

In the Supreme Court of the United States

HARVEST ROCK CHURCH, INC.; HARVEST INTERNATIONAL MINISTRY, INC.,
ITSELF AND ON BEHALF OF ITS MEMBER CHURCHES IN CALIFORNIA,
Applicants,

v.

GAVIN NEWSOM, IN HIS OFFICIAL CAPACITY
AS THE GOVERNOR OF CALIFORNIA,
Respondent.

**On Emergency Application for Writ of Injunction to the Honorable
Elena Kagan, Associate Justice of the United States Supreme
Court and Circuit Justice for the Ninth Circuit**

**UNOPPOSED MOTION BY SOUTH BAY UNITED
PENTECOSTAL CHURCH AND BISHOP ARTHUR HODGES III,
WITH ATTACHED PROPOSED *AMICUS CURIAE* BRIEF IN
SUPPORT OF APPLICATION AND IN SUPPORT OF
EMERGENCY APPLICATION FOR WRIT OF INJUNCTION, FOR
LEAVE (1) TO FILE THE BRIEF, (2) TO DO SO IN AN UNBOUND
FORMAT ON 8½-BY-11-INCH PAPER, AND (3) TO DO SO
WITHOUT TEN DAYS' ADVANCE NOTICE TO THE PARTIES**

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**UNOPPOSED MOTION FOR LEAVE (1) TO FILE *AMICUS CURIAE* BRIEF
OF SOUTH BAY UNITED PENTECOSTAL CHURCH AND BISHOP
ARTHUR HODGES III IN SUPPORT OF APPLICATION AND IN SUPPORT
OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION, FOR LEAVE
(1) TO FILE THE BRIEF, (2) TO DO SO IN AN UNBOUND FORMAT ON 8½-
BY-11-INCH PAPER, AND (3) TO DO SO WITHOUT TEN DAYS' ADVANCE
NOTICE TO THE PARTIES¹**

Movants, a Pentecostal church in San Diego County, California, and its pastor, Bishop Arthur Hodges III (“South Bay”), that are litigating a substantially similar action in the Southern District of California and before the Ninth Circuit, respectfully request leave of the Court to (1) file the attached *amicus curiae* brief in support of applicants and in support of applicants’ emergency application for a writ of injunction, (2) file the brief in an unbound format on 8½-by-11-inch paper, and (3) file the brief without ten days’ advance notice to the parties.

Position of the Parties

Applicants and Respondent consent to this motion.

Identities of *Amici*; Rule 29.6 Statement

The proposed *amici* are a California church and its pastor. South Bay Pentecostal Church is a nonprofit public benefit corporation organized under the laws of the State of California. It does not have any parent corporation or any stock. Bishop Hodges is the Senior Pastor and Chief Executive Officer of South Bay Pentecostal Church.

¹ No counsel for a party authored this motion or the proposed *amicus* brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to fund the motion’s or brief’s preparation or submission.

Interests of *Amici*; Summary of Proposed Brief

Movants are a California church and its pastor who are actively litigating a nearly identical case in the Southern District of California and before the Ninth Circuit. Movants have carefully followed all of the religious liberty litigation in California challenging Governor Newsom’s COVID-19 restrictions, including their own case, and cases in California Superior Court. Following this Court’s denial of their emergency application for a writ of injunction, the Ninth Circuit granted Movants limited remand to the district court for the purpose of supplementing the record, and now Movants are again litigating their challenge before the Ninth Circuit.

Upon reviewing this Court’s decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 2020 WL 6948354 (2020), as well as Respondent Governor Newsom’s brief in the present application, Movants determined that various statements in Governor Newsom’s brief needed correcting lest this Court issue an order that prejudices Movants’ rights in their case, and the rights of other churches fighting in California Superior Court for the right to worship.

In addition, this Court should explicitly reject the notion that Governor Newsom’s “Blueprint for a Safer Economy” is neutral based on its classification of like-industries-alike, *see* Resp. Br., 11–14, 18–22, when Governor Newsom also contends that such classification is a scientific one entitled to deference. Contrary to Governor Newsom’s arguments, such classification is both rebuttable and has been rebutted by preeminent experts in Movant’s own action. Further, this Court should make very clear that traditional strict scrutiny analysis applies to all religious

challenges to COVID-19 orders—guidance which various lower courts desperately need. *Contrast* Resp. Br., 38 n.28.

Finally, relief is needed from this Court—not the Ninth Circuit. *See* Resp. Br., 16–18. In addition to civil rights actions in every federal court in California, there are pending administrative and state law actions brought by California municipalities in California state court. These actions seek thousands of dollars in fines and contempt sanctions. Only an opinion from this Court will bind those proceedings.

