No. 20-746

In The Supreme Court of the United States

SOUTH BAY UNITED PENTECOSTAL CHURCH and BISHOP ARTHUR HODGES III,

Petitioners,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This reply must take into consideration developments that occurred since the filing of this Petition last November. As conflict in the lower courts emerges following this Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), California, the leading provocateur, remains unbowed.

On February 5, 2021, this Court granted Petitioners (collectively "South Bay") an injunction barring enforcement of California's total ban on indoor worship in Tier 1 of its "Blueprint" and any percentage capacity limit on places of worship in Tier 1 lower than the 25% the Blueprint affords "non-essential retail." *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) ("*S. Bay II*").

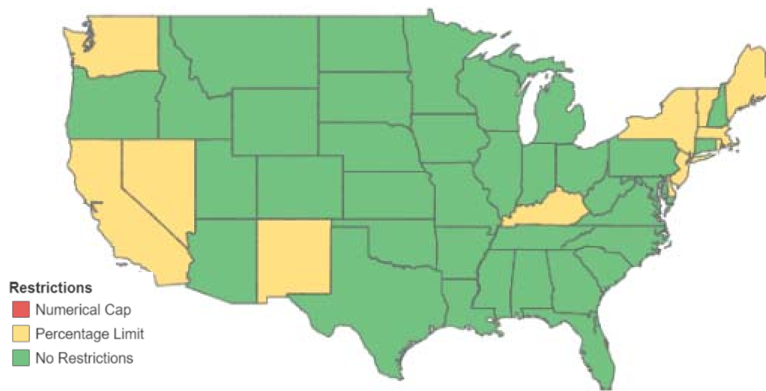
But, on March 17, the day before California filed its opposition, San Diego County (to be joined by 35 others) moved into Tier 2,[1] in which "non-essential retail" is allowed 50% capacity and grocery stores 100% capacity. Yet churches remain limited to 25%. This means that under Tier 3 (soon to be reached by San Diego), as well as Tier 4, churches will *never* be allowed more than half-capacity under the Blueprint as it now stands.[2]

California thus brazenly continues its disparate treatment of religion at the same time 38 states allow churches 100% capacity and 11 others 50% or 60%

[1] https://covid19.ca.gov/safer-economy/#county-status.

[2] https://covid19.ca.gov/industry-guidance/.

capacity.[3] As was the case in Tier 1, only California "has gone so far[.]" *S. Bay II*, 141 S. Ct. at 717 (Gorsuch, J., statement).



With no other state having a 25% cap, and with even the District of Columbia's 25% cap recently being enjoined, *Archbishop of Washington v. Bowser*, No. 20-CV-03625 (TNM), 2021 WL 1146399 (D.D.C. Mar. 25, 2021), under the narrow tailoring/least restrictive means test, the outcome here should be no cap, as in 38 states, see *Holt v. Hobbs*, 574 U.S. 352, 368 (2015), or at the very least the 50–60% allowed in 11 states.

As discussed below, the defiant Ninth Circuit is now a major driver of conflicts among the Circuits on three distinct legal issues, with the First and Seventh Circuits following the Ninth Circuit, and the Second and Sixth Circuits following this Court. These conflicts need resolution, for which this case is a suitable

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[3] https://www.becketlaw.org/covid-19-religious-worship/.

vehicle. Unless this Court provides that resolution, *Brooklyn Diocese* will be steadily eroded.

ARGUMENT

Contrary to California's suggestion, this Petition challenges *all* "strict limitations, including closures, on all Places of Worship in California" under the Blueprint, including the disparate percentage capacity caps in Tiers 2 through 4. (Question 1.) The Petition further requests that this Court clarify the standard of review for Free Exercise challenges to pandemic regulations. (Question 2.)

In opposition, California argues three points. (Opp.9–12): First, that the lower courts are following *Brooklyn Diocese* and no further guidance is necessary (Opp.12); Second, that this case is a poor fit for plenary review because *South Bay II* granted all the relief justified by the record below (Opp.9–11); Third, that this Court should vacate the Ninth Circuit's decision in lieu of merits review (Opp.11 n.9). These arguments are addressed in turn.

I. The Lower Courts Have Split Over *Brooklyn Diocese* and *South Bay II.*

The day after South Bay filed this Petition, this Court handed down *Brooklyn Diocese.* Although South Bay hoped that opinion would provide enough

guidance to the lower courts, that has not been the case—not even after the decision in *South Bay II.*

Demonstrating the problem, California avers that no further guidance is needed because after *Brooklyn Diocese* "no . . . free-exercise challenge [can be denied] on the view that strict scrutiny does not apply under *Jacobson*[.]" Opp.12. But *Brooklyn Diocese* has nothing to do with the short-lived, errant notion of "*Jacobson* deference." *Id.* at 70 (Gorsuch, J., concurring). In fact, the only thing all the circuits hold in common is that they have stopped citing *Jacobson*. Otherwise, the majority of decisions on either side of multiple splits conflict with *Brooklyn Diocese* and *South Bay II*.

