No. _____

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

## PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT


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## QUESTIONS PRESENTED

Once again, Petitioners South Bay United Pentecostal Church and Bishop Arthur Hodges III ("South Bay") must seek relief from this Court. California, in revising its reopening restrictions under a new "Blueprint" framework, exacerbates its discrimination and disparate treatment toward Places of Worship. While millions of Californians in a range of industries resumed business while observing mask-wearing and social distancing protocols, church services remain a disfavored activity in the eyes of the State and the County of San Diego.

Similar scenarios playing out in other states generated a myriad of cases requesting stays and injunctions, several of which rose through appellate courts and were submitted to this Court for review. Lower courts are divided as to the constitutional standard for reviewing Free Exercise challenges to pandemic restrictions. Courts in the Fifth and Sixth Circuits have upheld claims under the Free Exercise Clause, applying strict scrutiny review, while Courts in the Second, Seventh, and Ninth circuits have rejected such claims, often relying in part on this Court's decision in *Jacobson v. Massachusetts* as justification for their excessive deference to the State.

The Questions Presented are:

1. Do Governor Newsom's lockdown orders and reopening restrictions under the "Blueprint" framework, placing strict limitations, including closures, on all Places of Worship in California,

violate South's Bay's First Amendment right to Free Exercise of Religion?

2. What is the proper standard of review for the challenges to State and County restrictions upon Free Exercise of Religion rights during a pandemic, and does *Jacobson v. Massachusetts* impose extra limitations to this Court's established line of Free Exercise jurisprudence during a pandemic?

## PARTIES AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the present Petition for a Writ of Certiorari Before Judgment, and the proceedings below:

Petitioners are SOUTH BAY UNITED PENTECOSTAL CHURCH and BISHOP ARTHUR HODGES III. Both are Plaintiffs in the U.S. District Court for the Southern District of California and Appellants in the U.S. Court of Appeals for the Ninth Circuit. Applicant South Bay United Pentecostal Church is a non-profit corporation with no parent company or stockholders.

Respondents are 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 of the County of San Diego. All are Defendants in the U.S. District Court for the Southern District of California and Appellees in the U.S. Court of Appeals for the Ninth Circuit.

## LIST OF ALL PROCEEDINGS

U.S. Supreme Court, No. 19A1044, *South Bay United Pentecostal Church v. Newsom*, application

for an injunction pending appellate review denied May 29, 2020.

U.S. Court of Appeals for the Ninth Circuit, No. 20-55533, *South Bay United Pentecostal Church v. Newsom*, motion for an injunction pending appeal denied May 22, 2020, and motion for limited remand to supplement the record and address California's "Blueprint for a Safer Economy" granted July 29, 2020.

U.S. District Court for the Southern District of California, No. 3:20-cv-00865, *South Bay United Pentecostal Church v. Newsom*, order denying motion for temporary restraining order entered on May 15, 2020, order denying motion for an injunction pending appeal entered on May 18, 2020, and order denying renewed motion for a temporary restraining order / preliminary injunction on limited remand, and denying an injunction pending appeal, entered on October 15, 2020.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner SOUTH BAY UNITED PENTECOSTAL CHURCH discloses the following. There is no parent or public held company owning 10% or more of Petitioner's stock.

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The May 22 published Ninth Circuit order denying an injunction pending appeal is available at 959 F.3d 938. App. D. The May 29 published Supreme Court order denying an application for a writ of injunction is available at 140 S. Ct. 1613. App. C.

The July 29 Ninth Circuit order granting limited remand is unreported. App. B. The unpublished October 15 district court order denying a renewed motion for a temporary restraining order, and denying an injunction pending appeal, is available at 2020 WL 6081733. App. A.

## JURISDICTION

South Bay filed its original complaint challenging California's restrictions on churches under the First Amendment's Free Exercise Clause on May 8, 2020, and filed amended complaints on May 11 and July 17, 2020. On May 11, South Bay filed an emergency motion for a temporary restraining order or preliminary injunction. The district court had

jurisdiction under 28 U.S.C. §§ 1331 and 1343, and authority to issue declaratory and injunctive relief under 28 U.S.C. §§ 1343 and 2201–02.

The United States District Court for the Southern District of California denied South Bay's motion on May 15, 2020. South Bay filed a timely notice of appeal. The United States Court of Appeals for the Ninth Circuit has jurisdiction over South Bay's interlocutory appeal under 28 U.S.C. § 1292(a)(1). On July 29, the Ninth Circuit ordered limited remand to the trial court to supplement the record and make additional findings of fact. Under Fed. R. App. P. 12.1, this limited remand did not divest the Ninth Circuit of jurisdiction. Following the District Court's denial of South Bay's renewed motion and denial of an injunction pending appeal, the Ninth Circuit ordered supplemental briefing, which is now complete. Oral argument is not yet scheduled before the Ninth Circuit.

This Court's jurisdiction is invoked under 28 U.S.C. §§ 1254(1) and 2101(e). Because this matter is time sensitive, South Bay files this petition before the Ninth Circuit has ruled, under Supreme Court Rule 11. South Bay expects that by the time the Court considers the petition, the Ninth Circuit will have issued an opinion. Either way, as explained below, the petition warrants this Court's immediate review and resolution before the end of the Court's 2020 Term.

## CONSTITUTIONAL PROVISIONS

The First Amendment provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

## INTRODUCTION

In the first few months following the widespread implementation of COVID-19 restrictions by various state governors, this Court rejected two applications for emergency injunctive relief from pandemic restrictions that prevented the Free Exercise of religious beliefs. The first application, brought by Petitioners here, challenged the restrictions in Governor Newsom's executive order and California's "Resilience Roadmap" against in-person worship services. This Court's denial was accompanied by a brief concurrence by Chief Justice Roberts, and a vigorous dissent by Justice Kavanaugh, joined by Justices Thomas and Gorsuch. App. 43a–49a. The second application, *Calvary Chapel Dayton Valley v. Steve Sisolak,* challenging Nevada's COVID-19 restrictions against churches, was also denied by this Court on July 24, 2020, with no elaboration, but elicited a lengthy dissent from Justice Alito, which was joined by Justice Thomas and Justice

Kavanaugh, and separate dissents by Justice Gorsuch and Justice Kavanaugh. 140 S. Ct. 2603 (2020).

It has now been eight months since the COVID-19 pandemic began and 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 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. 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 for the ability of religious congregations, such as Petitioner 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.

No one can deny that the Founders of our Country considered religious liberty, with its prominent place at the head of guaranteed protections in the Bill of Rights, to be a freedom that should be unassailable from attack by any government actor, absent a

compelling interest, even in the case of an emergency. This Court has recognized that an "[e]mergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved," and that constitutional limitations on the powers of the States "are questions which have always been, and always will be, the subject of close examination under our constitutional system." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425–26 (1934).

However, the pandemic "emergency" has been used to justify the broad overreach of the police power of the State with regard to religious expression, effectively transforming our cherished freedom of worship from a "first class right" into a "second class right." Thus, the urgency of the current need to reaffirm the First Amendment as a bastion of religious liberty is undeniable. This Court is the last resort for restoring religious freedom to its proper place as a "first class right" for the vast number of Americans who practice their religion faithfully, for whom each day that passes without being able to access their Places of Worship to pray, when prayer is needed *more than ever*, clearly constitutes irreparable harm. It is during the most difficult times of our country, including a nationwide pandemic, that we cannot afford to let tyranny against religion rise in the guise of well-meaning police power of the State. This Court reminded us more than 150 years ago, in the aftermath of the Civil War, "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any provisions [of the Bill of Rights] can be suspended during any of

the great exigencies of government." *Ex Parte Milligan*, 71 U.S. 2, 121 (1866).

## FACTUAL AND PROCEDURAL BACKGROUND

### A. California's Lockdown Orders

On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency as a result of the threat of the pandemic known as COVID-19. 3ER332. Two weeks later, on March 19, 2020, the Governor ordered all individuals living in the State of California to stay home. 3ER533.[1] This order, however, gave some Californians the right to leave their residence, such as workers "needed to maintain continuity of operations of the federal critical infrastructure sectors" as well as 13 *essential* industries Governor Newsom viewed as "critical to protect the health and well-being of all Californians." 3ER536.

The list of essential critical industries included the Hollywood movie industry, but excluded Places of Worship. 3ER558. Buried in the list of "Essential Workforce, if remote working is not practical" within *Sector 8. Government Operations and Other Community-Based Essential Functions*, we find the State's only mention of religious-related activity, permitting "Clergy for essential support and faith-

[1] The now 16 volumes of the Excerpts of Record are located at 9th Cir. Dkt. Nos. 3 and 82.

based services that are provided through streaming or other technologies that support physical distancing and state public health guidelines." 3ER551. Of the list of 18 workforce descriptions in this sector, clergy providing faith-based services is the only category restricted from working in person, directly contradicting the list's label. 3ER551. Places of Worship were closed to the public and all religious leaders were prohibited from conducting in-person religious services, regardless of the measures taken to reduce or eliminate the risk of the virus spreading.

The inclusion of Hollywood on this list of "essential" businesses permitting in-person activities reveals that California was not granting "essential" operating privileges solely on the basis of whether they were needed to protect health and safety. But, at the time, South Bay, like many other churches, decided to do its part by voluntarily adhering to these requirements. San Diego County's public health department issued orders alongside Governor Newsom's, which were generally identical to the Governor's but sometimes more restrictive. *See* 3ER589–97; 6ER1108–10 (discussing San Diego's specific ban on drive-in worship).

### B. The Stabilization of the Pandemic in California: Resilience Roadmap

Seven weeks in, the pandemic had, in the Governor's words, "stabilized." 3ER324–25; 2ER224–67, 314–20. As a result, on May 7, 2020, the Governor published his four-stage "Resilience Roadmap"—the California reopening plan which granted more

Californians the right to leave their residence. 3ER560. In assigning types of businesses to stages 1–4, Governor Newsom explicitly stated that California's reopening plan weighed the risk of a COVID-19 outbreak with the "reward" of the value of the business. 3ER512. The Resilience Roadmap placed religious services in Stage 3 along with theatres, museums and bars, instead of Stage 2, which included retail and dine-in restaurants. 3ER568.