Format and Timing of Filing

Applicants filed their emergency application on November 23, 2020; two groups of proposed *amici* filed their motions for leave to file *amicus curiae* briefs on November 25 and 27, 2020; and Respondent filed his brief on November 30, 2020. Upon reviewing Respondent’s brief in the evening of November 30, proposed *amici* determined that an *amicus* brief would aid the Court, and immediately determined to file one. In light of the need to file this brief immediately, there was insufficient time for the proposed *amici* to prepare their brief for printing and filing in booklet form, as ordinarily required by Supreme Court Rule 33.1. Nor, for the same reason, were the proposed *amici* able to provide the parties with ten days’ notice of their intent to file the attached brief, as ordinarily required by Rule 37.2(a). But the proposed *amici* did provide notice of their intent to file the brief to the parties in the morning of December 1, 2020, promptly after reviewing Respondent’s brief, and all parties consented to the filing of the *amicus* brief.

* * *

For the foregoing reasons, the proposed *amici* respectfully request that the Court grant this motion to file the attached proposed *amicus* brief and accept it in the format and at the time submitted.

Respectfully submitted,

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INTRODUCTION

It has now been over eight months since the COVID-19 pandemic was first identified as a serious threat to society, when across the nation many states, including California, initiated two-week “lockdowns” in an attempt to slow the spread of the virus. The stated goal to justify such extreme measures was to “flatten the curve” so that hospitals would not be overwhelmed and lives unnecessarily lost.

At that time, little was known for certain about how the novel coronavirus spread. Recognizing that a complete shutdown of human activity would be impossible, Governor Newsom designated certain “sectors” as “essential,” thus permitting various businesses or organizations to continue operating during the lockdown, as long as they complied with industry guidelines regulating how they did their work. Places of Worship were excluded from “essential” activities, and a small concession categorized clergy as essential only while working remotely. Governor Newsom compounded his error by designing burdensome barriers impacting the ability of religious congregations, such as *Amici* South Bay United Pentecostal Church and Bishop Arthur Hodges III (collectively “South Bay”), to practice their faith within both the “Resilience Roadmap” of May 7, 2020 and, even more egregiously, through its successor, the “Blueprint to a Safer Economy” of August 27, 2020.

But then at midnight on Wednesday, November 25, 2020, this Court issued a per curiam opinion in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___, 2020 WL 6948354 (2020), enjoining New York’s COVID-19 restrictions as applied to churches. This Court recognized that “[i]t is incumbent on the courts to ensure

decisions are made according to the rule of law, not hysteria. . . . One hopes that this great principle—essential to any free society, including ours—will not itself become yet another casualty of COVID-19.” *Dep’t of Health & Human Servs. v. Manke*, 943 N.W.2d 397, 398 (Mich. 2020) (Viviano, C.J., concurring). Although Respondent requests that this Court instruct the Ninth Circuit to reconsider Harvest Rock’s motion for injunctive relief pending appeal in light of *Diocese of Brooklyn*, see Resp. Br., 16–18, the unique aspects of California’s restrictions—such as the indoor worship ban, and ban on congregational singing—warrant this Court’s guidance. South Bay thus submits this brief to ensure that its interests, and the interests of all California churches, are protected.

RELEVANT FACTUAL BACKGROUND

A. Plaintiffs Bishop Hodges and South Bay Pentecostal Church.

Bishop Arthur Hodges III is Senior Pastor of South Bay Pentecostal Church, a diverse Christian community in Chula Vista, California. Before the pandemic restrictions, the church held three to five worship services every Sunday, for congregants to “come together with one accord” to pray and worship. Along with worship services, the church ministered to the faithful by performing baptisms, funerals, weddings, and other religious ceremonies. The sanctuary of South Bay Pentecostal Church can seat up to 600 people, but was usually only a third-, or half-filled, with 200–300 congregants. 2ER305–13.²

² Citations to “ER” and “9th Cir. Dkt.” are to the Excerpts of Record and the Docket in South Bay’s pending appeal before the Ninth Circuit, No. 20-55533. Following limited remand, there are now 16 volumes of the Excerpts of Record, located at 9th

Almost as soon as various state governors began issuing executive orders intended to curb the COVID-19 pandemic, suits were filed alleging that the orders infringed upon constitutional rights. *See* Verified Complaint, *Abiding Place Ministries v. Cty. of San Diego*, No. 20-cv-0683-BAS, 2020 WL 1881323 (S.D. Cal. Apr. 9, 2020). South Bay did not join in those lawsuits because the Church believed it was important to do its part in curbing the pandemic in March and April.

However, on Friday, May 8, 2020, the day California entered Stage 2 of its then-operative Resilience Roadmap, South Bay filed suit in the Southern District of California. That same day, South Bay filed an application for a temporary restraining order. 3ER609–10; Dist. Ct. Dkt. Nos. 3, 12. On Friday, May 15, 2020, the District Court denied South Bay’s application. 1ER1–33. That same day, South Bay appealed to the Ninth Circuit, and the next day filed an urgent motion for an injunction pending appeal. 2ER43–47; 9th Cir. Dkt. No. 2.

On Friday, May 22, 2020, the Ninth Circuit’s motions panel issued its order on South Bay’s motion for an injunction pending appeal. 9th Cir. Dkt. No. 29; *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020) (“*S. Bay I*”). The panel, Judges Silverman and Nguyen, issued a three-page order holding that strict scrutiny was not required under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (“*Lukumi*”). Judge Collins published an eighteen-page dissent in which he concluded that *Jacobson* does not apply to Free Exercise claims,

Cir. Dkt. Nos. 3 and 82. Citations to “Dist. Ct. Dkt.” are to South Bay’s action before the Southern District of California, No. 3:20-cv-865.

