No. 20A136

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

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

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

This Court has made clear that "reasonable observers have reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context[.]" *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (quotations omitted). As already suggested by proposed *amicus* Becket Fund for Religious Liberty, the context here "scuppers" California's attempt to defend its total ban on indoor worship under the required strict scrutiny. Brief of Becket Fund for Religious Liberty, as *Amicus Curiae*, at 9 ("Becket Br.").

On December 10, 2020, a California Superior Court, instructed by this Court's decision in *Brooklyn Diocese*, granted Father Trevor Burfitt, who oversees five Catholic congregations, a preliminary injunction against enforcement of Governor Newsom's total indoor worship ban under his Blueprint for a Safer Economy (Blueprint) and the overlapping "Regional Stay at Home Order" (Regional Order). The latter was based on a mysteriously calculated "metric" of ICU bed availability with the underlying data at that time being withheld from the public. *Burfitt v. Newsom*, Kern Cnty. No. BCV-20-102267 (Cal. Super. 2020) (App. K).

Unpersuaded by California's data-free assertions on the supposedly peculiar viral danger of religious versus commercial gatherings indoors, the court in *Burfitt,* mirroring this Court's finding in *Brooklyn Diocese*—on the same core facts—found as follows:

> However, Defendants' efforts to distinguish the permitted secular activity from the prohibited religious activity are not persuasive. For example, Defendants contend that the

> congregations of shoppers in big-box stores, grocery stores, etc., are not comparable to religious services in terms of crowd size, proximity, and length of stay. To the contrary, based on the evidence presented (or lack thereof) and common knowledge, it appears that shoppers at a Costco, Walmart, Home Depot, etc. may—and frequently do—congregate in numbers, proximity, and duration that is very comparable to worshippers in houses of worship. Defendants have not convincingly established that the health risks associated with houses of worship would be any different than "essential businesses" or "critical infrastructure," assuming the same requirements of social distancing and the wearing of masks were applied across the board.

Id.

Presented with no real evidence to the contrary, but only conclusory declarations from California health bureaucrats unsupported by verifiable data—the same non-evidence presented here—the *Burfitt* court prohibited California from imposing on churches any capacity limits greater than those on " 'essential businesses' or 'critical infrastructure'—includ[ing] big-box retail stores, grocery stores, home improvement stores, hotels, airports, train stations, bus stations, movie production houses, warehouses, factories, schools, and a lengthy list of additional businesses." *Id.*

After waiting more than a month without seeking an emergency stay of the *Burfitt* court's injunction, California filed an appeal followed by a "Writ of Supersedeas" in California's Fifth Appellate District that likewise did not seek an emergency stay. The appellate court, however, *sua sponte* stayed the injunction temporarily (pending Father Burfitt's opposition to the Writ) after reviewing California's *verified* Petition, the very first sentence of which contains the following demonstrably false claim of a dire health emergency: "California is experiencing the

worst surge of the COVID-19 pandemic, and its health care system is on the brink of collapse."[1] Only three days later, on January 25, 2021, California rescinded its "Regional Stay at Home Order." App. H-4. California's health system was *not* "on the brink of collapse"—for lack of ICU beds or otherwise.

Nor is California facing its "darkest hour," as the Ninth Circuit was persuaded by California's reckless hyperbole in its briefing there. App. A, p. 2. Quite to the contrary, once the data underlying the rescinded Regional Order—rescinded only after California had obtained the Ninth's Circuit's decision upholding the total worship ban in the midst of California's "darkest hour"—the public learned to its dismay and growing outrage that, as *amicus* Becket notes, "That data showed that projected available ICU capacity statewide will soon be over 15% in all regions of the State; by mid-February the State projects Southern California will have the *most* ICU capacity, with 33.3% available." Becket Br., 12.[2]

Having rescinded the Regional Order, which was supposedly based on the imminent "collapse" of California's health care system for lack of ICU beds—a claim falsified by its own data—California now avers in *this* Court that "the strain on California's hospitals and healthcare workers has been devastating." The evidence for this dire assessment is several newspaper articles no different in tenor from those that appeared during California's flu epidemic in 2017–2018. Resp. Br., 15–16 &

[1] Verified Petition for Writ of Supersedeas, *Burfitt v. Newsom*, 5th App. Dist. No. F082235 (Cal. App. Jan. 20, 2021), https://bit.ly/39ww4GY.

