No. _____

In The
Supreme Court of the United States

SOUTH BAY UNITED PENTECOSTAL CHURCH, AND BISHOP ARTHUR HODGES III,

Applicants,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California, SANDRA SHEWRY, in her official capacity as Acting California Public Health Officer, WILMA J. WOOTEN, in her official capacity as Public Health Officer, County of San Diego, HELEN ROBBINS-MEYER, in her official capacity as Director of Emergency Services, County of San Diego, and WILLIAM D. GORE, in his official capacity as Sheriff, County of San Diego

Respondents.

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit

Emergency Application for Writ of Injunction
Relief Requested before Sunday, January 31, 2021

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QUESTION PRESENTED

Once again, Applicants South Bay United Pentecostal Church and Bishop Arthur Hodges III (collectively "South Bay") must seek relief from this Court. Despite this Court's decisions in *Brooklyn Diocese* and *Harvest Rock II*, the Ninth Circuit has just found that *a total ban on worship in churches for 99.9% of Californians*, while favored businesses continue to operate at full or other substantial capacities, is a "narrowly tailored" approach to containing COVID-19.

For the 0.01% of Californians who may enter their churches—those living in counties not subject to the "Purple Tier" of California's "Blueprint for a Safer Economy" or the "Regional Order"—doing so comes with the lower tiers' ban on singing praise to God. Those lower tiers of the Blueprint also impose limits on houses of worship far stricter than those on favored businesses.

Without emergency relief, worship in the State of California generally and in San Diego County in particular is currently prohibited under threat of civil and criminal penalties unless churches meet outdoors in violation of their theological commitments. Moreover, according to the District Court and the Ninth Circuit, any practical impossibility in worshipping outdoors is irrelevant. California's shoppers are entitled to indoor, climate-controlled spaces, but not California's worshipers.

The Question Presented is: Whether California's and San Diego County's COVID-19 pandemic regulations, which impose strict limitations on indoor worship not imposed on indoor secular businesses—including total closure and a ban on singing—violate South's Bay's First Amendment right to the Free Exercise of Religion.

PARTIES AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the present Emergency Application for Writ of Injunction and the proceedings below:

Applicants are SOUTH BAY UNITED PENTECOSTAL CHURCH and BISHOP ARTHUR HODGES III. Both are Plaintiffs in the U.S. District Court for the Southern District of California and Appellants in the U.S. Court of Appeals for the Ninth Circuit. Applicant South Bay United Pentecostal Church is a non-profit corporation with no parent company or stockholders.

Respondents are GAVIN NEWSOM, in his official capacity as the Governor of California, XAVIER BECERRA, in his official capacity as the Attorney General of California, SANDRA SHEWRY, in her official capacity as Acting California Public Health Officer,[1] WILMA J. WOOTEN, in her official capacity as Public Health Officer, County of San Diego, HELEN ROBBINS-MEYER, in her official capacity as Director of Emergency Services, County of San Diego, and WILLIAM D. GORE, in his official capacity as Sheriff of the County of San Diego. All are Defendants in the U.S. District Court for the Southern District of California and Appellees in the U.S. Court of Appeals for the Ninth Circuit.

LIST OF ALL PROCEEDINGS

U.S. Supreme Court, No. 19A1044, *South Bay United Pentecostal Church v. Newsom*, application for an emergency writ of injunction denied May 29, 2020. U.S.

[1] Effective January 4, 2021, Dr. Shewry has been replaced as California Public Health Officer by Dr. TOMÁS J. ARAGÓN.

Supreme Court No. 20-746, petition for a writ of certiorari before judgment filed November 24, 2020.

U.S. Court of Appeals for the Ninth Circuit, No. 20-56358, *South Bay United Pentecostal Church v. Newsom*, motion for an injunction pending appeal denied December 24, 2020, and district court's denial of preliminary injunctive relief affirmed on the merits on January 22, 2021.

U.S. Court of Appeals for the Ninth Circuit, No. 20-55533, *South Bay United Pentecostal Church v. Newsom*, motion for an injunction pending appeal denied May 22, 2020, and district court order vacated and appeal remanded December 8, 2020.

U.S. District Court for the Southern District of California, No. 3:20-cv-00865, *South Bay United Pentecostal Church v. Newsom*, motion for temporary restraining order and order to show cause re: preliminary injunction, and for injunction pending appeal, denied May 15 and 18, 2020, respectively; renewed motion for temporary restraining order or preliminary injunction on limited remand, and for injunction pending appeal, denied October 15, 2020; and re-renewed motion for temporary restraining order or preliminary injunction following vacatur and full remand denied December 21, 2020.

DECISIONS BELOW

All decisions in this case in the lower courts are styled *South Bay United Pentecostal Church v. Newsom*. The published October 15, 2020 district court order denying South Bay's renewed motion for a preliminary injunction on limited remand is currently available at 2020 WL 6081733. It is submitted here as Appendix F. The

published December 8, 2020 Ninth Circuit order vacating the district court order, and remanding for further consideration, is available at 981 F.3d 765. It is submitted here as Appendix E. The published December 21 district court order reimposing its order denying South Bay's renewed motion for a preliminary injunction is currently available at 2020 WL 7488974. It is submitted here as Appendix D-1, and the corresponding hearing transcript is submitted as Appendix D-2.

The December 23, 2020 published Ninth Circuit order expediting South Bay's appeal is available at 982 F.3d 1239. It is submitted here as Appendix C. The December 24, 2020, published Ninth Circuit order denying South Bay's motion for an injunction pending appeal is available at 983 F.3d 383. It is submitted here as Appendix B. The January 22, 2021 published Ninth Circuit order affirming the district court's denial of preliminary injunctive relief on the merits is currently available at 2021 WL 222814. It is submitted here as Appendix A. The video recording of the oral argument is available at https://youtu.be/fTigF7mzhiI.

JURISDICTION

South Bay filed its original complaint challenging California's restrictions on churches under the First Amendment's Free Exercise Clause on May 8, 2020, and filed amended complaints on May 11 and July 17, 2020. The United States District Court for the Southern District of California had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and authority to issue South Bay's requested declaratory and injunctive relief under 28 U.S.C. §§ 1343 and 2201–02.

Following this Court's decisions in *Brooklyn Diocese* and *Harvest Rock II*, the Ninth Circuit remanded South Bay's then-pending appeal. App. E. The district court denied South Bay's re-renewed motion for a preliminary injunction on December 21, 2020. App. D. That same day, South Bay filed a timely notice of appeal, and the next day filed a motion for an injunction pending appeal with the Ninth Circuit. The United States Court of Appeals for the Ninth Circuit had jurisdiction over South Bay's interlocutory appeal under 28 U.S.C. § 1292(a)(1).

On December 23 and 24, the Ninth Circuit denied South Bay's motion for an injunction pending appeal, but set an expedited briefing schedule on the merits of the appeal, with oral argument set for January 15, 2021. App. B; App. C. On January 22, 2021, the Ninth Circuit affirmed in large part the district court's denial of preliminary injunctive relief, calling into question only the hard caps that may, in the future, become at issue. App. A. This Court's jurisdiction is invoked under 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS

The First Amendment provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Rules 20, 22 and 23 of the Rules of this Court, and 28 U.S.C. § 1651, Applicants South Bay United Pentecostal Church and Bishop Arthur Hodges III ("South Bay") respectfully request a writ of injunction precluding enforcement against them of Governor Newsom's and San Diego's two latest and parallel iterations of COVID-19 restrictions, known as the "Regional Stay At Home Order" and the "Blueprint for a Safer Economy." These restrictions are issued by the State of California and enforced by the County of San Diego, with the County also issuing its own order, incorporating by reference and enforcing California's order.

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) ("*Brooklyn Diocese*"), this Court issued an extraordinary writ enjoining enforcement of New York Governor Andrew Cuomo's draconian 10- and 25-person occupancy caps on houses of worship under the "Red" and "Orange" zones, respectively, of his COVID-19-related "Cluster Action Initiative," encompassing most of Brooklyn and the immediately surrounding areas at that time.

This Court found these restrictions neither neutral nor narrowly tailored under the strict scrutiny mandated by the Free Exercise Clause, given that numerous secular businesses were not so restricted. *Id.* at 66–67. The gist of this Court's seminal decision is that "even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." *Id.* at 68. This Court thus admonished the lower courts that it is

especially during a pandemic—not *despite* a pandemic—that courts should stand strong in protecting constitutional rights. For as this Court noted in the aftermath of the Civil War, "it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." *Ex Parte Milligan*, 71 U.S. 2, 126 (1866).

