whether Plaintiff Cheetahs has also
17 moved its operations outdoors. (See Declaration of Rich Buonantony ISO Ptf.’ Supp. Br., ¶ 5.)

18 ³ See, e.g., Will Stone, “The Pandemic is Entering a Dangerous New Wave,”
19 <https://www.npr.org/sections/health-shots/2020/11/13/934566781/the-pandemic-this-week-8-things-to-know-about-the-surge> (last accessed Dec. 4, 2020).

20 ⁴ See Johns Hopkins University & School of Medicine, Coronavirus Resource Center,
21 <https://coronavirus.jhu.edu/data/new-cases> (last visited Dec. 4, 2020).

22 ⁵ See Centers for Disease Control and Prevention COVID Data Tracker at
23 <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (last visited Dec. 4,
2020); California Department of Public Health COVID-19 Information, [https://www.cdph.ca.gov/
Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/Immunization/ncov2019.aspx) (last visited Dec. 4, 2020).

24 ⁶ See State of California, Tracking COVID-19 in California—Coronavirus
25 COVID-19 Response, <https://covid19.ca.gov/state-dashboard/#top> (showing a daily rate of 4,529
26 on October 31, 2020, and a daily rate of 22,018 on December 3, 2020) (last visited Dec. 4, 2020);
27 *id.* (hospitalized COVID-19 patients more than tripled from approximately 3,000 in late October
28 to over 9,900 as of December 3).

⁷ For data regarding the worsening COVID-19 situation in San Diego County, select “San
29 Diego” at <https://covid19.ca.gov/state-dashboard/>, and [https://public.tableau.com/views/COVID-
19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no](https://public.tableau.com/views/COVID-19CasesDashboard_15931020425010/Cases?:embed=y&:showVizHome=no).

1 On November 24, 2020, the State issued updated guidance for restaurant operations.⁸ That
2 guidance permits restaurants to provide live performances indoors in Tier 2 (red) counties, subject
3 to certain conditions.⁹ It also permits restaurants to provide outdoor live performances in Tier 1
4 (purple) counties, subject to certain conditions.¹⁰ As set forth on the State’s website regarding
5 COVID-19 restrictions, “[L]ive performances are permitted to the extent that they are permitted
6 by applicable sector guidance for the venue hosting such a performance (such as restaurants,
7 wineries, or bars).”¹¹

8 On December 3, 2020, in response to the continuing dramatic increase in COVID-19
9 infections and hospitalizations and the high risk that California hospitals would soon be
10 overwhelmed, threatening the care not only of COVID-19 patients but of California patients in
11 general, the Governor announced a Regional Stay at Home Order.¹² The order divides the State
12 into multiple regions, with each region comprising a group of geographically contiguous counties.
13 Once a region’s intensive care unit (ICU) capacity drops below an availability rate of fifteen
14 percent, the terms of the order apply to that region, and remain in effect for at least three weeks.
15 When the order is in effect for a region, it requires the closure of various sectors, including
16 recreational facilities, museums, movie theaters, wineries, and bars. It also requires that

17 ⁸ See Li Decl., Ex. B, COVID-19 Industry Guidance: Restaurants, Nov. 24, 2020, also
18 available at <https://files.covid19.ca.gov/pdf/guidance-dine-in-restaurants.pdf> (last visited Dec. 4,
2020).

19 ⁹ The guidance provides that in Tier 1 (red), “Indoor operations are permitted but must be
20 limited to 25% capacity or 100 people, whichever is fewer, and continue to follow the
21 modifications in this guidance. For indoor performances, performers must wear face coverings at
22 all times and maintain physical distancing from spectators and other performers. Performers are
23 counted toward the occupancy capacity limit.” (Li Decl., Ex. B, COVID-19 Industry Guidance:
24 Restaurants, Nov. 24, 2020, at 3.)

22 ¹⁰ The guidance provides that in Tier 1 (purple), “Outdoor operations are permitted and
23 must continue to follow the modifications in this guidance. Performers must maintain physical
24 distancing from spectators and other performers. Performers who are singing, shouting, playing a
25 wind instrument, or engaging in similar activities without a face covering must maintain at least
26 twelve feet of distance from spectators.” (Li Decl., Ex. B, COVID-19 Industry Guidance:
27 Restaurants, Nov. 24, 2020, at 3.)