[2] Citing Don Thompson, *California reveals data used to lift stay-at-home order*, AP NEWS (Jan. 25, 2021), https://bit.ly/3t1QwHr.

nn.25, 26.[3]

Also before this Court, California now claims that "in the early summer, California loosened its initial restrictions and 'tried . . . allowing in-door worship at 25%' of the 'church's maximum capacity.' " Resp. Br., 36 (quoting App. D-1 at 23). This statement is absolutely false. At the time referenced—the early summer—California imposed a cap of 25% or 100-persons, whichever was *lower*. 3-ER-462, 6-ER-1211. California further alleges that, "[a]s the court of appeals recognized," the singing ban is a "universal prohibition" that "applies to *all* indoor activities[.]" Resp. Br., 51–52 (quoting App. A, pp. 49–50). Never mind that California's own declarants discuss how music production is allowed to proceed subject to specific safeguards. 3-ER-489–90, 498.

With respect to the reopening of churches in Los Angeles County,[4] California—unable to deny that this is the case—cites the Ninth Circuit's plain factual error on this point in an effort to substantiate an obvious falsehood. Resp. Br., 48–49 (citing App. A, p. 38 n.34). Moreover, California—evincing a continuing lack of candor—now fails to mention to this Court its acknowledgement below that Los Angeles County's December 19, 2020 order plainly and unequivocally permitted churches to open. As

[3] *Compare*, as to 2017–2018 flu epidemic, Amanda MacMillan, *Hospitals Overwhelmed by Flu Patients Are Treating Them in Tents,* TIME (Jan. 18, 2018), http://bit.ly/2YqdA4v ("In California, which has been particularly hard hit by this season's flu, several hospitals have set up large 'surge tents' outside their emergency departments to accommodate and treat flu patients. Even then, the *LA Times* reported this week, emergency departments had standing-room only, and some patients had to be treated in hallways"). Examples could be multiplied.

[4] Notably, Los Angeles County "has the largest population of any county in the nation—nearly 10 million residents who account for approximately 27 percent of California's population." *About LA County*, COUNTY OF LOS ANGELES, https://lacounty.gov/government/about-la-county/.

stated by the county's press release:

> The Los Angeles County Health Officer Order will be modified today to align with recent Supreme Court rulings for places of worship. Places of worship are permitted to offer faith-based services both indoors and outdoors with mandatory physical distancing and face coverings over both the nose and mouth that must be worn at all times while on site. Places of worship must also assure that attendance does not exceed the number of people who can be accommodated while maintaining a physical distance of six feet between separate households.

App. J-1, p.1, ¶ 5; *see also* App. J-2, J-4.[5] California's contention below was that Los Angeles County backtracked on the reopening on December 29, 2020. RB-51. But even this is false. App. J-3, J-5. All Los Angeles did was clarify that it was only modifying its own order—the only order its law enforcement personnel actually enforce—and that it had no authority to supersede California's order. App. J-3, p. 3, ¶ 2.b. Despite reopening the churches in California's most densely populated County, "with the region [Southern California] now in its fourth week of declining hospitalizations, it was clear Wednesday[, January 28,] that the county was decisively on its way out of its third surge of the pandemic[.]"[6]

California's habitual hyperbole (at best) and outright fabrications (at worst) surely figured in the *Burfitt* court's rejection of its data-free justifications for banning worship. California's statement before this Court that it recognizes the importance of permitting worship in churches, and "is committed to relaxing [its] restrictions as

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[5] *See* Minyvonne Burke, *L.A. county reverses ban, allows churches to hold indoor services as California struggles to contain Covid surge*, NBC NEWS (Dec. 22, 2020), http://nbcnews.to/2YvfNeZ.

