



LIMANDRI & JONNA LLP

CHARLES S. LIMANDRI¹*
PAUL M. JONNA¹

JEFFREY M. TRISSELL¹
B. DEAN WILSON
MILAN L. BRANDON II
NOEL J. MEZA III

RICHARD SALPIETRA
BRIAN D. MILLER
GREGORY J. ANTHONY
Of Counsel

*BOARD CERTIFIED CIVIL TRIAL ADVOCATE
ADMITTED TO THE DISTRICT OF COLUMBIA BAR
ADMITTED TO THE NEW YORK BAR
¹ADMITTED TO THE U.S. SUPREME COURT

POST OFFICE BOX 9120
RANCHO SANTA FE, CALIFORNIA 92067
TELEPHONE: (858) 759-9930
FACSIMILE: (858) 759-9938
WEBSITE: www.limandri.com

PHYSICAL ADDRESS:
16236 SAN DIEGUITO ROAD
BUILDING 3, SUITE 3-15
RANCHO SANTA FE, CA 92091
KATHY DENWORTH
Office Administrator

January 26, 2021

Hon. Scott R. Harris, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *South Bay United Pentecostal Church, et al. v. Newsom, et al.*, No. 20A136

Dear Mr. Harris:

Applicants South Bay United Pentecostal Church and Bishop Arthur Hodges III submit this letter regarding the above-referenced emergency application for a writ of injunction, seeking relief before Sunday, January 31, 2021.

On Monday, January 25, 2021, Governor Newsom rescinded his December 3, 2020 “Regional Stay at Home Order.” *See* App. H-4 (attached hereto). As a result, all counties in California are now governed by their tier assignment in Governor Newsom’s August 28, 2020 “Blueprint for a Safer Economy.” This means that San Diego County is in the “Purple Tier,” where “hair salons and barbershops,” “personal care services,” and “limited services” can open. *See* App. G-3, pp. 1–2 (submitted with the emergency application).

“Personal care services” includes “personal care that requires touching a client’s face, e.g., facials, electrolysis, and waxing,” as well as “esthetic, skin care, electrology, nail services, body art professionals, tattoo parlors, and piercing shops, and massage therapy.” Cal. MJN, Ex. 2 (9th Cir. Dkt. 26, at 75). “Limited services” includes “laundromats, dry cleaners, other laundry services, auto repair shops, car washes, landscapers, door to door services and sales, pet grooming, and dog walking,” as well as “residential and janitorial cleaning services, HVAC services, appliance repair persons, electricians, plumbers, other mechanical tradespersons, handypersons, and general contractors.” *Id.* at Ex. 5 (9th Cir. Dkt. 26, at 75).

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In addition, on Monday, January 25, 2021, the Ninth Circuit panel in *Harvest Rock Church, Inc. v. Newsom*, No. 20-56357, ruled on Harvest Rock's motion for an injunction pending appeal. Judge O'Scannlain wrote a seven page concurring opinion in which he noted that he was bound by the Ninth Circuit merits opinion in South Bay's appeal—the subject of South Bay's application to this Court—but was writing to separately to explain why that opinion was wrong. *See* App. L (attached hereto).

Sincerely,

LiMANDRI & JONNA LLP



Charles S. LiMandri

APPENDIX H-4



Sandra Shewry
Acting Director
Erica S. Pan, MD, MPH
Acting State Health Officer

State of California—Health and Human
Services Agency
**California Department of
Public Health**



GAVIN NEWSOM
Governor

December 3, 2020

TO: All Californians

SUBJECT: Regional Stay at Home Order

On January 25, 2021, the Regional Stay at Home Order ended as a result of improvement of ICU projections throughout California.

Note: This Regional Stay at Home Order has an accompanying Supplemental Order.

Upon assessment of the recent, unprecedented rise in the rate of increase in COVID-19 cases, hospitalizations, and test positivity rates across California, the California Department of Public Health (CDPH) is taking immediate actions to prevent the spread of the virus.