25 ¹¹ See Li Decl., Ex. C, “Are gatherings for musical, theatrical, and artistic performances
26 permitted?”, available at <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (last
27 visited Dec. 4, 2020).

26 ¹² See Li Decl., Ex. D, Regional Stay at Home Order, Dec. 3, 2020, also available at
27 [https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-
28 Scenario.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf) (last visited Dec. 4, 2020). The order is described at [https://covid19.ca.gov/stay-
home-except-for-essential-needs/#regional](https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional) (last visited Dec. 4, 2020).

1 restaurants limit their services to take-out, pick-up, or delivery.¹³ After an initial three-week
2 period, if the region’s ICU capacity is at or above fifteen percent, the County will be assigned a
3 tier under the Blueprint and the Blueprint’s guidance scheme will resume its application.¹⁴ As of
4 December 3, 2020, the Southern California Region, which includes San Diego County, had 20.60
5 percent actual ICU capacity remaining.¹⁵

6 LEGAL STANDARD

7 An injunction is an extraordinary power that should rarely, if ever, be exercised in a
8 doubtful case. “The right must be clear, the injury impending and threatened, so as to be averted
9 only by the protective preventive process of injunction.” (*City of Tiburon v. Northwestern Pac.*
10 *R. Co.* (1970) 4 Cal.App.3d 160, 179, citation omitted.) “[T]rial courts should evaluate two
11 interrelated factors when deciding whether or not to issue a preliminary injunction. The first is
12 the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm
13 that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the
14 defendant is likely to suffer if the preliminary injunction were issued.” (*Ibid.*, internal quotation
15 marks and citation omitted.) When the defendant is a public official or agency, the court also
16 considers the public interest. (*Tahoe Keys Property Owners’ Assn. v. State Water Resources*
17 *Control Board* (1994) 23 Cal.App.4th 1459, 1472-73.)

18 ARGUMENT

19 I. PLAINTIFFS HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS

20 Under now-operative state public health orders, Plaintiffs have the relief they sought
21 through their Complaint. The crux of Plaintiffs’ complaint was that live adult entertainment was
22 not permitted indoors at a time when other businesses, such as restaurants, were permitted.
23 However, the November 24, 2020 restaurant guidance changed the State’s treatment of live
24 performances held at restaurants, by authorizing such performances under the same conditions
25 under which restaurants may operate. In short, Plaintiff’s claims are directed at an order that has

26 ¹³ See Li Decl., Ex. D, Regional Stay at Home Order, Dec. 3, 2020, also available at
27 [https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-](https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf)
[Scenario.pdf](https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf) (last visited Dec. 4, 2020).

28 ¹⁴ *Ibid.*

¹⁵ *Ibid.*

1 been superseded by a new order that allows Plaintiffs to engage in their desired conduct. This
2 motion is therefore moot.

3 **A. The Orders Challenged in the Complaint Have Been Superseded by**
4 **Orders Giving Plaintiffs Their Desired Relief, Rendering All Claims Moot**

5 “California courts will decide only justiciable controversies.” (*Wilson & Wilson v. City*
6 *Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573, citations omitted (*Wilson*).) Courts
7 “will not render opinions on moot questions or abstract propositions, or declare principles of law
8 which cannot affect the matter at issue on appeal.” (*Daily Journal Corp. v. County of Los*
9 *Angeles* (2009) 172 Cal.App.4th 1550, 1557.) A case becomes moot when “the question
10 addressed was at one time a live issue in the case,” but is no longer live “because of events
11 occurring after the judicial process was initiated.” (*Younger v. Superior Court* (1978) 21 Cal.3d
12 102, 120; see also *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th
13 425, 454 [“a case becomes moot when a court ruling can have no practical effect or cannot
14 provide the parties with effective relief”].) “The pivotal question in determining if a case is moot
15 is therefore whether the court can grant the plaintiff any effectual relief.” (*Wilson, supra*, 191
16 Cal.App.4th at p. 1574.)