[6] Rong-Gong Lin II & Luke Money, *L.A. has avoided a New York-level COVID-19 hospital meltdown as conditions improve*, LOS ANGELES TIMES (Jan. 28, 2021), http://lat.ms/2YqAYP4.

soon as public health circumstances allow—as it has in the recent past," is as audacious as it is incredible. Resp. Br., 28. In the past year, California has made very clear that the Free Exercise of religion is a second-class right, and that people of faith are a disfavored minority. It is indeed California's "darkest hour"—for houses of worship. But the lights are on at Costco and Walmart, along with every other place of business Governor Newsom favors.

As explained below, all preliminary injunction factors favor both South Bay specifically and all churches generally. With California's animus towards people of faith becoming clearer by the day, this Court's protection is urgently required. This Court should enjoin California's total ban on worship in churches, its percentage caps, and its ban on singing. California has not met its burden to justify anything less.[7]

REPLY ARGUMENT

1. South Bay is Likely to Succeed on the Merits

To begin, "[a] plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits[.]" *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Here, it is undisputable that strict scrutiny applies to California's restrictions and that the *professed* interest in curbing COVID-19 is compelling. *See*

[7] The Becket Fund notes that this Court could tailor an injunction allowing a 25% occupancy cap. Becket Br., 14–16. Although non-essential retail is open at 25% in California's "Purple Tier," App. G-3, p. 2, as California makes clear, grocery stores are open at 50% occupancy. Resp. Br., 14, 41. Further, as the *Burfitt* court held, given that all critical infrastructure is open at 100% occupancy "with modifications" there is no reason based in true scientific evidence, as opposed to mere suppositions by "experts" without hard data to support their views, that churches should not be treated the same way. *See* App. H-3. South Bay believes that critical infrastructure is the key comparator because, as Justice Kavanaugh opined, "[t]he State cannot assume the worst when people go to worship but assume the best when people go to work[.]" *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1615 (2020) (Kavanaugh, J., dissenting).

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 66–67 (2020) ("*Brooklyn Diocese*"). Here, the only question is whether California's restrictions are "narrowly tailored," *i.e.*, whether California's "interests could be achieved by narrower ordinances that burdened religion to a far lesser degree" and whether those ordinances "leave[] appreciable damage" to those interests "unprohibited." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993).

In opposition to this application, California repeats its pseudo-scientific "transmission risk analysis" based solely on the *ipse dixit* of its experts, who cite no verifiable data comparing the transmission risk of churches versus favored commercial enterprises. Resp. Br., 30–38. No such data exists. Although California's experts have pontificated far longer than New York's experts, their conclusory allegations, unsupported by verifiable Rt data, are essentially identical: "Believe us, churches are dangerous."[8] As stated in South Bay's application, and the Becket Fund in its *amicus* brief, these declarations are not expert testimony, do not satisfy the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and are not admissible as expert testimony under Fed. R. Evid. 702. *See* Appl. Br., 28; Becket Br., 9 n.8. Perhaps the most conclusive evidence that South Bay can worship safely are "videos of recent indoor services lasting two hours and involving singing[.]" Resp. Br., 51 & n.50 (citing Facebook video of Christmas liturgy held after the Ninth Circuit refused to protect South Bay's rights). What more does South Bay

[8] Of course, this Court is the best arbiter of California's argument that New York submitted "virtually no discussion of comparative risk" in *Brooklyn Diocese*. *See* Resp. Br., 38 n.38 (asserting that the record is significantly different). However, to South Bay, it appears to simply be another falsehood.

have to do than have a "perfect record" since May 31, 2020—last Pentecost Sunday? 4-ER-689.

California's transmission risk analysis is absurd on its face, as evidenced by relevant statistics. The average grocery shopper takes 43 minutes to complete his shopping. The average trip to the mall, for those aged 18–34, is 158.4 minutes. The average person makes 1.6 trips to the grocery store every week. And the average woman spends 399 hours shopping a year. This all adds up, with Americans spending a collective 37 billion hours per year *waiting in retail lines*. 5-ER-1136, FER-81–98.

