



COVID-19 Phased Reopening: State and Local Code Enforcement Issues and Related First Amendment Challenges

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Resilience Roadmap Stages

STAGE 1:

STAGE 2:

STAGE 3:

STAGE 4:

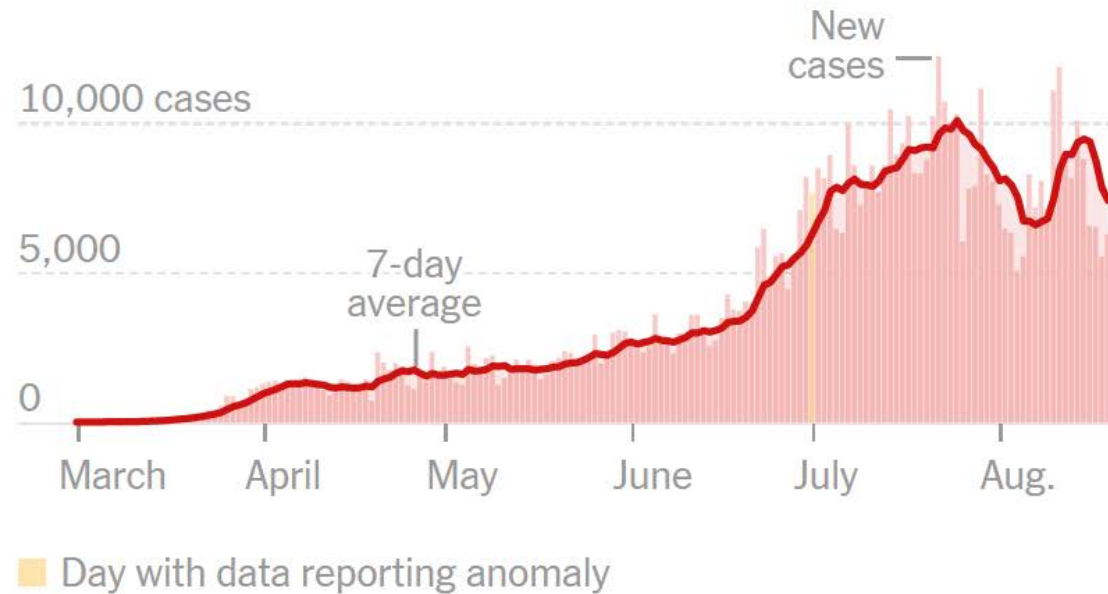


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August 25, 2020

California Coronavirus

By The New York Times Updated August 20, 2020, 10:54 A.M. E.T.