17 Here, Plaintiffs’ Complaint, TRO application, and preliminary injunction motion seek relief
18 with respect to “orders of the State and County” that have allegedly violated Plaintiffs’ First
19 Amendment, due process, and equal protection rights, by preventing them from providing live
20 entertainment in any manner. (Compl. ¶ 33; TRO App. 16 [discussing “**complete ban** of **all** live
21 adult entertainment”].) But this was not the case even at the time Plaintiffs filed their Complaint.
22 At that time, the State guidance issued under the framework of the State’s Blueprint for a Safer
23 Economy prohibited live entertainment indoors and outdoors, in Tiers 1 and 2, unless conducted
24 in accordance with the private gatherings guidance,¹⁶ which meant that live performances could
25 operate outdoors with three households (including the performer as one household).¹⁷

26 ¹⁶ Li Decl., Ex. A, Guidance for Private Gatherings, California Department of Public
27 Health, Oct. 9, 2020, available at <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx> (last visited Dec. 4, 2020).

28 ¹⁷ *Ibid.*

1 Nor is there a “complete ban” presently. Indeed, as of November 24, 2020, the State’s
2 updated guidance for restaurants permits Plaintiffs to provide live adult entertainment indoors at
3 their restaurant facilities, for Tier 2—which is what Plaintiffs sought in the Complaint. (Li Decl.,
4 Ex. B; Compl. ¶ 36.) The updated guidance for restaurants also allows Plaintiffs to provide live
5 adult entertainment outdoors at their restaurant facilities, for Tier 1—which is the practice that at
6 least one Plaintiff has adopted since San Diego moved to Tier 1 on November 14, 2020. (Li
7 Decl., Ex. B; Declaration of Trever Shamshoian ISO Ptf.’ Supp. Br., ¶ 6; Declaration of Rich
8 Buonantony ISO Ptf.’ Supp. Br., ¶ 5.) The activities that Plaintiffs seek to carry out, according
9 to the Complaint and their preliminary injunction application, are now permitted, under the
10 November 24, 2020 restaurant guidance.¹⁸

11 Thus, any relief this Court might grant with respect to the previously controlling orders—
12 which are the only orders before this Court, based on the operative Complaint—would be
13 ineffectual, as Plaintiffs’ operations are no longer governed by those orders. “Plaintiffs seek no
14 more than to allow these socially distanced adult performances in their venues that [were] only
15 allowed to operate as restaurants at 25% capacity” at the time the Complaint was filed. (TRO
16 App. 5.) The November 24, 2020 restaurant guidance now allows for this, when epidemiological
17 conditions permit restaurants to operate at 25 percent capacity. A change in law “is usually
18 enough to render a case moot, even if the [government] possesses the power to reenact the [law]
19 after the lawsuit is dismissed.” (*Rosebrock v. Mathis* (9th Cir. 2014) 745 F.3d 963, 971; see also
20 *Santa Monica Food Not Bombs v. City of Santa Monica* (9th Cir. 2006) 450 F.3d 1022, 1031-32
21 [holding that amendments to city ordinances had rendered facial challenges to those ordinances
22 moot].) Because Plaintiffs no longer need any relief from the orders as they existed at the time
23 the Complaint was filed, all claims in the Complaint are now moot. (Cf. *N.Y. State Rifle & Pistol*
24 *Association, Inc. v. City of New York* (2020) 140 S.Ct. 1525, 1526 [finding case moot where state
25 law changed while the case was pending]; *Elim Romanian Pentecostal Church v. Pritzker* (2020)
26 140 S.Ct. 2823 [denying injunctive relief due to issuance of new guidance].)

27 ¹⁸ Guidance for live performances that do not take place at restaurant facilities is still
28 under development, but that guidance is not necessary in order for restaurants to have live
performances in accordance with the November 24, 2020 restaurant guidance.