Regardless of averages, under California's rules, one can take as long as one likes to finish shopping. This results, as numerous videos and photos demonstrate, in large gatherings at grocery stores:

5-ER-1136; FER-104–09;[9] *see also* FER-110–13.

[9] Taking screenshots of and citing RuggerPro (@RuggerPro), TWITTER (Mar. 12, 2020), https://t.co/PvrWJPnPRj.

California's attempt to distinguish "massage and tattoo parlors" and "nail salons" on the basis that they do not involve "large numbers of people" is another baseless supposition belied by what the *Burfitt* court rightly noted is simple "common sense." Resp. Br., 42. Masseuses and barbers can see dozens of people, if not hundreds, in a week. California's argument that "[e]mployers are [] 'better positioned to control their employees' behavior," reveals implicit bias against religious leaders. Resp. Br., 44 (citing App. D-1, p. 20). People of faith respect and obey their pastors, they don't ignore them. Employees in factories or offices, on the other hand, might well thumb their noses at management when the managers aren't looking.

This Court should make abundantly clear that "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). Nor is there a world where music and film production can continue apace, but worshipping God with song is forbidden.

2. The Other Preliminary Injunction Factors Favor South Bay

In addition to a "likel[ihood of] success on the merits," the issuance of a preliminary injunction requires that the plaintiff be "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*, 555 U.S. at 20. Here, no party disputes that banning worship in churches causes irreparable harm. *See* Resp. Br., 54–55; *see also* App. A, pp. 43–44; App. D-1, p. 12.

With respect to the merged inquiry of the balance of equities and the public

interest, *see Nken v. Holder*, 556 U.S. 418, 435 (2009), there are two main issues: the harm to all Californians from further spread of COVID-19, and the harm to South Bay in particular, and all Californians of faith generally, from banning worship in churches.

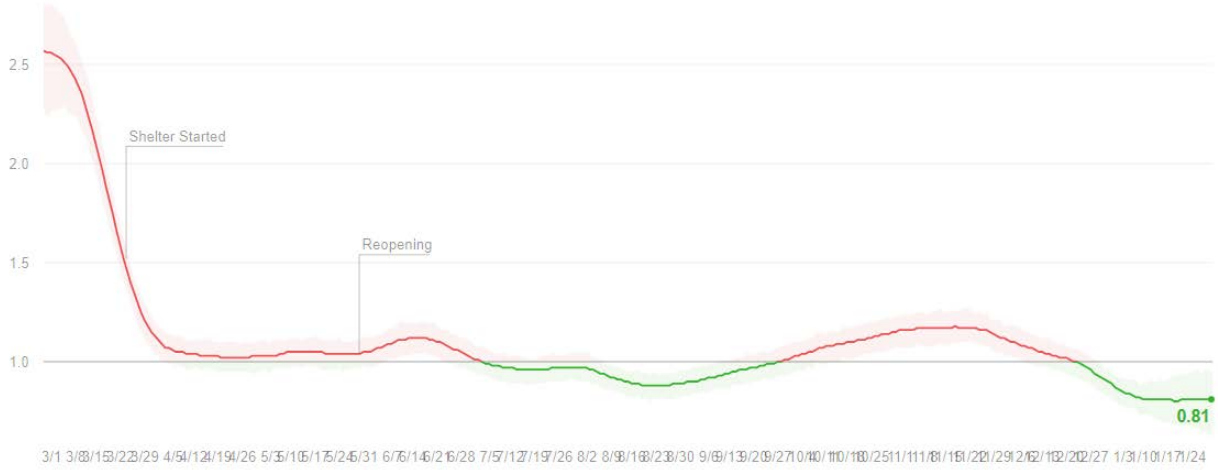
With respect to the former, as stated in South Bay's initial brief, there is no meaningful evidence that banning worship in churches actually prevents the spread of COVID-19, and so the analysis favors South Bay. Appl. Br., 32–34. In addition, California's and San Diego's COVID-19 statistics are improving as even California admits. But as the Becket Fund rightly cautions, this Court should view California's statistics with the well-founded suspicion they deserve in view of California's secrecy respecting them and its wild claim of a "collapse" in the State's health care system only days before it said, in effect, "never mind." Becket Br., 11–13.