After seven weeks of Stage 1, however, Californians had enough—and on May 8, 2020, Governor Newsom moved California to Stage 2a of his Resilience Roadmap—opening retail for curbside pickup and manufacturing/warehousing. 13ER2980–85, 3056–69; 14ER3207–61; 12ER2601–04. On Wednesday, May 20, California let San Diego move ahead to Stage 2b, including permitting restaurants and malls to reopen. 13ER2985–86; 12ER2605–19.

On Memorial Day, Governor Newsom announced changes to his Resilience Roadmap with respect to constitutionally-protected protesting and worship activities. With respect to both, Governor Newsom permitted individual counties to apply for 21-day licenses during which worship and protest would be permitted so long as the gathering did not exceed 25% of "building capacity" or "the relevant area's maximum occupancy," and with a maximum cap of no more than 100 persons. 13ER2986–87. However, California remained in "Stage 2." Alongside this change, Governor Newsome published industry guidance for "Places of Worship," 13ER3070–83, and

updated the Q&A page on the coronavirus website concerning political protests. 13ER3084–93.

The next day, May 26, 2020, Governor Newsom also announced that hair salons and barbershops could reopen (moving them from "Stage 3" to "Stage 2"). 13ER2987; 12ER2620–26. On May 27, 2020, San Diego received its first 21-day worship/protest license and issued a series of orders granting permission to worship. 13ER2987; 14ER3262–307.

On June 12, Governor Newsom changed, without public announcements, the industry guidance for "Places of Worship" and the Q&A page concerning protests, lifting restrictions on them when they occurred outdoors—but continued the 100-person cap or 25% occupancy limit for indoor worship or protesting. 13ER2988, 3094–117.

On July 6, 2020, Governor Newsom changed the industry guidance for "Places of Worship" and the Q&A page concerning political protesting and added a ban on "indoor singing and chanting activities." 13ER2988, 3118–41. Then, on July 13, 2020, Governor Newsom banned 30 counties from conducting many indoor activities, including worship and protest. 13ER2988, 3142–45; 14ER3146–60. This included small gatherings of worshippers in homes. 12ER2635–41.

### C. New Criteria: Blueprint to a Safer Economy

On August 28, 2020, an entirely new bureaucratic scheme: the "Blueprint for a Safer Economy,"

superseded the Resilience Roadmap and its County Monitoring List. 5ER885–907. No longer able to document his claim of a statewide "health emergency" with a statistically significant number of COVID-caused deaths or hospitalizations in a population of 40 million, *see* 5ER640–675, and despite mounting evidence that the COVID-19 lockdown may be killing more people than it is saving, *see* 12ER2840; 5ER727–728, 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.[2]

[2] 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.

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. The Blueprint assigns counties to four color-coded "tiers" of "risk" which is totally reliant on the amount of testing plus the number of positive case results regardless of severity. 8ER1733–55.[3]

| | 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 **<br><br>(Rate per 100,000 population* excluding prison cases^, 7 day average with 7 day lag) | >7 | 4-7 | 1-3.9 | <1 |
| Testing Positivity^<br><br>(Excluding prison cases^, 7 day average with 7 day lag) | >8% | 5-8% | 2-4.9% | <2% |

**"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.

[3] The counties continue to keep track of the impact upon the hospitals, etc., but it is no longer the determinative criterion that determines what tier the county is placed in under the Blueprint restrictions.

Under the original definition of the "purple" tier, the following activities were 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 (*e.g.*, liquor stores, cannabis dispensaries)
- All government offices
- All "essential retail" offices
- Appliance Repair Shops
- Auto Repair Shops
- Banks and Credit Unions
- Bookstores (25%)
- Carwashes
- Childcare
- Convenience stores
- Day Camps (including indoor facilities)
- Doctors and Dentists
- Farmer's markets Florists (25%)
- Gas stations
- Grocery stores (50%)
- Hair Salons and Barbershops
- Higher education institutions (in "certain indoor settings, like labs and studio arts")
- Home improvement stores (25%)
- Pharmacies
- Hotels
- Hotel fitness centers (50%)
- Jewelry stores (25%)
- Laundromats
- Libraries (25%)

- Dry Cleaners
- Non-essential retail (*e.g.*, toy stores) (25%)
- Pet Groomers[4]

**"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

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[4] 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. *See* https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf; https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf.

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.

In addition to the designation of risk for each county, the Blueprint utilizes a risk/reward ratio to determine the level of reopening allowed for various categories of nonessential activities. The Industry Guidance 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.

| **Widespread**<br>**Tier 1** | **Substantial**<br>**Tier 2** |
|---|---|
| Outdoor Only with modifications | Open indoors<br>with modifications<br>• Max 25% capacity or 100 people, whichever is fewer |

| Moderate<br>Tier 3 | Minimal<br>Tier 4 |
|---|---|
| Open indoors<br>with modifications<br>• Max 50% capacity or 200 people, whichever is fewer | Open indoors<br>with modifications<br>• 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."[5]

After the new Blueprint framework was announced, San Diego was placed in the red "substantial" tier. Places of Worship were included among the "some nonessential" businesses allowed to open indoors during that time with capacity restrictions. On November 10, 2020, San Diego

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[5] *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/.

announced that its metrics for 3 consecutive weeks had pushed it back to the purple, or widespread tier.[6] Places of Worship are now closed for indoor services once again, while 28 categories of non-essential indoor activities are allowed to remain open. On November 16, Governor Newsom exercised the "emergency brake" he designed into the Blueprint—the tool by which he can override the Blueprint and take whatever action he desires. Using that "emergency brake," Governor Newsom pushed "94.1 percent of California's population" into the Purple Tier.[7]

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. For when tragedy strikes, the religious rely on their faith more

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[6] José A. Álvarez, *County Moves to Purple Tier; Restrictions to Start Nov. 14*, COUNTY OF SAN DIEGO COMMUNICATIONS OFFICE (Nov. 10, 2020), https://www.countynewscenter.com/county-moves-to-purple-tier-restrictions-to-start-nov-14/.

[7] 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/.

than ever, and to deny them this fundamental right guaranteed under the U.S. Constitution is governmental tyranny at its most egregious.

### D. 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. 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.

During the week following Monday, May 25, 2020, California and San Diego lifted the first ban on all worship services. As a result, the following Sunday, May 31 (Pentecost Sunday), South Bay held worship services with no more than 100 persons in attendance. 13ER2993–94. 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. Each worship service required the participation of at least 30 volunteers/staff to be held. The Church could not feasibly hold more than three worship services each Sunday. 13ER2994–95.

South Bay Pentecostal Church has a complex theology, based on Sacred Scripture, relating to the

requirement that "all" of its congregants gather together. California's regulations continued to burden those religious beliefs, by preventing "all" from gathering. 13ER2990–91 (citing Hebrews 10:25; Acts 1:8, 2:1, 2:42, 2:46–27.) These religious requirements disfavor multiple worship services, by preferring that the entire congregation meet at once. For example, it would be akin to holding a family reunion in three sessions, with one-third of the family gathering at each session, but not being allowed to meet the rest of the family gathering in the other sessions. 13ER2996. South Bay's theology also encourages congregants to attend multiple worship services—which many normally do. Nevertheless, because the interplay of California's regulations and the nature of its worship services limited the Church to serving a maximum of 300 people each Sunday (at three worship services), it had to limit congregants' ability to attend more than one service per Sunday. 13ER2996.

### E. Public Protests

On June 12, 2020, after South Bay noted in briefing that political protests and worship services were treated the same under California's regulations—but in practice certain political protests were entirely exempt from those regulations—California modified them. 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). The Church's altar and baptistery is in its sanctuary auditorium, which is indoors. 13ER2993.

### F. Singing and Chanting Restrictions

On July 6, 2020, in addition to the above restrictions, California published regulations stating that "Places of Worship must therefore 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.

### G. Proceedings Below and Across the Country.

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 Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323-LY, 2020 WL 1502102 (W.D. Tex. Mar. 30, 2020). Then, beginning on April 6, courts began citing this Court's opinion in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), for the proposition that the pandemic can justify infringements on those constitutional rights. *See S. Wind Women's Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020). Almost as soon as the various governors' executive orders were issued, the lower courts began splitting on whether the orders violated

constitutional rights, both under this Court's Free Exercise jurisprudence and under *Jacobson*.

On Friday, May 8, 2020, the day California entered Stage 2 of the Resilience Roadmap, South Bay filed suit in the Southern District of California. South Bay contended that permitting various entities to open in Stage 2, but relegating Places of Worship to Stage 3, was an unconstitutional violation of their right to the Free Exercise of religion. 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. App. E; App. F. 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 issued its order on South Bay's motion for an injunction pending appeal. App. D. 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, California's Resilience Roadmap was not "neutral" or "of general applicability," and did not satisfy strict scrutiny.

On May 29, 2020, this Court denied South Bay's application for an emergency writ of injunction.

App. C. The denial was accompanied by a short concurring opinion by Chief Justice Roberts and a vigorous dissent by Justice Kavanaugh, joined by Justice Thomas and Justice Gorsuch. Justice Kavanaugh found that California did not have "a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap." App. C. at 61a.

On July 29, 2020, the Ninth Circuit Court of Appeals ordered limited remand of the interlocutory appeal from the denial of South Bay's motion for a 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." App. B.

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. Nevertheless, on October 15, 2020, the District Court denied South Bay's Renewed Motion. App. A.

In light of the ongoing violations of South Bay's Free Exercise rights, the deepening of the circuit split with the Second, Seventh and Ninth Circuits splitting from the Fifth and Sixth Circuits, regarding the proper constitutional standard that applies when a state governor acts during a State of Emergency to restrict Free Exercise rights, it is imperative that this Court clearly state the correct rule of law to be followed.

