No. 20-A138

In The
Supreme Court of the United States

GATEWAY CITY CHURCH, ET AL.,

Applicants,
v.

GAVIN NEWSOM, ET AL.,

Respondents.

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

Applicants' Brief In Reply to Respondents' Opposition to the Emergency Application for Writ of Injunction Or In The Alternative For Certiorari Or Summary Reversal

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PARTIES

Applicants are Gateway City Church, The Home Church, The Spectrum Church, Orchard Community Church, and Trinity Bible Church. Respondents are County of Santa Clara and Sara H. Cody, M.D., in her official capacity as Santa Clara County Health Officer, County of Santa Clara.

RULE 29.6 DISCLOSURE STATEMENT

Applicants Gateway City Church, The Home Church, The Spectrum Church, Orchard Community Church, and Trinity Bible Church hereby state that they are each nonprofit corporations established pursuant to section 501(c)(3) of the Internal Revenue Code, incorporated under the laws of the State of California, do not issue stock, have no parent corporations, and that there are no parent or publicly held companies owning 10% or more of the corporation's stock.

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

Gateway City Church, The Home Church, The Spectrum Church, Orchard Community Church, and Trinity Bible Church ("Churches") respectfully submit their Applicants' Brief In Reply to the Respondents' Opposition to the Emergency Application for Writ of Injunction Or In The Alternative For Certiorari Or Summary Reversal filed by the County of Santa Clara and the Santa Clara County Health Officer, Sara H. Cody, M.D. (collectively "County"). By this reply brief, the Churches will not repeat arguments previously set forth in their application.

ARGUMENT

I. THE COUNTY'S FRAMING OF THE QUESTION PRESENTED BEGS THE QUESTION AS TO WHETHER THE INDOOR WORSHIP PROHIBITION IS A NEUTRAL AND GENERALLY APPLICABLE LAW.

The County begins by framing the question as if the central issue has already been resolved – in its favor. The question that the County has presented asks whether the First Amendment compels the creation of a religious exemption for indoor worship services from a "uniform…prohibition" on all gatherings. Co. Brief, p. i. This statement inserts an assumption that the prohibition is uniform. By *uniform* the County means a neutral law of general applicability. Whether the prohibition is uniform sits at the heart of the dispute. As explained below, it comes as no surprise that the Churches -- which last Sunday were again prohibited from holding a worship

service inside their sanctuaries – disagree with the presumption that the *Gathering* and *Capacity Directives* are either neutral or generally applicable.

II. THAT THE CHURCHES CAN MEET AT 20% CAPACITY – EXCEPT TO HOLD A WORSHIP SERVICE – IS NOT A NEUTRAL RULE.

The County's position is straightforward. A religious congregation can use its facility at 20% capacity, but not for a worship service. Co. Brief, p. 1. Stated otherwise, 20% of the faithful can meet at their place of worship, so long as they do not worship. To state the proposition is to recognize that it fails neutrality.

Consider Gateway City Church which has 2,000 people on any given Sunday during ordinary times meeting in a 60,000 sq. ft. building with an auditorium for seating of around 1,000. At 20% capacity, 400 congregants can be present "for any purpose," id., with no limitations on time or space so long as they do not worship together. The consequences of what the County is stating is remarkable for all of the wrong reasons. The County asserts that these 400 faithful can do what they will at Gateway City Church except for the act of corporate worship, i.e., a worship service. A worship service is categorized by the County as a "gathering," and gatherings are prohibited. Yet the (1) same number of persons (2) at the same location (3) meeting for any length of time and, (4) for any other purpose, falls outside of what the County deems a "gathering."

"[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Church of Lukumi Babalu Aye v. City of*

Hialeah, 508 U.S. 520, 533 (1993). On its face, the County's *Capacity Directive* targets a specific expression of faith – **worship** services – "without a secular meaning discernable from the language or context," Id. Note that the modifier for service is *worship*. Therefore, the *Capacity Directive* fails neutrality making it subject to strict scrutiny review.

III. THE DEFINITION FOR *GATHERINGS* IS NOT A GENERALLY APPLICABLE LAW IN LIGHT OF THE ENUMERATED EXCEPTIONS.

The County runs away from the face of the text of its *gatherings* definition which reads,

> A "gathering" is an event, assembly, meeting, or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and in a coordinated fashion—like a wedding, banquet, conference, religious service, festival, fair, party, performance, competition, movie theater operation, fitness class, barbecue, protest, or picnic. App. Brief, *Gatherings Directice*, Exh. F, p. 2.

Absent from the County's opposition brief is an explanation of how an airport falls outside of this definition. Is waiting to board a flight with 100-400 persons not an "event, assembly, or convening?" Are not "multiple people from separate households" waiting to catch the same plane? Why isn't a gate a "single space"? Is waiting for a flight as a ticketed passenger, lining up to board by row number, section, or other grouping at an airport gate somehow not an event done in a "coordinated fashion?" The County fails to articulate how waiting for a flight at a gate is not encompassed by this boutique definition of *gatherings*.