TOTAL CASES

646,848

DEATHS

11,686

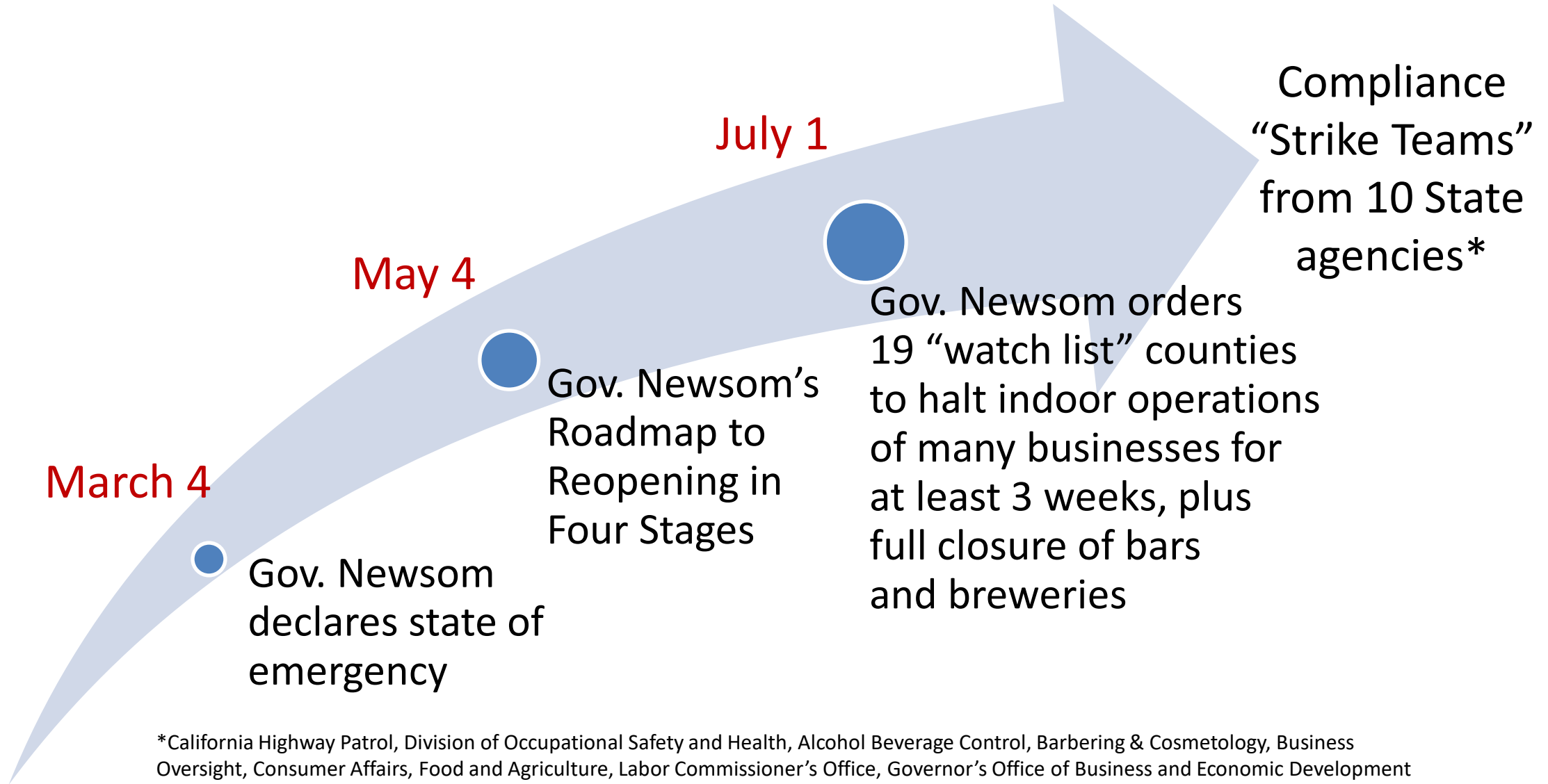
Includes confirmed and probable cases where available

Super Spreaders

- **In-person church gathering (Sacramento, CA)**
 - 71 cases, “leave us alone”
- **2.5 hour choir practice (Mount Vernon, WA)**
 - 45 of 64 diagnosed with COVID-19 or ill with symptoms, two died
- **Restaurant and Brewpub (East Lansing, MI)**
 - 107 cases = 95 customers + 12 contacts residing in 13 counties
 - All 16-28 yrs., 40% university students, graduates
- **CDC Unnamed Children’s Summer Camp (GA)**
 - 76% of 344 campers and staff whose tests were available to CDC had been infected (almost half the total camp) and 231 were aged 17 or younger.



COVID-19 Pandemic



Overview

- State Enforcement
- Local Enforcement
- Face Masks/Covering
- Mechanics of Enforcement
- Case Study
- Businesses
- Schools
- Religious Services
- Public Protests and Rallies
- Protest Curfews/Restrictions



State Enforcement

Newsom's Funding Threat

- “We have made contingent, specifically, \$2.5 billion in the budget, that we will make contingent upon performance.”
- “If they’re simply unwilling to do it, then we will redirect those dollars to communities that are.”
- “If this is not enough of an incentive, the State will take further enforcement actions itself.”



Non-Compliance with State, County Health Orders

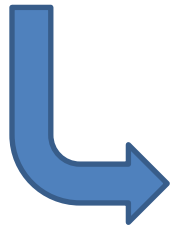
State threatens cities with denial of funds

- FEMA Public Assistance Grants
- CDAA Disaster Assistance Funds
- CARES and HEROES Act Funds
- State Budget Funds for FY 2020-2021



Non-Compliance with State, County Health Orders

- Affirmative action inconsistent with State's Public Health Orders



Treated as determination that there is no longer a local emergency beyond a local agency's control



Thus no basis for emergency funding

Examples:

City of Atwater
City of Coalinga

Local Enforcement

Priority Enforcement Concerns

- Face masks
- In-person religious services
- Salons/beauty services
- Bars/restaurants
- Schools



The Mask Conundrum

Face Mask Enforcement

Marin County

- Individuals found violating health orders face fines ranging from \$25 to \$500. For businesses, fines range from \$250 to \$10,000.