California's Resilience Roadmap was not "neutral" or "of general applicability," and did not satisfy strict scrutiny.

During the week following Monday, May 25, 2020, California lifted the first ban on all worship services. On May 29, 2020, this Court denied South Bay's application for an emergency writ of injunction. 9th Cir. Dkt. No. 31; *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) ("*S. Bay II*"). The denial was accompanied by a short concurring opinion by Chief Justice Roberts and a vigorous dissent by Justice Kavanaugh.

The following Sunday, May 31 (Pentecost Sunday), South Bay held worship services with no more than 100 persons in attendance. 13ER2993–94. To attend a Sunday worship service, the Church required its congregants to reserve their place online. Every Sunday, the Church had to turn numerous people away because it met the 100-person cap for each of its services. This is despite the fact that the sanctuary could safely (with social distancing) accommodate well over 100 persons. 13ER2994. South Bay went above and beyond with its safety measures, which led to the Church being unable to hold more than three worship services each Sunday. 13ER2994–95.

On June 12, 2020, California modified its uniform treatment of "protest" and worship." Under the June 12 regulations, there are no restrictions on protest or worship, so long as they occur outdoors, not indoors. But this did not help South Bay. The Church, like many other Places of Worship, does not have an adequate place where it can meet outdoors. More problematically, the Church's theology requires approaching the altar at the end of each service and performing baptisms (both with

social distancing as possible). The Church’s altar and baptistery is in its sanctuary auditorium, which is indoors. 13ER2993.

On July 6, 2020, in addition to the above restrictions, California published regulations stating that “Places of Worship must [] discontinue indoor singing and chanting activities.” 13ER3121. This restriction is particularly concerning because singing is at the very heart of Pentecostal worship services, and essentially acts as a ban on them. 13ER2993; 11ER2576–82. During these months, the parties filed their briefs on appeal before the Ninth Circuit. 9th Cir. Dkt. Nos. 36, 45, 46, 62.

On July 29, 2020, the Ninth Circuit ordered limited remand of the interlocutory appeal from the denial of South Bay’s motion for temporary restraining order “for the limited purpose of permitting the district court to consider Plaintiffs’ request in light of the events and case law that have developed since May 15, 2020.” 9th Cir. Dkt. No. 74 at 2.

Before the district court, South Bay filed a Verified Second Amended Complaint, 13ER2971–3028, submitted all of the extra-record evidence cited in its prior briefs before the Ninth Circuit and this Court, 13ER3029–14ER3599; 11ER2576–12ER2837; 5ER640–675, 731–907, and supplemented the record with declarations from esteemed experts, including new declarations from George Delgado, M.D., of COVID Planning Tools, 12ER2838–2852; 5ER715–730; and declarations from Jayanta Bhattacharya, M.D., Ph.D., a Stanford University medicine professor and author of the Great Barrington Declaration, 11ER2526–2540; 5ER664–671, 712–714; Sean Kaufman, CPH, an infectious disease specialist formerly

of the CDC, 13ER2917–2924; James Lyons-Weiler, Ph.D., a Bioinformatics research scientist, 13ER2925–2970; and Charles Cicchetti, Ph.D., a former economics professor, 13ER2853–2916.³

Nevertheless, on October 15, 2020, the District Court denied South Bay’s Renewed Motion. 4ER614–639. Following the issuance of that order, the Ninth Circuit Court ordered supplemental briefing, which the parties provided. That supplemental briefing primarily concerned Governor Newsom’s new “Blueprint for a Safer Economy,” which replaced the Resilience Roadmap. 9th Cir. Dkt. Nos. 83, 88, 89. Oral argument has yet to be scheduled.

On Tuesday, November 24, 2020, South Bay filed a petition for a writ of certiorari before judgment with this Court, No. 20-746. The next day, at midnight, this Court issued a per curiam opinion in *Diocese of Brooklyn*, 2020 WL 6948354. Because of the present Application submitted by Harvest Rock, South Bay has waited to file a motion for an injunction pending appeal in the lower courts, should this Court provide clear guidance. On December 1, 2020, the Ninth Circuit stayed all proceedings pending resolution of this application. 9th Cir. Dkt. No. 95.

B. Other Actions in California Superior Court

In addition to South Bay’s and Harvest Rock’s federal actions, there are numerous California Superior Court religious liberty actions, two of which South Bay

³ Those declarations addressed California’s then-operative “Resilience Roadmap,” but are transferrable to California’s present “Blueprint for a Safer Economy” because the defects remain the same.

will highlight.⁴ The first is a pair of actions titled *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).

There, despite Governor Newsom's orders, Grace Community Church began holding indoor worship services on Sunday, July 26, 2020, and has continued every Sunday since. Upon receiving a cease and desist letter from the County of Los Angeles, on Wednesday, August 12, 2020, Grace Community Church filed a civil rights action seeking injunctive relief in California Superior Court. Two days later, instead of filing a cross-action, the County of Los Angeles filed its own action, and sought a temporary restraining order against Grace Community Church, asserting that the church's worship services constituted a public nuisance.