First of all, California's statement (Opp.12) that "there is every reason to expect that lower courts will continue to apply this Court's guidance" is absurd. California itself refuses to follow that guidance, forcing South Bay to obtain the *South Bay II* injunction, while Harvest Rock received the same relief on the same date (February 5), *Harvest Rock Church v. Newsom*, ___ S. Ct. ___, 2021 WL 406257 (2021), and several pastors received a GVR a few days later. *Gish v. Newsom*, ___ S. Ct. ___, 2021 WL 422669 (2021).

Evidently in the belief that this Court "can't catch them all," Santa Clara County sallied forth with its own total worship ban. With dreary predictability, the district court and the Ninth Circuit rubber-stamped it, prompting a *fourth* rebuke and emergency injunction from this Court: "The Ninth Circuit's failure to grant relief was erroneous. This outcome is clearly dictated

by this Court's decision in [*South Bay II*]." *Gateway City Church v. Newsom*, ___ S. Ct. ___, 2021 WL 753575 (2021) ("*Gateway II*").

And now, district courts in California are denying injunctive relief to churches (including South Bay) challenging California's outlier percentage capacity restrictions, issuing opinions that smack of déjà vu. See Oral Ruling, *S. Bay United Pentecostal Church v. Newsom*, 3:20-cv-00865-BAS-AHG, ECF No. 119 (S.D. Cal. Mar. 29, 2021), *aff'd*, *In re S. Bay United Pentecostal Church*, ___ F.3d ___, 2021 WL 1232108; Oral Ruling, *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832-JAM-CKD, ECF No. 130, at 42–47 (E.D. Cal. Mar. 9, 2021) (available at D.C. Dkt. 101).

California's rebellion against this Court's teaching occurs among three distinct splits in the lower courts concerning: (1) What constitutes irreparable harm? (2) When does strict scrutiny apply? and (3) When is strict scrutiny satisfied? These conflicts cry out for further definitive guidance.

* * *

The first split concerns harm. In June 2020, the Seventh Circuit held that free exercise is not compromised by state-imposed "remote" worship: "Feeding the body requires teams of people to work together in physical spaces, but churches can feed the spirit in other ways." *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 347 (7th Cir. 2020). The Seventh Circuit reaffirmed its secular value judgment. *Cassell v. Snyders*, 990 F.3d 539, 550 n.1 (7th Cir. 2021) (unlike

groceries, "in-person religious services" are only "importan[t] to those who attend").

Less than a week apart, the First and Second Circuits split over state-imposed modifications of worship. The First Circuit found no "serious harm" when a plaintiff can hold "online worship services . . . drive-in services, and . . . gatherings of ten or fewer people." *Calvary Chapel of Bangor v. Mills*, 984 F.3d 21, 29 (1st Cir. 2020). The Second Circuit disagreed: "The court below concluded that Agudath Israel had not demonstrated irreparable harm because its congregants could 'continue to observe their religion' with 'modifications.' This was error." *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636 (2d Cir. 2020).

The second split concerns when strict scrutiny *applies*. The Sixth Circuit held that closure of all schools, including religious schools, was neutral because all schools were closed. *Commonwealth v. Beshear*, 981 F.3d 505, 510 (6th Cir. 2020). Likewise, the Ninth Circuit has twice held a restriction on "gatherings"—conveniently defined to exclude crowds of people engaged in commerce—is neutral because all "gatherings" are covered. *Gateway City Church v. Newsom*, No. 21-15189, 2021 WL 781981 (9th Cir. Feb. 12, 2021) (unreported) (Santa Clara County's "gathering" restrictions); *Tandon v. Newsom*, ___ F.3d ___, 2021 WL 1232730, *5 (statewide "gathering" restrictions).

The Sixth and Ninth Circuits so held even though this Court has clearly suggested they are in error. *Danville Christian Acad., Inc. v. Beshear*, 141 S. Ct. 527,

528 (2020) (expired school closure order subject to later challenge if renewed, including a *Yoder* challenge).

In contrast, the Sixth Circuit subsequently, and the Ninth Circuit previously, held that facial neutrality is insufficient and courts must determine whether religion is "disparate[ly] treat[ed]." *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020); *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1141 (9th Cir. 2021) ("*S. Bay I*"); see also *Tandon*, ___ F.3d ___, 2021 WL 1232730, *18 (Bumatay, J., dissenting). In a few short months, two circuits have flipped positions.