## REASONS FOR GRANTING THE WRIT

This Court's previous denial of South Bay's application for an emergency injunction on May 29, 2020 has been cited 115 times by numerous lower courts throughout the Circuits – usually to support the view that strict scrutiny does not apply to the review of state-wide executive orders issued during the COVID-19 pandemic, even if those orders restrict the religious from exercising their Free Exercise rights. This viewpoint is in direct conflict with a line of established Free Exercise jurisprudence, most notably expressed in this Court's decisions in *Lukumi*, *Trinity Lutheran***,** and *Espinoza* and faithfully followed by appellate judges in the Fifth and Sixth Circuits. The denial by this Court of another Ninth Circuit interlocutory appeal, *Calvary Chapel v. Sisolak*, on July 24, 2020, was strongly dissented by Justice Alito, Justice Gorsuch, and

Justice Kavanaugh—with Justice Thomas and Justice Kavanaugh also joining Justice Alito's dissent. These conflicting non-majority opinions are unfortunately wreaking havoc in the lower courts. This Court should set the matter straight and should do so by respecting its longstanding traditions protecting religious rights.

## 1. The Conflicting Decisions of the Lower Courts Create Troubling Precedent for Free Exercise Challenges to Lockdown Orders and Reopening Restrictions

### 1.1. The Ninth, Seventh, and Second Circuits have Denied Injunctive Relief for Governors' Executive Orders that Restrict the Right of Free Exercise

The appellate decisions in the Ninth, Seventh and Second Circuits declined to subject lockdown orders and reopening restrictions to strict scrutiny, creating troubling precedent for lower courts. These courts gave undue deference to the State by either excessively limiting the types of situations where religious discrimination could be found, or illogically equating facial neutrality and general applicability with a scheme of differential classifications of permissible activities that designated churches for disparate treatment. These lower courts concluded that if certain secular activities were being treated worse than churches, then discrimination could not possibly be present.

In this case, the 2-1 split panel found that South Bay had not shown it was likely to succeed on appeal. The reasoning was quite brief in concluding that the First Amendment was not violated since the state restrictions were not being imposed *because* of religious motivation nor did they impose burdens *only* on religious conduct, citing *Lukumi*. Judge Collins disagreed. In an 18-page dissent, he pointed out that since the restrictions were not facially neutral, strict scrutiny review *was required*. Furthermore, Judge Collins found that the restrictions also failed the general applicability test and rejected the idea that *Jacobson* required a lower standard of review. App. D.

In *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728 (9th Cir. 2020), the Ninth Circuit again rejected the argument that Governor Newsom's lockdown orders, and new framework of restrictions under the "Blueprint for a Safer Economy" as applied to in-person worship services, violated Harvest Rock's First Amendment right to Free Exercise of religion. Once again, the panel was split 2-1 in its denial, concluding that there was no evidence that secular activities were being treated more favorably than religious activities. The panel indicated that even though it was not bound by it, they were persuaded by Chief Justice Roberts' concurring opinion in this case, App. C, that an injunction was not in the public interest. Judge O'Scannlain issued a 15 page vigorous dissent, citing Justice Alito's dissenting opinion in *Calvary Chapel*, in arguing that even though "certain calculated, neutral restrictions . . . necessary to combat emergent threats to public

health" may be imposed upon the religious, the Constitution "does not allow a State to pursue such measures against religious practices more aggressively than it does against comparable secular activities." *Harvest Rock*, 977 F.3d at 731

In *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341 (7th Cir. 2020), the Seventh Circuit, following the reasoning of the Ninth Circuit, upheld the denial of injunctive relief to churches that claimed the Illinois Governor had violated their Free Exercise rights by limiting the size of public assemblies to 10 persons, including religious services. Despite the churches' inclusion on a list of "essential" activities, they were not exempted from the ten-person cap. The Seventh Circuit found that there was no discrimination against religious activities nor was there any "hostility toward religion". Instead, the Seventh Circuit concluded that the Executive Order "appears . . . to impose neutral and generally applicable rules, as in *Employment Division v. Smith*, 494 U.S. 873 (1990)." *Id.* at 344.

In support of this finding of neutrality and general applicability, the Seventh Circuit pointed out that the 10 person cap applied not only to worship services but also to the "most comparable types of secular gatherings such as concerts, lectures. . . ." *Id.* In considering the appellate analyses of the Sixth Circuit, Ninth Circuit and this Court's denial in *South Bay*, the Seventh Circuit admitted that worship services were not exactly like any of the possible comparisons, but sided with Chief Justice Roberts' concurrence in finding that they should be

compared to "lectures, concerts, movie showings, spectator sports and theatrical performances" rather than "grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods." *Id.* at 346. Finally, the Seventh Circuit rejected the church's argument that a compelling interest was required, stating it was compelled to implement the approach under *Smith*, namely "that the Free Exercise Clause does not require a state to accommodate religious functions or exempt them from generally applicable laws." *Id.* at 345.

The Second Circuit continued to follow the line of reasoning that if some secular activities are treated worse than churches, no violations of Free Exercise Rights have occurred. In *Agudath Israel of Am. v. Cuomo*, ___ F.3d ___, 2020 WL 6559473 (2d Cir. 2020), a coalition of Jewish synagogues and the Roman Catholic Diocese of Brooklyn claimed that the 10-person cap on religious services was a violation of their constitutional rights. The Second Circuit, also in a 2-1 split, found that the order was both neutral and generally applicable, based on the "recent precedent" in *South Bay* and *Elim*. Judge Park dissented, arguing that strict scrutiny was clearly warranted, since the "disparate treatment of religious and secular institutions is plainly not neutral," and that the New York Governor failed to overcome his burden since "there is little doubt that the absolute capacity limits on houses of worship are not 'narrowly tailored.'" *Id.* at *5.

### 1.2. The Fifth and Sixth Circuits have Granted Injunctive Relief for Governors' Executive Orders that Restrict the Right of Free Exercise

In the complete opposite direction from the Ninth, Seventh, and Second Circuits, appellate courts in the Fifth and Sixth Circuits found that lockdown orders imposing restrictions on church services did not survive strict scrutiny because the orders clearly discriminated against churches.

In *Roberts v. Neace*, 958 F.3d 409 (2020), the Sixth Circuit correctly applied strict scrutiny in determining whether the Kentucky Governor's executive orders violated the First Amendment and the Kentucky Religious Freedom Restoration Act. The petitioners argued that the restrictions prohibiting "faith-based" mass gatherings violated their constitutional rights. The Kentucky Governor had issued lockdown orders in March 2020, prohibiting all mass gatherings, including faith-based, but providing exceptions for secular activities. A second order a few days later, on March 25, required non "life-sustaining" organizations to close. There were "19 broad categories of life-sustaining organizations and over a hundred sub-categories spanning four pages."

The Sixth Circuit explained that "[f]aith-based discrimination can come in many forms," with laws that "might appear to be generally applicable on the surface but not be so in practice due to exceptions for comparable secular activities." *Id.* The Sixth Circuit

found that the four pages of exceptions, plus the kinds of group activities allowed, was sufficient to "remove them from the safe harbor for generally applicable laws." *Id*. The key point with regard to evaluating neutrality was that "a law can reveal a lack of neutrality by protecting secular activities more than comparable religious ones." *Id*. at 415. With regard to the compelling interest analysis, the Sixth Circuit did admit that the Governor had a compelling interest in trying to prevent the spread of the coronavirus but did not find that the orders were the "least restrictive" means of doing so. "If the Commonwealth trusts its people to innovate around a crisis in their professional lives, surely it can trust the same people to do the same things in the exercise of their faith." *Id*.

The Fifth Circuit, in *First Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi*, 959 F.3d 669 (5th Cir. 2020), joined the Sixth Circuit in granting injunctive relief from lockdown orders. Circuit Judge Willett stated in his concurrence, "Singling out house of worship—and *only* houses of worship, it seems—cannot possibly be squared with the First Amendment. . . . [W]hy can its members be trusted to adhere to social-distancing in a secular setting (a gym) but not in a sacred one (a church)?" *Id*. at 671.

### 1.3. The Ninth, Seventh and Second Circuits' Approaches Misinterpret the Neutrality and General Applicability Test in *Smith* and Directly Conflict with this Court's Post-*Smith* Line of Free Exercise Jurisprudence in *Lukumi*, *Trinity Lutheran* and *Espinoza*

This First Amendment protects not only one's interior beliefs from government restrictions but also an individual's outward expression of those beliefs in the public arena, which most certainly includes the freedom to attend services at a place of worship. *See Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246, 2275 (2020) (Gorsuch, J., concurring); *Cantwell*, 310 U.S. at 303–04. Governor Newsom's executive orders and San Diego's county-wide public health directives under the Blueprint framework interfere with South Bay's First Amendment right to practice its religious beliefs, which automatically subjects such actions to heightened constitutional review. The District Court, following the Ninth Circuit, failed to apply strict scrutiny to the Governor's orders and therefore denied South Bay's renewed motion for injunctive relief because it concluded that South Bay was unlikely to succeed on the merits.

In *Trinity Lutheran*, 137 S. Ct. 2012 (2017), the Court concluded that the Department that supervised Missouri's Scrap Tire Program violated Trinity Lutheran's Free Exercise rights when it denied it a grant because of its religious status as a

church. Quoting *Lukumi*, this Court reiterated that strict scrutiny applies when religious are targeted for "special disabilities" because of their "religious status". *Id*. at 2021.

Most recently, in *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), this Court once again applied strict scrutiny to uphold the Free Exercise claim of parents of students attending a Christian school who were denied the ability to use funds from Montana's scholarship program to pay for their children's tuition solely because their school was a religious institution. In analyzing the case, this Court confirmed the "straightforward rule" that "[w]hen otherwise eligible recipients are disqualified from a public benefit "solely because of their religious character," strict scrutiny applies. *Id*. at 2260. This Court also held that the state's interest did not rise to the standard of "an interest of the highest order" when it did not apply the same objectives "with respect to analogous nonreligious conduct." *Id*. at 2261 (quoting *Lukumi*, 508 U.S. at 546).

As evidenced by this Court's consistent application of the strict scrutiny standard in *Lukumi*, *Trinity Lutheran* and *Espinoza*, every lower court reviewing a Free Exercise challenge must undertake an analysis that probes beyond a cursory examination of neutrality and general applicability to determine whether discrimination has actually occurred. Furthermore, the court must also establish that the State has met its two-pronged burden of showing both a compelling interest and that the restrictions are narrowly tailored, in other words, the

least restrictive means to accomplish that compelling interest.