California's withholding of data to meet its litigation needs, *see* Appl. Br., at 23 n.13, or other needs,[10] is par for the course for those with "reasonable memories." *McCreary*, 545 U.S. at 866. Even the 0.0% ICU capacity which California touted—a statistic that lends itself to raw numbers, and which the Ninth Circuit found compelling—is misleading. *Compare* RB-12 ("[T]here are no longer any ICU beds in Southern California"); RB-18, 62 (similar); *with* App. A, p. 26 ("ICU capacity has disappeared"), p. 48 ("ICU capacity is non-existent"). "ICU capacity" in California's "figure does not measure *actual* remaining capacity;" rather, "effective" "ICU capacity

[10] *See* David Siders & Carla Marinucci, *'It's all fallen apart': Newsom scrambles to save California—and his career*, POLITICO (Jan. 11, 2021), http://politi.co/39uhTly (discussing the fast growing recall initiative); Daniel Payne, *Democrat governors signal post-Trump shift to less harsh COVID-19 restrictions*, JUST THE NEWS (Jan. 28, 2021), http://bit.ly/3tbwWs3.

is reduced" based on a formula.[11] Even data that is not expressly "hidden," remains either shrouded in mystery or intentionally designed to mislead.

In any event, undisputed data shows that California's and San Diego's statistics are greatly improved. California's Rt is 0.81, the second best in the country, and its total new cases are in free-fall.[12]



Statistics in San Diego County are equally impressive. [13] The statistics are so good that, like Nevada, California's cardrooms are reopening.[14]

But—lest one lose sight of the forest for the trees—even if California's disingenuous doomsaying were well-founded, that would not alter its obligation under the Free Exercise Clause to treat religious gatherings on a par with comparable

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[11] *See* Tarryn Mento, *High Demand For ICU Capacity, Staff Makes Transferring Patients Difficult*, KPBS (Dec. 14, 2020), http://bit.ly/3cp2B3l.

[12] *See* https://rt.live; https://rt.live/us/CA.

[13] *See Daily COVID-19 Data Update*, SAN DIEGO COUNTY, https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19_Daily_Status_Update.pdf; *COVID-19 Deaths in San Diego County by Date of Death*, SAN DIEGO COUNTY, https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19%20Deaths%20by%20Date%20of%20Death.pdf.

[14] *See LA County cardrooms race to reopen following updated health orders*, CALIFORNIA NEWS TIMES (Jan. 28, 2021), http://bit.ly/2MjNX2F.

secular gatherings, *no matter how severe the pandemic*.

With respect to churches, all across California people of faith are suffering. For many, their faith requires worship within temples consecrated to God—which remain closed for 99.9% of California's population under the presently operative Blueprint.[15] For others, California's recent inclement weather has forced the cancellation of their outdoor worship services. Starting the day after the Ninth Circuit ruled that "San Diego County benefits from a year-round warm climate," such that worshipping in "parking lots" is "plausibl[e]," App. A, p. 45, San Diego County was hit with three successive winter storms, which brought rain, hail, snow, and 30 mph wind gusts.[16] As California notes, perhaps the most prominent example of a church holding its worship services outdoors—due to the threat of criminal prosecution if it uses its churches—is the Catholic Church. Resp. Br., 55 n.56. But Catholic parishes were forced to cancel outdoor worship services due to the storms.[17] A review of photos published by various news media make clear that cancelling outdoor worship services was the only safe choice.[18] At the time of this brief, San Diego County is under a flash

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[15] *See Current tier assignments as of January 26, 2021*, BLUEPRINT FOR A SAFER ECONOMY, https://covid19.ca.gov/safer-economy/#county-status.