The third split concerns when strict scrutiny is *satisfied*. The Sixth Circuit (at least now) takes a rigorous approach in keeping with *Brooklyn Diocese* and this Court's constant teaching. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920 (1995). Thus, respecting a second school closure order, the Sixth Circuit, noting that the government had not even contested strict scrutiny, held it could never be satisfied and enjoined the closure. *Monclova*, 984 F.3d at 482.

The Second Circuit is similarly rigorous. Concerning New York's disparate percentage capacity restrictions on houses of worship under its "Cluster Action Initiative," the court, while remanding, made clear that under *Brooklyn Diocese* New York had a nearly impossible burden to justify those restrictions. *Agudath*, 983 F.3d at 628. On remand, New York—

taking the hint—acquiesced in a *permanent* injunction against *all* the percentage capacity restrictions on houses of worship. *Agudath Israel of Am. v. Cuomo*, No. 20-CV-4834, 2021 WL 804717 (E.D.N.Y. Feb. 9, 2021).

In this case, the Ninth Circuit held that California's percentage capacity restrictions on worship satisfied strict scrutiny because of the (data-less) pontificating of the State's experts on four or eight "risk factors" that supposedly required worship to be regulated more harshly than commerce. *S. Bay I*, 985 F.3d at 1142–48.[4] This Petition addresses that error—the same error the Second Circuit recognized in *Agudath*.

Similarly, the Seventh Circuit held that "the fine-grained details" of comparing worship with other activities are "crucial," holding that it could not issue an injunction on the supposedly undeveloped record. *Cassell*, 990 F.3d at 548.

Thus, the Seventh and Ninth Circuits, unlike the Second and Sixth, have ignored this Court's identification in *Brooklyn Diocese* of relevant secular comparators for determining disparate treatment of religion: large stores, factories, schools (*id.* at 67); "hardware

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[4] There is an intra-circuit split in the Ninth. In *Dayton Valley*, the Ninth Circuit struck down a Nevada executive order limiting churches to 50 people or 25% capacity while favored businesses were allowed 25% with *no* in-person cap. 982 F.3d at 1230 n.1. The court enjoined the 50-person cap and mandated no less than 25% capacity for churches, with leave to grant greater relief on remand. *Id.* at 1234. Following denial of certiorari, the case is stayed pending negotiations.

stores, acupuncturists, liquor stores, bicycle repair shops, certain signage companies, accountants, lawyers, and insurance agents . . . bus stations and airports, laundromats and banks, hardware stores and liquor shops." *Id*. at 69 (Gorsuch, J., statement).

*   *   *

Finally, district court decisions reveal an undercurrent of resistance to this Court's guidance. In January, one district court held that *Jacobson* is binding until expressly overruled. *Delaney v. Baker*, No. CV 20-11154-WGY, 2021 WL 42340, at *11 (D. Mass. Jan. 6, 2021).

On March 10, another district court—in California, of course—insisted on applying the rational basis test regardless of this Court's negation of "*Jacobson* deference." *Calvary Chapel of Ukiah v. Newsom*, No. 2:20-cv-01431-KJM-DMC, 2021 WL 916213, at *12 (E.D. Cal. Mar. 10, 2021) (ban on congregational singing but not professional "performers" is neutral).

A day earlier, in *Cross Culture*, another California district court issued essentially the same opinion as the lower courts here. Flatly rejecting this Court's comparators approach, the district court opined: "I don't think constitutional analysis would permit a district court to compare houses of worship to any other secular location." *Id.*, ECF No. 130, at *8:16–22. Citing Justice Kagan's dissent in *South Bay II*, the court concluded that strict scrutiny was satisfied based on California's *ipse dixit* that worship is riskier than

commerce. *Id*. at *45–48 (D.C. Dkt. 101). No doubt the Ninth Circuit stands ready to affirm.[5]

California district courts thus continue to embrace the very argument this Court rejected in *Brooklyn Diocese* and *South Bay II*: "But California errs to the extent it suggests its four factors are always present in worship, or always absent from the other secular activities its regulations allow." *S. Bay II*, 141 S. Ct. at 718 (Gorsuch, J., statement).

Turning finally to this case, the district court denied South Bay a TRO raising its percentage capacity cap from 25% to 50% in time for Easter. On remand from this Court, California argued—for the first time in the proceedings below—that the District Court should rely on permitted "density" or "occupant load" under the Building and Fire Codes. D.C. Dkt. 119, at *22:6–20. According to California, because churches could technically have more people per square foot than retail, lower percentage caps for churches are constitutional. *Id*. at *30:2–5.

When Governor Cuomo introduced this same argument on appeal, the Second Circuit dismissed it as an impermissible "*post hoc* rationalization . . . found nowhere but in the defendants' litigating papers."

