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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RON GIVENS, et al.,
Plaintiffs,
v.
GAVIN NEWSOM, et al.,
Defendants.

No. 2:20-cv-0852-JAM-CKD
ORDER ON MOTION TO COMPEL &
MOTION FOR PROTECTIVE ORDER
(ECF Nos. 58 & 59)

Presently before the court are the parties’ cross-motions to compel and to protect against the depositions of four current or former California state officials, three of whom are defendants in this civil rights action.¹ (ECF Nos. 58, 59.) The parties filed joint statements regarding the discovery disagreement. (ECF Nos. 60, 61.) The court heard remote arguments on the motions on January 6, 2021. (ECF No. 62.) Mark Meuser and Gill Sperlein appeared for plaintiffs, and James Walter appeared for defendants. For the following reasons, the court GRANTS IN PART and DENIES IN PART defendants’ motion for protective order, and DENIES plaintiffs’ motion to compel.

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¹ This matter was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(1) and 28 U.S.C. § 636(b)(1).

1 **BACKGROUND**

2 **A. The Underlying Action**

3 **1. The Complaint**

4 This discovery dispute arises in plaintiffs’ 42 U.S.C. § 1983 action challenging certain
5 COVID-19 emergency orders issued by California state officials as violating plaintiffs’ right to
6 peaceful assembly, free speech, and petition. On March 19, 2020, as this country was first
7 beginning to grapple with the COVID-19 threat, Governor Gavin Newsom signed Executive
8 Order N-33-20 stating, in relevant part, that “all residents are directed to immediately heed the
9 current State public health directives.” (ECF No. 1.1 (Ex. 1) ¶ 1.) Reprinted and incorporated
10 therein was the March 19, 2020 Order of the State Public Health Officer (“PHO”) Dr. Sonia
11 Angell, requiring “all individuals living in the State of California to stay home or at their place of
12 residence except as needed to maintain continuity of operations of the federal critical
13 infrastructure sectors.” (Id.)

14 On April 22, 2020, plaintiff Ron Givens, who works for the Sacramento Gun Club,
15 applied for a permit to hold a 1,000-person protest on the grounds of the State Capitol Building
16 (“Capitol grounds”) on May 3rd. (ECF No. 1 at 8.) The stated purpose was to protest the State’s
17 delays in processing background checks for gun purchasers during the COVID-19 outbreak. (Id.
18 at 7; ECF No. 33.2 at 2) On April 23, 2020, plaintiff Christine Bish, who was then campaigning
19 for election to represent California in the U.S. House of Representatives, also applied for a permit
20 to protest on the Capitol grounds—for 500 people on May 2nd. (ECF Nos. 1 at 9, 33.2 at 2.) The
21 stated purpose of her rally was to encourage the State to lift its coronavirus-related restrictions,
22 and to raise voter awareness about civil rights issues pertaining to the stay-at-home orders. (Id.)

23 The next day, April 24, 2020, officers of the California Highway Patrol (“CHP”), which
24 processes permit applications for the Capitol grounds, called each plaintiff to inform them their
25 permits had been denied. (Id. at 8, 9.) According to the complaint, “[t]he CHP officer informed
26 Givens that the basis for his application’s denial was that defendant Governor Newsom had
27 instructed the CHP that no permits should be issued for protests, as they were not allowed under
28 the State Order.” (Id. at 8.) Likewise, CHP Officer Moos who spoke to Bish said her application

1 was denied “due to the State and County Health Order and our inability to ensure proper social
2 distancing to keep demonstrators safe.” (Id. at 9.)