### 2. Governor Newsom's Restrictions on South Bay's Free Exercise Rights Clash with this Court's Precedents.

According to this Court's Free Exercise jurisprudence, the constitutional test to be applied is straightforward. As a threshold inquiry, the court examines whether Governor Newsom's lockdown orders and Blueprint scheme are neutral and generally applicable. In other words, are churches put in a disfavored category of restrictions? As Judge Collins found in this case, App. D at 53a–70a, and Judge O'Scannlain found in *Harvest Rock*, 977 F.3d at 731–37, it is clear that the restrictions are not facially neutral because they explicitly single out religious activity as a category for disparate treatment.

#### 2.1. Governor Newsom's Executive Orders and Blueprint Restrictions fail the Neutrality Test.

First, Governor Newsom singled out clergy, by treating clergy differently from other essential workforce in Sector 8. Seventeen out of eighteen categories of workforce in Sector 8 were not subject to working remotely because it was deemed impractical for them to do so. Governor Newsom used an impermissible value judgment to limit Clergy from working (*i.e.*, conducting worship services) "in person" because in the State's opinion it was "practical" for

clergy to work remotely. California's singling out of clergy and making a blanket determination that it is "practical" for them to not lead church services in person, is discriminatory and clear evidence of non-neutrality.

Second, Places of Worship are in their own category for purposes of determining what limitations apply in the four tiers of restrictions. It is *irrelevant* that other secular activities are also categorized. The point is that there is no neutrality, because the prohibitions and limitations that are applied to Places of Worship have been specifically created by the State for Places of Worship, based on the State's own assessment of risk/reward for the particular activities that are exclusively conducted by Places of Worship. Once again, Governor Newsom's singling out of Places of Worship as a separate activity to be regulated as he sees fit is clear evidence of non-neutrality.

### 2.2. Governor Newsom's Executive Orders and Blueprint Restrictions fail the General Applicability Test.

#### 2.2.1. Secular Activities are Treated More Favorably

Governor Newsom's reopening restrictions under the Blueprint scheme are not generally applicable because a host of secular activities are still allowed to be conducted indoors as long as they follow minimal guidelines for mask wearing, sanitizing and social distancing, while indoor church services are not

allowed to take place even if they follow the same guidelines for mask wearing, sanitizing and social distancing. Furthermore, the State justifies restricting indoor worship services based on a heightened risk rationale that is not applied equally to similar activities. According to the Blueprint website, the following nine criteria are used to assess the riskiness of a particular human activity or a business:

> • Ability to accommodate face covering wearing at all times (e.g. eating and drinking would require removal of face covering)
> • Ability to physically distance between individuals from different households
> • Ability to limit the number of people per square foot
> • Ability to limit duration of exposure
> • Ability to limit amount of mixing of people from differing households and communities
> • Ability to limit amount of physical interactions of visitors/patrons
> • Ability to optimize ventilation (e.g. indoor vs outdoor, air exchange and filtration)
> • Ability to limit activities that are known to cause increased spread (e.g. singing, shouting, heavy breathing; loud environs will cause people to raise voice)

8ER1740.

When applying these nine criteria to South Bay's church services, it is easy to conclude that church services are equal or better in their ability to decrease

risk than a grocery store, restaurant or factory. South Bay has the ability to require mask wearing during worship services, establish seating 6-feet apart, limit the number of attendees at each service, limit the length of a service, and sanitize between services. By comparison, at a grocery megastore such as Target or Costco, which in the purple tier is permitted to remain open while churches are closed: there are no limits as to the number of people in the store at one time; people can shop for unlimited amounts of time; social distancing is difficult to enforce as people continually pass each other within aisles, and the store does not usually stop operations to empty its store three times a day to sanitize. Unsurprisingly, grocery stores are linked to COVID-19 outbreaks.[8] And yet the State finds worshipping in a church service a more dangerous human activity for spreading COVID-19.

#### 2.2.2. Singing is Arbitrarily Given Much Greater Weight as a Risk Factor

The only possible criteria that the State can claim as "higher risk" involves the activity of singing which is an integral part of South Bay's worship service. "[S]inging is at the heart of Pentecostal worship services," and so a ban on singing "is essentially a ban

[8] Terri-Ann Williams, *RISK FACTOR Supermarket most likely place for Brits to have visited before positive Covid test, Test & Trace data shows*, THE U.S. SUN (Nov. 20, 2020), https://www.the-sun.com/news/1826530/supermarkets-most-common-place-catch-covid/.

on Pentecostal worship services." 13ER2993; *see also* 11ER2576–82. Dr. James Watt, the State's expert, lists singing as part of five criteria to judge the riskiness of a particular human activity/business: 1) being indoors, 2) bringing together a large group of people, 3) having close proximity between individuals, 4) gathering for an extended duration (unlimited), and 5) having substantial singing and vocalizing that generally takes place at events. 9ER1776.

However, upon closer examination, the results of the study that Dr. Watt cites to support his claim of singing being more dangerous also put forth a new thesis that there are certain individuals who are "superspreaders" for an **unknown reason**: "Our results also clearly show that some participants release many more particles than others, for as-yet **unclear reasons**." [9] Participants were asked to vocalize at many different levels of loudness over varying lengths of time, but the loudness *did not determine* whether an individual was a "superspreader." Dr. Watt also referenced two news articles and a study describing outbreaks at church events, all of which occurred early in March, in the earliest stages of the pandemic, to support his conclusions. South Bay's expert, in contrast, cited studies by various scientists explaining effective measures that can be taken to eliminate the spread

[9] The article also noted that "the relative contribution of each expiratory activity in transmitting infectious microorganisms, however, remains unclear."

of COVID-19 through singing, 12ER2842–45, to which the State has no response.

In view of the above, Governor Newsom's justification for assigning a "higher risk" designation to indoor worship services appears, by attributing significantly more weight to singing without compensating for the decrease in risk by mask-wearing, social distancing and hygiene protocols, to be yet another impermissible value judgment unrelated to health and safety.

Despite the obvious greater risks to health and safety in outdoor protests, Governor Newsom has actively promoted them. He 'thank[ed]" the protestors for violating his orders, 13ER3003, 15ER3441, instructed them to "[k]eep doing it" 13ER3003, 15ER3444, "express[ed his] deep gratitude to them, 13ER3003, 15ER3454, and told them they had a "right" to free speech. 12ER2829. Later, he even tweeted his support. 12ER2832–33. The Governor is willing to grant first class status to the First Amendment right of protest, but assigns second class status to the First Amendment right of freedom of expression.

### 2.3. Governor Newsom's Executive Orders and Blueprint Restrictions are not Narrowly Tailored to Serve a Compelling State Interest.

Everyone recognizes that the State does have a clear interest in protecting the health and safety of its residents, especially in the management of

infectious diseases. But Governor Newsom cannot claim compelling interest when there is no valid justification for treating indoor worship services differently from other secular activities that are allowed to continue indoors. Furthermore, "[a]s more medical and scientific evidence becomes available, and as States have time to craft policies in light of that evidence, courts should expect policies that more carefully account for constitutional rights." *Calvary Chapel*, 140 S. Ct. at 2605 (Alito, J., dissenting). It has been eight months since Governor Newsom first issued his lockdown orders. South Bay has complied with all the necessary guidelines to conduct its worship services safely and there is no evidence that attending a worship service at South Bay or any other Place of Worship is riskier than shopping at Costco, eating at a restaurant, working in a factory or filming a television show. To the contrary, Places of Worship often have a greater ability to reduce risk of transmission through their protocols. And none of these secular activities have the guarantee of the Constitution for protection.

#### 2.3.1. The Orders Fail Even Generic Equal Protection.

Even if a mere *Jacobson* "equal protection" analysis is engaged in, *cf.* App. C at 43a–45a, (Roberts, C.J., concurring), churches are treated far from equally. For example, San Diego elementary and high schools were permitted to open back up again at full-service capacity when the County was in 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 the County's return to the "purple" tier. 5ER809–828.[10] 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.

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[10] 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/.

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 (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 San Diego 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*, 140 S. Ct. at 2609 (Gorsuch, J., dissenting).

#### 2.3.2. The Orders Fail Regular Free Exercise Analysis

But, of course, the Free Exercise clause is not redundant of the Equal Protection clause. If it ever was the right question, the question which First Amendment jurisprudence demands *now* is not merely the *Jacobson* question of whether "[s]imilar or more severe restrictions apply to comparable secular gatherings." App. C. at 44a (Roberts, C.J., concurring).

Rather, the question is whether there is a compelling government interest in preventing South Bay Pentecostal Church from holding worship services (with singing) in its sanctuary, when the 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. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006).

California has never even attempted to answer this tailored question, instead simply stating that worship services have led to some outbreaks. But none of California's anecdotal hearsay relates to South Bay Pentecostal Church. California'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 California's anecdotal cases are examined closely, the newspaper hearsay reveals that almost all of the outbreaks occurred in May or earlier—six months ago—and were primarily caused by a failure to adhere to commonsense safety precautions such as individuals not staying home

despite having symptoms, people not washing hands, and people sharing food. 5ER718–725. Nothing in them indicates that South Bay Pentecostal Church cannot worship safely. 5ER726.

Nor is the Blueprint narrowly tailored and the least restrictive means for stopping COVID-19, given the existence of the same exemptions described above. Those exemptions show that California can accomplish its interests in stopping COVID-19 without completely shutting down places of worship or limiting their capacity to the lesser of 25% or 100 people. Other mitigation strategies (such as social distancing when practicable and proper hygiene practices) are apparently sufficient to stop COVID in essential workplaces and in numerous other comparable settings, and all are *less restrictive* than a total ban or draconian restriction on congregate worship. 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.

### 3. The Other Preliminary Injunction Factors Favor South Bay

#### 3.1. South Bay Will Suffer Irreparable Harm Without Injunctive Relief.

It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Without an injunction preventing Governor Newsom from further enforcing its worship restrictions, South Bay will suffer irreparable harm to its fundamental constitutional rights.