1 Even if Plaintiffs were unhappy with some aspect of the November 24, 2020 restaurant
2 guidance under which they can now offer live performances, Plaintiffs cannot, without amending
3 their complaint, simply restyle their action as a challenge to that guidance—or for that matter, as
4 a challenge to the December 3, 2020 Regional Stay at Home Order, or to any other order or
5 guidance issued after the date the operative complaint was filed. Plaintiffs must amend their
6 complaint to include allegations about the specific legal restrictions they are challenging. (*N.Y.*
7 *State Rifle & Pistol Ass’n*, 140 S. Ct. at 1526 [amendment of pleadings allows plaintiff to pursue
8 “some residual claim under the new [legal] framework,” internal quotation marks and citation
9 omitted].) This is because courts should only grant injunctive relief when there is a “sufficient
10 nexus between the claims raised in a motion for injunctive relief and the claims set forth in the
11 underlying complaint itself.” (*Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.* (9th Cir.
12 2015) 810 F.3d 631, 636 [citing *De Beers Consol. Mines v. United States* (1945) 325 U.S. 212,
13 220, quotation marks omitted].) Here, the relationship between the preliminary injunction and the
14 underlying complaint is not sufficiently strong, because any injunction issued now could not grant
15 effectual relief with respect to the orders challenged in the Complaint. Those orders are no longer
16 effective.

17 Finally, to the extent Plaintiffs seek an order preemptively shielding them from the effects
18 of future public health orders, the Court should reject such a claim as unripe. Those future orders
19 do not yet exist, which means there is currently no live dispute about those orders. (See *Pac.*
20 *Legal Found. v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 170 [explaining that “the ripeness
21 doctrine is primarily bottomed on the recognition that judicial decision-making is best conducted
22 in the context of an actual set of facts”]). There is no basis for providing Plaintiffs’ restaurant and
23 live adult entertainment businesses with a special exemption from generally applicable public
24 health orders, on a going forward basis. (See, e.g., *640 Tenth, LP v. Newsom*, Order on Appl. For
25 TRO (Nov. 23, 2020) (San Diego Sup. Ct., Case No. 37-2020-00041316-CU-MC-CTL) [denying
26 application for TRO regarding State and County public health orders, filed by San Diego County
27 restaurants and gyms.] The Court should decline to provide an advisory opinion based on
28 hypothetical future facts.

1 **B. Mootness Exceptions Do Not Apply**

2 California courts recognize “three discretionary exceptions to the rules regarding mootness
3 allowing a court to review the merits of an issue: (1) when the case presents an issue of broad
4 public interest that is likely to recur; (2) when there may be a recurrence of the controversy
5 between the parties; and (3) when a material question remains for the court’s determination.”
6 (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1548, internal
7 quotation marks and citation omitted.) None of these exceptions applies here.

8 The controversy that is the focus of the Complaint is unlikely to recur. The crux of
9 Plaintiffs’ complaint is that live adult entertainment was not permitted to operate indoors at a time
10 when other businesses, such as restaurants, were so permitted. (See, e.g., Compl. ¶ 30; TRO App.
11 5, 13, 23.) But the November 24, 2020 guidance marks a categorical change to the State’s
12 treatment of live performances held at restaurants, by authorizing such performances under the
13 same conditions under which restaurants may operate. Consistent with this Court’s analysis, the
14 State maintained the treatment of live performances held at restaurants in the Regional Stay at
15 Home Order, which permits live performances held at dine-in restaurants under the same
16 conditions under which restaurants may operate.

17 These circumstances are therefore not analogous to those in *Roman Catholic Diocese of*
18 *Brooklyn v. Cuomo*, in which the Supreme Court rejected a mootness argument based on a
19 reclassification of the area in question to a less restrictive tier, resulting from improved COVID-
20 19 rates. The Court found that “injunctive relief is still called for because the applicants remain
21 under a constant threat that the area in question will be reclassified as red or orange.” No. 20A87,
22 2020 WL 6948354, at *3 (U.S. Nov. 25, 2020). But in that case, there was no change to the
23 operative legal framework, only a change to the facts subject to the legal framework. Here,
24 although San Diego County might move between different tiers of restrictions in the future, the
25 governing legal framework has changed, consistent with this Court’s analysis, such that live
26 performances in restaurants will be permitted insofar as restaurants are permitted to operate.