The Court, the Hon. James C. Chalfant, denied the temporary restraining order in part, refusing to enjoin all indoor worship services as long as Grace Community Church complied with social distancing and mask wearing requirements. *See* 5ER778–92 (hearing transcript). That same day, the County of Los Angeles filed a petition for writ of mandate seeking an injunction from the court of appeal. The next day, Saturday, August 15, 2020, the appellate court stayed Judge Chalfant's ruling, but did not grant the injunction. The practical effect of the stay was that the County could issue a \$1,000 citation against Grace Community Church for holding

⁴ Counsel for South Bay also represents the religious objectors in these cases.

worship services, but there was no court order in place enjoining worship services.

Towards the end of August, the County of Los Angeles ramped up its efforts to shut down the worship services. On August 28, the County issued a notice of eviction to Grace Community Church, providing thirty days' notice that it was terminating its rental agreement for the church's parking lot. And on Sunday, August 30, 2020, the County of Los Angeles' Department of Public Health issued its first administrative citation to Grace Community Church. The County has continued issuing \$1,000 citations every week.

The preliminary injunction motion was ultimately heard by the Hon. Mitchell Beckloff—not Judge Chalfant. On Thursday, September 10, 2020, Judge Beckloff granted the County's requested preliminary injunction. Grace Community Church continued worshipping. A contempt trial is now set for January 15, 2021.

The second action is titled *Burfitt v. Newsom*, Kern Cnty. No. BCV-20-102267 (Cal. Super. Sep. 29, 2020). Father Trevor Burfitt is a Roman Catholic priest and a pastor of five churches, in four different California counties, that are associated with an international order of Catholic priests. After filing suit, and apparently in direct retaliation for the lawsuit, on October 15, 2020, two health inspectors from the County of Los Angeles visited one of his churches and issued it a \$1,000 citation for the “illegal” use of the 500-seat capacity sanctuary by “approximately 11” Catholic worshippers. The citation did not state whether the worshippers were socially distancing or wearing masks, but simply noted that permitting anybody to enter the church in the “purple tier”—even if they are praying alone—violated the health order.

An administrative appeal hearing is now set for January 14, 2021.

C. The Endless Lockdown of the “Blueprint”

On August 28, 2020, an entirely new bureaucratic scheme: the “Blueprint for a Safer Economy,” superseded California’s prior Resilience Roadmap and its County Monitoring List. 5ER885–907. With that scheme, Governor Newsom changed the parameters for evaluating the impact of COVID-19, to focus on the number of cases rather than the number of deaths or hospitalizations.⁵ Anyone who tests positive for the virus in California has a “case” of COVID-19, even if the person tested was asymptomatic or only mildly affected, never required hospitalization or even a doctor’s visit, i.e., is not ill. The Blueprint assigns counties to four color-coded “tiers” of “risk” which is totally reliant on the amount of testing (and penalizes a county for under-testing) plus the number of positive case results regardless of severity. 8ER1733–55.

	Higher Risk → Lower Risk of Community Disease Transmission***			
	Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Measure				
Adjusted Case Rate for Tier Assignment** (Rate per 100,000 population* excluding prison cases^, 7 day average with 7 day lag)	>7	4-7	1-3.9	<1
Testing Positivity^ (Excluding prison cases^, 7 day average with 7 day lag)	>8%	5-8%	2-4.9%	<2%

⁵ Prior County metrics: (1) 10% or greater increase in average COVID-19 hospitalizations during the past 3 days; (2) Fewer than 20% of ICU beds available; and (3) Fewer than 25% of ventilators available. See 13ER2856–2857.

“Purple” tier - Widespread: more than 7 “cases” per day per 100,000 people and more than 8% positive tests. In this tier “many non-essential indoor business operations are closed.” Places of Worship, since they are classified as *non-essential*, are not allowed to open. Services must be held outdoors only. The following activities are permitted to reopen *indoors* at full or (where indicated below) reduced indoor capacity, and with the proviso that “counties can restrict further,” 8ER1751–55:

- | | | |
|---|---|--|
| ○ “Essential” retail businesses (<i>e.g.</i> , liquor stores, cannabis dispensaries) | ○ Convenience stores | ○ Home improvement stores (25%) |
| | ○ Day Camps (including indoor facilities) | ○ Pharmacies |
| ○ All government offices | ○ Doctors and Dentists | ○ Hotels |
| ○ All “essential retail” offices | ○ Dry Cleaners | ○ Hotel fitness centers (50%) |
| | ○ Farmer’s markets | |
| ○ Appliance Repair Shops | ○ Florists (25%) | ○ Jewelry stores (25%) |
| | ○ Gas stations | ○ Laundromats |
| ○ Auto Repair Shops | ○ Grocery stores (50%) | ○ Libraries (25%) |
| ○ Banks and Credit Unions | ○ Hair Salons and Barbershops | ○ Non-essential retail (<i>e.g.</i> , toy stores) (25%) |
| ○ Bookstores (25%) | ○ Higher education institutions (in “certain indoor settings, like labs and studio arts”) | ○ Pet Groomers |
| ○ Carwashes | | |
| ○ Childcare | | |