The State, like the nation, continues to record an unprecedented surge in the level of community spread of COVID-19. California implemented an accelerated application of the Blueprint Framework metrics on November 16 and a limited Stay at Home Order issued on November 19. However, in the interim, the number of new cases per day has increased by over 112%, (from 8,743 to 18,588) and the rate of rise of new cases per day continues to increase dramatically. The number of new hospital admissions has increased from 777 on November 15, to 1,651 on December 2, and because of the lag between case identification and hospitalizations, we can only expect these numbers to increase.

Current projections show that without additional intervention to slow the spread of COVID-19, the number of available adult Intensive Care Unit (ICU) beds in the State of California will be at capacity in mid-December. This is a sign that the rate of rise in cases, if it continues, is at risk of overwhelming the ability of California hospitals to deliver healthcare to its residents suffering from COVID-19 and from other illnesses requiring hospital care. ICU beds are a critical resource for individuals who need the most advanced support and care and the ability to add additional ICU capacity is limited by the lack of available ICU nurses and physicians as a result of the nationwide surge in hospitalizations and ICU admissions.

Because the rate of increases in new cases continues to escalate and threatens to overwhelm the state's hospital system, further aggressive action is necessary to respond to the quickly evolving situation. While vaccines are promising future interventions, they are not available to address the immediate risks to healthcare delivery in the current surge. The immediate aggressive institution of additional non-pharmaceutical public health interventions is critical to avoid further overwhelming hospitals and to prevent the need to ration care.

NOW, THEREFORE, I, as Acting State Public Health Officer of the State of California, order:

1. CDPH will evaluate public health based on Regions, responsive to hospital capacity for persons resident in those Regions.

2. CDPH will evaluate the adult ICU bed capacity for each Region and identify on [covid19.ca.gov](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Regional-Stay-at-Home-Order.aspx) any Regions for which that capacity is less than 15%. When that capacity is less than 15%, the following terms (the Terms of this Order) will apply.
 - a. All gatherings with members of other households are prohibited in the Region except as expressly permitted herein.

 - b. All individuals living in the Region shall stay home or at their place of residence except as necessary to conduct activities associated with the operation, maintenance, or usage of critical infrastructure,^[1] as required by law, or as specifically permitted in this order.

 - c. Worship and political expression are permitted outdoors, consistent with existing guidance for those activities.

 - d. Critical infrastructure sectors may operate and must continue to modify operations pursuant to the applicable sector guidance.

 - e. Guidance related to schools remain in effect and unchanged. Accordingly, when this Order takes effect in a Region, schools that have previously reopened for in-person instruction may remain open, and schools may continue to bring students back for in-person instruction under the Elementary School Waiver Process or Cohorting Guidance.

 - f. In order to reduce congestion and the resulting increase in risk of transmission of COVID-19 in critical infrastructure retailers, all retailers may operate indoors at no more than 20% capacity and must follow the guidance for retailers. All access to retail must be strictly metered to ensure compliance with the limit on capacity. The sale of food, beverages, and alcohol for in- store consumption is prohibited.

g. To promote and protect the physical and mental well-being of people in California, outdoor recreation facilities may continue to operate. Those facilities may not sell food or drink for on-site consumption. Overnight stays at campgrounds are not permitted.

h. Nothing in this Order prevents any number of persons from the same household from leaving their residence, lodging, or temporary accommodation, as long as they do not engage in any interaction with (or otherwise gather with) any number of persons from any other household, except as specifically permitted herein.

i. Terms (a) and (b) of this section do not apply to persons experiencing homelessness.

3. Except as otherwise required by law, no hotel or lodging entity in California shall accept or honor out of state reservations for non-essential travel, unless the reservation is for at least the minimum time period required for quarantine and the persons identified in the reservation will quarantine in the hotel or lodging entity until after that time period has expired.

4. This order shall take effect on December 5, 2020 at 1259pm PST.

5. For Regions where the adult ICU bed capacity falls below 15% after the effective date of this order, the Terms of this Order shall take effect 24 hours after that assessment.