Eight days after its decision in *Brooklyn Diocese*, this Court issued an order in *Harvest Rock Church, Inc. v. Newsom*, __ S. Ct. __, 2020 WL 7061630 (2020) ("*Harvest Rock II*"), granting certiorari on three questions challenging the *entire scheme* of California's even more draconian restrictions on worship, vacating the district court's denial of an injunction prohibiting the scheme's enforcement, and instructing the district court to reconsider its decision in light of *Brooklyn Diocese*. In applying *Brooklyn Diocese*, this Court has been very consistent: every application for injunctive relief is resulting in the vacatur of lower court opinions denying injunctive relief. *See Harvest Rock II*, 2020 WL 7061630 (9th Circuit/California); *Robinson v. Murphy*, __ S. Ct __, 2020 WL 7346601 (2020) (3d Circuit/New Jersey); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527 (2020) (10th Circuit/Colorado).

Responding to this Court's loud and clear signal, in early December 2020, Colorado lifted its restrictions on churches. *High Plains*, 141 S. Ct. 527 (Kagan, J., dissenting). Similarly, in late December 2020, Los Angeles County lifted its own restrictions on churches to "align with recent Supreme Court rulings for places of worship"—imposing only neutral requirements of social distancing and mask-wearing. App. J. Finally, also in December, a California Superior Court held that

Governor Newsom's and San Diego County's orders violated the Free Exercise clause of the California Constitution, and enjoined them as applied to a Catholic priest and the five churches he oversees—permitting only neutral requirements of social distancing and mask-wearing. *Burfitt v. Newsom*, No. BCV-20-102267, *2 (Cal. Super. Dec. 10, 2020) (App. K). The Ninth Circuit also struck down Nevada's 50-person occupancy cap on churches, *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020) ("*Calvary Chapel II*"), and the Sixth Circuit struck down an Ohio county's closure of religious schools. *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, __ F.3d __, 2020 WL 7778170 (6th Cir. 2020).

Nevertheless, neither the Southern District of California nor the Ninth Circuit detected any meaningful change in the law following this Court's decision in *Brooklyn Diocese*. Instead of granting South Bay relief from California's *current total ban* on worship in churches, on the eve of Christmas, and then on the eve of what is likely Southern California's largest winter storm, both lower courts adhered to the absurd proposition that banning worship in churches for over 99.9%[2] of Californians, and every San Diegan, is "narrowly tailored." App. A, p. 43; App. D, p. 21.

As the lower courts here have refused to recognize *Brooklyn Diocese's* "seismic shift" in COVID-19 jurisprudence, *Calvary Chapel II*, 982 F.3d at 1232, they should be compelled to do so by this Court. Amazingly, the only relief granted by the Ninth Circuit was to strike down the hard caps on attendance at worship in the Red and Orange Tiers of the Blueprint, which do not yet apply to San Diego, and which

[2] https://covid19.ca.gov/safer-economy/#county-status (Jan. 24, 2021).

currently only apply to 0.1% of California's population. App. A, pp. 47–49. According to the Ninth Circuit, this Court simply got it wrong when it found that percentage caps are more narrowly tailored than a complete ban on worship in churches. App. A, pp. 41–42 ("The Court's suggestion that the 'maximum attendance at a religious service *could* be tied to the size of the church or synagogue,' [citation], does not appear to be supported").

This cannot stand. Importantly, "[t]he question today [] is not whether [*Brooklyn Diocese*] was right or wrong, but whether to adhere to it in deciding the present case." *See June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2133–35 (2020) (Roberts, C.J., concurring). In light of this Court's precedents, South Bay's extensive safety precautions and perfect results, and California's favored treatment of other industries, South Bay should be entitled to be treated at least equal to those industries.

Therefore, South Bay respectfully requests that this Court issue an emergency writ of injunction, enjoining California and San Diego County from enforcing, trying to enforce, threatening to enforce, or otherwise requiring compliance with:

1. any industry-specific standards for Places of Worship that do not apply with equal or greater force to other industries, including specifically:
    a. no percentage cap of 25% or 50% of occupancy (red tier, and orange and yellow tiers),
    b. permitting only neutral requirements such as regular disinfecting, mask-wearing, and six-foot social distancing per household, as recommended by CDC guidelines;

2. any outright prohibition on indoor worship services because worshipping inside the sanctuary with the use of the altar and baptistery is a necessary part of Pentecostal worship services and restricting it is not narrowly tailored; and
3. any outright prohibition on singing or chanting during indoor worship services because singing is at the heart of Pentecostal worship services and, in light of the church's intention to take measures to safely sing, restricting it is not narrowly tailored.

INTRODUCTION

This Court's binding precedent in *Brooklyn Diocese* and *Harvest Rock II* unequivocally dictate that California's ban on religious worship cannot stand. As stated by Ninth Circuit Judge O'Scannlain in his non-majority opinions both before and after this Court ruled, and by Superior Court Judge Pulskamp in his preliminary injunction, and Los Angeles County in issuing its modified health order, California's ban on worship in churches—under either the Blueprint or the Regional Order—is not neutral, not narrowly tailored, and not constitutional. *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 731–37 (9th Cir. 2020) (O'Scannlain, J., dissenting) ("*Harvest Rock I*"); *Harvest Rock Church, Inc. v. Newsom*, 982 F.3d 1240, 1240–41 (9th Cir. 2020) (O'Scannlain, J., concurring in part and dissenting in part) ("*Harvest Rock III*"); *Burfitt v. Newsom*, No. BCV-20-102267 (Cal. Super. 2020) (Pulskamp, J.) (App. K).

Nevertheless, despite the Holy Season of Christmas, and despite winter storms ravaging Southern California, the lower courts ignored binding precedent and refused

to grant South Bay relief, reimposing orders that are essentially the same as the orders vacated by this Court. *Harvest Rock II*, 2020 WL 7061630.[3] The lower courts' orders directly contradict the above precedents and explicitly endorse the standard set forth in the *Brooklyn Diocese* dissenting opinions. In light of the fundamental constitutional rights at issue, and given the lower courts' unmistakable departure from the clear and binding precedent on these issues, this Court should immediately issue an emergency writ of injunction "before another Sabbath passes," *Brooklyn Diocese*, 141 S. Ct. at 68—*i.e.*, before Sunday, January 31, 2021.

FACTUAL BACKGROUND

A. California's and San Diego's Original "Stay-at-Home" Orders

On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency as a result of the threat of COVID-19. 5-ER-1114.[4] Two weeks later, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, which ordered all Californians "to immediately heed the current State public health directives" by staying home or at their place of residence. 5-ER-1116–17, 1167–68.

Executive Order N-33-20 gave some Californians the right to leave their residence as "needed to maintain continuity of operations of the federal critical infrastructure sectors." 5-ER-1116–17, 1167–92. The Executive Order, which quoted

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[3] *See* Gary Robbins, *Series of winter storms could slash San Diego's 3.5-inch rain deficit*, THE SAN DIEGO UNION TRIBUNE (Jan. 22, 2021), http://bit.ly/2NvPvqL.

[4] Submitted herewith as Appendices are the lower court orders and the governmental orders at issue. Citations to evidentiary material—primarily expert declarations and motions for judicial notice—are made via citation to the Ninth Circuit Excerpts of Record, located at 9th Cir. Dkt. Nos. 18, 27, and 38. The Ninth Circuit Appellants' Opening Brief ("AOB"), Respondents' Brief ("RB"), and Appellants' Reply Brief ("ARB"), are available at 9th Cir. Dkt. Nos. 20, 28, and 37, respectively.

a Statewide Public Health Officer Order, did not designate certain industries as essential based on the transmission risk of COVID-19 in those industries. Rather, it "identified 16 critical infrastructure sectors" that are "so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, economic security, public health or safety, or any combination thereof." 5-ER-1167–68. In other words, "[t]he supply chain must continue, and Californians must have access to such necessities as food, prescriptions, and health care." 5-ER-1168.

"Critical infrastructure" included the following:

- Gas stations
- Liquor stores / Marijuana dispensaries
- "Essential" retailers such as Best Buy, Target, Home Depot, and Walmart
- Pharmacies
- Grocery stores / Farmer's markets
- Essential offices such as Banks, investment firms, government functions
- Essential manufacturing and warehousing
- Laundromats
- Transit for essential purposes
- Childcare,
- The entertainment industries, including film studios, and
- Worship services ***via live-streaming.*** App. H-3.

Thus, from the beginning of the pandemic, California's COVID-19, regulations targeted indoor worship for suppression, regardless of the measures taken to reduce or eliminate the risk of viral spread. The inclusion of Hollywood on the "critical infrastructure" list made the whole scheme constitutionally suspect from the outset because it revealed that California was not categorizing businesses solely on the basis of whether they were needed to protect health and safety. Nevertheless, initially South Bay decided to do its part by voluntarily adhering to these requirements.