Subsequently, California determined that “Personal Care Services” including “esthetic, skin care, electrology, nail services, body art professionals, tattoo parlors, and piercing shops, and massage therapy” could also open indoor in the “purple” tier.⁶

⁶ See *Blueprint for a Safer Economy: Activity and Business Tiers*, CAL. DEPT. PUB. HEALTH (Nov. 13, 2020 update), <https://www.cdph.ca.gov/Programs/CID/DCDC/>

“Red” tier - Substantial: 4–7 “cases” per day per 100,000 people and 5-8% positive tests. In this tier, “some non-essential indoor business operations are closed.” Places of Worship, considered a *non-essential indoor business*, may open, but with a cap of 25% or 100 people whichever is *fewer*.

“Orange” tier - Moderate: 1–3.9 “cases” per day per 100,000 people and 2-4.9% positive tests. In this tier, “some indoor business operations are open with modifications.” Places of Worship are allowed 50% capacity or 200 people, whichever is *fewer*. Retail, Shopping centers, personal care services, hair salons and barbershops have *no* capacity restrictions. Museums, Zoos and Aquariums can open up to 50% with *no hard cap*.

“Yellow” tier: - Minimal: less than one “case” per day per 100,000 people and less than 2% positive tests. In this tier, “most indoor business operations are open with modifications.” 5ER903– 905. Places of Worship are still subject to 50% capacity restrictions. *No capacity restrictions* for Museums, Zoos and Aquariums.

The Industry Guidances previously issued on April 28, 2020 now include a colored-coded chart for each Industry, which show the restrictions as applied for each tier of risk. The specific “Industry Guidance” for churches provides the following limitations, depending on what tier the county is in. 8ER1753.

CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf; *COVID-19 Industry Guidance: Expanded Personal Care Services*, CAL. CORONAVIUS (COVID-19 RESPONSE (Oct. 20, 2020), <https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf>.

Widespread Tier 1	Substantial Tier 2
Outdoor Only with modifications	Open indoors with modifications <ul style="list-style-type: none"> • Max 25% capacity or 100 people, whichever is fewer

Moderate Tier 3	Minimal Tier 4
Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity or 200 people, whichever is fewer 	Open indoors with modifications <ul style="list-style-type: none"> • Max 50% capacity

Notably, the Blueprint has no provision for returning to full liberty. Even the “yellow” risk tier, in which less than one “case” per day can be found per 100,000 people, only permits 50% church capacity. There is no “green” tier in the Blueprint because, as the Governor explained, “[w]e don’t put up green because we don’t believe that there’s a green light that says just go back to the way things were or back to the pre-pandemic mindset.”⁷

On November 16, Governor Newsom exercised the “emergency brake” he designed into the Blueprint—the tool by which he can override the Blueprint and

⁷ Gov. Newsom Outlines California’s New Simplified, 4-Tier COVID-19 Reopening Guidelines, CBS SF BAYAREA (Aug. 28, 2020), <https://sanfrancisco.cbslocal.com/2020/08/28/govnewsom-californiasnewsimplified-color-coded-covid-reopening-guidelines/>.

take whatever action he desires. Using that “emergency brake,” Governor Newsom pushed “94.1 percent of California’s population” into the Purple Tier.⁸

Under the Blueprint, Governor Newsom clearly envisions continuing his State of Emergency for an indeterminate amount of time, all the while subjecting California residents to a yo-yo experience of yanking between tiers, based on backroom statistical analyses and predictors that ignore the reality of what Californians need to survive economically and, even more importantly for those who practice a religious faith, spiritually.

ARGUMENT

1. California Churches Will Likely Succeed on the Merits: The Blueprint violates Worshippers’ Free Exercise Rights.

1.1. California’s Restrictions on Worship Are Subject to Strict Scrutiny

Under the First Amendment, a law burdening religion need only pass rational basis scrutiny if it is “neutral” and “of general application.” *S. Bay I*, 959 F.3d at 941 (Collins, J., dissenting) (citing *Lukumi*, 508 U.S. at 531). On the other hand, a law that is not neutral or not generally applicable must satisfy strict scrutiny. *Id.* at 944 (Collins, J., dissenting). In turn, a law is not neutral if its object is to infringe on religious exercise. *Id.* It is also not generally applicable if it is substantially underinclusive as to its purposes—that is, if it “fail[s] to prohibit nonreligious conduct

⁸ Governor Newsom Announces New Immediate Actions to Curb COVID-19 Transmission, OFFICE OF GOVERNOR GAVIN NEWSOM (Nov. 16, 2020), <https://www.gov.ca.gov/2020/11/16/governornewsom-announces-new-immediate-actions-to-curb-covid-19-transmission/>.

that endangers [the government's] interests in a similar or greater degree than [plaintiff's religious exercise] does." *Lukumi*, 508 U.S. at 432.