West Hollywood

- Sheriff will hand out face coverings as part of requesting compliance along with enforcing sliding scale of fines.

County of Los Angeles

- Board of Supervisors instructed DPH to create plan for fining businesses that violate COVID-19 protocols by no later than July 21, 2020.

Napa County

- Board of Supervisors authorized citations from \$25-\$500 for individuals and \$200-\$5,000 for businesses that violate public health orders.

Face Mask Enforcement

Hermosa Beach

- Four health ordinance enforcement officers from Willdan Group assist HBPD regarding required face coverings, no arresting authority.



\$100 for first offense, \$200 for second, \$500 for each subsequent offense within one-year period

Manhattan Beach

- 8 contractors work in teams. Contemporary Services Corp. security guards issue warnings and hand out masks. Willdan Group provides personnel with authority to write citations.



Aug 2-8: 226 citations, 1,657 warnings for wearing face coverings incorrectly, handed out 100s face masks

Merced County Sheriff – May 16 Stance

My “Official” stance ...

- “Nobody has the right to dictate what risks I’m going to take when I leave my house and this includes an elected governor.”
- “I WILL NOT be taking any enforcement action in this county for any of the COVID-19 “violations”.
- “My decision is based on the Constitutional Rights afforded our citizens and I as the Constitutional Law Enforcement Authority in Merced County.”



Merced County Sheriff – July 2 New Stance

- “This disease is very serious.”
- “Wearing a mask is so effective ... it’s the biggest preventive medicine that you can do along with social distancing.”
- “I have a mask in my work truck, my personal truck and at home.”
- “Do the right thing every time you leave your house.”

Watch: Sheriff’s Plea for Residents to Wear Masks



Foregoing Mask: Protected Speech?



Protected Speech?

Q: Is not wearing a mask expressive conduct triggering First Amendment protection?

A: Two pronged test:

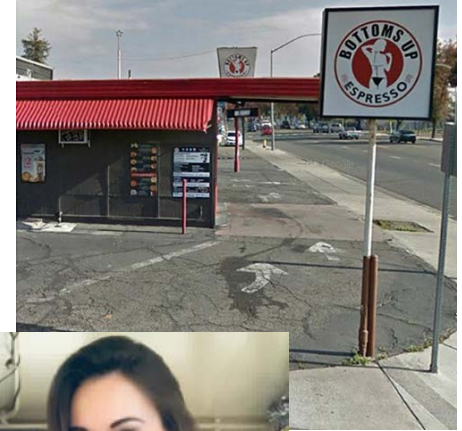
1. An intent to convey a particularized message *and*
2. That the message would be understood by those that viewed it.



Protected Speech?

Edge v. City of Everett, 929 F.3d 657 (9th Circuit 2019)

- Bikini Barista argued requiring covering “minimum body areas” while serving violated First Amendment.
- No particularized message by wearing a bikini and unlikely others would understand plaintiffs’ intended message of “fearless body acceptance”.
- Ninth Circuit reversed district court’s grant of PI finding plaintiffs’ wardrobe did not constitute expressive conduct within the meaning of First Amendment.



Protecting Public Health & Safety

Buhl v. Hannigan, 16 Cal.App.4th 1612 (1993)

- Challenge brought to motorcycle helmet law.
- Court found helmet law:
 - Rationally related to legitimate safety concern.
 - Does not impermissibly infringe on constitutionally protected freedom of religion, freedom of expression, or right of privacy.
- Operating a motorcycle is not expression and impact on Sikh turban wearing incidental to valid and neutral law.



The Mask Conundrum Revisited

Analyze:

- ✓ Intent to convey particularized message
- ✓ Message understood by those that viewed it
- ✓ Related to legitimate health and safety concern



Mechanics of Enforcement

Close Businesses

Factory Shut Down After 300+ Infections, 4 Deaths

- Los Angeles Apparel reopened a closed 150,000-sq. ft. factory with plans to produce 300,000 masks and 50,000 gowns per week
- Deemed essential business re: PPE shortage
- July 10, LA County DPH ordered manufacturing facility closed
- Investigation = 300+ infections and four deaths among workers
 - violations of mandatory public health infection control orders and failure to cooperate with DPH's investigation
- July 22, factory reopened with employee training and new protocols; subject to unannounced visits by health inspectors