3 On April 27, 2020, plaintiffs filed this action challenging the March 19, 2020 executive
4 order and the CHP’s denial of Capitol grounds protest permit applications pursuant to that order
5 (collectively, “the Orders”). (ECF No. 1.) The complaint names four defendants: Governor
6 Newsom, California Attorney General Xavier Becerra, then-CHP Commissioner Warren Stanley,
7 and then-PHO Dr. Angell. (Id. at 4.) Defendants Newsom, Stanley, and Angell are subjects of
8 the present discovery dispute. At this juncture, four causes of action remain in this case. First,
9 plaintiffs claim that the Orders’ issuance and enforcement violate the Free Speech Clause of the
10 First Amendment by entirely prohibiting demonstrations at the Capitol grounds. (Id. at 10-11.)
11 Specifically, plaintiffs allege that this prohibition “is unreasonable and has a chilling effect on
12 protected speech” and that the Orders are unconstitutionally overbroad. (Id. ¶¶ 54-55.) Second,
13 plaintiffs claim that the Orders violate the Freedom of Assembly Clause because the purported
14 ban “restricts fundamental rights” by outright prohibiting political rallies where less restrictive
15 alternatives exist to satisfy public health interests. (Id. at 11-12.) Third, plaintiffs claim that for
16 the same reason, the Orders also violate the First Amendment’s Petition Clause. (Id. at 13.) And
17 finally, plaintiffs assert a violation of the Fourteenth Amendment’s Due Process Clause, claiming
18 that the March 19, 2020 executive order to “heed” public health directives is unconstitutionally
19 vague. (Id. at 14-15.) Plaintiffs seek declaratory relief and an injunction halting the executive
20 order’s enforcement. (Id. at 19.)

21 **2. Subsequent Events**

22 With their complaint, plaintiffs also filed an application for a temporary restraining order
23 (“TRO”) preliminarily enjoining the executive order’s enforcement. (ECF No. 5.) The court
24 denied the application, holding that plaintiffs were unlikely to succeed on the merits of their
25 claims both because the Orders were “within the scope of the State’s emergency powers to fight
26 the spread of COVID-19” and because even under a traditional constitutional analysis, there was
27 no violation of plaintiffs’ constitutional rights. (ECF No. 18 at 7.)

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1 In June 2020, plaintiffs sought reconsideration of the TRO denial, arguing in part that
2 events since the TRO ruling showed that defendants were “selectively enforcing the Governor’s
3 [executive order] based on the content of the anticipated speech.” (ECF No. 28 at 2; see id. at 11,
4 15-16.) Plaintiffs contrasted (a) the State’s apparent sanctioning of dozens of large in-person
5 protests against police brutality that exceeded the 100-person limit on attendance established by a
6 recent May 25, 2020 executive order with (b) arrests of individuals protesting the “authoritarian
7 response” to the COVID-19 threat at the Capitol grounds. (Id. at 11-12.)

8 Defendants opposed reconsideration and moved to dismiss the action as having been
9 mooted by the State’s latest June 12, 2020 directive completely removing caps on attendance at
10 outdoor protests. (ECF Nos. 33, 35 at 8.) In support of the motion to dismiss, defendants filed a
11 declaration by CHP Captain Douglas Lyons, who supervises the review of Capitol grounds
12 protest permit applications. (ECF No. 33.2.) Captain Lyons averred that the CHP “adopted
13 permit practices after April 20, 2020, which were consistent with state public health directives,
14 including the California Department of Public Health (CDPH) determination that ‘all gatherings
15 should be postponed or canceled’ to protect public health and slow the rate of transmission of
16 COVID-19.” (Id. ¶ 3.) Based on those policies, plaintiffs’ permit applications were denied “in
17 the interest of public health and safety.” (Id. ¶ 6.)

18 In a ruling from the bench on July 14, 2020, the court denied plaintiffs’ motion for
19 reconsideration, and denied in part defendants’ motion to dismiss.² (ECF Nos. 42, 45.) The court
20 held that, despite the recent lifting of the cap on outdoor protests, the action was not moot because
21 the March 19, 2020 executive order still remained in effect and it was not unlikely that the
22 challenged congregation limitations would be re-imposed, given the ever-shifting calculus of the
23 COVID-19 response.³ (ECF No. 45 at 14-19.)

24 The State’s stay-at-home orders continue to morph with the waves of the pandemic. At
25 present, there is a 200-person limit on single-event, outdoor gatherings at the Capitol grounds.