This Court has made clear that when COVID-19 orders restrict a church to a greater degree than "‘essential’ businesses," "acupuncture facilities, camp grounds, garages," "all plants manufacturing chemicals and microelectronics," "all transportation facilities," "a large store . . . that could ‘literally have hundreds of people shopping there on any given day,’" or "factories and schools," the orders are not neutral. *Diocese of Brooklyn*, 2020 WL 6948354, at *2. They are also not neutral when "statements made in connection with the challenged rules can be viewed as targeting" religious worshippers. *Id.*

Here, as shown above, California's occupancy restrictions on churches are plainly greater than those imposed on other industries. *See* Section A, *supra*. The ban on singing in church is also not neutral because it only applies to certain industries, and not others. *See* 9th Cir. Dkt. 89 at 17 n.6 (California's supplemental brief noting that the singing ban only applies to churches, protests, schools, and restaurants) (citing 7ER1405, 1420, 1432); *see also Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728, 733–34 (9th Cir. 2020) (O'Scannlain, J., dissenting) (finding that the same restrictions are neither neutral nor generally applicable).

Finally, here—contrary to Respondent's argument, *see* Resp. Br., 29—Governor Newsom's statements show that churches have been targeted from the very beginning. During an early May 7, 2020, press conference, Governor Newsom was

asked by a journalist why schools were being prioritized over places of worship. The following exchange followed:

Q: Thank you Governor. Can you clarify why churches and salons are in Stage 3 and not Stage 2. Um, what makes them more high risk than schools, for example? Uh, what factors are you weighing here when you decide what goes into what phase?

A: Yeah, we're, we're looking at the science, epidemiology, looking again at frequency, duration, time, uh, and looking at low risk-high reward, low risk-low reward, looking at a series of conditions and criteria, as well as best practices uh from other states and nations.

13ER2983–84. In other words, places of worship have always been sidelined because they provide a “low reward” in the eyes of Governor Newsom.

Respondent argues that his restrictions are neutral because non-neutrality is only present where “the law at issue . . . regulates or prohibits conduct *because* it is undertaken for religious reasons.” Resp. Br., 19 (quoting *Lukumi*, 508 U.S. at 532) (*italics added*). Respondent, however, misunderstands the meaning of “*because*,” following the meaning used in *Korematsu*:

It is said that we are dealing here with the case of imprisonment of a citizen . . . solely because of his ancestry, without evidence or inquiry concerning his loyalty. . . . Our task would be simple, our duty clear, were this a case involving [] imprisonment . . . *because* of racial prejudice [but] . . . we are dealing specifically with nothing but an exclusion order. . . . Korematsu was not excluded . . . *because* of hostility to him or his race. He was excluded *because* . . . the properly constituted military authorities . . . decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast[.]

Korematsu v. United States, 323 U.S. 214, 223–24 (1944). In other words, it was “because” of urgency, not because of “Japanese ancestry,” that the government could restrict the rights of Mr. Korematsu and his fellow Japanese-Americans. *Id.*

Thus, according to Respondent, he can institute an express ban on worship qua worship, and then explain to this Court that its *facially discriminatory* actions are not motivated by *invidious animus*—and so everything is okay—just like in *Korematsu*. This Court should not take up Respondent’s invitation. Restricting liberties “solely and explicitly on the basis of [a protected characteristic], is objectively unlawful.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (abrogating *Korematsu*). This Court should explicitly reject this reasoning. *See S. Bay I*, 959 F.3d at 944 (Collins, J., dissenting).

This Court should further explicitly reject the argument, often made by Respondent, that he may identify churches by name for disparate treatment so long as he alleges this is done to give them preferential treatment. *See Diocese of Brooklyn*, 2020 WL 6948354, at *13 (Sotomayor, J., dissenting); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 551 (2004). The simple problem with this argument is that it is far too easy to lead to gerrymandering. The only truly “neutral” order that is presently in place in California is that all residents are ordered to stay at home—unless a specific exemption applies to them. *See* 13ER3030–3031. But with so many exemptions to that order granted—so many in fact that few remember that the original order is still in place—there is no meaningful way for courts to determine whether the exemption that applies to churches is in reality preferential treatment or discrimination.

Under the federal constitution, strict scrutiny must be applied to California's restrictions on worship.

1.2. California's Restrictions Cannot Satisfy Strict Scrutiny

The Blueprint clearly fails strict scrutiny. In order to satisfy strict scrutiny and thus advance a “compelling interest,” a law must not “leave[] appreciable damage to [its] supposedly vital interest unprohibited.” *Lukumi*, 508 U.S. at 547 (internal quotations omitted). But the Blueprint leaves unprohibited a vast amount of damage to its interest in stopping COVID, given its numerous exemptions for activities that involve large groups of people in close proximity for long durations (e.g., factories, warehouses, meatpacking plants, homeless shelters, drop-in centers, public transportation, protests, airlines and airline terminals, etc.), or that are otherwise impossible to carry out while maintaining social distancing (e.g., personal care services). Importantly, in *Diocese of Brooklyn*, this Court made clear that a traditional Free Exercise analysis is required—not any lesser *Jacobson* analysis. *See Diocese of Brooklyn*, 2020 WL 6948354, at *1–2 (citing and applying *Lukumi*, 508 U.S. at 546); *see also id.* at *5 (Gorsuch, J., concurring) (“[A]ppl[y]ing] . . . the traditional legal test associated with the right at issue [is] exactly what the Court does today”).