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[5] The judicial profession of confusion concerning comparators in *Cross Culture* is not unique, but rather is seen in the Seventh Circuit, which likewise cited Justice Kagan's dissent in *South Bay II* while professing a lack of clarity on the question of comparators under *Brooklyn Diocese* and *South Bay II*. *Cassell*, 990 F.3d at 548 ("many questions remain unanswered").

Agudath, 983 F.3d at 635 (cleaned up). See also *Archbishop of Washington*, 2021 WL 1146399, *15 (agreeing with *Agudath* and enjoining 25% cap on churches).[6]

But the District Court here agreed with California's *post hoc* contrivance, holding that person-per-square foot is suddenly key to narrow tailoring. D.C. Dkt. 119, at *44:16–21, 48:21–22, 53:14–15. The Ninth Circuit, ignoring the Second Circuit's opinion in *Agudath*, affirmed denial of the TRO and denied South Bay's mandamus application without prejudice. *In re S. Bay*, ___ F.3d ___, 2021 WL 1232108, *2.

The Ninth Circuit's decision in *In re South Bay* foreshadows another circuit split—this time driven by the *post hoc* rationalization of "occupant load."

II. The Lower Court Splits Can Be Resolved by Further Guidance Here.

California argues that because South Bay has already been granted all the relief justified by the record below, this case is a poor fit for plenary review. Opp.9–11. But, as noted above, South Bay seeks relief from *all* the Blueprint's disparately applied capacity limitations—the same relief that eventuated in *Agudath* in light of *Brooklyn Diocese*.

Moreover, the pertinent record *is* complete: churches are afforded only one-half or one-third the

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[6] The Ninth Circuit further departed from *Brooklyn Diocese* in ignoring South Bay Church's "admirable safety record[]." *Brooklyn Diocese*, 141 S. Ct. at 67.

capacity of secular comparators in Tier 2 (25% for churches, 50% or 100% for favored businesses), Tier 3 (50% for churches but 100% for favored businesses), and Tier 4 (same). As Justice Gorsuch noted in *South Bay II*, "nothing in our order precludes future challenges to the other disparate occupancy caps applicable to places of worship, particularly in 'Tiers' 2 through 4." 141 S. Ct. at 719 n.1. That is what is presented here.

Finally, in view of the division in the lower courts, South Bay respectfully requests that this Court employ this case as a vehicle for a decision containing the following points of Free Exercise analysis in the context of pandemics and other emergencies:

First, adopting the "disparate treatment" test in *Monclova* and *Dayton Valley* as formulated with precision in Judge Bumatay's dissent in *Tandon*: that under *Brooklyn Diocese*, "regulations must place religious activities on par with the most favored class of comparable secular activities, or face strict scrutiny." *Tandon*, ___ F.3d ___, 2021 WL 1232730, *15.

Second, as suggested by the Becket Fund in *Gateway II*, "the Court should expressly recognize what *Diocese of Brooklyn* and *South Bay II* implicitly hold: severe restrictions on worship are presumptively invalid under the First Amendment." Brief as *Amicus Curiae* 12, in 20A138, https://bit.ly/2PHHWya.

Third, adopting the narrow tailoring test proposed by Justice Alito: "the State [must] demonstrate[ ] clearly that nothing short of [its] measures will reduce

the community spread of COVID-19 at [] religious gatherings to the same extent as do the restrictions the State enforces with respect to other activities[.]" *S. Bay II*, 141 S. Ct. 716.

Fourth, adopting the Second Circuit's approach to irreparable harm in *Agudath*: *i.e.*, that state-imposed "remote" or otherwise churchless worship is per se irreparable harm.

In general, this Court should remind lower courts that government restrictions on fundamental liberties must be "actually necessary to the solution" of a real problem and be supported by more than "ambiguous proof." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799, 800 (2011); *Agudath*, 983 F.3d at 628. Further, where the evidence is in "equipoise" the tie goes to churches. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 426–27 (2006) (striking down ban on drug used in religious ceremonies).

III. Summary Reversal or Vacatur is Also Appropriate.

Lastly, California invites vacatur instead of certiorari. Opp.11 n.9. South Bay agrees this Court should at least order vacatur. See *Planned Parenthood v. Abbott*, ___ S. Ct. ___, 2021 WL 231539 (2021). But South Bay believes that summary reversal or full merits review on certiorari is more appropriate because lower courts are indeed applying this Court's "standard in name only." *Maryland v. Kulbicki*, 577 U.S. 1, 2 (2015). A further opinion from this Court is urgently needed.

Without an unmistakable landmark, the courts below will continue to disagree over, or deliberately circumvent, *Brooklyn Diocese* and the Court's subsequent guidance.

CONCLUSION

For the reasons stated, South Bay respectfully requests that this Court grant its petition for a writ of certiorari, or summarily reverse, and in either case clarify and develop precedent for the various circuit and district courts to follow.

Respectfully submitted,

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