27 Nor is there a material question remaining for the Court’s determination. Denial of the
28 preliminary injunction motion would not leave Plaintiffs without the guidance necessary to

1 litigate any remaining live issues or to pursue challenges to orders subsequent to those identified
2 in the Complaint. (Cf. *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 205 [finding
3 material question remaining when judgment on review “effectively prevents [a party] from
4 litigating the key issue in the new action”].) There is therefore no basis for reaching the merits of
5 Plaintiffs’ mooted claims, through this preliminary injunction motion.

6 **C. Any Constitutional Challenges to Previous Orders or to New or Future**
7 **Orders Lack Merit**

8 Even if Plaintiffs’ claims were not moot, there is no likelihood of success on the merits of
9 any constitutional claims that might be considered live issues. All of Defendants’ orders, as they
10 existed at the time the Complaint was filed or as they are currently in effect, are (1) permissible
11 exercises of the State’s emergency powers; (2) content-neutral time, place, and manner
12 regulations of speech; and (3) consistent with equal protection and due process principles.

13 **1. The Challenged Orders Are a Permissible Exercise of the State’s**
14 **Emergency Powers.**

15 “[A] community has the right to protect itself against an epidemic of disease which
16 threatens the safety of its members.” (*Jacobson v. Massachusetts* (1905) 197 U.S. 11, 27, internal
17 quotation marks omitted.) “[U]nder the pressure of great dangers,” individual liberties may be
18 subject to reasonable restraints “as the safety of the general public may demand.” (*Id.*, p. 29; cf.
19 *Olive Lane Industrial Park, LLC v. County of San Diego* (2014) 227 Cal.App.4th 1480, 1490
20 [holding that Legislature may impose reasonable restraints on exercise of constitutionally
21 protected rights].) Plaintiffs do not and cannot demonstrate that their alleged right to operate their
22 businesses as they see fit overrides the State’s current compelling interest in responding to the
23 deadly COVID-19 pandemic to minimize the loss of human life.

24 **2. Restrictions on Live Entertainment Are Content-Neutral Time,**
25 **Place, Manner Regulations that Survive Intermediate Scrutiny**

26 “A time, place, and manner restriction on speech is valid if it: (a) is content neutral, (b) is
27 narrowly tailored to serve a significant government interest, and (c) leaves open ample alternative
28 channels for communication.” (*Klein v. San Diego County* (9th Cir. 2006) 463 F.3d 1029, 1034.)

1 The COVID-19 measures at issue in the Complaint, as well as those that currently apply, are
2 directed toward promoting the safe and gradual reopening of the State in order to safeguard public
3 health. The restrictions make no reference to content and nothing in the record suggests that the
4 State disagrees with Plaintiffs’ message or that any Defendant has an animus toward live adult
5 entertainment. “[A] facially neutral law does not become content-based simply because it may
6 disproportionately affect speech on certain topics.” (*McCullen v. Coakley* (2014) 573 U.S. 464,
7 480.) Rather, “[a] regulation that serves purposes unrelated to the content of expression is
8 deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”
9 (*Id.*, internal quotation marks and citation omitted.)

10 Courts in California and around the country have consistently rejected arguments that
11 orders to protect the public from COVID-19 are impermissible, content-based restrictions on
12 speech.¹⁹ The State’s COVID-19 health orders treat all forms of live entertainment equally.
13 Plaintiffs objected to the previously applicable guidance as putting them at a disadvantage
14 compared to other businesses like gyms, hotels, and beauty salons that had been allowed to
15 operate (Suppl. Br. 6), but Plaintiffs do not contend that live performances are part of these
16 businesses’ operations. And under the currently applicable restaurant guidance, live
17 entertainment in restaurants is permitted, insofar as restaurants are permitted to operate. Thus, the
18 regulatory approach taken by former and current State orders has no relation to the content of the
19 speech Plaintiffs engage in, even if this approach has an incidental effect on in-person expressive
20 conduct. (*McCullen, supra*, 573 U.S. at 480.)