Even under a generic “equal protection” analysis, churches are treated far from equally. For example, elementary and high schools were permitted to open back up again at full-service capacity when their county entered the “red” tier, where adults and children are inside of buildings for prolonged periods of time, with only a social distancing requirement—no capacity limit—and are being allowed to stay open

despite their county's return to the "purple" tier. 5ER809–828.⁹ For colleges, in the "red" tier a per-room capacity limit of 25% or 100 individuals has been implemented, but a per-room limit means that larger buildings can house hundreds, if not thousands of students. 5ER830–863. Remarkably, in the "purple" tier California even permits counties to offer certain college courses indoors, including lab and art classes. 5ER839.

College athletic programs are also given special treatment. In the red-tier, college athletic facilities are allowed to have players, coaches, and trainers indoors for extended periods of time with no express limit on the amount of occupants inside such facilities. In particular, California's restrictions merely state that the "athletic facilities must limit occupancy to essential personnel," but do not put an actual limit on the number of total people that can occupy that facility. 5ER839, 853–863. Like California's notable exemption of Hollywood from the coronavirus lockdown from the very beginning, 13ER2980, 3055, this exemption may make economic sense, but not constitutional sense.

Transit, manufacturing, and warehousing are also entitled to preferential treatment, with California's guidelines providing no capacity limit in the "purple" tier. 13ER3001; 3ER328, 560–584; 5ER865–876. Although airlines are regulated by the FAA, California could impose a quarantine on people who have recently flown

⁹ J.R. Stone, *Move into purple tier will stop school districts looking to offer in-person learning*, ABC7 (Nov. 16, 2020), <https://abc7news.com/coronavirus-california-purple-tier-schools-in-person-learning/8030550/>.

(like Hawaii), but instead California is content to respect the constitutional right to travel. *See* 5ER878–883 (Los Angeles Times article noting how airlines have only self-imposed restrictions). Finally, even if a county moves back into the “red” tier, bookstores, clothing and shoe stores, hair salons and barbershops, home and furniture stores, jewelry stores, libraries, shopping malls, retailers, and nail salons will be allowed to be opened at 50% capacity; museums are allowed to open at 25% capacity; and movie theaters are allowed to open at 25%/100 person per screen—while churches are limited to 25%/100 person total. 5ER885–907. As Justice Gorsuch said, “[t]his is a simple case.” *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2609 (2020) (Gorsuch, J., dissenting).

But, of course, the Free Exercise clause is not redundant of the Equal Protection clause. Under the Free Exercise clause, the question is whether there is a compelling government interest in preventing *particular* churches from holding worship services (with singing) in their sanctuaries, *see Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006), when a church practices social distancing, requires masks, checks temperature, regularly disinfects its sanctuary, requires people showing symptoms to stay home, and so far has a perfect record—no coronavirus infections. 13ER2995, 3020–3021; 5ER732. According to this Court, the answer should be no. *See Diocese of Brooklyn*, 2020 WL 6948354, at *3.¹⁰

¹⁰ Respondent argues that it is critical that this Court allow it to continue requiring specific safety measures. Resp. Br., 28. In reality, it is critical that this Court allow plaintiffs to raise necessary challenges under regular Free Exercise jurisprudence. For “[i]n a country with the religious diversity of the United States, judges cannot be expected to have a complete understanding and appreciation of” the requirements of

Respondent has never even attempted to answer this tailored question, instead simply stating that worship services have led to some outbreaks. *See* Resp. Br., 4–5, 29. But none of Respondent’s anecdotal hearsay has related to the churches actually seeking to reopen. Respondent’s habit of string-citing articles and cases is only impressive from a distance. 7ER1468–8ER1643; 8ER1911–1927; *see also* 5ER778–779, 787, 791–792 (California Superior Court Judge Chalfant reviewing same news articles and concluding that they are “not evidence,” “not good enough,” and “you can’t just make stuff up” to justify restricting religious rights). There have been a grand total of 650 confirmed COVID-19 cases tied to worship services, with at least one million worship services being performed during the pandemic by the Catholic Church alone. 5ER716–717. Further, when Respondent’s anecdotal cases are examined closely, the newspaper hearsay reveals that almost all of the outbreaks were primarily caused by a failure to adhere to commonsense safety precautions. 5ER718–725. Nothing in them indicates that individual churches that seek to reopen cannot worship safely. 5ER726.