6. The Terms of this Order shall remain in place for at least three weeks from the date the order takes effect in a Region and shall continue until CDPH's four-week projections of the Region's total available adult ICU bed capacity is greater than or equal to 15%. Four-week adult ICU bed capacity projections will be made approximately twice a week, unless CDPH determines that public health conditions merit an alternate projection schedule. If after three weeks from the effective date of the Terms of this Order in a Region, CDPH's four-week projections of the Region's total available adult ICU bed capacity is greater than or equal to 15%, the Terms of this Order shall no longer apply to the Region

7. After the termination of the Terms of this Order in a Region, each county within the Region will be assigned to a tier based on the Blueprint for a Safer Economy as set out in my August 28, 2020 Order, and the County is subject to the restrictions of the Blueprint appropriate to that tier.

8. I will continue to monitor the epidemiological data and will modify this Regional Stay-at-Home Order as required by the evolving public health conditions. If I determine that it is necessary to change the Terms of this Order, or otherwise modify the Regional Stay-at-Home Order, these modifications will be posted at [covid19.ca.gov](https://www.cdph.ca.gov/covid19).

9. When operative in a Region, the Terms of this Order supersede any conflicting terms in other CDPH orders, directives, or guidance. Specifically, for those Regions with ICU bed capacity triggering this order, the Terms of this Order shall supersede the State's Blueprint for a Safer Economy and all guidance (other than guidance for critical infrastructure sectors) during the operative period. In all Regions that are not subject to the restrictions in this order, the Blueprint for a Safer Economy and all guidance shall remain in effect.

10. This order is issued pursuant to Health and Safety Code sections 120125, 120130(c), 120135, 120140, 120145, 120175, 120195 and 131080; EO N-60-20, N-25-20, and other authority provided for under the Emergency Services Act; and other applicable law.



Erica S. Pan, MD, MPH

Acting State Public Health Officer

California Department of Public Health

[1] Go to the [covid19.ca.gov Essential Workforce](https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Regional-Stay-at-Home-Order.aspx) web page for a full list of California's Critical Infrastructure workforce.

California Department of Public Health
PO Box, 997377, MS 0500, Sacramento, CA 95899-7377
Department Website ([cdph.ca.gov](https://www.cdph.ca.gov))



Page Last Updated : January 25, 2021

APPENDIX L

FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JAN 25 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HARVEST ROCK CHURCH, INC., itself
and on behalf of its member churches in
California; HARVEST INTERNATIONAL
MINISTRY, INC., itself and on behalf of its
member churches in California,

Plaintiffs-Appellants,

v.

GAVIN NEWSOM, in his official capacity
as Governor of the State of California,

Defendant-Appellee.

No. 20-56357

D.C. No.

2:20-cv-06414-JGB-KK

Central District of California,
Los Angeles

ORDER

Before: O'SCANNLAIN, RAWLINSON, and CHRISTEN, Circuit Judges.

In light of our court's recent opinion in *South Bay United Pentecostal Church v. Newsom*, No. 20-56358 (9th Cir. Jan. 22, 2021), Appellants' emergency motion for an injunction pending appeal is GRANTED in part and DENIED in part, without prejudice to renewing the request before the merits panel in this case.

The State of California is enjoined from enforcing the following policies against Harvest Rock Church or its member churches pending resolution of the appeal in this case: (1) the fixed 100-person attendance limit on indoor places of worship under Tier 2 of the State's Blueprint for a Safer Economy; and (2) the

fixed 200-person attendance limit on indoor places of worship under Tier 3 of the Blueprint.

This injunction does not prevent the State from enforcing the following policies against Harvest Rock or its member churches pending resolution of the appeal in this case: (1) the total prohibitions against indoor worship under Tier 1 of the Blueprint and the December 3 Regional Stay at Home Order; (2) the limitations on attendance at indoor worship services under Tiers 2, 3, and 4 of the Blueprint that are tied to a percentage of a facility's fire-code capacity; and (3) the State's restrictions on singing and chanting at indoor worship services.