#### 3.2. The Balance of Equities Tips Sharply in South Bay's Favor.

The balance of hardships also tips overwhelming in South Bay's favor because the threatened injury to them is weighty—the loss of constitutional rights and the inability to practice their faith. *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F. Supp. 2d 1005, 1012 (N.D. Cal. 2007). By contrast, the cost of an injunction to the Government is negligible. "[T]here can be no harm to [the government] when it is prevented from enforcing an unconstitutional statute." *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004).

### 3.3. The Relief Sought is in the Public Interest.

As a threshold matter, the government simply "does not have an interest in the enforcement of an unconstitutional law." *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2010) (quotation marks omitted). Although public health interests are undoubtedly important, targeting Places of Worship for disparate treatment will not advance that interest in any way. South Bay's safety measures have prevented any COVID-19 outbreaks stemming from its worship services. No public health interest is served by prohibiting indoor church services where masks, social distancing, and other hygiene measures are in place, especially when a huge superstore like Target or Costco can have hundreds of people shopping indoors. "The question is not whether the State may take generally applicable public-health measures, but whether it may impose greater restrictions only on houses of worship. It may not." *Agudath Israel of Am. v. Cuomo*, ___ F.3d ___, 2020 WL 6559473, at *6 (2d Cir. 2020) (Park, dissenting).

## CONCLUSION

For the reasons stated, South Bay respectfully requests that this Court grant its petition for a writ of certiorari before judgment, and set a clear precedent for the various Circuit and District Courts to follow.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

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| SOUTH BAY UNITED PENTECOSTAL CHURCH, *et al.*,<br>Plaintiffs,<br>v.<br>GAVIN NEWSOM, in his official capacity as the Governor of California, *et al.*,<br>Defendants. | Case No. 20-cv-00865-BAS-AHG<br>**ORDER DENYING PLAINTIFFS' RENEWED MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION (ECF No. 53)**<br>(Filed Oct. 15, 2020) |

## I. INTRODUCTION

This case arises from the State of California's efforts to limit the spread of the novel severe acute respiratory syndrome-related coronavirus (SARS-CoV-2) that has upended society. The illness caused by the virus, coronavirus disease 2019 (COVID-19), has killed more than ten thousand people in California and sickened many more. There is no known cure, widely available effective treatment, or approved vaccine for the disease. And because people infected with the virus may be asymptomatic, they may unintentionally infect others around them. Therefore, physical distancing that limits physical contact is essential to slow the spread of the virus.

To ensure physical distancing, the Governor of California has issued a series of restrictions on public gatherings. This case centers on the restrictions for in-person, indoor religious worship services. Plaintiffs South Bay United Pentecostal Church and Bishop Arthur Hodges III allege these restrictions violate their constitutional rights by limiting their ability to freely exercise their religion.

An earlier version of California's restrictions prohibited Plaintiffs from holding any in-person worship services. In May 2020, Plaintiffs asked the Court to enjoin those restrictions while this case proceeded. After the Court denied Plaintiffs' request for extraordinary relief, they appealed to the Court of Appeals for the Ninth Circuit and concurrently requested an emergency injunction, which was denied. Plaintiffs next asked the Supreme Court for emergency relief, but it, too, denied their request. Plaintiffs later requested that their appeal be sent back to this Court to allow the Court to reconsider whether California's restrictions should be enjoined in light of new developments. The Ninth Circuit granted their request.

Now before the Court is Plaintiffs' renewed motion for a temporary restraining order or preliminary injunction. In San Diego County, California's restrictions currently limit Plaintiffs' indoor worship services to 25% of building capacity or 100 people, whichever is fewer. The restrictions also forbid group singing and chanting indoors. Thus, the challenged restrictions are more nuanced and lenient than the rules the Court previously considered in May. Plaintiffs now argue,

however, that California's "scientific pronouncements" are "largely baseless," and that by "all reasonable scientific measurements," the COVID-19 health emergency "has ended." (ECF No. 61 at 1:12-15.) They also argue the State's restrictions treat certain secular businesses more favorably than religious organizations and have been enforced in a discriminatory manner. Consequently, Plaintiffs argue the restrictions regarding indoor worship services and singing are unconstitutional and should be enjoined before trial.

California paints a different picture of the current circumstances. It stresses the crisis is ongoing and filled with uncertainty. California highlights that COVID-19 infections and deaths surged after the Court considered Plaintiffs' first request to enjoin the State's rules. And although Plaintiffs' renewed motion cites that "[a]s of July 14, 2020, California ha[s] only reported a total of 7,227 deaths from COVID-19," the State points out that this count had swelled to 12,407 as of August 31, 2020. (State's Opp'n 9:18-21, ECF No. 57; *see also* Renewed Mot. 1:24–25, ECF No. 53-1.) California argues "these numbers are enormous, far greater than the number of people killed in the 9/11 terrorist attacks and those who lost their lives in Hurricane Katrina." (State's Opp'n 9:21–23.) The State also claims Plaintiffs "ignore the reason for why the State has been able to slow the spread of the disease: the imposition of the very types of public health restrictions that Plaintiffs ask the Court to enjoin." (*Id.* 10:14–17.) "Enjoining restrictions because they have proven effective in curbing COVID-19 would be 'like

throwing away your umbrella in a rainstorm because you are not getting wet,' " the State argues. (*Id.* 10:26–28 (citing *Shelby Cty. v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting)).) Therefore, both California and the County of San Diego urge the Court to again refuse Plaintiffs' request for extraordinary relief.

Ultimately, the Court concludes Plaintiffs have not met their burden to demonstrate they are entitled to a preliminary injunction—"an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Therefore, for the following reasons, the Court **DENIES** Plaintiffs' renewed motion for a temporary restraining order or preliminary injunction.

## II. BACKGROUND

### A. SARS-CoV-2

Transmission. Although much remains uncertain about the novel coronavirus, "there is consensus among epidemiologists that the most common mode of transmission of SARS-CoV-2 is from person to person, through respiratory droplets such as those that are produced when an infected person coughs or sneezes, or projects his or her voice through speaking, singing and other vocalization." (Dr. Watt Decl. ¶ 27, ECF No.

57-2[1] *accord* Dr. Rutherford Decl. ¶ 28, ECF No. 57-3.[2] The virus can also "live on certain surfaces for a period

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[1] Dr. James Watt is the Chief of the Division of Communicable Disease Control of the Center for Infectious Diseases at the California Department of Public Health ("CDPH"). (Dr. Watt Decl. ¶ 2.) He received his doctor of medicine from the University of California, San Diego in 1993 and a master's degree in public health from the University of California, Berkeley in 1995. (*Id.* ¶ 3.) Dr. Watt previously worked for the Centers for Disease Control and Prevention ("CDC") as an Epidemic Intelligence Service Officer in the Respiratory Diseases Branch. (*Id.* ¶ 4.) He is also an Associate at the Johns Hopkins Bloomberg School of Public Health and a Clinical Professor at the University of California, San Francisco School of Medicine, where he teaches graduate students in public health and medical students about communicable disease control. (*Id.* ¶ 5.) His professional commendations include the U.S. Public Health Service Achievement medal in 2000, the National Center for Infectious Diseases Honor Award in 2001, and Outstanding Achievement Awards from the CDPH in 2015 and 2016. (*Id.* ¶ 8.) Dr. Watt has been "very involved" in the CDPH's response to the COVID-19 pandemic, "working full time for approximately 60–70 hours per week to address the pandemic" from January 2020 to the date of his declaration. (*Id.* ¶ 15.) The Court addresses Plaintiffs' objections to Dr. Watt's declaration and other evidence below. *See infra* note 7.

[2] Dr. George Rutherford is the Salvatore Pablo Lucia Professor of Epidemiology, Preventive Medicine, Pediatrics, and History at the University of California, San Francisco School of Medicine. (Dr. Rutherford Decl. ¶ 4.) He also leads the Division of Infectious Disease and Global Epidemiology in the Department of Epidemiology and Biostatistics. (*Id.*) Further, Dr. Rutherford is an adjunct professor at the University of California, Berkeley School of Public Health. (*Id.*) He also serves as the "Director of Global Strategic Information Group in the Institute for Global Health Sciences at U.C. San Francisco." (*Id.*) Dr. Rutherford received his doctor of medicine from the Duke University School of Medicine in 1978. (*Id.* ¶ 2.) He also received training in epidemiology in the CDC's Epidemic Intelligence Service and spent ten years in various public health positions before entering academia. (*Id.* ¶ 3.) Since the

of time, suggesting that fomite transmission (through touching a surface where the live virus is present) is possible," but this method of transmission "is not believed to be a common method by which individuals can be infected by the virus." (Dr. Watt Decl. ¶ 29; *see also* Dr. Rutherford Decl. ¶ 30.) There is also "broad consensus that people who are not experiencing symptoms can still spread SARS-CoV-2." (Watt Decl. ¶ 30; *see also id.* ¶ 31; Dr. Rutherford Decl. ¶¶ 20–32.) "Therefore, individuals who themselves may have been unknowingly infected by others can themselves become unknowing transmitters of the virus." (Dr. Watt Decl. ¶ 32; *accord* Dr. Rutherford Decl. ¶ 27.)