[16] *See, e.g., Rain, snow arrive Saturday with heavier storm still to come*, FOX 5 SAN DIEGO (Jan. 23, 2021), http://bit.ly/3j1juTe; Monica Garske, *Winter Storm No. 3 Set to Bring Heavy Rain, Fresh Snow to San Diego County*, NBC 7 SAN DIEGO (Jan. 28, 2021), http://bit.ly/2NF6F5a.

[17] *See, e.g.,* Fr. Raymond Napuli, *Upcoming Daily Masses suspended until further notice*, MISSION BASILICA SAN DIEGO DE ALCALÁ (Jan. 25, 2021), https://missionsandiego.flocknote.com/note/10632773 (noting how "recent strong winds have damaged our outdoor Mass set up in the Mission Courtyard" and so "All Daily Masses are suspended until further notice").

[18] *See, e.g., Photos: Winter storm brings rain, snow with more on the way*, FOX 5 SAN DIEGO (Jan. 25, 2021), http://bit.ly/3r7VDnF; Karla Rendon-Alvarez, *Photos: Winter Storm Batters San Diego County With Trifecta of Snow, Wind and Rain*, NBC 7 SAN DIEGO (Jan. 25, 2021), http://bit.ly/2MD4jDg.

flood watch.[19] The news reports indicate that the weather is only going to get more severe.[20]

For those Californians whose faith requires them to worship in their churches, the courts have been particularly unkind—even following *Brooklyn Diocese*:

- *Calvary Chapel San Jose*: Calvary Chapel San Jose resumed worship services on May 31, 2020, and on June 9, 2020, filed a federal civil rights action alleging that the prohibition on its worship services violated the First Amendment. Four months later, on October 27, 2020, Santa Clara County initiated litigation against the church in California Superior Court. On November 2, the superior court granted the county a temporary restraining order, with which the church did not comply, and on December 4—after *Brooklyn Diocese*—issued a preliminary injunction. On December 8, the church was held in contempt and sanctioned $55,000. The district court held that abstention principles applied and refused to rule on any further motion by the church. A second contempt trial was heard by the trial court in mid-January. The injunction remains in effect. *Calvary Chapel San Jose v. Cody*, No. 20-cv-03794-BLF (N.D. Cal. Jun. 9, 2020), and *County of Santa Clara v. Calvary Chapel San Jose*, S.C. Cnty. No. 20CV372285 (Cal. Super. Oct. 27, 2020).

- *Godspeak Calvary Chapel*: After Godspeak Calvary Chapel began resuming worship services on May 31, 2020, Ventura County initiated litigation against the church, seeking a preliminary injunction against the worship services. Following the church's determination that its faith did not permit it to follow the trial court's temporary restraining order, it was held in contempt and sanctioned. The trial court ultimately entered a preliminary injunction, and despite *Brooklyn Diocese*, the injunction remains in effect. *County of Ventura v. Godspeak Calvary Chapel*, Vent. Cnty. No. 56-2020-00544086-CU-MC-VTA (Cal. Super. Aug. 5, 2020).

- *Grace Community Church of the Valley*: After the large, Los Angeles-based non-denominational church sued Governor Newsom and Los Angeles County in California Superior Court, Los Angeles counter-sued

[19] *See Flash flood watch, winter weather advisory issued*, CBS 8 SAN DIEGO (Jan. 28, 2021), http://bit.ly/3oznmvA.

[20] *See Major storm pounding Northern California heads south*, CBS NEWS (Jan. 28, 2021), http://cbsn.ws/3aenVG4.

and obtained a preliminary injunction against the church worshipping indoors. When the church continued to worship, Los Angeles evicted the church from its parking lot and obtained an OSC re: Contempt. A contempt trial has yet to occur. The case is still pending and the injunction remains in effect. *Grace Community Church of the Valley v. Newsom*, L.A. Cnty. No. 20BBCV00497 (Cal. Super. Aug. 12, 2020), and *County of Los Angeles v. Grace Community Church of the Valley*, L.A. Cnty. No. 20STCV30695 (Cal. Super. Aug. 14, 2020).