IT IS SO ORDERED.

FILED

Harvest Rock Church, Inc. v. Newsom, No. 20-56357

JAN 25 2021

O'SCANNLAIN, J., specially concurring:

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I agree that, in light of our court's recent opinion in *South Bay United Pentecostal Church v. Newsom*, — F.3d —, 2021 WL 222814 (9th Cir. Jan. 22, 2021), we must largely deny Harvest Rock Church's emergency motion for an injunction against the State of California's draconian restrictions on indoor worship services.

I write separately, however, because I believe that the decision in *South Bay* is woefully out of step with both the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), and our own court's decision in *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228 (9th Cir. 2020). A simple, straightforward application of these controlling cases compels what should be the obvious result here: California's uniquely severe restrictions against religious worship services—including its *total ban* against indoor worship in nearly the entire state—are patently unconstitutional and should be enjoined. The court's refusal to do so in *South Bay* cries out for correction.

I

In an effort to combat the spread of COVID-19, California's "Blueprint for a Safer Economy" and its December 3 Stay at Home Order *completely prohibit* indoor worship services in nearly the whole state. Even in the midst of the present

pandemic, these measures are drastic: California is the *only state in the country* that imposes such a ban, according to the brief filed in this case by an organization participating as amicus curiae. *See* Brief of the Becket Fund for Religious Liberty as *Amicus Curiae*, Dkt. No. 29, at 2–4. Yet, in exactly the same locales where indoor worship is prohibited, California still allows a vast array of secular facilities to open indoors, including (to name only a few): retail stores, shopping malls, factories, food-processing plants, warehouses, transportation facilities, childcare centers, colleges, libraries, professional sports facilities, and movie studios.

II

We should have little trouble concluding that these severe measures violate the Free Exercise Clause of the First Amendment. My view on that question is unchanged from my dissent from our denial of Harvest Rock Church’s first emergency motion for an injunction pending appeal in October. *See Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 731 (9th Cir. 2020) (O’Scannlain, J., dissenting), *cert. granted before judgment*, — S. Ct. —, 2020 WL 7061630 (2020), *and vacated on remand*, 981 F.3d 764 (9th Cir. 2020). Since then, two intervening cases have entered injunctions against attendance caps on worship services that were far less extreme than California’s total ban. *See Roman Cath. Diocese*, 141 S. Ct. at 63; *Calvary Chapel*, 982 F.3d at 1228. These controlling decisions compel the same conclusion here.

A

First, there can be no doubt that California’s discriminatory treatment of houses of worship must be subject to strict scrutiny. *See Roman Cath. Diocese*, 141 S. Ct. at 67; *Calvary Chapel*, 982 F.3d at 1233. Indeed, even the *South Bay* opinion could not avoid that reality. *See South Bay*, 2021 WL 222814, at *8–9.

B

Second, the controlling decisions also eliminate any notion that California’s measures withstand such scrutiny.

It should go without saying that strict scrutiny is an exceedingly difficult standard to satisfy—indeed it is “our most rigorous and exacting standard of constitutional review.” *Miller v. Johnson*, 515 U.S. 900, 920 (1995). To sustain its ban on indoor worship, the State must demonstrate that such a measure is narrowly tailored to serve a compelling state interest. *Roman Cath. Diocese*, 141 S. Ct. at 67. That is, the State must show that its “inroad on religious liberty . . . is the *least restrictive means* of achieving” its compelling interest. *Thomas v. Rev. Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) (emphasis added).

The State’s interest in controlling the spread of a deadly pandemic is unquestionably compelling; no one disputes this. But California has not come close to showing that its measures are narrowly tailored to that interest. As exhaustively recounted in the *South Bay* decision, the State submitted many pages

of expert testimony setting forth its understanding of how COVID-19 is spread and why indoor activities present a risk of such spread. But even if we were to accept that testimony as true,¹ it does not support a *total ban* on indoor services as the *least restrictive means* available to mitigate the risk at places of worship.