The County of San Diego issued orders alongside California, sometimes more restrictive than Executive Order N-33-20, but never less so. *See* 5-ER-1117, 6-ER-

1310–40. For example, San Diego even banned the drive-in worship services that California permitted—a ban the District Court here enforced. *See* 4-ER-821:17–22:12.

B. The Resilience Roadmap

By late April 2020, according to Governor Newsom, the coronavirus "curve" had flattened. 5-ER-1117. Californians began anticipating the day when their constitutional liberties would be restored. Instead, on April 28, 2020, Governor Newsom announced the "Resilience Roadmap" (Roadmap). 5-ER-1118. The Roadmap introduced a new scheme of secular value judgments categorizing businesses by their "transmission risk" and societal "reward," permitting "low risk-high reward" industries to open. 5-ER-1194–1206.

Houses of worship did not make the revised winners' list of "low risk-high reward" businesses allowed to operate under the emerging Stage 2 of the Roadmap. When asked why reopening of houses of worship had been deferred to the hazy future of Stage 3, Governor Newsom admitted that a secular risk-reward value judgment was at work: "Yeah, we're, we're looking at the science, epidemiology, looking again at frequency, duration, time, and *looking at low risk-high reward, low risk-low reward*, looking at a series of conditions and criteria, as well as best practices from other states and nations." 5-ER-1121 (citing http://bit.ly/375aC99, at 50:36). In other words, according to Governor Newsom, places of worship offered only a "low reward" for the risk involved. That discriminatory value judgment against religion has been the mainspring of California's COVID-19 pandemic regulatory regime in all its variations.

On May 7, 2020, Governor Newsom published his Roadmap online, identifying

the new industries that could open immediately (*i.e.*, Stage 2a), those that could open in a few weeks (*i.e.*, Stage 2b), and those that could not open for several months, until Stage 3 was announced. 4-ER-918–21, 5-ER-1121, 1194–1203. For each industry that was allowed to open in Stage 2, the Roadmap also linked to industry-specific guidance with which the industry was required to comply. 5-ER-1121, 1205–06; *see* 3-ER-392–433, 449–84, 4-ER-757–803, 839–84.

Between May 8–21, 2020, the County of San Diego issued a series of Orders of the County Health Officer. 5-ER-1121–22, 6-ER-1346–95. These promulgated the County's own "Safe Reopening Plan" for all businesses reopening in Stage 2. 5-ER-1121–22, 6-ER-1397–99. Here, too, houses of worship failed to make the cut.

C. Plaintiffs Bishop Hodges and South Bay Pentecostal Church

South Bay Pentecostal Church, a member of the United Pentecostal Church International, is a reflection of the Chula Vista community in San Diego County. The majority of its members are Hispanic, with the balance consisting of Filipino, Caucasian, African-American, and other ethnic groups representing a cross-section of society, from rich to poor, and people of all ages. 7-ER-1740, 8-ER-1852, 1855.

In addition to his capacities in the United Pentecostal Church International, Bishop Hodges has served as Senior Pastor and Bishop of South Bay for thirty-five years. 7-ER-1740, 8-ER-1852. South Bay's model is the New Testament church described in the Acts of the Apostles: "And when the day of Pentecost was fully come, they were all with one accord in one place." Acts 2:1. South Bay believes that "all" being gathered in "one place" is fundamental to fulfillment of Christ's divine commission to

His church. Acts 1:8. The Book of Acts, which chronicles the founding of the Church, uses the word "together" thirty-one times. This experience of worshipping together occurs *both* "*in the temple*, and breaking bread from house to house." Acts 2:46–47 (emphasis added). 8-ER-1854.

Accordingly, South Bay holds between three and five services each Sunday. Pre-pandemic, the average attendance at these services was between two-hundred and three-hundred congregants. South Bay's sanctuary can normally seat up to six-hundred people. Thus, it is normally only a third-filled or half-filled. Its fire-code capacity is 731. 8-ER-1854.

South Bay's services begin with Bible classes spread across different ages and groups. Each class may have between ten and one-hundred participants. When these classes conclude, congregants gather together with one accord for praise and worship. Those with special needs or sickness come forward and stand around the altar, where hands are laid upon them and they are then anointed. This sacrament observes the Scriptural charge to "let them pray over him, anointing him with oil in the name of the LORD." James 5:14. South Bay's services conclude with preaching followed by a challenge to physical action, where the congregation is challenged to approach the altar to "come believing, come praying." 8-ER-1854–55.

D. South Bay's Prior Litigation under the Roadmap

Almost as soon as various state governors began issuing executive orders intended to curb the COVID-19 pandemic, various groups began challenging them. While South Bay did not join in these early lawsuits, by late April, when Governor

Newsom announced the Roadmap, South Bay determined that there was no reason it should be relegated to Stage 3, while Stage 2 permitted numerous indoor business activities to continue or reopen.

South Bay had previously demonstrated its ability to adopt and enforce suitable safety precautions as the largest food distributor to needy people in the South Bay region of San Diego County. Every week, South Bay distributed between three and twelve tons of food. 7-ER-1744, 8-ER-1858. South Bay believed that since it was capable of adopting *and enforcing* proper safety precautions for the purposes of food distribution, it was clearly capable of adopting and enforcing similar protocols for Scripturally mandated indoor worship. 8-ER-1858.

South Bay is able to integrate masks, gloves, screens, veils, temperature checks, and other mechanisms to inhibit the spread of COVID-19 during services. And South Bay can also require anyone who is sick or has symptoms to stay at home. In other words, South Bay can abide by any necessary COVID-19 health guidelines as readily as the many secular businesses on California's and the County's winners' lists. 8-ER-1857–58. South Bay's sanctuary is also large enough to accommodate six feet of social distancing. 7-ER-1741, 8-ER-1857 (photos).

Given these facts, on May 8, 2020, the day California entered into Stage 2 of the Roadmap, South Bay filed suit in the U.S. District Court for the Southern District of California. South Bay contended that permitting various industries to open in Stage 2, but relegating churches to Stage 3, was an unconstitutional violation of its right to the Free Exercise of religion.

On Friday, May 15, 2020, the District Court denied South Bay's motion for a preliminary injunction without a written opinion, 8-ER-1818–19, but only an oral opinion from the bench. 8-ER-1820–50. A week later, on Friday, May 22, 2020, the majority of the Ninth Circuit's motions panel denied South Bay's motion for an injunction pending. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020) ("*S. Bay I*"). Anticipating what is now the state of the law post-*Brooklyn Diocese*, Circuit Judge Collins published an eighteen-page dissent in which he concluded that Governor Newsom's Roadmap was neither neutral nor generally applicable, that it failed strict scrutiny, and that the balance of equities favored a grant of preliminary injunctive relief. *Id.* at 944–47 (Collins, J., dissenting).

On May 23, 2020, South Bay submitted an emergency application for a writ of injunction pending appellate review to Justice Elena Kagan. Apparently in response, on Monday, May 25, 2020, Governor Newsom announced changes to the Roadmap permitting individual counties to apply for 21-day licenses during which worship and political protests would be permitted so long as the gathering did not exceed 25% of "building capacity" or "the relevant area's maximum occupancy," but with a hard cap of no more than 100 persons, provided the county satisfied certain statistical benchmarks. 5-ER-1124–25, 6-ER-1209–31. Two days later, San Diego received its first 21-day license, and issued a series of orders granting permission to worship. 5-ER-1124, 6-ER-1401–45. Then, on May 29, 2020, this Court, by a vote of 5-to-4, denied South Bay's emergency application for a writ of injunction. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) ("*S. Bay II*").

Chief Justice Roberts wrote a concurrence in which he held that California's restrictions on worship were constitutional in light of the deference which should be given to the government in emergencies. *Id.* at 1613. Justice Kavanaugh wrote a dissenting opinion joined by Justices Thomas and Gorsuch. In another anticipation of what would become the majority opinion in *Brooklyn Diocese*, the three Justices concluded that "California's latest safety guidelines discriminate against places of worship" because "comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries." *Id.* at 1614. "California," said the Justices, had failed to justify "distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap." *Id.* at 1615.

On Sunday, May 31, 2020—Pentecost Sunday—South Bay held worship services that complied with Governor Newsom's newest orders, *i.e.*, a 100-person cap. To ensure social distancing, South Bay removed every other church pew. South Bay also had to turn away congregants who wished to attend after the arbitrary cap was reached. This despite the fact that there was ample room for more than 100 congregants practicing social distancing. 7-ER-1742–43 (photos)

On June 12, 2020, California modified its uniform treatment of "protests" and "worship." Under the June 12 regulations, there are no restrictions on either protest or worship, so long as they occur outdoors. 5-ER-1125, 6-ER-1233–55, 1447–68. But this did not help South Bay, which has no adequate outdoor venue and is in any event

theologically bound to worship in the temple with its altar, altar calls and baptismal font. 7-ER-1744. Also around this date, Hollywood began taking more meaningful advantage of the exceptions granted back in March. *See* 3-ER-497, 5-ER-1117.