The rules for gatherings also run into serious constitutional shortcomings due to enumerated exceptions. This is not only true of gatherings at airport gates, but also of a meeting or event such as a hearing in a courtroom, a lesson given in a classroom,[1] a government meeting, or waiting for transit. App. Brief, Exh. E, p. 24. All such activities are an "event, assembly, meeting, or convening that brings together multiple people from separate households in a single space." Yet a worship service is an assembly or meeting that is *verboten*. "When a State so obviously targets religion for differential treatment, our job becomes that much clearer." *South Bay United Pentecostal Church, et al. v. Gavin Newsom, Governor of California, et al.*, 592 U.S. ___ (Feb. 5, 2021) No. 20A136 (20-746)(Gorsuch, J., concurring), ("*South Bay II*").

The County argues that "listing worship services as one of many examples of activities captured by the definition of gatherings does not evidence any discriminatory or even disparate treatment of worship services." Co. Brief, p. 18. This is a *non sequitur*. The premise is that listing an activity as an example of something that is prohibited is not the same as entering that activity on a prohibited list. It remains inescapable that under either circumstance, the identical activity is proscribed. By way of illustration, the analysis in *Lukumi* would be no different if the City of Hialeah had defined *unlawful killing of animals* in the municipal code as follows:

> Except for purposes of the consumption of food, the

[1] See, Calvary Chapel San José, Southridge Baptist Church of San José, Advocates for Faith & Freedom, *amicus* brief, Exh. C, p.4-5, ¶ 6(c).

> "unlawful killing of an animal" is defined as the infliction of injury on a nonhuman creature with the intent of the cessation of biological function – like religious animal sacrifice, skinning alive, hanging by the throat until breathing ceases, immolation.

Use of the word ***like*** in the hypothetical definition above or in the County's definition of *gathering* (e.g., "like a religious service") fails to eradicate the disparate treatment of religion. Whether meant as illustrative or not, all of the enumerated activities appearing on the definition are in fact banned. The County never explicates how setting forth a list of banned activities is fundamentally different than drafting a definition that provides examples of activities that the government bans.

IV. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE COUNTY HAS SOME JURISDICTION OVER AIRPORTS.

The Federal Aviation Administration ("FAA") issued a guidance with regards to COVID-19 restrictions and accommodations. The guidance explicitly provides that state and local jurisdictions retain authority to restrict individuals when they are in the airport. "The guidance here is not legally binding in its own right…[c]onformity with this guidance, as distinct from existing statutes, regulations, is voluntary only…." App. Brief, Exh. 4, at p. 1. The District Court was correct that this is not the language of preemption. Citing evidence from the County and State, the District Court found that "the federal government does not categorically prohibit local governments from imposing public health ordinances on airports; rather, it has indicated that any such measures must be approved by the FAA." Id., at p. 11-13.

As such, "It does not follow that the State and County cannot impose *any* public health measures on airports at all." Id., at p. 20:16-17.

A short point should be mentioned regarding the County's claim that it has placed a 20% capacity limitation on airports. First, the *Capacity Directive* does not mention airports. It does provide: "**Public Transit**[:] All indoor waiting areas accessible to the public are limited to 20% capacity." App. Brief., Exh. E, p. 4. If the County claims that airports are included in the *Capacity Directive*, they have thereby conceded that they have jurisdiction over the airports in Santa Clara County. On the other hand, if airports are not covered under the *Capacity Directive*, the County has not provided any citation in support of the claim that airports are under a County-imposed 20% capacity limitation.

Tellingly, up until this litigation, the County has not claimed that the airport exemption is based on a lack of jurisdiction. Instead, the County's Public Health Department has pronounced that it is "not currently recommending closure of airports."[2] In contrast to the County's dithering in its opposition brief over the extent of its jurisdiction, this published statement is not the language of an entity that is unsure of whether it possesses authority over airports.

[2] County of Santa Clara Public Health Department: Statement Regarding COVID-19 and Airports." Mar. 11, 2020. Accessed at https://www.sccgov.org/sites/phd/news/Pages/covid-19-airports.aspx

V. AN AIRPORT IS NO MORE OF A TRANSITORY VENUE THAN A PLACE OF WORSHIP.

The County submits that an airport is a transitory venue but a church is not. Co. Brief, p. 27. If by *transitory* the County means that it is a place used as a center for transportation, such is true. However, an airport is not transitory in the sense of people constantly moving about like shoppers at grocery or retail stores as they walk down aisles selecting items. In contrast, when 100-400 travelers sit together for 1-2 hours at an airport gate, that activity is no more transitory than the faithful who sit at a place of worship.