- *Fr. Trevor Burfitt, SSPX*: A Catholic priest overseeing five churches in four counties sued Governor Newsom and the counties in California Superior Court, seeking an injunction permitting him to hold worship services in his churches. Relying on *Brooklyn Diocese*, the superior court granted the injunction. Forty-nine days later, and after Los Angeles came into compliance with the injunction by amending its health order, the appellate court stayed the injunction, presumably relying on the Ninth Circuit's recent opinion in this action. *Burfitt v. Newsom*, Kern Cnty. No. BCV-20-102267 (Cal. Super. Sep. 29, 2020); *Burfitt v. Newsom*, 5th App. Dist. No. F082235 (Cal. App. Jan. 11, 2021).

All of these cases should have been quickly resolved in favor of the various churches. That they have not, and that churches are still forced to worship under the threat of criminal and civil penalties, is an appalling act of official cruelty as well as a blatant, and quite unprecedented, violation of the Free Exercise Clause. Never in the history of this nation have all believers been forced out of all their houses of worship by the State on the unproven theory that some of them *might* transmit a virus that *might* be seriously harmful to a small number of people in a population of many millions—at the same time shopping, office work, mass transit and purchases of liquor and marijuana are all permitted indoors. This situation could hardly be more bizarre.

* * *

The thesis of California's supporting *amici* is that "the Free Exercise Clause

was never intended or originally understood to require religious exemptions from laws that protect public health or safety," such as "religion-neutral restrictions that govern all large gatherings[.]" Brief of Americans United for Separation of Church and State, et al., as *Amici Curiae*, at 1, 3. But, of course, the restrictions on worship at issue are not "religion-neutral," as *Brooklyn Diocese* makes clear in a teaching that the Ninth Circuit obdurately refuses to follow even as to a total ban on indoor worship through the vast State of California while innumerable commercial premises are open for business.

But the *amicus* brief raises a question of greater import: In reviewing the history and purpose of the First Amendment, should it *ever* be interpreted as permitting the government to criminalize attending Sunday worship services? The cases that California's *amici* cite concern using religion as a pretext for "tumultuous petitioning" and "riotous assemblies," and in that context it may seem reasonable to prohibit religious assemblies. *See generally* Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?*, 39 WM. & MARY L. REV. 819, 835–36 (1998). But even then, in thinking of the history and purpose of the First Amendment, it "radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation[.]" *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952). Should it not, therefore, protect without exception the right for churches to hold worship services? *See Employment Div. v. Smith*, 494 U.S. 872, 881 (1990) (listing "assembling with others for a worship service" as the first of quintessential "physical acts"

required to freely exercise religion).

On the one hand, this Court has made clear that criminalizing worship in churches can never be viewed as "neutral," and so strict scrutiny must always be applied. *Brooklyn Diocese*, 141 S. Ct. at 66. And under strict scrutiny, as Justice Kavanaugh opined, the State may have the authority to impose "very strict restrictions" so long as it imposes those restrictions on "*religious services and secular gatherings alike*." *Id.* at 74 (Kavanaugh, J., concurring) (emphasis added).

On the other hand, some lower courts have refused to apply strict scrutiny, both with respect to California's ban on worship in churches, *Harvest Rock Church, Inc. v. Newsom*, No. EDCV 20-6414 JGB (KKx), 2020 WL 7639584, at *5–6 (C.D. Cal. Dec. 21, 2020), *People v. Calvary Chapel San Jose*, No. 20CV372285, 2020 WL 7872811, at *4 (Cal. Super. Dec. 4, 2020), and with respect to other religious discrimination. *Commonwealth v. Beshear*, 981 F.3d 505, 510 (6th Cir. 2020). And when constitutional jurisprudence goes too far off the rails, this Court has not shied away from holding that certain actions are so anathema to the Constitution that they are "objectively unlawful," "morally repugnant," and should be struck down before even engaging in a strict scrutiny analysis. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (abrogating *Korematsu v. United States*, 323 U.S. 214 (1944), which held that strict scrutiny was satisfied in forcible detention of Japanese-Americans); *see also Planned Parenthood v. Abbott*, __ S. Ct. __, 2021 WL 231539 (2021) (vacating *In re Abbott*, 956 F.3d 696 (5th Cir. 2020), progenitor of the modern "*Jacobson* deference" doctrine).