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22 ¹⁹ See *Givens v. Newsom* (E.D. Cal. 2020) 459 F.Supp.3d 1302, 1314 (“[c]onsidering the
23 persistent threat of COVID-19 ... the State’s stay at home order [is a] content-neutral time, place,
24 and manner regulation[] designed to slow its spread.”); *Elim Romanian Pentecostal Church v.*
25 *Pritzker* (N.D. Ill. May 13, 2020), 2020 WL 2468194, at *5 (rejecting claim that governor’s
26 orders imposed content-based speech restriction), *aff’d*, 962 F.3d 341 (7th Cir. 2020); *Antietam*
27 *Battlefield KOA v. Hogan* (D. Md. May 20, 2020) 461 F.Supp.3d 214, 235 (governor’s executive
28 order that temporarily prohibits all large gatherings “only for the duration of the public health
emergency . . . is best analyzed as a [content-neutral] time, place, and manner restriction”);
Calvary Chapel of Bangor v. Mills (D. Me. 2020) 459 F.Supp.3d. 273, 287 (no likelihood of
success on merits of free speech and assembly claims); *Lighthouse Fellowship Church v.*
Northam (E.D. Va. 2020) 458 F.Supp.3d 418, 436 (even if governor’s COVID-19 orders had an
incidental impact on expressive conduct, plaintiff’s claims is unlikely to succeed), appeal
dismissed as moot, 2020 WL 6074341 (4th Cir. Oct. 13, 2020).

1 The State’s COVID-19 health orders survive the intermediate scrutiny applicable to time,
2 place, and manner restrictions. The restrictions at issue in the Complaint and those that are
3 currently applicable impose temporary conditions upon live entertainment based on local
4 COVID-19 infection rates and critical care capacity. Such restrictions do not burden
5 “substantially more speech than is necessary” to achieve the State’s substantial interest in
6 protecting public health in the midst of the COVID-19 pandemic. (*Ward v. Rock Against*
7 *Racism* (1989) 491 U.S. 781, 799; see also *Givens, supra*, 459 F.Supp.3d at 1313 [“[T]he
8 government ‘need not [use] the least restrictive or least intrusive means’ available to achieve its
9 legitimate interests,” quoting *Ward, supra*, 491 U.S. at 798]; *Legacy Church, Inc. v.*
10 *Kunkel* (D.N.M., July 13, 2020, No. CV 20-0327) 2020 WL 3963764, at *113 [“That a time,
11 place, or manner restriction burdens some protected speech does not render the restriction too
12 loosely tailored[.]”].) And, empirical evidence supports the State’s regulation of activities that
13 pose a higher risk of spreading COVID-19, such as restaurant dining and live entertainment.²⁰

14 Plaintiffs also have “ample alternative channels” to exercise their First Amendment rights.
15 For example, nothing prevents Plaintiffs’ performers from dancing and performing for an
16 audience over the internet. As the Supreme Court has recognized, “cyberspace—the ‘vast
17 democratic forums of the Internet’ in general, and social media in particular”—has become an
18 essential forum for the exercise of First Amendment rights. (*Packingham v. North Carolina*
19 (2017) 137 S. Ct. 1730, 1735 (quoting *Reno v. American Civil Liberties Union* (1997) 521 U.S.
20 844, 868); see also *Givens, supra*, 459 F.Supp.3d at p. 1314 [protestors retained alternative
21 channels of communications such as online resources to stage rallies and make their protest]);
22 *Antietam Battlefield, supra*, 461 F.Supp.3d at p. 236 [prohibition on large protests left options to
23 gather in small groups and communicate via the internet, newspaper, or signs, provided sufficient
24 alternative to restriction on large gatherings; “The court understands that these alternatives might

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26 ²⁰ See Li Decl., Ex. F, Watt Decl. ¶¶ 15-75; Li Decl., Ex. G, Mobility Network Models of
27 COVID-19 Explain Inequities and Inform Reopenings, 4 (discussing correlation between human
28 mobility patterns with the spread of COVID-19 spread of the disease, finding, “[o]n average
across metro areas, full-service restaurants, gyms, hotels, cafes, religious organizations, and
limited-service restaurants produced the largest predicted increases in infections when reopened
[.]. Reopening full-service restaurants was associated with a particularly high risk. . . .”).

1 not carry the same force as a large rally or an in-person religious service with all congregants.
2 But, especially in view of the COVID-19 pandemic, sufficient alternatives are available”].)