And how could it be? The *South Bay* decision itself proves the point that there are many ways that the State might safeguard indoor activities that stop well short of a total prohibition. The opinion discusses at great length the variety of less severe measures that California has taken to allow all manner of secular activity to take place safely indoors, including occupancy limitations; facemask, physical-distancing, and disinfection protocols; installation of plexiglass barriers; regular COVID-19 testing practices; and penalties the State might enforce for failures to comply with such requirements. *See generally South Bay*, 2021 WL 222814, at *11–15. The obvious conclusion should be that, because the State has found measures like these sufficient to safeguard indoor activities as varied as running a

¹ With respect, I question the salience of much of the evidence recounted in *South Bay*, which, among other things, often presents assertions about issues far beyond the scientific expertise of an infectious disease specialist. For example, the views of an epidemiologist can hardly compel deference on matters of *religion*. Thus, I see no reason for our court to have credited an epidemiologist’s assertion that individuals come to places of worship for the specific “purpose of being together,” *South Bay*, 2021 WL 222814, at *3 (quoting declaration of Dr. George Rutherford), as opposed to any number of relevant private religious purposes—such as to pray to God within the sacred and spiritually uplifting confines of a church, synagogue, or mosque.

daycare center, shopping in a mall, working in a warehouse or factory, riding public transportation, practicing a professional sport, attending a college class, or filming a movie, then surely *some* combination of similar measures might work for indoor religious worship as well.

Even if it weren't otherwise clear that the State's *total ban* is not the narrowest way by which it might make indoor worship safer, the Supreme Court's decision in *Roman Catholic Diocese* dictates such a conclusion. There, the Court held that New York's 25-person cap on attendance at worship services was a restriction "far more severe than has been shown to be required to prevent the spread of the virus." *Roman Cath. Diocese*, 141 S. Ct. at 67. The Court observed that "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services," including, "[a]mong other things," tying "the maximum attendance at a religious service . . . to the size of the church or synagogue." *Id.* Our court subsequently held that even a 50-person cap on attendance at worship services was too inflexible to be narrowly tailored. *Calvary Chapel*, 982 F.3d at 1234.

If fixed attendance caps of 25 or 50 people are too rigid and too extreme to withstand strict scrutiny, how can a *complete ban* not be? To paraphrase the Supreme Court, nothing in the record recounted in *South Bay* supports the conclusion that "admitting [even a single person] to a 1,000-seat church or 400-

seat synagogue would create a more serious health risk than the many other activities that the State allows.” *Roman Cath. Diocese*, 141 S. Ct. at 67. Although we judges “are not public health experts,” *id.* at 68, we cannot simply forfeit all common sense to the State’s assertions. We must instead insist upon a “serious examination of the need for [the State’s] drastic measure[s].” *Id.* Under any meaningful examination, California’s complete ban on indoor worship fails strict scrutiny—just as New York’s and Nevada’s more permissive regimes did before.

III

The remaining *Winter* factors also favor an injunction. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

Because the State’s restrictions violate the Free Exercise Clause of the First Amendment, there “can be no question” that their continued enforcement would cause irreparable harm to the religious believers and places of worship currently prohibited from worshipping indoors. *Roman Cath. Diocese*, 141 S. Ct. at 67.

An injunction to protect these constitutionally guaranteed rights undoubtedly serves the public interest. Although the State’s concern for mitigating a public health crisis is undeniably weighty, “[n]o public interest is served by maintaining an unconstitutional policy when constitutional alternatives are available to achieve the same goal.” *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 637 (2d Cir. 2020); *see also Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (“[T]he

injunction serves the interests of the general public by ensuring that the government's . . . procedures comply with the Constitution.”).

“[E]ven in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Cath. Diocese*, 141 S. Ct. at 68. Thus, as both the Supreme Court and our court have agreed: Even in a case with such vital interests on each side, the balance of harms and the public interest require us to enjoin the State’s unconstitutional practices. Indeed, neither court appears to have had much difficulty reaching such a conclusion. *See id.* at 67–68; *Calvary Chapel*, 982 F.3d at 1234.