Gatherings. Group gatherings increase the risk of transmission of the virus. (Dr. Watt Decl. ¶¶ 37–43; *see also* Dr. Rutherford Decl. ¶¶ 47–52.) "The more people that gather, the higher the likelihood that an infected person will be present. Also, the larger the gathering, the higher the number of people who may be secondarily infected by that infected person." (Dr. Watt Decl. ¶ 42; *see also* Dr. Rutherford Decl. ¶ 47.) "Evidence indicates the risk of transmission at a gathering increases when individuals are in close proximity to one another for an extended period." (Dr. Watt Decl. ¶ 43.) The transmission risk also "increases with both the

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novel coronavirus emerged, Dr. Rutherford has "devoted substantial time to researching and studying the virus" as part of his epidemiology roles and has "spoken extensively on topics related to the novel coronavirus and the disease it causes during 2020," including through presentations to the California Medical Association and the California Health and Human Services Agency. (*Id.* ¶ 14.)

length of time the gathering lasts and the proximity of people to each other at the gathering." (*Id.*)

Indoor Gatherings and Singing. Although gatherings increase the risk of transmission of the virus, this risk "is much higher when the gathering takes place indoors rather than outdoors." (Dr. Watt Decl. ¶ 43; Dr. Rutherford Decl. ¶ 50 ("There is a lower risk of COVID-19 transmission when a group gathering takes place outdoors; there is a much decreased likelihood of aerosolized transmission of the virus outdoors because aerosolized particles will dissipate into the atmosphere.").) There is also "scientific consensus that vocalization, even normal speech, produces aerosols, and that louder and more forceful expression such as singing and chanting produces more aerosols." (Dr. Watt Decl. ¶ 45.) "Most scientists believe that group singing, particularly when engaged in while in close proximity to others in an enclosed space, carries a high risk of spreading the COVID-19 virus through the emission of infected droplets (which typically travel <6 feet) and aerosols." (*Id.*; *see also* Dr. Rutherford Decl. ¶ 54 (explaining that engaging in "singing, chanting, shouting, and speaking loudly . . . in an indoor or enclosed space" increases the risk of transmission).)

Given the foregoing, religious "services and similar cultural events, particularly those taking place in an enclosed space, involve a heightened level of risk of COVID-19 transmission." (Dr. Watt Decl. ¶ 72; *accord* Dr. Rutherford Decl. ¶ 57.) "The characteristics of such events that cause the increased risk of transmission include: being indoors, bringing together a large group

of people, having close proximity between individuals, gathering for an extended duration, and having substantial singing and vocalizing that generally takes place at the events." (Dr. Watt Decl. ¶ 72; *see also* Dr. Rutherford Decl. ¶ 57 ("Based on my knowledge, experience and study of the relevant publications, attending indoor worship services (and similar cultural events, which are included in this discussion) presents an exceptionally high risk of COVID-19 transmission because they involve a combination of many high risk factors").)

COVID-19. "The virus can cause severe disease and death in individuals of any age. Older adults and people of any age who have serious underlying medical conditions are at higher risk for severe illness or death from COVID-19." (Dr. Watt Decl. ¶ 22; *see also* Dr. Rutherford Decl. ¶¶ 40, 51.) "The symptoms of the disease are predominantly respiratory but many of those infected also experience non-respiratory symptoms." (Dr. Rutherford Decl. ¶ 20; *see also* Dr. Watt Decl. ¶ 21.) "The disease typically starts as a fever and cough that progresses to respiratory distress and pneumonia in some individuals. In its most severe form it causes respiratory and/or myocardial failure." (Dr. Rutherford Decl. ¶ 21.) "Currently there is no vaccine available in the United States and no generally effective treatment for COVID-19." (*Id.* ¶ 36; *see also id.* ¶ 37 (noting that "[w]e have learned a lot about treatment of the novel coronavirus since the beginning of the pandemic and treatments have improved," but "they are far from curative"); Dr. Watt Decl. ¶ 24.)

### B. South Bay Pentecostal Church

Plaintiff South Bay Pentecostal Church "is a multi-national, multi-cultural congregation" located in Chula Vista in San Diego County, California. (Bishop Hodges Decl. ¶ 3, ECF No. 12-2.) Its congregation "represents a cross-section of society, from rich to poor and encompassing people of all ages." (*Id.* ¶ 17.) Plaintiff Bishop Art Hodges III has served as the senior pastor of the Church for thirty-five years. (*Id.* ¶ 2.)

Typically, the Church holds "between three and five services each Sunday." (Bishop Hodges Decl. ¶ 12, ECF No. 12-2.) "The average attendance at some of these services lies between two-hundred (200) and three-hundred (300) congregants." (*Id.*) The Church's "sanctuary can hold up to six-hundred (600) people." (*Id.*) The Church "also perform[s] baptisms, funerals, weddings, and other religious ceremonies." (*Id.* ¶ 15.)

Bishop Hodges explains that "singing is at the heart of our worship services, and comprises 25–50% of our typical Pentecostal worship gathering experience at Church." (Bishop Hodges Decl. ¶ 3, ECF No. 53-2.) "In a Pentecostal Church worship service, everyone is instructed and expected to sing praise to God, just as everyone is instructed and expected to pray to God. In our worship services, praying, singing, and praising God is not for spectators, it is for participants." (*Id.* ¶ 10.) A service at the Church also "concludes with fellowship both inside and outside the sanctuary." (Bishop Hodges Decl. ¶ 14, ECF No. 12-2.) Bishop Hodges further explains: "'Zoom Meetings' and other

tele-conferencing applications are inadequate substitutes [for in-person services] as they curtail a minister's ability to lay hands upon a congregant or perform a baptism. They also curtail our congregation's ability to approach the altar, which is central to our experience of faith." (*Id.* ¶ 20.)

### C. Stay-at-Home Order and First Motion for Injunctive Relief

Executive Order N-33-20. On March 4, 2020, the Governor of California proclaimed a State of Emergency in California because of the threat of COVID-19. (Second Am. Compl. ("SAC") ¶ 18, ECF No. 47; *see also* SAC Ex. 1-1, ECF No. 47-1.) On March 19, 2020, the Governor issued Executive Order N-33-20, which states that to protect the public's health, "all individuals living in the State of California" are "to stay at home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." (SAC Ex. 1-1.)[3] California's Public Health Officer designated a list of "Essential Critical Infrastructure Workers." (SAC Ex. 1-2.) Included in that list were "[f]aith based services that are provided through streaming or other technology." (*Id.* at 16.) Meaning, Plaintiffs could conduct services over

[3] The Court considers the public records and government documents attached to the Second Amended Complaint because their authenticity is not questioned. The Court similarly grants the State's and Plaintiffs' requests for judicial notice as to the contents of public records and government documents. (ECF Nos. 57-7, 69.) *See*, *e.g.*, *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 969 n.4 (9th Cir. 2008).

online streaming video or teleconferencing, but not in person at the Church's sanctuary. (*See id.*)

The State later released a "Resilience Roadmap" that categorized workplaces into four stages. (SAC Ex. 1-3.) The roadmap placed "religious services" in Stage 3, along with movie theaters, museums, and bars—instead of Stage 2, which included retail stores and dine-in restaurants. (*Id.*) The County of San Diego adopted the State's restrictions, list of essential workers, and roadmap through a series of public health orders and emergency regulations. (*See* SAC Exs. 2-2, 2-3, 2-4.)

On May 8, 2020, Plaintiffs filed this action against various State and County officials.[4] (ECF No. 1.) On

[4] After changes to the pleadings and personnel, the Defendants are:

| **Name** | **Title** |
|---|---|
| Gavin Newsom | Governor of California |
| Xavier Becerra | Attorney General of California |
| Sandra Shewry* | Acting Director of the CDPH |
| Wilma J. Wooten | Public Health Officer, County of San Diego |
| Helen Robbins-Meyer | Director of Emergency Services, County of San Diego |
| William D. Gore | Sheriff of the County of San Diego |

Plaintiffs sue all these Defendants in their official capacities. (SAC ¶¶ 10–15.) For simplicity, the Court collectively refers to the State of California officials as either "California" or the "State." The Court also collectively refers to the County of San Diego officials as the "County" or "San Diego County." *But see* U.S. Const. amend XI; 42 U.S.C. § 1983; *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

* The Court substitutes Sandra Shewry, the Acting Director of the CDPH, in place of Sonia Angell, the former official, who resigned. (*See* ECF No. 67 at n.1.) *See* Fed. R. Civ. P. 25(d).

May 11, 2020, Plaintiffs filed a First Amended Complaint raising claims under the First Amendment's Free Exercise, Establishment, Free Speech, and Assembly Clauses; the Fourteenth Amendment's Due Process and Equal Protection Clauses; and rights enumerated in Article 1, sections 1 through 4, of the California Constitution. (ECF No. 11.) Plaintiffs then moved for a temporary restraining order and an order to show cause regarding a preliminary injunction. (ECF No. 12.) Plaintiffs sought an injunction that would prevent the State and County "from enforcing . . . any prohibition on Plaintiffs' engagement in religious services, practices, or activities at which the County of San Diego's Social Distancing and Sanitation Protocol and Safe Reopening Plan is being followed." (ECF No. 12-1 at 25:10–14.)

Prior Ruling. On May 15, 2020, the Court denied Plaintiffs' motion during a telephonic hearing. (ECF No. 32.) The Court concluded Plaintiffs are unlikely to prevail on the merits of their claims for several reasons. First, applying *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the Court found that the State "may limit an individual's right to freely exercise his religious beliefs when faced with a serious health crises" like that presented by COVID-19. (Mot. Hr'g Tr. 25:19–25, ECF No. 38.) The Court reasoned: "The right to practice religion freely does not include the liberty to expose the community to communicable disease or to ill health or death." (*Id.* 26:1–3.)

Second, citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the Court

reasoned that the then-operative restrictions did not place a burden on in-person worship services "because of a religious motivation, but because of the manner in which the service is held, which happens to pose a greater risk of exposure to the virus." (Mot. Hr'g Tr. 26:9–25.) The Court highlighted that "the services involve people sitting together in a closed environment for long periods of time." (*Id.* 26:19–20.) The Court further determined that Plaintiffs had "not demonstrated arbitrary exceptions to [the] classification" level that included in-person worship services. (*Id.* 27:5–6.) The Court also found the reopening restrictions were "rationally based on protecting safety and stopping" the spread of the virus. (*Id.* 27:10–11.)

Third, the Court reasoned that, even if the equivalent of strict scrutiny applied to Plaintiffs' state constitutional free exercise claim, the restrictions were narrowly tailored to further a compelling governmental interest—the State's interest in protecting public health. (Mot. Hr'g Tr. 27:12–28:17.) Finally, the Court determined Plaintiffs were unlikely to succeed on their federal equal protection and due process claims. (*Id.* 29:18–30:2.) And after further finding that neither the balance of equities nor the public interest supported issuing a temporary restraining order, the Court denied Plaintiffs' motion. (*Id.* 30:3–19.)