3 **3. The Equal Protection, Due Process, and Vagueness Claims Fail**

4 The equal protection claim is that adult entertainment has been subjected to different
5 treatment because of the content of the First Amendment activity involved. This is “no more than
6 a First Amendment claim dressed in equal protection clothing.” (*Orin v. Barclay* (9th Cir. 2001)
7 272 F.3d 1207, 1213 n.3.) The claim is thus “subsumed by, and co-extensive with, [the] First
8 Amendment claim[s].” (*Ibid.*) “Where plaintiffs allege violations of the Equal Protection Clause
9 relating to expressive conduct,” this Court uses “essentially the same analysis as . . . in a case
10 alleging only content or viewpoint discrimination under the First Amendment.” (*Dariano v.*
11 *Morgan Hill Unified Sch. Dist.* (9th Cir. 2014) 767 F.3d 764, 780, internal quotation marks and
12 citation omitted.) “Plaintiffs do not allege membership in a protected class or contend that the
13 [challenged] conduct burdened any fundamental right other than their speech rights,” and the
14 equal protection claim thus “rise[]s and fall[]s with the First Amendment claims.” (*OSU Student*
15 *All. v. Ray* (9th Cir. 2012) 699 F.3d 1053, 1067.)

16 To the extent Plaintiffs invoke their procedural due process claim—regarding an alleged
17 “fundamental and protected interest in the use and enjoyment of their venue”—as a basis for a
18 preliminary injunction, that claim also lacks any merit. (Compl. ¶ 43; TRO App. 24.) Even
19 assuming that Plaintiffs have identified a protected liberty or property interest, “governmental
20 decisions which affect large areas and are not directed at one or a few individuals do not give rise
21 to the constitutional procedural due process requirements of individual notice and hearing.”
22 (*Halverson v. Skagit County* (9th Cir. 1994) 42 F.3d 1257, 1261, *as amended on denial of reh’g.*)
23 The challenged orders “affect[] a large number of people, as opposed to targeting a small number
24 of individuals based on individual factual determinations.” (*Gallo v. U.S. Dist. Court for Dist. of*
25 *Arizona* (9th Cir. 2003) 349 F.3d 1169, 1182.) The orders apply to all businesses throughout the
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1 State and do not single out Plaintiffs for individualized treatment. They thus “do not ‘give rise to
2 constitutional procedural due process requirements.’”²¹ (*Ibid*, citation omitted).

3 Finally, although the Complaint does not contain a vagueness claim, the TRO Application
4 asserts that Defendants’ orders are “vague and arbitrary” and asks the Court to “step in and bring
5 some semblance of clarity to what is permitted and what is not.” (TRO App. 25.) This
6 improperly raised claim lacks any likelihood of success on the merits. “A law is
7 unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is
8 prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement.” (*Human Life*
9 *of Washington Inc. v. Brumsickle* (9th Cir. 2010) 624 F.3d 990, 1019 (citation omitted).)
10 Vagueness challenges will be rejected when it is “clear what the ordinance as a whole prohibits.”
11 (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 110.) Here, there is no question that the
12 cease-and-desist letters that prompted Plaintiffs to sue here put Plaintiffs on notice that their
13 conduct was prohibited under then-applicable orders. It is also clear that the currently applicable
14 November 24, 2020 restaurant guidance permits the very conduct Plaintiffs want to engage in,
15 subject to application of the Regional Stay at Home Order.

16 **II. PLAINTIFFS FAIL TO SATISFY THE REMAINING PRELIMINARY INJUNCTION** 17 **FACTORS**

18 **A. Plaintiffs Cannot Demonstrate Immediate Irreparable Harm**

19 Plaintiffs have not and cannot demonstrate they are likely to suffer irreparable harm in the
20 absence of the requested injunction. That is because an injunction against enforcement of the
21 orders at issue in the Complaint would have no effect. A court should not “presume irreparable
22 injury or the inadequacy of legal remedies based simply on assertion of a constitutional theory for
23 relief.” (*Tahoe Keys*, *supra*, 23 Cal.App.4th at p. 1472.) Rather, the irreparable injury required
24 for a preliminary injunction must result from the lack of an injunction.