On July 1, 2020—despite loosening restrictions for other industries, 5-ER-1125:1–3—California only further tightened its restrictions on indoor worship with a ban on "indoor singing and chanting activities" at churches. 6-ER-1259. Singing is at the very heart of Pentecostal worship services, and banning it essentially acts as a ban on those services. 4-ER-906–07, 7-ER-1744. Singing comprises 25–50% of a typical Pentecostal worship gathering. 4-ER-906. At South Bay, everyone is instructed and expected to sing praise to God, just as everyone is instructed and expected to pray to God. 4-ER-907.

In light of these developments, on July 10, 2020, South Bay moved the Ninth Circuit to order limited remand to the District Court. South Bay argued that the District Court should determine in the first instance whether California's preferential treatment of political protestors, as well as the singing ban, were constitutional. On July 29, 2020, the Ninth Circuit granted limited remand.

E. The Second Round of Litigation Under the "Blueprint for a Safer Economy"

On August 10, 2020, having filed a Verified Second Amended Complaint, 5-ER-1108–65, South Bay renewed its motion for a preliminary injunction. The motion included declarations from esteemed experts, including new declarations from George Delgado, M.D., of COVID Planning Tools, 5-ER-975–89, *see also* 2-ER-185–258, 3-ER-606–09, 4-ER-672–87, 7-ER-1860–66, and declarations from Jayanta Bhattacharya,

M.D., Ph.D., a Stanford University medical professor and author of the Great Barrington Declaration,[5] 4-ER-890–904, *see also* 2-ER-259–87, 4-ER-657–71, Sean Kaufman, CPH, an infectious disease specialist formerly of the CDC, 5-ER-1054–61, *see also* 2-ER-288–301, James Lyons-Weiler, Ph.D., a Bioinformatics research scientist, 5-ER-1062–74, and Charles Cicchetti, Ph.D., a former economics professor, 5-ER-990–98. Later, South Bay added a declaration from Robert F. Onder, M.D., J.D., a medical professor. 2-ER-302–32.

Three weeks later, on September 1, 2020, both California and San Diego filed their respective opposition briefs, and California submitted expert declarations to respond to South Bay's experts. On September 9, 2020, South Bay submitted its reply briefs, as well as rebuttal declarations from two of its experts, as well as Bishop Hodges. In its opposition brief, California—having failed to produce any evidence of viral spread at South Bay—resorted to citing a YouTube recording of a sermon at South Bay asking for prayers for two individuals infected with COVID-19. As Bishop Hodges attested in his rebuttal declaration, neither person contracted the virus at his church. One contracted it in a hospital and had not been back to worship services since February, while the other was only the relative of a congregant. 4-ER-689.

[5] The Great Barrington Declaration is a statement authored by Stanford Professor Jayanta Bhattacharya, Harvard Professor Dr. Martin Kulldorff, and Oxford Professor Dr. Sunetra Gupta in Great Barrington, Massachusetts. The Declaration promotes an approach to the pandemic called Focused Protection, which contends that the most compassionate approach is one that spends resources to protect the most vulnerable while eschewing lockdowns that harm less vulnerable populations more than the risk of COVID-19 infection. Since writing the Declaration, Professors Bhattacharya, Kulldorff, and Gupta, have been joined by 40+ esteemed colleagues who co-signed the Declaration in early October. The Declaration has also been co-signed by 10,000+ medical and public health scientists, and 30,000+ medical practitioners. 2-ER-264–65, 279–87, 4-ER-657–68. South Bay does not contend that "Focused Protection" is necessarily the only way to go, just that the theory shows that Governor Newsom's restrictions are not narrowly tailored.

Bishop Hodges concluded his declaration with a statement that California has never challenged: "To date, we are unaware of any instance of a coronavirus infection tied to our worship services. We have a perfect record and we are committed to acting safely in order to maintain that perfect record." 4-ER-689.

During limited remand, on August 28, 2020, California announced an entirely new bureaucratic scheme: the "Blueprint for a Safer Economy," which superseded the Resilience Roadmap. The Blueprint assigns counties to four color-coded "tiers" of "risk"—Purple, Red, Orange, and Yellow—depending on the positive rate of COVID-19 testing. App. G. In each tier, California has imposed a labyrinthine set of regulations concerning which businesses may open, and under what conditions, conveniently placed into a color-coded chart. App. G-3.

The Blueprint does not apply to the essential businesses originally designated by Governor Newsom as "critical infrastructure," and later as Stage 1 of the Roadmap. Under the Blueprint, they are simply "open with modifications." App G-3, p. 1. But with every other industry, the Blueprint is an even more arbitrary list of winners and losers based on secular value judgments than was the situation with the Roadmap.

Thus, in the most restrictive Purple Tier, in addition to "critical infrastructure," salons and barbershops can open, as well as personal care services (tattoo and massage parlors, electrology, etc.), hotels (even for non-essential travel), and retail at 25% capacity. In the Red Tier, numerous activities are allowed to open indoors with capacity caps, such as private gatherings (three households), retail (50%), museums / zoos, (25%), theaters / restaurants (25% / 100 people), gyms (10%). In the Orange Tier, the

above industries' capacity caps are doubled and retail loses its cap entirely, while entertainment (bowling alleys, cardrooms) can open at 25%. Finally, in the Yellow Tier, capacity caps are again increased for theaters, gyms, restaurants, and entertainment centers—and bars can finally reopen. App. G-3.

In stark contrast, the "Industry Guidance" for churches provides the following strict limitations, depending on what tier a county is in:

Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Outdoor Only with modifications	Open indoors with modifications • Max 25% capacity or 100 people, whichever is fewer	Open indoors with modifications • Max 50% capacity or 200 people, whichever is fewer	Open indoors with modifications • Max 50% capacity

App. G-3, p. 3. Under the Blueprint, houses of worship never regain their full capacity, not even in the yellow tier. At its inception, San Diego County was assigned to the Red Tier, and has never proceeded to less restrictive tiers.

On October 15, 2020, the District Court in this case denied South Bay's renewed motion for a preliminary injunction. App. F. The parties informed the Ninth Circuit, which then ordered supplemental briefing. Meanwhile, on November 10, San Diego County announced that it had been pushed from the Red Tier into the Purple Tier of the Blueprint—meaning churches were required to close. 3-ER-618. Then, on November 16, Governor Newsom exercised the Blueprint's "emergency brake," which allows him to override the Blueprint. Using that tool, Governor Newsom pushed "94.1 percent of California's population" into the Purple Tier. 3-ER-618–19. As noted above, that percentage is now 99.9%. At this time, South Bay filed with this Court a petition

for a writ of certiorari before judgment. No. 20-746.

On November 25, 2020, this Court issued its decision in *Brooklyn Diocese*, and eight days later, on December 3, 2020, published its order in *Harvest Rock II*. Then, on December 8, 2020, the Ninth Circuit vacated the District Court's refusal of a preliminary injunction, and remanded with instructions to reconsider that decision in light of *Brooklyn Diocese*. App. E.

F. The Third Round of Litigation Under the "Regional Stay Home Order"

On December 3, 2020, Governor Newsom announced yet another scheme that suppresses indoor worship: the "Regional Stay Home Order" (Regional Order) which overlays the Blueprint. When triggered, the Regional Order essentially pushes the affected region back into Stage 1 of the former Roadmap, with only "critical infrastructure" allowed to remain open. When the Regional Order expires due to better COVID-19 statistics, a county is reassigned to a tier in the Blueprint. App. H. Thus, even after the Regional Order expires, counties in the region are simply returned to the church-suppressing regime of the Blueprint.