26 ² On December 4, 2020, the Ninth Circuit dismissed for lack of jurisdiction plaintiffs’
27 interlocutory appeal of the TRO denial. (ECF No. 56.)

28 ³ With plaintiffs’ concession that their state law claims were barred by Eleventh Amendment
immunity, the court granted the motion to dismiss as to those claims. (ECF No. 45 at 12, 19.)

1 (ECF No. 60 at 5 (citing <https://capitolpermits.chp.ca.gov>.)

2 **B. The Discovery Dispute**

3 In the present cross-motions, plaintiffs seek to compel and defendants seek to prevent—or
4 at least postpone—the depositions of (1) defendant Governor Newsom, (2) defendant former CHP
5 Commissioner Stanley, (3) defendant former PHO Dr. Angell, and (4) non-party Dr. James Watt,
6 the Chief of California’s Division of Communicable Disease Control, who throughout this
7 litigation has submitted declarations regarding COVID-19 and the State’s response, in support of
8 defendants.

9 On August 26, 2020, the parties exchanged their Rule 26(a)(1) initial disclosures. (ECF
10 No. 61 at 13.) Among other individuals disclosed by defendants as “likely to have discoverable
11 information” were Dr. Watt, CHP Captain Lyons who oversaw Capitol grounds permit reviews,
12 and CHP Officer Moos who originally called plaintiff Bish to inform her of her application’s
13 denial. (Id.; ECF Nos. 1 at 9, 33.2 at 2.) Plaintiffs’ disclosures indicated their intent to depose
14 defendants Newsom, Stanley, and Angell, as well as Dr. Watt. (ECF No. 60 at 5.)

15 On October 26, 2020, plaintiffs noticed the depositions of these four individuals for
16 November 10, 11, 12, and 13, 2020, respectively. (ECF No. 60 at 3.) Defendants informed
17 plaintiffs of their objection to these depositions and indicated that they would move for a
18 protective order to prevent the depositions. (Id. at 5.) Plaintiffs agreed to suspend these
19 depositions until after the resolution of the present motion. (Id.) On November 6, 2020,
20 defendants filed the motion for protective order, noticing the motion for hearing on December 16,
21 2020. (ECF No. 55.) When no joint statement of the discovery disagreement was filed by the
22 deadline of December 9, 2020, the court denied without prejudice the motion for protective order
23 and vacated the hearing.⁴ (ECF No. 57.) On December 15, 2020, plaintiffs filed the instant
24 motion to compel the depositions, and defendants concurrently re-filed the instant motion for
25 protective order. (ECF Nos. 58, 59.) Defendants have not objected to depositions of the CHP

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27 ⁴ Defendants explain that they informed plaintiffs as early as December 2, 2020 that the process
28 for completing the joint statement was taking longer than anticipated and offered to re-notice the
motion for a later date. (ECF No. 60 at 5.) Plaintiffs declined that offer and then did not respond
to defendants’ two emails on December 9, 2020. (Id.)

1 fact witnesses Captain Lyons and Officer Moos, which are scheduled sometime in late January.
2 (ECF No. 60 at 5, 9.)

3 **DISCUSSION**

4 **A. Motion to Compel**

5 Plaintiffs' motion to compel is based entirely on defendants' failure to submit their portion
6 of the joint statement to plaintiffs in time to meet the December 9 filing deadline for the original
7 motion for protective order, and the court's consequent denial of that motion without prejudice.
8 (ECF No. 60 at 3-4.) This argument is totally unavailing. Plaintiffs cannot refuse to cooperate
9 with defendants' attempts to meet and confer before re-noticing their motion for protective order
10 for a later date (as required by this court's Local Rules, see L.R. 251(b)) and then use the non-
11 prejudicial denial of the motion as a substantive basis to have the court require appearances at the
12 disputed depositions. The court finds this motion to compel largely duplicative of the now re-
13 filed and properly supported motion for protective order, where both parties have focused their
14 substantive legal arguments. Accordingly, the court turns to that motion.