25 ²¹ To the extent Plaintiffs invoke the Takings Clause of the Fifth Amendment (Compl., 15
26 [“Violation of Plaintiffs’ Due Process Rights Compr[is]e a Taking”), that claim also fails.
27 Plaintiffs do not allege that the challenged orders “physically invade[] or take[] title to
28 property either directly or by authorizing someone else to do so.” (*Weise v. Becerra* (E.D. Cal.
2018) 306 F. Supp. 3d 1190, 1198.) “[M]ere diminution in the value of property, however
serious, is insufficient to demonstrate a taking.” (*Rancho de Calistoga v. City of Calistoga* (9th
Cir. 2015) 800 F.3d 1083, 1090.)

1 Here, the lack of an injunction would result in the continued application of the November
2 24, 2020 restaurant guidance to Plaintiffs’ operations—under which Plaintiffs do not and cannot
3 allege any irreparable injury. All of Plaintiffs’ assertions of irreparable harm are predicated on a
4 legal regime that does not permit them to operate the live adult entertainment aspects of their
5 businesses, even as the restaurant portions of their businesses are allowed to operate. Now that
6 the guidance that Plaintiffs contend previously prohibited them from operating is no longer
7 controlling, and the currently operative guidance allows Plaintiffs to engage in their desired
8 conduct, the alleged irreparable harm no longer exists.

9 **B. The Balance of Harms Favors Denial of the Motion**

10 The factors of balancing hardships of the public and Plaintiffs, and advancement of the
11 public interest tip sharply against granting Plaintiffs’ motion. When injunctive relief is sought,
12 consideration of public policy is required. (*Tahoe Keys, supra*, 23 Cal.App.4th at p. 1471.) The
13 public has a strong interest in protecting itself from infectious disease and in curbing COVID-19
14 to prevent illness and death not only from the disease itself but from the effects of overwhelming
15 the State’s hospital system, and so that the economy, schools, and other activities can reopen
16 more quickly. Any limited and temporary harm that Plaintiffs might suffer from the orders that
17 were formerly in effect or the ones that currently apply is far outweighed by the potential harm to
18 the public health in general. Neither the former nor currently applicable orders prohibit Plaintiffs
19 from providing live adult entertainment. Rather, they temporarily restrict that entertainment in
20 restaurants when current epidemiological conditions are too risky.

21 Most significantly, an injunction would directly compromise public safety by preventing
22 the State from addressing the worst public health crisis in over a century. The public interest
23 would be directly harmed if the State is unable to enact temporary, content neutral restrictions
24 that apply regardless of the type of live entertainment being offered. This is “a matter of
25 significant public concern and provisional injunctive relief which would deter or delay defendants
26 in the performance of their duties and would necessarily entail a significant risk of harm to the
27 public interest.” (*Tahoe Keys, supra*, 23 Cal.App.4th at p. 1473.) The public interest thus weighs
28 strongly against an injunction.

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CONCLUSION

For the foregoing reasons, this Court should deny the preliminary injunction motion and discharge the temporary restraining order.

Dated: December 4, 2020

Respectfully Submitted,

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Governor of California, and the California
Department of Public Health*

SA2020304258

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *Midway Venture, LLC, et al. v. County of San Diego, et al.*
Case No.: 37-2020-00038194

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the One Legal electronic filing system. Participants who are registered with One Legal will be served electronically. Participants in this case who are not registered with One Legal will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On December 4, 2020, I electronically served the attached

- **OPPOSITION OF GOVERNOR NEWSOM AND CALIFORNIA DEPARTMENT OF PUBLIC HEALTH TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
- **DECLARATION OF P. PATTY LI IN SUPPORT OF OPPOSITION TO APPLICATION FOR ISSUANCE OF A PRELIMINARY INJUNCTION**

by transmitting a true copy via this Court's One Legal system. Because one or more of the participants in this case have not registered with the Court's One Legal system or are unable to receive electronic correspondence, on December 4, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000; San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on December 4, 2020, at San Francisco, California.

M. Mendiola
Declarant


Signature