In addition, in a departure from the "critical infrastructure" restrictions, schools are allowed to remain open, as well as non-essential retail at 20%, and grocery stores at 35%, but churches have the same Purple Tier restrictions. That order went into effect in the "Southern California Region" encompassing San Diego County on Monday, December 7, 2020. App. H.[6] Currently, the Regional Order covers three of

[6] The Supplemental Order located at Appendix H-2 was not included in the record below, but merely cited by the District Court. *See* App. D-1, p.9 n.30. The list of "critical infrastructure" located at Appendix H-3 is now posted online at https://covid19.ca.gov/essential-workforce/ (Jan. 24, 2021). Minor changes have been made to §§ 8.13, 8.16, and 13.15, and a new § 1.22 has been added.

the State's five regions and 90.9% of its population.[7]

On December 18, 2020, after further submissions of briefs and expert declarations, the District Court heard oral argument on South Bay's renewed motion for a preliminary injunction. App. D-2. On Monday, December 21, 2020, the District Court denied South Bay's renewed motion for a preliminary injunction. App. D-1. The District Court distinguished all contrary precedents on the basis that "the climate in Southern California is warm year-round," and so California's closure of churches is not "an effective ban on religious services" and does not "strike at the very heart of the First Amendment's guarantee of religious liberty." App D-1, pp. 21–23.[8] Further, the District Court limited its analysis to the Regional Order, ignoring the Blueprint entirely, and also failed to address San Diego County's order closing churches.[9]

On the same day that the District Court issued its order denying injunctive relief, South Bay appealed to the Ninth Circuit, and the next day, December 22, filed an urgent motion for an injunction pending appeal, seeking relief by Christmas. On December 23, the Ninth Circuit set an expedited briefing schedule on South Bay's appeal. App. C. The day after that, Christmas Eve, the Ninth Circuit denied South Bay's motion for an injunction pending appeal, "without prejudice." App. B. Because oral argument on the merits of the appeal was set for only three weeks away—

[7] *See* https://covid19.ca.gov/safer-economy/ (Jan. 24, 2021).

[8] This conclusion is very similar to the District Court's earlier one, finding that no "fundamental rights" were being infringed upon because "[i]ndividuals can practice religion in whatever way they wish as long as they're not sitting with each other in large groups inside." 8-ER-1836:9–17, 1847:9–11.

[9] The District Court stated that at the hearing South Bay requested 20% occupancy, identical to non-grocery retail. *See* App. A, p. 19 & n. 18; App. D-1, p. 23 n. 49. This statement is inaccurate, which the hearing transcript makes clear. App. D-2.

January 15, 2021—South Bay did not seek relief from this Court at that time. On January 22, 2021, the Ninth Circuit affirmed, in large part, the District Court's denial of preliminary injunctive relief. App. A.

REASONS FOR GRANTING THE APPLICATION

The All Writs Act, 28 U.S.C. § 1651, authorizes an individual Justice or the full Court to issue an injunction when (1) the circumstances presented are "critical and exigent;" (2) the legal rights at issue are "indisputably clear;" and (3) injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction." *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312 (1986) (Scalia, J., in chambers) (citations and alterations omitted). A Circuit Justice or the full Court may also grant injunctive relief "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Ass'ns, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987) (Blackmun, J.). However, the Court also has discretion to issue an injunction "based on all the circumstances of the case." *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171 (2014). For example, in the fast-changing COVID-19 landscape, relief may be appropriate to protect a religious objector from discrimination "before another Sabbath passes." *Brooklyn Diocese*, 141 S. Ct. at 68.

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Normally, when preliminary injunction "appellants seek vindication of rights protected under the First Amendment," reviewing courts "are required to make an independent examination of the record as a whole without deference to the factual findings of the trial court." *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) (citing *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 499 (1984); *Hurley v. Irish American GLIB*, 515 U.S. 557, 567-68 (1995)).[10]

Nevertheless, here the Ninth Circuit applied merely a "limited and deferential" review, App. A, p. 20, which had the practical effect of leading to numerous factual errors being copied over from the District Court's opinion into the Ninth Circuit opinion. South Bay has corrected as many of those errors as it could below.

1. There is a "Significant Possibility" that this Court would Grant Certiorari and Reverse Because the Violation of South Bay's—and all Californians' rights—is Indisputably Clear.

1.1. The Worship Restrictions Are Subject to Strict Scrutiny

Under the First Amendment, a law burdening religion need only pass rational basis scrutiny if it is "neutral" and "of general application." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). But a law that is not neutral or generally applicable must satisfy strict scrutiny. *Id*. at 546.

Strict scrutiny is required of regulations that restrict churches to a greater degree than " 'essential' businesses," "acupuncture facilities, camp grounds, garages," "plants manufacturing chemicals and microelectronics," "transportation facilities," "a

[10] *See also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982); *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (Alito, J.); *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2019).

large store," "factories and schools," *Brooklyn Diocese*, 141 S. Ct. at 66–67, "casinos, restaurants and bars, amusement and theme parks, gyms and fitness centers, movie theaters, and mass protests." *Calvary Chapel II*, 982 F.3d at 1231. Such orders cannot be defended as neutral or generally applicable.

Here, California's occupancy restrictions on churches are plainly far more severe than those imposed on other industries. Under the Regional Order and the Purple Tier of the Blueprint, churches are at 0% occupancy, while many other industries can open without any occupancy limit, including various offices, factories, transit, and schools, while retail is allowed between 25–35%. *See* App. G; App. H.

The ban on singing in church is also not neutral because it applies only to certain industries, while others are exempt. As Judge O'Scannlain noted, singing is banned in church but "speaking loudly or shouting [is allowed] on an indoor television studio set filled with actors projecting lines and directors barking orders or in an indoor practice facility or locker room filled with dozens of professional athletes and coaches shouting instructions to each other[.]" *Harvest Rock I*, 977 F.3d at 736 (O'Scannlain, J., dissenting). *This was confirmed by California's declarants*, who stated that for music and film production, "[s]inging in large groups is permitted" so long as specific, *self-designed*, safeguards are adhered to, such as arranging singers in a line, and ensuring adequate ventilation and testing. 3-ER-489–90, 498.

Here, the lower courts accepted that *Brooklyn Diocese* compelled them to apply strict scrutiny to the occupancy restrictions. However, the Ninth Circuit held that the ban on singing in church was only subject to rational basis review because

"California's ban on indoor singing and chanting applies to *all* indoor activities, sectors, and private gatherings." (The District Court was silent as to singing.) App. A, pp. 23–25, 49–50; App. D-1, pp. 14–15.

This in incorrect. California falsely stated this twice in its appellate brief, *see* RB-12–13, 58, which South Bay noted. *See* ARB-12–13. The Order cited by California only (absurdly) bans singing at private parties (which cannot be enforced). 3-ER-389.[11] With respect to music and film production, and professional sports,[12] the Ninth Circuit faulted South Bay for not identifying an *affirmative* grant of permission for those industries to engage in singing or loud vocalizations. App. A, p. 35–36. But declarants from those industries made clear that they interpreted the absence of a prohibition as permission to sing—and indeed had devised protocols to safely sing. 3-ER-489, 497–98. That one individual in the film industry is unaware of any musical being filmed (ignoring altogether the actual music industry and professional sports), App. A, p. 36 (quoting 3-ER-498), is irrelevant to the industries' *right* to sing—even in large groups—so long as they adhere to certain safety precautions. Strict scrutiny must be applied.[13]

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[11] The Ninth Circuit also noted that singing is banned at indoor at protests, schools, and restaurants. App. A, p. 6. This is accurate, but there is no general, across-the-board, indoor singing ban.

[12] The Ninth Circuit said that the exemption for professional sports was raised for the first time on appeal. App. A, p. 36. This is inaccurate. FER-53:8; FER-13:26, 24:6.

[13] In addition, just like the alternative holding in *Brooklyn Diocese*, here churches have been subjected to invidious discrimination from the very beginning. On May 7, 2020, Governor Newsom openly declared that houses of worship were not permitted to reopen because they provide a "low reward." 5-ER-1121. Further, like Governor Cuomo's hasty withdrawal of his Red Zone "in the shadow of our review," *Brooklyn Diocese*, 141 S. Ct. at 72, California's restrictions have been gerrymandered to meet the litigation needs of the moment rather than "public health." Governor Newsom's May 25 granting of permission to worship, 5-ER-1123–24, 6-ER-1209–21, occurred immediately after Judge Collins' May 22 dissent in *S. Bay I* and South Bay's application to this Court. And his blessing of all outdoor activity without restriction, 5-ER-1125, 6-ER-1247–55, occurred only after his politically expedient approval of the George Floyd demonstrations threatened to expose his COVID-19 regime's lack of neutrality and general applicability upon judicial review. 5-ER-1140; *see Spell v. Edwards*, 962 F.3d 175, 181–83 (5th

1.2. The Worship Restrictions Cannot Satisfy Strict Scrutiny

To satisfy strict scrutiny, "a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 547 (quotations omitted). This test "is not watered down but really means what it says." *Id.* (cleaned up). "A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." *Id.*

Although the extreme underinclusivness of California's regulations make suspect its claimed compelling interest, *see Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 801–02 (2011); *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014) (Gorsuch, J.), because the propriety of the issuance of an extraordinary writ of injunction does not turn on this prong, South Bay does not contest whether California has a compelling interest in its restrictions.