15 **B. Motion for Protective Order**

16 In their motion, defendants seek to preclude entirely the depositions of Governor
17 Newsom, former Commissioner Stanley, and former PHO Dr. Angell, and to preclude the
18 deposition of Dr. Watt at least until expert discovery begins. (ECF No. 60 at 10-11.) Defendants
19 argue that proposed deponents Newsom, Stanley, and Angell were, at the time of the conduct
20 challenged in this litigation, high-ranking government officials who must not be subject to
21 deposition in the absence of extraordinary circumstances—invoking the so-called “apex
22 doctrine.” (ECF Nos. 60 at 4, 61 at 3.) As to Dr. Watt, defendants argue that he has thus far
23 offered only expert assistance and that plaintiffs therefore may only depose him after the period
24 for expert discovery begins (currently scheduled for July 16, 2021) and only in the event that
25 defendants designate Dr. Watt as one of their expert witnesses. (ECF No. 60 at 10.)

26 Under Rule 26(c) of the Federal Rules of Civil Procedure, “[t]he court may, for good
27 cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or
28 undue burden or expense” by, among other things, forbidding a deposition or limiting its scope.

1 Fed. R. Civ. P. 26(c)(1). When a party seeks the deposition of a high-ranking government or
2 corporate official (a so-called “apex” deposition), there is “tremendous potential for abuse or
3 harassment.” Apple Inc. v. Samsung Elecs. Co., Ltd, 282 F.R.D. 259, 263 (N.D. Cal. 2012).
4 Apex depositions are generally not permitted absent “extraordinary circumstances” because “high
5 ranking government officials have greater duties and time constraints than other witnesses
6 and . . . , without appropriate limitations, such officials will spend an inordinate amount of time
7 tending to pending litigation.” Thomas v. Cate, 715 F. Supp. 2d 1012, 1048 (E.D. Cal. 2010); see
8 Coleman v. Schwarzenegger, No. CIV S-90-0520-LKK-JFM-P, 2008 WL 4300437, at *3 (E.D.
9 Cal. Sept. 15, 2008). As such, courts have developed the “apex” doctrine, which provides a
10 framework for determining whether “good cause” exists to forbid the deposition under
11 Rule 26(c). Smith v. City of Stockton, No. 2:15-CV-0363-KJM-AC, 2017 WL 11435161, at *2
12 (E.D. Cal. Mar. 27, 2017).

13 Under the apex doctrine, “an individual objecting to a deposition must first demonstrate
14 he is sufficiently high-ranking to invoke the deposition privilege.” Estate of Levingston v. Cty. of
15 Kern, 320 F.R.D. 520, 525 (E.D. Cal. 2017). Upon this showing, the court then considers
16 whether there are “extraordinary circumstances” that justify deposing the high-ranking officials,
17 based on “(1) whether the deponent has unique first-hand, non-repetitive knowledge of the facts
18 at issue in the case; and (2) whether the party seeking the deposition has exhausted other less
19 intrusive discovery methods.” Id.; see Coleman, 2008 WL 4300437, at *3 (to show extraordinary
20 circumstances, plaintiffs must show that proposed high-ranking deponents “possess personal
21 knowledge of facts critical to the outcome of the proceedings and that such information cannot be
22 obtained by other means”).

23 ***1. Governor Newsom***

24 Although generally “it is rare for a court to disallow the taking of a deposition,”
25 Levingston, 320 F.R.D. at 524, “[h]eads of government agencies are not normally subject to
26 deposition,” Kyle Eng’g Co. v. Kleppe, 600 F.2d 226, 231 (9th Cir. 1979). Plaintiffs do not
27 dispute that Governor Newsom is a high-ranking government official to whom the apex doctrine
28 applies. The question therefore is whether plaintiffs have established “extraordinary

1 circumstances” warranting discovery directly from the Governor via deposition. Thomas, 715
2 F. Supp. 2d at 1049.