### D. Appeal and Changing Landscape

Ninth Circuit. Plaintiffs appealed to the Ninth Circuit and filed an emergency motion for an

injunction that would allow them to hold in-person religious services pending appeal. (ECF Nos. 35, 41–42.) On May 22, 2020, the Ninth Circuit denied Plaintiffs' request. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020). The Ninth Circuit concluded Plaintiffs had "not demonstrated a sufficient likelihood of success on appeal." *Id.* at 939. It explained:

> Where state action does not "infringe upon or restrict practices because of their religious motivation" and does not "in a selective manner impose burdens only on conduct motivated by religious belief," it does not violate the First Amendment. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 543, (1993). We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure. In the words of Justice Robert Jackson, if a "[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

*Id.* at 939. The Ninth Circuit also determined the remaining injunction factors "do not counsel in favor of injunctive relief." *Id.* at 940. Judge Collins dissented. *Id.* at 940–47. He reasoned the State's then-operative reopening plan is not facially neutral or generally applicable, is subject to strict scrutiny, and does not pass muster under this standard. *Id.* at 943–46. On the last point, Judge Collins reasoned California's

"undeniably compelling interest in public health" could be achieved through narrower restrictions that regulated the "specific underlying risk-creating *behaviors*, rather than banning the particular *religious* setting within which they occur." *Id.* at 946–47.

On May 25, 2020, California issued guidelines that allow places of worship to resume in-person services with limitations. (SAC Ex. 1-5.) The guidelines contain instructions and recommendations for physical distancing during worship services as well as cleaning and disinfection protocols, training for employees and volunteers, and individual screening. (*Id.*) Further, while citing the increased risk of transmission of the virus in an indoor setting, the guidelines limit attendance for in-person worship services "to 25% of building capacity or a maximum of 100 attendees, whichever is fewer." (*Id.* at 3.)

Supreme Court. When California relaxed its restrictions, Plaintiffs were seeking emergency relief from the Supreme Court. (Grabarsky Decl. Ex. 6, ECF No. 57-1.) They filed a supplemental brief to challenge the State's May 25 guidelines. (*Id.* Ex. 7.) After Justice Kagan referred Plaintiffs' application for injunctive relief to the Supreme Court, the Court denied it. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). Chief Justice Roberts wrote an opinion concurring in the denial of the application. *Id.* at 1613–14. He reasoned:

> Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

*Id.* at 1613. The Chief Justice further explained:

> The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and

> expertise to assess public health and is not accountable to the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 545 (1985).

*Id.* Justice Kavanaugh dissented. He reasoned that indoor worship services are comparable to "factories, offices, supermarkets," and various other secular establishments that were not subject to the same occupancy cap. *Id.* at 1614. And although "California undoubtedly has a compelling interest in combating the spread of COVID-19 and protecting the health of its citizens," Justice Kavanaugh reasoned California's restrictions discriminate against religion because the State lacks a compelling justification for distinguishing between worship services and the aforementioned secular businesses. *Id.* at 1615.

### E. Continued Developments and Limited Remand

Singing Restrictions. After the Supreme Court's decision, the State and County officials continued to "actively shap[e] their response to changing facts on the ground." *See* 140 S. Ct. at 1614 (Roberts, C.J.). In early July, the State issued revised guidance that requires places of worship to "discontinue indoor singing and chanting activities" because such activities "negate the risk reduction achieved through six feet of physical distancing." (SAC Ex. 1-9.) This prohibition on indoor group singing and chanting similarly applies to

political protests, schools, and restaurants.[5] (*See* Dr. Watt Decl. ¶¶ 88–90 (explaining why the State imposed restrictions on these activities and noting that other gatherings that involve "an elevated risk of COVID-19 virus spread through singing, chanting or similar activities, such as those at live concerts, live music venues, live theatrical performances, spectator sports, recreational team sports, theme parks and indoor protests, remain prohibited throughout the State").)

July 13 Closure Order. Then, on July 13, 2020, due to the "significant increase in the spread of COVID-19," the State issued an order re-imposing many previously relaxed restrictions on indoor activities. (SAC Ex. 1-13.) In addition, for those counties on the State's "County Monitoring List," which are those the State believed showed "concerning levels of disease transmission, hospitalizations, insufficient testing, or other critical epidemiological markers," the order closed various indoor businesses, as well as "places of worship." (*Id.*)

Limited Remand. Meanwhile, on July 10, 2020, while Plaintiffs' interlocutory appeal was pending,

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[5] (Gabrasky Decl. Ex. 14 (providing "singing and chanting activities are discontinued" for "indoor protests"); Ex. 15 (providing "[a]ctivities where there is increased likelihood for transmission from contaminated exhaled droplets such as band and choir practice and performances are not permitted" and any activities "that involve singing must only take place outdoors"); Ex. 16 (providing restaurants "must discontinue" concert or performance-like entertainment "until these types of activities are allowed to resume").)

Plaintiffs moved this Court for an indicative ruling to revisit its denial of their initial motion. (ECF No. 45.) The Court granted their request, reasoning it raised a substantial issue. (ECF No. 46.) Plaintiffs then filed their Second Amended Complaint. (ECF No. 47.) And on July 29, 2020, the Ninth Circuit remanded the appeal "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." (ECF No. 49.)

Four-Tier System. On August 10, 2020, Plaintiffs filed their renewed motion for a temporary restraining order or a preliminary injunction. (Renewed Mot., ECF No. 53.) While the motion was being briefed, circumstances again changed. On August 28, 2020, due to "increased knowledge of disease transmission vulnerabilities and risk factors," the State established a new four-tier system for reopening, which superseded the State's July 13 order. (Grabarsky Decl. Exs. 50–53.) Under this four-tier system, which is more nuanced than the State's prior restrictions, lower-risk activities and sectors are permitted to resume sooner than higher-risk ones based on a series of "risk criteria." These criteria include the ability "to physically distance between individuals from different households," "to limit the number of people per square foot," "to limit duration of exposure," "to optimize ventilation (e.g. indoor vs outdoor, air exchange and filtration)," and "to limit activities that are known to cause increased spread" like singing and shouting. (*Id.* Ex. 51; *see also* Dr. Rutherford Decl. ¶¶ 57–71 (discussing risks of

indoor religious worship and cultural events, grocery shopping, restaurant dining, and factories and whether those environments involve the "heightened risk created by group singing").)

Counties are assigned to a tier based on their reported COVID-19 case rate and percentage of positive COVID-19 tests. (Grabarsky Decl. Ex. 50.) For example, Tier 2 is the red-colored tier, which marks "substantial" risk of community disease transmission. (*Id.*) The State placed San Diego County into this tier when Plaintiffs' motion was being briefed, and the County remains there now. (*Id.* Ex. 52-1.)[6] In this tier, Plaintiffs again may hold indoor worship services up to 25% of building capacity or 100 persons, whichever is fewer. (*Id.* Exs. 52–23.) Indoor restaurants and movie theaters in the County are subject to the same attendance restrictions as worship services, but bars, wineries, cardrooms, concerts, sporting events, family entertainment centers, and theatrical performances remain either closed entirely or restricted to outdoor activities only. (*Id.* Ex. 53.) Retail stores—except standalone grocers—are limited to 50% capacity indoors with modifications. (*Id.*) Non-critical office spaces are designated

[6] Although the facts underlying the State's decision making with respect to its four-tier system may be subject to dispute, the fact that the State has placed and kept San Diego County in Tier 2 is not subject to reasonable dispute. *See* Blueprint for a Safer Economy—Current Tier Assignments as of October 13, 2020, https://covid19.ca.gov/safer-economy/; *see also* Fed. R. Evid. 201(b); *King v. Cty. of Los Angeles*, 885 F.3d 548, 555 (9th Cir. 2018) (taking judicial notice of "undisputed and publicly available information displayed on government websites").

"remote," and gyms are limited to 10% capacity indoors. (*Id.*)

The State and County filed oppositions to Plaintiffs' renewed motion, and Plaintiffs filed a reply to each opposition. (State's Opp'n, ECF No. 57; County's Opp'n, ECF No. 58; County's Joinder, ECF No. 59; Reply to State's Opp'n, ECF No. 61; Reply to County's Opp'n, ECF No. 61-1.)[7] Further, on September 4, 10, 11,

[7] Plaintiffs lodge 142 evidentiary objections to the evidence submitted by California and the County. (ECF No. 61-6.) Among raising other objections, Plaintiffs argue certain evidence is hearsay, irrelevant, "more prejudicial than probative," or lacks foundation. (*Id.* at 1:12–142.) The State responds. (ECF No. 65.)

The Court overrules these objections. Evidence submitted in connection with a request for a preliminary injunction is not subject to the same requirements that would apply at trial. *See Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984); *see also*, *e.g.*, *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) ("A district court may, however, consider hearsay in deciding whether to issue a preliminary injunction."); *Nat'l Rifle Ass'n of Am. v. City of Los Angeles*, 441 F. Supp. 3d 915, 926 (C.D. Cal. 2019) ("Because of the extraordinary nature of injunctive relief . . . a district court may consider evidence outside the normal rules of evidence, including: hearsay, exhibits, declarations, and pleadings."); *Rosen Entm't Sys., LP v. Eiger Vision*, 343 F. Supp. 2d 908, 912 (C.D. Cal. 2004) (applying the Ninth Circuit's reasoning in *Flynt* to objections to the defendant's evidence). Rather, the evidence's form impacts the weight it is given when the court assesses the merits of equitable relief. *Rosen*, 343 F. Supp. 2d at 912. Indeed, the Court notes that both parties, including their proposed experts, routinely rely on various reported statistics for COVID-19. (*See*, *e.g.*, SAC ¶¶ 105–112 (citing statistics prepared by California and the County); Cicchetti Decl. ¶¶ 17–19 (citing data from *Politico* and *The New York Times*); Dr. Delgado Decl. ¶¶ 7–14 (relying on CDC and non-governmental website data); *Lyons-Weiler* Decl. ¶¶ 10–18, 27 (citing information from the European CDC and an assortment of news

and 14, and on October 1, 6, 7, and 13, 2020, the parties filed notices of supplemental authority, all of which the Court has considered. (ECF Nos. 60, 62–64, 66–68, 70.)