Until now.

Harvest Rock Church v. Newsom, No. 20-56357
Christen, Circuit Judge, concurring

JAN 25 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

I write separately, and briefly, to clarify a few points.

First, when Harvest Rock filed its emergency motion for injunction pending appeal, two other emergency motions were pending in which houses of worship challenged California's response to the COVID-19 pandemic. One of those cases, *Gish v. Newsom*, No. 20-56324, was consolidated with *South Bay Pentecostal Church v. Newsom*, No. 20-56358, but the issues in Harvest Rock's motion were not aligned with those presented in *South Bay*. In particular, the briefing in *South Bay* addressed California's December 3, 2020 Stay at Home and an order issued December 19, 2020 by Los Angeles County.

The posture of these challenges changed at the January 4, 2021 argument held on Harvest Rock's motion because the parties agreed to supplement their briefs to address the December 3, 2020 Stay at Home Order. Additionally, the order issued by Los Angeles County was withdrawn. At that point, the issues raised by Harvest Rock's motion became aligned with those in *South Bay*, and under our court rules, the *South Bay* panel had priority to issue a merits ruling. *See* General Order 4.1(a). Oral argument was held in *South Bay* on January 15, 2021. To avoid issuing a ruling on Harvest Rock's emergency motion that might have conflicted with *South Bay*'s merits ruling—especially at a time when California's

public health system is under tremendous strain—it was important to allow the *South Bay* panel time to issue its opinion.

Second, because the *South Bay* panel has priority, the relief ordered here mirrors the relief granted in *South Bay*.

IN THE SUPREME COURT OF THE UNITED STATES

No. 20A-136

**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.

CERTIFICATE OF SERVICE

I, Charles S. LiMandri, counsel of record for Applicants South Bay United Pentecostal Church and Bishop Arthur Hodges III, hereby certify that on this 26th day of January, 2021, I caused 2 packages containing 1 copy of the LETTER RE: RESCISSION OF STAY AT HOME ORDER in the above entitled case to be served by electronic and priority U.S. mail on the following counsel:

XAVIER BECERRA, Attorney General of California
PAUL STEIN, Supervising Deputy Attorney General
TODD GRABARSKY, Deputy Attorney General
LISA J. PLANK, Deputy Attorney General
California Department of Justice
STATE OF CALIFORNIA
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (415) 510-4445
Facsimile: (415) 703-1234
Lisa.Plank@doj.ca.gov
todd.grabarsky@doj.ca.gov
giam.nguyen@doj.ca.gov

misha.igra@doj.ca.gov

Attorneys for Defendants and Respondents, GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California, SONIA ANGELL, in her official capacity as California Public Health Officer

THOMAS E. MONTGOMERY, County Counsel County of San Diego

TIMOTHY M. WHITE, Senior Deputy

JEFFREY P. MICHALOWSKI

VALERIE PALID

DIANA GAITAN

1600 Pacific Highway, Room 355

San Diego, California 92101-2469

Telephone: (619) 531-4865

Facsimile: (619) 531-6005

timothy.white@sdcounty.ca.gov

diana.gaitan@sdcounty.ca.gov

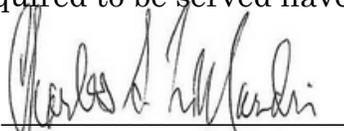
Jeffrey.Michalowski@sdcounty.ca.gov

valerie.palid@sdcounty.ca.gov

diana.gaitan@sdcounty.ca.gov

Attorneys for Defendants and Respondents, 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

I further certify that all parties required to be served have been served.



CHARLES S. LIMANDRI

Counsel of Record

PAUL M. JONNA

JEFFREY M. TRISSELL

LIMANDRI & JONNA LLP

P.O. Box 9120

Rancho Santa Fe, CA 92067

(858) 759-9930

cslimandri@limandri.com