3 As to the first factor, plaintiffs argue Governor Newsom has unique first-hand knowledge
4 of the facts at issue, as plaintiffs allege that he personally violated their constitutional rights by
5 signing the March 19, 2020 executive order and directing the CHP to refuse all applications for
6 permits to protest on Capitol grounds. (ECF No. 61 at 9.) According to plaintiffs, the CHP
7 directive was issued personally, not through intermediaries, so “[n]o one would be better
8 positioned to know the exact circumstances and content of these instructions than their source—
9 Governor Newsom.” (Id. at 10.)

10 Plaintiffs are correct that courts often look more favorably on depositions of high-ranking
11 officials when there are allegations that the official personally made the decision(s) at issue in the
12 litigation. See, e.g., Bagley v. Blagojevich, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (denying
13 apex doctrine protection where plaintiffs alleged “the Governor was either the ultimate decision
14 maker or at least personally involved in the decision”); Freedom From Religion Found., Inc. v.
15 Abbott, No. A-16-CA-00233-SS, 2017 WL 4582804, at *11 (W.D. Tex. Oct. 13, 2017) (in
16 permitting limited deposition of governor, noting that “Governor Abbott is a party to this
17 litigation in his individual capacity, and his motive in requesting removal of FFRF’s exhibit is
18 central to FFRF’s claims against him”). But, as these cases themselves suggest, merely asserting
19 personal involvement in a contested decision is not sufficient, alone, to deny deposition
20 protection—particularly for those positioned at the very pinnacle of the governmental hierarchy,
21 such as the Governor here.

22 Typically, depositions of such individuals are allowed “when there are allegations that the
23 official acted with improper motive or acted outside the scope of his official capacity.” Coleman,
24 2008 WL 4300437, at *3-4 (surveying case law, including Bagley, and finding no extraordinary
25 circumstances based in part on lack of allegations of improper motive). The court can find no
26 such allegations in plaintiffs’ complaint. Plaintiffs have alleged only that Governor Newsom
27 (1) signed the executive order to follow public health directives, without making exceptions for
28 First Amendment activities; and (2) (according to Officer Moos) “instructed the CHP that no

1 permits should be issued for protests, as they were not allowed under the [Executive] Order.”⁵
2 (ECF No. 1 at 5-6, 8.) These alleged acts fall firmly within the scope of a governor’s typical
3 duties, and it is difficult to see how those actions might be improper initial reactions to the
4 outbreak of an unprecedented pandemic.

5 Even in asserting their First Amendment claims, the present complaint imputes no
6 discriminatory or otherwise improper motive to the Governor in taking these alleged actions.
7 (See ECF No. 1 at 10-13 (not alleging content- or viewpoint-based discrimination, but rather
8 overall chilling of speech and restriction of fundamental rights).) Cf. FFRF, 2017 WL 4582804,
9 at *11 & n.24 (finding governor’s “first-hand knowledge of his own motives” was reason to deny
10 protection where plaintiff “pled specific facts sufficient to support its allegation that Governor
11 Abbott acted with improper motive”). Although plaintiffs have recently raised arguments of
12 generalized viewpoint discrimination based on the State’s post-filing enforcement of
13 COVID-related assembly restrictions, that is insufficient as it remains uncertain whether plaintiffs
14 attribute that discrimination to the Governor himself, or whether plaintiffs will actually assert
15 such claims in an amended complaint. See In re F.D.I.C., 58 F.3d 1055, 1062 (5th Cir. 1995)
16 (requiring “strong showing of bad faith or improper behavior” before subjecting high-level
17 officials to deposition); FFRF, 2017 WL 4582804, at *11 n.24 (cautioning that “conclusory
18 allegations of bad faith are insufficient to demonstrate the necessity of deposing a high-ranking
19 government official”); United States v. Sensient Colors, Inc., 649 F. Supp. 2d 309, 323 (D.N.J.
20 2009) (holding bald assertions of bad faith insufficient to require agency officials to submit to
21 depositions, but allowing deposition where plaintiff alleged specific facts demonstrating bad
22 faith).