Nor is the Blueprint narrowly tailored and the least restrictive means for stopping COVID-19. Under strict scrutiny, the burden is on the state to justify unequal treatment. *Calvary Chapel*, 2020 WL 4251360, at *9 (Kavanaugh, J., dissenting); *see also United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 816, 818 (2000). Thus, this Court should be able to review Respondent’s expert declarations

various faiths. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2066 (2020).

and determine, based on them alone, that Respondent has not met its burden. But South Bay believes it is important to dissuade the Court of Respondent's oft-repeated statement that the expert consensus supports it. *See* Resp. Br., 11–14, 18–20, 22, 23–24. According to South Bay's experts, there are countless more tailored restrictions that actually comport more closely with the science of public health. 13ER2921–24; 11ER2531–32; 5ER664–68.

This opinion is widely shared. In October 2020, Stanford Professor Dr. Jayanta Bhattacharya (South Bay's expert), Harvard Professor Dr. Martin Kulldorff, and Oxford Professor Dr. Sunetra Gupta decided to write a short Declaration regarding a more scientifically appropriate response to the pandemic. The Declaration was written from a global public health and humanitarian perspective, with special concerns about how the current COVID-19 strategies are forcing children, the working class and the poor to carry the heaviest burden. *See* 5ER664–68.

The Declaration offers an alternative approach called Focused Protection, which contends that the most compassionate approach to the COVID-19 pandemic is one that spends overwhelming resources to protect the most vulnerable—older people and some people with chronic conditions—while eschewing lockdowns that harm less vulnerable populations (people under the age of 60 without chronic conditions) more than the risk of COVID-19 infection. The Declaration and associated writings provide concrete suggestions for protecting the vulnerable, including nursing home residents, older “essential” workers, and older people living in multi-generational households.

Since writing the Declaration, the three esteemed Professors have been joined by 40+ esteemed colleagues (including medical and public health scientists and medical practitioners) who co-signed the Declaration in early October. Since that time, the Declaration has been co-signed by 10,000+ medical and public health scientists, and 30,000+ medical practitioners. California’s approach is the opposite of “narrowly tailored.”

Further, in South Bay’s action, Respondent provided no response to the scientific studies and opinion offered by South Bay’s expert regarding how it can safely engage in singing in its worship services. 12ER2842–2845. And it is important to remember that to prevent “religious gerrymanders,” *Lukumi*, 508 U.S. at 534, courts must not “turn a blind eye to the context in which [a] policy” arises. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005). For example, here, the timing of Respondent’s determination that all activities are safer outside has always been suspicious. On May 25, 2020, Respondent very consciously made a uniform regulation covering both political protest and worship. 13ER2986, 3071–3093. That same day, George Floyd was killed, 13ER3003; 14ER3374, and only 18 days later, Respondent promulgated regulations blessing the protests by lifting all restrictions on outdoor activities, 13ER2988, 3094–3117, a legally wise choice. *See App.*, 25–28 (collecting cases where courts struck down restrictions on worship due to favored treatment of protesters).¹¹ In light of this timing, the burden should be

¹¹ Notably, Respondent has never disputed the fact that California did not make any public announcement regarding these regulations.

heavily placed on Respondent to justify what appears to be gerrymandered regulations favoring protests—a burden which, based on the present record, Respondent cannot satisfy.¹²

The Blueprint thus “burden[s] substantially more [religious exercise] than is necessary to further the government’s interests” and so is ipso facto not narrowly tailored. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). Here, the inarguable purpose of the restrictions on “places of worship” is to stop COVID-19, and yet the Blueprint subjects comparable activities, *for the purposes of the government’s interests*, to far fewer burdens. It thus easily fails strict scrutiny.

2. The Confusion in the Lower Courts, and Multiplicity of California Actions, Justifies Guidance from this Court.

As stated above, South Bay is filing this *amicus curiae* brief because it hopes that this Court’s grant of injunctive relief to Harvest Rock will aid it in its quest to worship. However, South Bay is also concerned about the many other churches currently suffering under Governor Newsom’s monarchical regime. Should this Court order the Ninth Circuit to apply *Diocese of Brooklyn* in the first instance, South Bay will not be prejudiced because it could seek relief from the Ninth Circuit promptly. However, there are numerous California churches currently languishing under California courts’ misinterpretation of the breadth of *S. Bay II*.

¹² See 11ER1766–67, 1879–1909; 11ER2425–2443 (Respondent merely collecting three very weak papers, only one of which was peer-reviewed).

As stated by Harvest Rock, it is has received letters threatening fines, App., 12, and churches in Ventura and Santa Clara have been held in contempt or fined more than \$100,000. Reply, 5. n.5. But these are not the only cases. Counsel for South Bay is representing Grace Community Church and Fr. Trevor Burfitt in litigation where the only happy resolution is a determination by the courts that Governor Newsom's orders were void from the beginning. And in addition to these cases, South Bay is aware of numerous other administrative citations being issued across the state, along with cease and desist orders, and other administrative action meant to thwart the right to worship. *See* 12ER2586–87, 2724–2824 (collecting instances of enforcement). Guidance from this Court is desperately needed to protect 40 million Californians.

CONCLUSION

For the foregoing reasons, South Bay respectfully requests that this Court grant Applicant Harvest Rock's emergency application for a writ of injunction, protecting both Applicant's rights and the rights of 40 million suffering Californians.

Respectfully submitted,

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