1.2.1. The Ban on Worship in Churches is Overinclusive

Turning to narrow tailoring, a regulation may not be either overinclusive or underinclusive. *Lukumi*, 508 U.S. at 546. With respect to overinclusiveness, the issue is whether the government's "interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Id.*

Here, California argued, and the Ninth Circuit accepted, App. A, pp. 27–40, that a ban on worship in churches for 99.9% of Californians is "narrowly tailored"

Cir. Jun. 18, 2020) (Ho, J., concurring); *Soos v. Cuomo*, 470 F.Supp.3d 268, 281–83 (N.D.N.Y. June 26, 2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2607–08 (Jul. 24, 2020) ("*Calvary Chapel I*") (Alito, J., dissenting). The Ninth Circuit dismissed these concerns out of hand. App. A, p. 25 n.21. But California's public health orders as litigation tactics are precisely the type of orders this Court views with suspicion, for "reasonable observers have reasonable memories." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005).

because California's three impressively credentialed experts opined on their own authority that attending church is risker than engaging in any other activity. 3-ER-500–35 (Dr. Watt); 3-ER-536–82 (Dr. Rutherford); 3-ER-583–605 (Dr. Stoto).

For the Blueprint, the Ninth Circuit stated that California has identified eight factors relating to the transmission risk of a specific activity, and that it then applies them to all industries to determine their risk profile. App. A, p. 27–30; 2-ER-361–62.[14] But there is no scientific basis for concluding that the eight "factors" show that church services lasting an hour or so have a greater transmission risk than, say, buses and trains filled with passengers during hours-long journeys, or meatpacking plants filled with workers laboring shoulder-to-shoulder for eight or more hours per day.

The Ninth Circuit distinguished transit from worship on the basis that "interactions in a transit setting are likely to be asocial, brief and distant." App. A, pp. 33–34. But California's experts' analysis was primarily focused on transit terminals—bus stations and airports—not transit itself. By "distant," California's experts simply argued that oftentimes "middle seats are not being sold." 3-ER-534, 3-ER-576. For warehouses and factories, the Ninth Circuit stated that it was not "assum[ing] the worst when people go to worship" and "assum[ing] the best when people go to work," App. A, p. 34 (quoting *S. Bay II*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting)), it was simply acknowledging that California is "*mandating* additional restrictions" at workplaces, such as "testing or contact tracing," that is not

[14] The Ninth Circuit repeated the District Court's mistaken identification of only *seven* factors. App. 27. But the Blueprint clearly lists eight factors. The missing factor is (3): "Ability to limit the number of people per square foot." App. G-2, pp. 6–7.

"practicable" for worshippers. App. A, p. 35.

The Ninth Circuit's focus on "practicability" is precisely "assuming the worst" of worshippers. Millions of people of faith would lay down their lives for their faith. Although they should not have to jump through absurd hoops to worship God, they would do anything and everything to get back into Church. And the evidence submitted by South Bay makes clear that even using these "eight factors," churches are not more "high risk" than California's favored industries. *See* 5-ER-982–83, 1136, FER-81–121 (grocery stores); 5-ER-985–86, 1138, FER-123 (factories).[15]

At any rate, the eight "factors" are the same sort of superficially plausible "science," masking secular value judgments, rejected by this Court in *Brooklyn Diocese*. As noted in South Bay's appellate briefs, AOB-59–61, ARB-6–11, New York argued in *Brooklyn Diocese* that "indoor religious gatherings commonly possess 'problematic features' from an epidemiological perspective that create an outsized risk of COVID-19 spread. They tend to involve large numbers of people from different households arriving simultaneously; congregating as an audience for an extended period of time to talk, sing, or chant; and then leaving simultaneously—as well as the

[15] Only one of South Bay's experts is referenced by the Ninth Circuit, which noted that the District Court dismissed his comparative risk analysis. App. A, p. 18. California's main criticism of that expert was simply that instead of being a trained epidemiologist, his qualifications come from being employed as the medical advisor to a COVID-19 planning group since the beginning the pandemic, 4-ER-685–87, that he placed too much emphasis on fomite transmission, 9-SER-1874, and that he has been politically criticized for pioneering the abortion pill reversal protocol. 8-SER-1829. But his opinions have been credited in multiple cases across the country, including multiple where injunctive relief was granted, 2-ER-187, 5-ER-976, and his opinions were implicitly credited by the dissent in *S. Bay II*, 140 S. Ct. at 1615 (Kavanaugh J., dissenting) ("[T]he State may not take a looser approach with . . . supermarkets [and] factories . . . while imposing stricter requirements on places of worship."). And, of course, the lower courts should have rejected an attack on that expert based on his support for all human life. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it").

possibility that participants will mingle in close proximity throughout." Opposition to Application for Writ of Injunction, p.22, *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (U.S. Nov. 18, 2020) (citations omitted), https://bit.ly/3mMBTmM.

Similarly, in *Brooklyn Diocese* the American Medical Association and the Medical Society of the State of New York weighed in with an *amicus* brief arguing that places worship are dangerous to public health according to a five-factor test: (1) enclosed spaces; (2) large groups; (3) close proximity to others; (4) long duration of exposure and staying in one place; and (5) loud talking and singing. Brief of the Am. Med. Ass'n and the Med. Soc. of N.Y. as *Amici Curiae* in Support of Respondent, pp.3–6, *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (U.S. Nov. 18, 2020), https://bit.ly/39eAYqz.

While New York's experts and the AMA's *amicus* brief were cited by dissenting Justices Breyer and Sotomayor, *see Brooklyn Diocese*, 141 S. Ct. at 78 (Breyer, J., dissenting), at 79 (Sotomayor, J., dissenting), the majority saw them for what they are: a pseudo-scientific attempt to distinguish religious gatherings from business gatherings so as to justify harsher treatment of religion. *Id*. at 67.

California's argument, and the Ninth Circuit's opinion, are essentially Justice Sotomayor's dissent. But that opinion is not this Court's precedent, and "*[s]tare decisis* instructs us to treat like cases alike." *June Med. Servs.*, 140 S. Ct. at 2141 (Roberts, C.J., concurring). Supposedly scientific "factors," supported only by experts' say-so (even a lengthy and repetitive say-so) are not enough to justify discrimination against places of worship as they do not "assess the transmission risk of religious worship

based on any data[.]" *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 628 (2d Cir. 2020).

The Ninth Circuit placed great weight on the unsupported opinions of California's expert declarations even though they were not "based on sufficient facts or data," as required by Federal Rule of Evidence 702(b). In that regard, California's expert declarations meet none of the factors set out by this Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993): (1) whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead **simply a subjective conclusory approach that cannot reasonably be assessed for reliability**; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. *Id*. at 593–94. Rather, as was the case in New York, California's so-called scientific evidence leaves the objective observer pondering: "Who knew public health would so perfectly align with secular convenience?" *Brooklyn Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring).

California also argued, and the Ninth Circuit accepted, that California had tried less restrictive alternatives, but they "proved inadequate in reducing community spread[.]" App. A, pp. 19, 39. But California's argument on "inadequacy" appeared only in its briefing; California's declarants never explained how or why California determined that lesser restrictions were insufficient, why certain restrictions must be imposed, or "how the Governor arrived at the specific numerical

and percentage capacity limitations in the Order." *Agudath Israel*, 983 F.3d at 628. No such explanation exists. The reality is that California's rise in cases is not being driven by all the closed churches. If "cases" are rising, it is because Californians have simply chosen to cease complying with draconian, patently ineffective and often nonsensical restrictions on their lives. "Mitigation fatigue" has set in. Californians *en masse* are tired of chasing the moving goal post of a return to normality. 2-ER-197–99; *see also* 5-ER-977–79.

Importantly, California's eight factors do not even apply to businesses deemed "critical infrastructure," which operate under both the Blueprint and the Regional Order regardless of transmission risk. Back in March, grocery stores were allowed to remain open—*not* because California believed them to be perfectly safe but because people *need* to eat. As Justice Alito observed when serving on the Third Circuit, foreshadowing this Court's holding in *Brooklyn Diocese*, that is precisely the kind of "value judgment in favor of secular motivations . . . but not religious motivations" that "must survive heightened scrutiny." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (medical exemption from no-beard policy triggered strict scrutiny of refusal to grant religious exemption).