23 Turning to the second “extraordinary circumstances” factor, even assuming that the
24 information plaintiffs seek from Governor Newsom is relevant to their claims as presently
25 asserted, plaintiffs have not shown “that no other person possesses the information in question,
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27 ⁵ Defendants dispute these allegations and contend that under then-existing State guidelines, the
28 CHP temporarily prohibited gatherings in April 2020, a prohibition that was soon lifted under
revised guidelines. (ECF No. 60 at 2.)

1 particularly other members of the Governor’s office or his administration, or that such
2 information may not be obtained by other means.” Coleman, 2008 WL 4300437, at *4. “When
3 the Governor acts within the parameters of his official duties by, for example, issuing orders . . . ,
4 it is likely that other lower-ranking members of his office or administration would have relevant
5 information about his actions.” Id. Thus far, plaintiffs have not attempted any less intrusive
6 discovery methods or sources for the information they seek. The only discovery that has taken
7 place is the exchange of initial disclosures, and the noticing of the above-described depositions.
8 (ECF No. 61 at 7.) At a bare minimum, no deposition should be required of Governor Newsom
9 until plaintiffs have first deposed the two CHP fact witnesses currently scheduled for deposition
10 later this month. And, as was the case in Coleman, the court is also confident that lower-ranking
11 members of the Governor’s staff would have some knowledge of the Orders at issue,
12 notwithstanding plaintiffs’ conclusory assertion that the Governor did not act through
13 “intermediaries” in ordering the CHP to deny all permit applications.

14 Plaintiffs have not described any efforts “to determine whether the information is
15 otherwise available and the extent to which their efforts failed to uncover such information.”
16 Coleman, 2008 WL 4300437, at *4. Instead, plaintiffs argue that their proposed “limited
17 deposition” of the Governor will be less intrusive than a “bitterly drawn-out battle of
18 interrogatories, objections, and motions to compel.” (ECF No. 61 at 9.) Plaintiffs state that they
19 “only intend to depose Governor Newsom as to his personal involvement with the decision
20 making process regarding his Executive Orders, his involvement with the Department of Public
21 Health’s guidance and orders, his involvement with the decision making process of who was
22 essential and who was not essential, and his involvement regarding the regulation of gatherings
23 on the Capitol grounds since he proclaimed a state of emergency.” (Id. at 10-11.)

24 Based on that wide range of proposed topics, alone, the court is unconvinced that
25 deposing the Governor will be the least burdensome method of discovery. Especially in this time
26 of heightened urgency and need for State leaders to focus on protecting public health, plaintiffs
27 must make at least some showing that other methods and sources of discovery have been tried
28 and proved unproductive. See Thomas, 715 F. Supp. 2d at 1048 (describing “greater duties and

1 time constraints” of high-ranking officials as rationale for apex protection). Until plaintiffs can
2 show the fruitlessness of other discovery avenues, a protective order will remain appropriate to
3 prohibit the deposition of Governor Newsom in this case.

4 **2. Former CHP Commissioner Stanley & Former Public Health Officer Dr. Angell**

5 Plaintiffs argue the apex doctrine does not apply to bar the depositions of defendants
6 Stanley and Angell because they no longer serve in their former high-level governmental roles.⁶
7 (ECF No. 61 at 12.) Former PHO Dr. Angell resigned on August 8, 2020, and former
8 Commissioner Stanley retired on November 17, 2020. (*Id.*) Plaintiffs urge that because neither
9 has moved on to another position with the State, there is no danger that a deposition will stymie
10 their official governmental duties. (*Id.*) Defendants counter that subjecting former public officials
11 to deposition “might chill states’ ability to recruit and retain such officials going forward and
12 might chill such officials in the performance of their duties.” (*Id.* at 7.)