In this respect, the clearest command this Court has offered regarding the

sanctity of worship services is that "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can . . . force nor influence a person to go to or to remain away from church against his will[.]" *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 15 (1947).

Here, one of the greatest tragedies of the COVID-19 pandemic is that "[i]n far too many places, for far too long, our first freedom has fallen on deaf ears." *Brooklyn Diocese*, 141 S. Ct. at 69–70 (Gorsuch, J., concurring). "At the flick of a pen, [government officials] have asserted the right to privilege restaurants, marijuana dispensaries, and casinos over churches, mosques, and temples." *Id*. Even after this Court ruled in *Brooklyn Diocese*, California and the lower courts remained unmoved—ignoring the "straightforward application" of that case by affirming a "*total ban* against indoor worship in nearly the entire state[.]" App. L, Special Concurrence, p. 1.

In light of California's especially harsh treatment of people of faith since the beginning of the pandemic, perhaps South Bay should not have been surprised by the post-remand procedural history of this case. Nevertheless, South Bay was surprised, as it believed that this Court's November 25, 2020 ruling essentially meant that it would be able to celebrate Christmas in church. That both lower courts refused to respect South Bay's right to celebrate Christmas in church is a tragedy of immense proportions that should never have happened. *See* App. B; App. D; *see also Harvest Rock Church, Inc. v. Newsom*, 982 F.3d 1240 (9th Cir. 2020) (O'Scannlain, J., dissenting from denial of relief before Christmas). South Bay believes that *Everson*

provides the right test, and should provide a bright-line rule in all contexts. But at the very least, in *this* context, that test should be applied so that no American has to worry about how much longer official government persecution will continue. Thus, South Bay respectfully submits that this Court should order that, in response to the COVID-19 pandemic, "[n]either a state nor the Federal Government can . . . force nor influence a person to . . . remain away from church against his will[.]" *Everson*, 330 U.S. at 15.

CONCLUSION

Never before in the history of this country has any American ever been told that you cannot walk into a church because you might transmit a virus. That is the time in which we live, but even in times such as these, "[t]he First Amendment does not allow our leaders to decide which rights to honor and which to ignore. In law, as in life, what's good for the goose is good for the gander. In these troubled times, nothing should unify the American people more than the principle that freedom for me, but not for thee, has no place under our Constitution." *Spell v. Edwards*, 962 F.3d 175, 183 (5th Cir. 2020) (Ho, J., concurring).

Indeed, "[h]istory reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an 'emergency' or threat to the public. But the ultimate strength of our constitutional guarantees lies in the unhesitating application in times of crisis and tranquility alike." *United States v. Bell*, 464 F.2d 667, 676 (2d Cir. 1972) (Mansfield, J., concurring). Thus, for the foregoing reasons, Applicants South Bay United Pentecostal Church and Bishop Arthur Hodges III

respectfully request that this Court grant their extraordinary application for a writ of injunction, protecting both their rights and the rights of all Californians of faith.

As the trial court sagely observed in *Burfitt*: "It is important to note that almost all of the entities that are allowed to host indoor operations do not engage in activity that is constitutionally protected, whereas houses of worship do." *Burfitt*, No. BCV-20-102267, at *2. No matter what the severity of this pandemic, churches, whose activities are protected under the Free Exercise Clause, must be afforded at least the same degree of operational freedom as businesses that enjoy no such protection yet have the favor of the wayward Governor of California.

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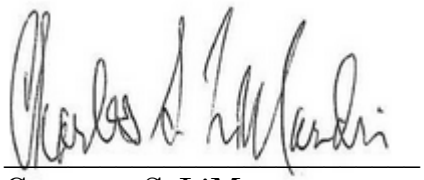
Respectfully submitted,



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