Dov Charney in his factory in Los Angeles, wearing one of his own masks. via Los Angeles Apparel

Cut Off Utilities

Los Angeles Mayor Garcetti:

1. Educate first
2. But with reoffenders, notice to initiate the process to request LADWP to shut off service within 48 hours



Legal basis? Due Process Concerns

Mayor: *“You’re breaking the law. Just as we can shut down bars breaking alcohol laws. In places that are in criminal violations, we can shut them down.”*



How to Set Up an Enforcement Case

1. Always seek voluntary compliance
2. Need an even-handed enforcement practice (BLM protest vs. Outdoor church)
3. Proceed to gain evidence of violations (City's established code enforcement process)
4. Inspections and photos
5. Go to court for injunction (state vs. federal)
6. What if violations persist?



Case Study

Case Study: *Godspeak Calvary Chapel*

- Godspeak Calvary Chapel and Rev. McCoy holding indoor religious services since May 31, 2020
- Ventura County seeks TRO in state court to enforce compliance with State and County health orders
- County provides evidence of ongoing indoor services and Court issues TRO ordering church to cease indoor services
- Godspeak continues to hold indoor services in defiance of Court's TRO
- Contempt hearing held August 21, 2020



Businesses

Gyms

Best Supplement Guide v. Newsom
Eastern District Case No. 2:20-cv-00466
2020 WL 2615022 (E.D. Cal. May 22, 2020)

- Complaint to reopen 500+ person gym
- TRO and Preliminary Injunction denied by Judge Mendez
- No arrests, no citations issued
- Outdoor gym in 100 degree plus heat



Bars and Restaurants

- **Current State health orders**
 - **Bars** – All indoor and outdoor operations closed (unless offering meals, allowed outdoors)
 - **Restaurants** – All indoor dine-in restaurants closed, outdoor dining allowed
- **Enforcement challenges**
 - Three El Dorado County restaurants defy health orders
 - Restaurants' health permits pulled
 - Up to \$500 a day fine for continuing to operate
 - Restaurants continue to operate



Tesla Case Example

Tesla v. Alameda County, Northern District Case No. 20:cv-03186



Elon Musk  @elonmusk · May 11

Tesla is restarting production today against Alameda County rules. I will be on the line with everyone else. If anyone is arrested, I ask that it only be me.

- Filed Saturday morning when Elon Musk was not permitted to resume his car manufacturing
- No emergency relief sought
- Viewed as a leveraged effort for plant reopening
- Voluntarily dismissed

Schools

Restrictions on In-Person Instruction

- **State's health orders**
 - Schools may reopen for in-person instruction if in a jurisdiction that has not been on State's monitoring list within the prior 14 days
 - Waiver process allows elementary schools to open for in-person instruction under specified conditions



Legal Challenges

***Brach v. Newsom* (C.D. Cal.) Central District Case No. 2:20-cv-06472**

- July 21, 2020, lawsuit filed
- Challenges constitutionality of limits on in-person schooling as deprivation of equal protection, due process, and right to education.
- August 13, 2020, Judge Wilson denies Plaintiffs' application for TRO. Orders further briefing on issue of Article III standing.
- September 10, 2020, preliminary injunction hearing scheduled



In-Person Religious Services

South Bay United Pentecostal - SCOTUS

South Bay United Pentecostal Church v. Newsom 2020 WL 2813056 (May 29, 2020)

- 5-4 decision
- Court rejected church's emergency application for injunctive relief to block enforcement of California's restrictions on in-person worship services.
- Court considered California's temporary numerical restrictions on worship services that limit places of worship to 25% of building capacity or maximum of 100 attendees.



South Bay Pentecostal - SCOTUS

Justice Roberts opinion:

- **Similar or more severe restrictions apply to comparable secular gatherings**
 - Lectures, concerts, movies, spectator sports, theatrical performances
 - Where large groups of people gather in close proximity for extended periods of time.
- **Only dissimilar activities are treated more leniently**
 - Operating grocery stores, banks, laundromats
 - Where people neither congregate in large groups nor remain in close proximity for extended periods
- **Deference to politically accountable officials** especially broad in areas fraught with medical and scientific uncertainties

Calvary Chapel - SCOTUS

Calvary Chapel Dayton Valley v. Sisolak, 2020 WL 4251360 (2020)