13 Plaintiffs acknowledge, as they must, that the apex doctrine can apply to former officials
14 as well as current officials. But they argue, and the court agrees, that several of the doctrine’s
15 rationales apply with less force when the proposed deponent is not currently serving in office.
16 For instance, there is no longer a concern that requiring the person to sit for a deposition will pull
17 them away from other duties of public service. See *Moriah v. Bank of China Ltd.*, 72 F. Supp. 3d
18 437, 440 (S.D.N.Y. 2014) (“Although the doctrine applies to former officials, the fact that they
19 are not current high-ranking officials is a factor when considering whether the information can be
20 obtained through less burdensome means and whether the deposition will interfere with the
21 official’s government duties.”) For that reason, some courts have held an official’s resignation
22 reason enough not to grant him protection under the apex doctrine. See *Sec. & Exch. Comm’n v.*
23 *Comm. on Ways & Means of the U.S. House of Representatives*, 161 F. Supp. 3d 199, 252
24 (S.D.N.Y. 2015) (“Given that Sutter has resigned from his position on the Subcommittee, he no
25 longer has government duties with which a deposition might interfere.”).

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28 ⁶ Plaintiffs do not dispute that, as the heads of their respective State agencies, defendants Stanley
and Angell were high-level officials while in office.

1 However, the rationale of protecting highly visible public servants from becoming targets
2 for unnecessary, or at worst harassing, discovery requests survives their departure from office.
3 See Apple v. Samsung, 282 F.R.D. at 263 (observing “tremendous potential for abuse or
4 harassment” when a party seeks to depose high-level official); Thomas, 715 F. Supp. 2d at
5 1049-50 (noting that the general rule prohibiting depositions of high-level officials applies to
6 former officials even though for them the “rationale based on interference with official duties is
7 absent”). Given this important surviving rationale, it remains equally appropriate to consider the
8 substantive reasons why the party seeks to depose a former official when determining whether
9 protection is warranted. Cf. FFRF, 2017 WL 4582804, at *11 (noting in the context of deposing
10 current officials that courts “should consider . . . the substantive reasons for taking the
11 deposition”).

12 Plaintiffs, however, provide almost no explanation of their reasons for wanting to depose
13 either Dr. Angell or former Commissioner Stanley. Of course, both are named defendants in this
14 action; but a closer inspection of the complaint reveals next to no substantive allegations as to
15 how either personally violated plaintiffs’ rights. Commissioner Stanley is mentioned by name
16 only in the Parties section, which states his leadership of the CHP. (ECF No. 1 at 4.) And
17 outside of her introduction in the Parties section, Dr. Angell appears again only where plaintiffs
18 allege that she failed to include in her public health directives any exceptions for First
19 Amendment activities. (Id. at 5.) In the joint statement, plaintiffs argue that former
20 Commissioner Stanley has unique information unavailable from other sources because only he, as
21 the head of the CHP, “would have been in [a] position to receive the order from Governor
22 Newsom and implement it.” (ECF No. 61 at 10 n.3.) The hypothetical phrasing of this statement
23 suggests that plaintiffs presently have no factual basis for their belief that the Governor ordered
24 Commissioner Stanley to deny all permit applications. And even if they did, it is not readily
25 apparent how Commissioner Stanley’s testimony about such an order would help plaintiffs prove
26 any of their claims. Again, the complaint presently contains no allegation of viewpoint
27 discrimination, and plaintiffs do not explain what defendant Stanley’s testimony would add
28 beyond the already established fact of the executive order’s issuance and immediate impact on

1 protest activities at the Capitol. Cf. Coleman, 2008 WL 4300437, at *3 (requiring showing that
2 proposed high-ranking deponents “possess personal knowledge of facts critical to the outcome of
3 the proceedings”).