Opposing this basic fact, California argued, and the Ninth Circuit accepted, that grocery stores are only open because they are "low-risk," not because people "need to eat." App. A, p. 35. California's only supporting evidence was a few sentences from the Blueprint webpage, which did not expressly support the proposition. *See* App. G-2, pp. 6–7. The overwhelming evidence followed common sense: "critical

infrastructure" is precisely what it sounds like: food, shelter, clothing. *See* § A, *supra*; 4-ER-919, 3-ER-521:4–13. Indeed, Dr. Watt's declaration stated: "Certain sectors of the economy have been designated as essential. [citation] For example, food processing must continue for people to be able to eat. *While these essential activities are permitted to continue to operate*, they must follow requirements for all workplaces that are designed to reduce the risk of COVID-19 transmission *as much as possible*." 3-ER-527 (italics added). [16]

As a fallback, in their declarations, California's experts also argued that all the "critical infrastructure" industries also happened to be low-risk, based on their say-so, and so "no harm, no foul." *See* 3-ER-534–35, 568–77. But "[t]he government's justification 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.' " *Agudath Israel*, 983 F.3d at 633 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Courts "cannot and will not uphold a statute that abridges an enumerated constitutional right on the basis of a factitious governmental interest found nowhere but in the defendants' litigating papers." *Id*. at 635 (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008)). This Court should not allow California to argue now, deep into litigation, that its secular value judgments favoring bodily needs over religion were "science" based on "risk factors" all along.

Finally, the Ninth Circuit stated that "South Bay has not pointed to anything in the record to support the notion that the lesser restriction it seeks—100%

[16] *See also Cal. Restaurant Ass'n, Inc. v. Cnty. of Los Angeles Dep't of Pub. Health*, No. 20STCP03881, at *41 n.16 (Cal. Super. 2020) (2-ER-162) (with respect to a list of outbreaks, noting that number of outbreaks does not necessarily translate to transmission risk in an industry: "essential sectors that were never required to cease indoor operations will necessarily be overrepresented on this list.").

occupancy with a reliance solely on mask-wearing, social distancing, and sanitation measures—would be effective to meet California's compelling interest in controlling community spread." App. A, pp.38–39. This is baffling and incorrect.

First, Los Angeles County—the epicenter of the pandemic in California—has lifted its restrictions on churches. **The injunction South Bay seeks is the health order in Los Angeles County.** App. J. That less restrictive health order was first issued on December 19, 2020. App. J-2, ¶ 2.b & n.1. Certain language in it was tweaked for a December 29, 2020 version of the order, but the substance did not change. App. J-3, ¶ 2.b & n.1. Under both versions, although it is a violation of California's order to worship in church, it is *not* an independent violation of Los Angeles County's order because Los Angeles believes California's order is unconstitutional. Previously, Los Angeles had a lengthy "Appendix F" detailing all of the requirements churches were required to follow, including worshipping outdoors only. On December 19, 2020, Los Angeles amended that protocol to permit worshipping indoors. App. J-4. But by December 29, 2020, "Appendix F" became a one paragraph statement that churches "should" worship outdoors, but they "must" adhere to the generic social-distancing requirements of "Appendix A." App. J-5.

At oral argument, the panel judges asked about the December 19 and 29 versions of the orders, and counsel explained how the substance was identical. Indeed, Los Angeles County actually offered on January 14, 2021—the day before oral argument—to settle a separate lawsuit permitting the church to worship indoors so long as it abided by "Appendix A." *See* https://youtu.be/fTigF7mzhiI?t=3615.

Churches are open in Los Angeles County.[17]

Second, the fact that South Bay has a "perfect record," 4-ER-689, means that a total closure of its church, while Walmart shoppers go their merry way, is *per se* overinclusive. Even with the threat of "asymptomatic transmission," South Bay's safety measures *have proven sufficient*. *See Agudath Israel*, 983 F.3d at 633 ("Those limits are 'far more severe than has been shown to be required to prevent the spread of the virus at [Appellants'] services,' particularly because the Governor has pointed to no evidence of any outbreaks related to Appellants' churches and synagogues") (quoting *Brooklyn Diocese*, 141 S. Ct. at 67).

The Ninth Circuit rejected this, stating that South Bay's perfect record "is entirely anecdotal" and "undermined by [equally anecdotal] evidence of outbreaks in similarly situated places of worship." App. A, p. 39. There is, in fact, *no evidence* of "outbreaks in *similarly situated*" worship settings. South Bay examined every isolated and anecdotal case put forth by California, including the ones from China. Although for some it was impossible to determine the proximate cause of the outbreak, in the vast majority of the anecdotal cases California cited, the congregations involved were not following CDC guidelines, were not socially distancing, were not wearing masks, and were not following the many precautions that South Bay has been following. *See* 4-ER-672–83. Moreover, several of the anecdotal cases were from February and March when much less was known about

[17] Appendices J-4 and J-5 were not submitted below. South Bay includes them here because it is alarmed by the Ninth Circuit's statement—contrary to California's, RB-51—that churches are actually closed in Los Angeles, and that South Bay's noting otherwise constituted "repeated misrepresentations on appeal[.]" App. A, p. 38 n.34.

the virus. *See also* 4-ER-726–27, 735, 739–40 (California Superior Court Judge Chalfant reviewing the same anecdotes and concluding that they are "not evidence," "not good enough," and "you can't just make stuff up" to restrict religious rights).

The District Court specifically cited two claimed outbreaks: at Awaken Church in San Diego and Grace Community Church in Los Angeles. *See* App. D-1, p. 23 (citing 2-SER-148, 317–25 [Awaken]; 2-SER-149, 330–52 [Grace]). But Awaken Church asserts that "[w]e trust each person who walks through our doors to make the decision that is best for him/her regarding the use of a facemask," and "we trust each person to participate in whatever level of social distancing they feel comfortable with." *See* https://awakenchurch.com/. And the outbreak at Grace Community Church involved "three part-time employees" who contracted the virus on the job at a spiritual retreat—*not* at a worship service. 2-ER-340. The irrelevance of anecdotes is clear from the fact that there have been COVID-19 outbreaks tied to virtually every industry. *See* 5-ER-1138–39, 7-ER-1785–811; *Brooklyn Diocese*, 141 S. Ct. at 67.

Finally, South Bay cited a study by Real Clear Science that actually tracked COVID-19 transmission at churches. That study found zero transmissions of COVID-19 at 17,000 Catholic parishes where more than one million Masses had been offered during the pandemic period under study. In other words, following CDC guidelines for churches actually works—and not just based on anecdotal say-so. 4-ER-674.

Presumably if California could have cited an outbreak at a church following CDC guidelines—as indeed the outbreaks cited above were self-reported—it would have done so. California's ban on worship in churches is overinclusive. *See, e.g., First*

Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi, 959 F.3d 669, 670 (5th Cir. 2020) (granting injunction "upon the assurances by the Church that it will satisfy the requirements entitling similarly situated businesses and operations to reopen") (cleaned up); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 616 (6th Cir. 2020) (enjoining enforcement of COVID-19 restrictions "if the Church, its ministers, and its congregants adhere to the public health requirements mandated for 'life-sustaining' entities").

1.2.2. The Ban on Worship in Churches is Underinclusive

With respect to underinclusiveness, a law must not "leave[] appreciable damage to [its] supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up). But both the Regional Order and the Blueprint leave unprohibited a vast amount of damage to the professed interest in stopping COVID-19, given numerous exemptions for activities that involve large groups of people in close proximity for long durations (*e.g.*, factories, warehouses, meatpacking plants, homeless shelters, drop-in centers, public transportation, protests, airlines and airline terminals, etc.), or that are impossible to conduct outdoors (*e.g.*, retail, office-based businesses, etc.), or that require loud vocalizations (*e.g.*, professional sports and music and film production).

As noted above, under the Regional Order, various offices (finance, government, supply chain, or otherwise supporting an essential industry), film production, laundromats, essential manufacturing, and schools can all stay open with only neutral requirements of social distancing and face coverings—and no limit on the number of

people that may attend. 3-ER-440–43, 5-ER-1170–92. And, once San Diego County moves back into the Blueprint, with each Tier more and more industries will be favored over churches. 3-ER-379–84.

As of January 24, 2021, California is reporting 36,790 COVID-19 related fatalities. 7-ER-1645–52.[18] That number of deaths does not motivate California to shut down Hollywood, professional sports, big-box stores, banks, transit, manufacturing, retail, and so on. *See* §§ E, F, *supra*. But, as California would have it, the mere specter of even one infection emanating from South Bay Church justifies its total closure, along with the total closure of virtually every house of worship in the State. The manifest absurdity of California's position in itself evinces an official determination to treat the undeniable viral vectors at favored businesses "less harshly," *Brooklyn Diocese*, 141 S. Ct. at 67, than houses of worship even though customers will contract the virus and some will die.

As explained by South Bay's experts, all public health policy necessarily weighs lives. 2-ER-266–70, 276–78 (Dr. Bhattacharya); 2-ER-293–96 (Mr. Kaufman); *see also* 4-ER-901–03, 5-ER-1058–61. 62,000 Californians die from heart disease every year, 5-ER-1142, but California has not decided to shut down all fast-food in an overwhelming show of force aimed at curing this disease. Similarly, over 200 Black Americans are killed by police every year,[19] and both public health experts and California explicitly determined that this form of "racism" justified lifting COVID-19

[18] *See* https://covid19.ca.gov/state-dashboard/ (Jan. 24, 2021).