- **5-4 decision:** Rejects church's request to stay public health restrictions
- **Kavanaugh dissent:** "Courts should be extremely deferential to the States when considering a substantive due process claim by a secular business that it is being treated worse than another business"
- **Takeaway:** Court's deference to health orders restricting business activity



Religious Services Cases – CA District Court

- *Gish v. Newsom*
2020 WL 1979970
(C.D. Cal. April 23, 2020)
- *Cross Culture v. Newsom*
2020 WL 2121111
(E.D. Cal. May 5, 2020)
- *Abiding Place Ministries v. Newsom*
2020 WL 2991467
(C.D. Cal. June 4, 2020)
- *Calvary Chapel of Ukiah v. Newsom*
(E.D. Cal. July 15, 2020)



Grants PI, plaintiffs likely to succeed on free exercise claim

- 25% cap for indoor religious services
 - Fails strict scrutiny, indoor secular activities not similarly limited
- Limitations for outdoor gatherings
 - Fails constitutional review, de facto exemptions allowed for protests and graduation ceremonies
- No compelling justification to treat protests and graduations more favorably than religious gatherings.



Public Protests and Rallies

Givens v. Newsom – CA District Court

2020 WL 2307224 (E.D. Cal. May 8, 2020)

- **First Amendment issues on public protest**
 - CHP denied requests for permits to protest on the grounds of the State Capitol because of State's stay-at-home order
- **TRO denied** by Judge Mendez
- **Case on appeal to the Ninth Circuit**
- Plaintiffs argue that government's response to BLM protests show discriminatory enforcement



Illinois Republican Party v. Pritzker
2020 WL 3604106 (N.D. Ill. July 2, 2020)

District Court ➡ 7th Circuit ➡ SCOTUS

- Illinois Republican Party challenges Governor's Order limiting gatherings (initial 10 person limit increased to 50).
- Order exempts religious gatherings. No such exemption for political gatherings.
- Courts find no evidence of selective enforcement. Find constitution does not forbid the governor from accommodating religion.



Litigation filed one week after Gov. Pritzker joined protesters

Protest Curfews/Restrictions

Public Protests



Temporary Curfew Orders

- ✓ Limited curfew orders
- ✓ Directed at addressing the substantial threat to the safety and welfare of the community
- ✓ Reasonably related to compelling government interest
- ✓ Even handed application



Temporary Curfew Orders

In re Juan C., 28 Cal.App.4th 1093 (1994)

- Upheld temporary curfew enacted by Long Beach, which experienced rioting, looting and burning after Rodney King verdict.
 - Curfew directed at limiting substantial threat to community's safety.
 - Curfew supported by compelling government interest.
 - Curfew orders remain valid only so long as emergency conditions are at play.
- Wednesday, April 29, 1992, jury verdict, riots broke out within hours.
 - Curfew effective April 30, enforced through the first weekend.
 - Juan C. arrest occurred at 11:00 PM on Saturday, May 2, 1992



Temporary Curfew Orders

George Floyd Protests: California cities' curfew orders

- **City of LA and County of LA**

Most restrictive 6 p.m. to 6 a.m. on June 1 and June 2

- **Santa Monica**

Most restrictive 1:30 p.m. to 5:30 a.m. on June 1;
and 2:00 p.m. to 5:30 a.m. on June 2

- **Culver City**

Most restrictive 4:00 p.m. to 5:30 a.m. from May 31 through June 2

- **Beverly Hills**

Most restrictive 1 p.m. to 5:30 a.m. (business district) on June 1;
citywide from 1 p.m. to 5:30 a.m. on June 2



Restrictions to Prevent Violence

Vlasak v. Superior Ct., 329 F.3d 683 (9th Cir. 2003)

- Plaintiff convicted for wielding bull hook during protest about circus' treatment of elephants.
- Ninth Circuit upheld ordinance's constitutionality:
 - Government's substantial interest in safety backed by evidence of prior injuries from large wooden sign poles
 - Limitations were content-neutral with only incidental limits on First Amendment expression



Restrictions to Prevent Violence

- Organizers sought permit for a “Straight Pride Parade/Event” triggering safety concerns and potential for large counter-protests.
- City adopted Urgency Ordinance
 - Bans bricks, glass bottles, chains, pepper spray, knives, metal pipes and similar items that can be used as weapons



Thank You!



Presenters



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