4 Plaintiffs make no attempt in the joint statement to justify the deposition of Dr. Angell,
5 aside from maintaining that she no longer has other pressing government duties. (ECF No. 61
6 at 12.) At the hearing, plaintiffs’ counsel argued that Dr. Angell’s post-filing statements
7 regarding the First Amendment rights of Black Lives Matter protestors demonstrates the need to
8 depose her in order to craft a possible amended complaint or motion for preliminary injunction.
9 The court remains unconvinced. At present, this action challenges only Dr. Angell’s signing of
10 the March 19, 2020 public health directive. There is no suggestion that Dr. Angell was
11 contemplating Capitol grounds demonstrations when she did so—indeed, she seems to be named
12 as a defendant only for not having considered the First Amendment implications of her order. As
13 the directive’s existence and its contents are self evident, it is difficult to see how Dr. Angell’s
14 deposition would benefit plaintiffs’ case. Cf. Coleman, 2008 WL 4300437, at *3. The court is
15 unwilling at this juncture to countenance what would amount to a fishing expedition regarding
16 Dr. Angell’s post-complaint conduct.

17 Because the apex doctrine applies beyond the end of a government official’s term, albeit
18 with less force, plaintiffs must provide a reasonably firm basis for the court to assess whether
19 deposition is justified—so as to guard against unnecessarily haranguing former officials. As
20 plaintiffs have not done so here, the court grants the request for a protective order for defendants
21 Stanley and Angell.

22 **3. Dr. Watt**

23 Defendants assert a different basis for precluding—or at least postponing—the deposition
24 of Dr. James Watt, the current Chief of California’s Division of Communicable Disease Control.
25 They argue that the court need not decide whether the apex doctrine applies to Dr. Watt at this
26 point because any attempt to depose Dr. Watt is premature, given that he has offered only expert
27 opinion testimony and the period for expert discovery in this case has not yet begun. (ECF
28 No. 61 at 8 n.1.) Plaintiffs counter that Dr. Watt has been disclosed as a factual witness by virtue

1 of defendants’ initial disclosures and they should not be forced to wait until expert discovery to
2 depose him just because he has special knowledge, education, or experience. (Id. at 13.)

3 Although it is unclear to the court exactly what discoverable information plaintiffs expect
4 to elicit from Dr. Watt, defendants have not provided in this motion an adequate reason for
5 precluding or delaying his deposition. As plaintiffs point out, Dr. Watt is “advising [the State] on
6 the COVID-19 response and [is] familiar with the guidance issued by the CDPH and the State of
7 California Executive Order N-33-20” (ECF No. 13 (Watt Decl.) ¶ 8); and defendants listed Dr.
8 Watt on their initial disclosures. The court finds this sufficient to establish a likelihood that his
9 testimony would be relevant to plaintiffs’ claims, and defendants simply have not carried their
10 burden to show good cause for making his deposition contingent upon his later designation as an
11 expert witness. See Fed. R. Civ. P. 26(c)(1) (“good cause” requirement for protective orders).
12 Defendants cite no case in support of their position, and it strikes the court as unfair to block
13 discovery from an individual likely to possess discoverable information just because that person
14 might later serve as an expert witness at trial.⁷ Accordingly, the court declines to issue a
15 protective order forbidding the deposition of Dr. Watt.

16 **CONCLUSION**

17 For these reasons, IT IS ORDERED THAT:

- 18 1. Defendants’ motion for protective order (ECF No. 59) is GRANTED IN PART and
19 DENIED IN PART. The court forbids the deposition of Governor Newsom, Stanley
20 Warren, and Dr. Sonia Angell on the present record. The court declines to issue a
21 protective order to block the deposition of Dr. James Watt; and

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25 ⁷ Despite briefly stating in a footnote that Dr. Watt is also a senior public health official,
26 defendants expressly did not assert apex doctrine protection for Dr. Watt in the joint statement.
27 (ECF No. 61 at 8 n.1 (“There is no need to decide whether and how the Apex Doctrine applies to
28 Dr. Watt at this point . . .”). Defense counsel’s attempt to assert apex protection for Dr. Watt at
the hearing comes too late. Unlike with the depositions discussed above, the burden of justifying
the denial of Dr. Watt’s deposition rests solely on defendants.

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2. Plaintiffs' motion to compel these depositions (ECF No. 58) is DENIED without prejudice.

IT IS SO ORDERED.

Dated: January 7, 2021



CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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