Both the District Court and the County make the claim that persons in places of transit are "independent" and "asocial." Co. Brief, p. 27; App. Brief, Exh. D, p. 20-21. The notion that worshipers are more social than travelers may be true upon entrance and exit of a religious sanctuary, but not during the service itself. Worshipers stand, sit, and kneel but typical religious services do not entail conversations with nearby congregants during the meeting. Before the service begins or after the benediction, fellowshipping with other believers occurs. However, under those circumstances health concerns can be mitigated by use of the same social distancing and masking rules observed in stores, government offices, and airports.

VI. THE COUNTY'S RISK PROFILE REASONING IS LESS NARROWLY TAILORED THAN CALIFORNIA'S RATIONALE THAT WAS JUST REJECTED BY THIS COURT.

The County makes little effort to elucidate how its risk profile is narrowly tailored and provides nothing by way of demonstrating that it uses the least restrictive means to achieve its goals.[3] *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). Though falling short in this Court, the State of California's attempt to claim narrow tailoring were more robust than the County's risk profile. Summarizing the State's process, Justice Gorsuch writes, "The State offers essentially four reasons…: It says that religious exercises involve (1) large numbers of people mixing from different households; (2) in close physical proximity; (3) for extended periods; (4) with singing." *South Bay II* (Gorsuch, J., concurring).[4] The sum of the matter is that this Court determined that California's rules and reasoning for the many entities and activities allowed were not narrowly tailored. If California's more sophisticated plan falls short of narrow tailoring, all the more so does the County's risk profile here.

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[3] The risk factors are a combination of "type, location, size, and duration of an activity." Co. Brief, p. 6.

[4] California enumerates seven risk factors. For further explanation of the State's risk factors, see *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, __ (9th Cir. 2021). Justice Gorsuch combined some of those factors hence compressing them to a more easily digestible set of four as quoted above.

Moreover, the County is the only jurisdiction in the nation that totally prohibits indoor worship services.[5] In terms of justifying a 0% capacity restriction on indoor worship services, the County provides no discernible rationale or specialized scientific knowledge suggesting that it alone has greater insight than all of the state, municipal, and county public health officials across the country.[6] Nor has it attempted to justify its punitive measures against religious institutions.[7] If the County stands as the sole outlier in the country, how can its rules be the least restrictive means available?

In sum, the County has fallen woefully short of carrying its burden on narrow tailoring and least restrictive means.

VII. THE 10-DAY QUARANTINE FOR FLIGHTS EXCEEDING 150 MILES LACKS EVEN A RATIONAL BASIS.

Despite on the one hand claiming a want of real authority to control airports, the County on the other hand puts forward a rule regarding air travel that it deems relevant to this case. The rule is the imposition of a 10-day quarantine for travelers that fly from destinations more than 150 miles away. Co. Brief, p. 24.

The 150-mile-quarantine rule stands as utterly devoid of scientific support. For example, a business traveler boards a morning flight out of San José for a day's meeting in Sacramento and takes the afternoon flight back. The distance by car is 121

[5] Roman Catholic Bishop of San José *amicus* brief, p. 3-4.
[6] Id. Appendix of catalogue of state-level restrictions on indoor worship. *COVID-19 and Religious Liberty*
[7] Calvary Chapel San José, et al., *amicus* brief, p. 1-3.

miles but by air is only 88 miles.[8] The traveler is not subject to the 10-day 150-mile-quarantine rule. If the same business traveler instead takes the one-hour morning flight to Los Angeles (305 miles)[9] and the afternoon flight back, the traveler must quarantine for 10 days. There is no evidence that the risk of spreading COVID-19 is any greater because of the extra miles flown in the day trip to Los Angeles than the morning/afternoon flights to Sacramento. It becomes more absurd when considering a similar trip from San José to Lake Tahoe and back which is 151 miles one way[10] -- just one mile over the 150-mile quarantine limit. If challenged, the 10-day 150-mile-quarantine rule could not withstand rational basis review.

Assuming that there is any science behind the 10-day quarantine for those arriving in the County of Santa Clara from a distance of more than 150 miles, the Churches propose that the same requirement for quarantine could apply to worshipers who travel more than 150 miles one-way to go to church. This puts to rest the County's notion that the Churches seek special treatment. Not so. The Churches seek equal treatment.[11]

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[8] TravelMath. Accessed at https://www.travelmath.com/from/Sacramento,+CA/to/San+Jose,+CA

[9] Id. Accessed athttps://www.travelmath.com/from/San+Jose,+CA/to/Los+Angeles,+CA

[10] Id. Accessed at https://www.travelmath.com/distance/from/Lake+Tahoe/to/San+Jose,+CA

[11] The Church-State Scholars *amicus* brief (p. 12-19) argues that granting this application would violate the Establishment Clause by giving special treatment to religious institutions. This is a misreading of the Churches' application. As

CONCLUSION

The foregoing considered, the Churches ask that their application be granted, or in the alternative, the applicants request the Court grant of certiorari or summary reversal.

Dated: February 25, 2021

s/ Kevin Snider

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demonstrated by their willingness to abide by the County's 150-mile 10-day quarantine, the Churches stand ready and willing to abide by the *same* rules as airports.