[19] *Number of people shot to death by the police in the United States from 2017 to 2020, by race*, STATISTA (Jan. 5, 2021), http://bit.ly/2Xygbc9.

restrictions for protestors, even after acknowledging that doing so led to more coronavirus-related fatalities. *See* 2-ER-276–78, 5-ER-1140–41, FER-125–28.

Why are 36,000 lives worth losing so that Hollywood can remain open and protestors can march? California never explained, and the Ninth Circuit brushed aside this argument, simply holding that California's restrictions are narrowly tailored, and stating that "heart disease [] poses no greater risk when large groups are permitted to congregate." App. A, pp. 26–27. The answer is simply that California does not view its own "claimed interest" as "so compelling" as to apply to favored activities. This is unconstitutional. *Yellowbear*, 741 F.3d at 60.

1.2.3. The Singing Ban is Not Narrowly Tailored

Turning to singing, California's experts opine that "louder and more forceful expression" is more likely to spread COVID-19. 3-ER-513–14, 544, 565–68. But in terms of an actual study on point, South Bay submitted a comprehensive report produced by a collaboration between a university and three music institutes in Germany, titled "Risk Assessment of a Coronavirus Infection in the Field of Music." 5-ER-979–82 (citing https://bit.ly/31Q9Ni6).

That study cited research conducted by medical, engineering, and vocal experts to conclude that singing can safely take place in worship services that adhere to social distancing, mask wearing and adequate ventilation protocols. 5-ER-979–82. Although California's experts padded the record with eight studies, 5-SER-964, 970–72, 7-SER-1524–76, some of those studies did not involve COVID-19 at all, 7-SER-1535–61, and those that did merely noted the potential for COVID-19 spread through singing

undertaken *without precautions*, 7-SER-1562–76, such as wearing "cloth masks" and "opening windows and doors for increased ventilation," 7-SER-1563—the same measures that South Bay proposes, and the same measures that the music and film industries use during their singing. 3-ER-489–90, 498.

California's singing ban cannot survive strict scrutiny. [20]

2. The Other Preliminary Injunction Factors Favor South Bay

Here, both lower courts rightly recognized that South Bay was suffering irreparable harm, App. A, pp. 43–44; App. D-1, p. 12, but wrongly concluded that the balance of equities and the public interest favored California.

In terms of harm to South Bay, both lower courts found that because the climate in Southern California is warm year-round, South Bay can simply worship outside. App. A, pp. 44 –46; App. D-1, pp. 21–22. In limiting the relevance of *Brooklyn Diocese* to "personal attendance," the Ninth Circuit essentially stated that the Catholic Church is worshipping outside, so why can't you? App. A, p.44. If South Bay would simply follow California's "encourage[ment] to '[c]onsider modifying' certain religious traditions," then everything would be fine. App. A, p. 29. On the other hand, according to the lower courts, the COVID-19 pandemic is a real crisis and "it is difficult to see how allowing more people to congregate indoors will do anything other

[20] The Ninth Circuit also stated that neutral social distancing requirements will preclude South Bay's ability to engage in its "altar calls" or "laying of the hands." App. A, pp. 39–40. So far in all COVID-19 litigation, California has acknowledged an implicit exception to social distancing requirements for religious sacraments, such as the reception of Holy Communion, and so did not raise this point itself. But in light of the Ninth Circuit's comment, this Court should make clear that California cannot permit personal care services to operate—massage and tattoo parlors and nail and hair salons, which are open in the Purple Tier, 3-ER-617—or any industry that does not have to abide by social distancing, while banning religious sacraments.

than lead to more cases[.]" App. A, p. 46; App. D-1, pp. 5, 24.

These holdings are problematic. In the morning, when church services are often held, the temperature in San Diego County in the winter is not "warm."[21] But more importantly, in *Brooklyn Diocese* this Court did not purport to hold that "personal attendance" at worship services was a *per se* important religious requirement, whereas other religious requirements are not. Rather, in *Brooklyn Diocese*, this Court paid attention to the *actual problems* raised by the religious adherents to arrive at its conclusion that, for them, "there are important religious traditions . . . that require personal attendance." *Brooklyn Diocese*, 141 S. Ct. at 68. Here, there are "important religious traditions" in the Pentecostal faith that require worship services "*in the temple*," with "*sing[ing] praise to God*," and with "*all*" *gathering* "*in one place*." Most basically, worship is sacred, it does not belong in a parking lot. 4-ER-907, 8-ER-1854.

The lower courts "misse[d] the point." *Capitol Hill Baptist Church v. Bowser*, No. 20-CV-02710 (TNM), 2020 WL 5995126, at *5 (D.D.C. Oct. 9, 2020). The government "may think that its proposed alternatives are sensible substitutes. And for many churches they may be. But . . . [i]t is for the Church, not the [government], to define for itself the meaning of 'not forsaking the assembling of ourselves together.' Hebrews 10:25." *Id*. As the Second Circuit concluded with appropriate bluntness: "The court below concluded that Agudath Israel had not demonstrated irreparable harm because its congregants could 'continue to observe their religion' with

[21] *See Hourly Weather: Chula Vista, CA*, THE WEATHER CHANNEL (Jan. 24, 2021), http://bit.ly/2Mn68UX.

'modifications.' This was error. It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith[.]" *Agudath Israel*, 983 F.3d 636 (citation omitted); *see also On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 911 (W.D. Ky. 2020); *Denver Bible Church v. Azar*, No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994, at *12 (D. Colo. Oct. 15, 2020).

Turning to the statistics, looking to Rt, the metric of spread, California is currently doing amazingly well, at 0.86. The vast majority of other states have greater Rt.[22] Yet when all 50 states and the District of Columbia were ranked by severity of COVID-19 restrictions, by eleven professors on seventeen metrics, California was ranked the second worst in severity—with only Hawaii having more severe restrictions.[23] San Diego County to date has a total of 2,375 COVID-19 related fatalities.[24] With a population of 3,338,330, 5-ER-1144, the probability of dying of COVID-19 in San Diego County is 71.1 out of 100,000. In comparison, annually, 155.2 out of 100,000 San Diegans die from cancer, and 146.8 out of 100,000 from heart disease. 5-ER-1144.

In terms of hospital capacity, San Diego has 6,416 total licensed hospital beds, with only 4,856 (or 75.7%) currently in use. It also has 853 total licensed ICU bed capacity, with only 702 (or 82.3%) in use.[25] With its most recent renewed motion,

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[22] *See* https://rt.live/ (Jan. 24, 2021).

[23] *See* Adam McCann, *States with the Fewest Coronavirus Restrictions*, WALLET HUB (Oct. 6, 2020), http://bit.ly/2M0tpf3.

[24] https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19%20Deaths%20by%20Date%20of%20Death.pdf (Jan. 24, 2021)

[25] https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19_Daily_Status_Update.pdf, pp. 6–7, (Jan. 24, 2021).

South Bay submitted an expert report comparing the situation in New York and California as of December 9, 2020. California's absolute numbers were nearly double that of New York—because it has double the population—but proportionally the statistics were nearly identical. 3-ER-606–09.

These statistics, however, are a red herring. The principle enunciated by this Court in *Brooklyn Diocese*—now *stare decisis*—is simply this: If the pandemic is not so bad as to require the shuttering of Costco and Hollywood, then *as a matter of law* it cannot be so bad as to require the shuttering of churches. *Brooklyn Diocese*, 141 S. Ct. at 68–69. It would perhaps be very inconvenient to require all groceries to be obtained by calling ahead, and then receiving curbside delivery. But unless we get to that point, there can be no justification for shutting people out of churches but not Costco. All arguments about the severity of the pandemic are thus irrelevant, for "*there is no world* in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques." *Brooklyn Diocese*, 141 S. Ct. at 72 (Gorsuch, J., concurring) (italics added).

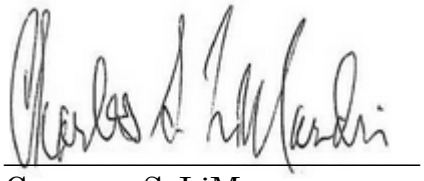
Thus, all preliminary injunction factors favor South Bay.

CONCLUSION

For all the reasons stated, South Bay respectfully requests that this Court grant the requested emergency application for a writ of injunction pending appeal, and correct the Ninth Circuit's "jurisprudential mistake." *Calvary Chapel I*, 140 S. Ct. at 2615 (Kavanaugh, J., dissenting).

Dated: Jan. 25, 2021

Respectfully submitted,



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