## III. LEGAL STANDARD

The standard for a temporary restraining order and preliminary injunction are "substantially identical." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). "A plaintiff seeking a preliminary injunction must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The party seeking the injunction bears the burden of proving these elements. *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). "A preliminary injunction is 'an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

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sources like *Bloomberg* and *US News and World Report*); Trissell Decl. Exs. A–C (appending CDC and County statistics); Dr. Watt Decl. ¶¶ 93–103; Dr. Rutherford Decl. ¶ 25.) To the extent the Court cites to evidence that Plaintiffs object to, the Court has determined Plaintiffs' objections are meritless or the evidence deserves some weight at this stage notwithstanding concerns over its admissibility at trial.

## IV. ANALYSIS

Against this backdrop, the Court considers Plaintiffs' renewed request for injunctive relief against the State and County officials. Plaintiffs tailor their renewed motion to their "Free Exercise Claims under the U.S. and California Constitutions." (Renewed Mot. 8 n.4.) Therefore, the Court focuses its analysis on these claims.

Further, the Court analyzes these claims in light of the current restrictions that apply to the Church. As summarized above, San Diego County is in the State's "red" tier—Tier 2. Thus, worship services may be held outdoors and include singing and chanting outdoors. Indoor worship services, however, are limited to up to 100 people or 25% of building capacity, whichever is fewer, and may not include singing or chanting. *See supra* Part II.E. Because Plaintiffs wish to hold indoor worship services that include group singing and exceed the Tier 2 limit on attendees, the Court considers whether Plaintiffs have demonstrated a likelihood of success on their claims that these restrictions violate their federal and state constitutional free exercise rights. (*See* Renewed Mot. 6:25–7:6.)

At bottom, Plaintiffs' renewed motion asks the Court to second guess decisions made by California officials concerning whether COVID-19 continues to present a health emergency and whether large indoor gatherings with singing pose a risk to public health. Although not binding, the Court finds Chief Justice Roberts's reasoning in this case to be compelling. The

background set forth above shows the State and County "are actively shaping their response to changing facts on the ground." *See* 140 S. Ct. at 1614 (Roberts, C.J.). And the evidence demonstrates the COVID-19 pandemic remains an area "fraught with medical and scientific uncertainties," where the State and County's latitude "must be especially broad." *See id.* at 1613 (quoting *Marshall*, 414 U.S. at 427).

Moreover, neither Plaintiffs' evidence nor their arguments convincingly show that the current restrictions exceed "those broad limits." *See* 140 S. Ct. at 1613. Hence, the Court finds Plaintiffs have not demonstrated a likelihood of success on the merits of their free exercise claims. *See id.* at 1614 ("Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (quoting *Garcia*, 469 U.S. at 545)). Consequently, Plaintiffs are not entitled to the "extraordinary and drastic remedy" that is injunctive relief before trial. *See Lopez*, 680 F.3d at 1072 (providing the court should not issue a preliminary injunction "unless the movant, *by a clear showing*, carries the burden of persuasion"); *accord City & Cty. of San Francisco v. U.S. Citizenship & Immigr. Servs.*, 944 F.3d 773, 789 (9th Cir. 2019).

The Court further expands upon its analysis below while addressing Plaintiffs' claims that (i) COVID-19 no longer presents a public health emergency, (ii) the State's restrictions discriminate against places of

worship, and (iii) the State's restrictions have been discriminatorily enforced.

### A. Public Health Emergency

The Court previously reasoned that the State "may limit an individual's right to freely exercise his religious beliefs when faced with a serious health crises" like that presented by COVID-19. (Mot. Hr'g Tr. 25:19–25, ECF No. 38 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).) In Plaintiffs' renewed motion, they argue the COVID-19 pandemic has stabilized in California, as the State "had only reported a total of 7,227 deaths" as of July 14, 2020. (Renewed Mot. 1:24–25 (citing COVID-19 Statewide Update for July 15, 2020, SAC Ex. 5-3).) They also argue curbing the virus is no longer "a compelling interest" given "the flattening of the death and hospitalization rates, regardless of the infection rate," as "numerous experts have concluded that the worst of the pandemic is absolutely over." (*Id.* 11:3–5.) Plaintiffs later argue that California's "scientific pronouncements" are "largely baseless," and that by "all reasonable scientific measurements," the COVID-19 health emergency "has ended." (Reply to State's Opp'n 1:12–15.)

Plaintiffs' position is not convincing. For one, arguments of counsel are not evidence. *See*, *e.g.*, *Carrillo-Gonzalez v. I.N.S.*, 353 F.3d 1077, 1079 (9th Cir. 2003). In determining whether to grant extraordinary relief, this Court is not bound by Plaintiffs' counsel's interpretation of CDC statistics or what they believe is an

acceptable death rate for COVID-19 compared to other causes of death—many of which are not contagious and are well-understood by the scientific community. (*See* Renewed Mot. 1:13–3:4; Reply to State's Opp'n 1:13–25; *see also* Dr. Watt Decl. ¶¶ 101–02.)[8] Second, the State's evidence regarding infections and deaths amply demonstrates that SARS-CoV-2 and COVID-19 continue to present a public health emergency in California, including in the County of San Diego. (Dr. Watt Decl. ¶¶ 16–103; Dr. Rutherford Decl. ¶¶ 16–46.) Third, Plaintiffs' contrary evidence is not compelling. At best, Plaintiffs' evidence confirms that "[t]he precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable

[8] Plaintiffs highlight that "the CDC updated its coronavirus statistics to reveal that for 94% of coronavirus related deaths, 'in addition to COVID-19, on average, there were 2.6 additional' comorbidities." (Reply to State Opp'n 1:15–22 (citing Trissell Decl. Ex. NN, ECF No. 61-5).) They extrapolate this 94% statistic to determine a much smaller infection-fatality rate for those who "are healthy and have no other comorbidities." (*Id.* 1:21–22.) That characterization is problematic. The "comorbidities" listed in the CDC's data include not only common health conditions like obesity, diabetes, and hypertension, but also conditions that COVID-19 *itself* can cause *before* death—like "pneumonia" and "respiratory failure." (Trissell Decl. Ex. NN at 5–6; *see also* Dr. Watt Decl. ¶ 21; Dr. Rutherford Decl. ¶ 21 ("The disease typically starts as a fever and cough that progresses to respiratory distress and pneumonia in some individuals. In its most severe form it causes respiratory and/or myocardial failure.").) The State, of course, has a compelling interest in protecting all of its residents from a communicable disease—including those residents with conditions like obesity and diabetes that may ultimately be "comorbidities" along with COVID-19.

disagreement."[9] *See S. Bay Church*, 140 S. Ct. at 1613 (Roberts, C.J.). And because Plaintiffs do not show "the

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[9] *Compare* Cicchetti Decl. ¶ 20, ECF No. 53-5 (claiming, as an economist, that there "is no scientific evidence that supports California continuing to restrict religious worship"), *and* Kauffman Decl. ¶ 14, ECF No. 53-6 (expressing that "[d]espite the state's claim, there is no rational and legitimate scientific or public health basis supporting the sweeping breadth and scope of the State of California's above-described closure mandate"), *and* Lyons-Weiler Decl. ¶ 29, ECF No. 53-7 (opining that the increasing cases in the United States "are not as large of a concern as they were in the beginning of the pandemic" because the "infection case fatality rate . . . is falling fast" and "COVID-19 is not the monster we initially thought it was"), *and* Dr. Bhattacharya Decl. ¶ 28, ECF No. 53-8 (estimating the "infection fatality rate is less than 0.2%" for "the non-elderly congregants," whereas the mortality risk for those over seventy who contract the disease is "still small, with 98.7% of infected elderly people surviving the infection"), *and* Trissell Decl. Exs. D–F, ECF No. 69-1 (arguing that current lockdown policies are producing detrimental effects on short and long-term public health and "[t]he most compassionate approach that balances the risks and benefits of reaching herd immunity, is to allow those who are at minimal risk of death to live their lives normally to build up immunity to the virus through natural infection, while better protecting those who are at highest risk"), *with* Watt Decl. ¶¶ 93–103, ECF No. 57-2 (explaining that having "a single infectious disease as a top ranking cause of death signals a serious change" because "[i]nfectious diseases were commonly the top causes of death decades ago, but they have been replaced with chronic diseases more recently because our public health efforts have led to reductions in infectious disease"), *and* Dr. Rutherford Decl. ¶¶ 38–46, ECF No. 57-3 (opining that "the novel coronavirus pandemic calls for extraordinary measures to protect the population" not only because it causes serious illness or death, but also because there is "emerging evidence that the virus has serious lasting, and possibly long-term, effects on some individuals"), *and* Imrey Decl. ¶ 50, ECF No. 57-4 (opining that "Dr. Bhattacharya's seroprevalence-survey based claims of very low overall and age-specific COVD-19 infection fatality rates,

broad limits" of the State and County's discretion in this context are being exceeded, second guessing their decisions is not appropriate. *See id.*; *see also San Francisco*, 944 F.3d at 789 (providing the court should not issue a preliminary injunction "unless the movant, *by a clear showing*, carries the burden of persuasion"). Accordingly, the Court rejects Plaintiffs' claim that the State's restrictions are unconstitutional because the COVID-19 public health emergency has ended.

### B. Discriminatory Restrictions

"Where state action does not 'infringe upon or restrict practices because of their religious motivation' and does not 'in a selective manner impose burdens only on conduct motivated by religious belief,' it does not violate the First Amendment." *S. Bay Church*, 959 F.3d at 939 (quoting *Lukumi*, 508 U.S. at 532). In determining whether a law discriminates against religion, courts compare the treatment of religious conduct and "analogous non-religious conduct" and consider whether the governmental interests "could be achieved by narrower ordinances that burden[] religion to a far lesser degree." *Lukumi*, 508 U.S. at 546.

As mentioned, the Court's decision to deny Plaintiffs' initial request for injunctive relief also rested on the Court's determination that the then-operative restrictions did not place a burden on in-person worship services "because of a religious motivation, but because

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generally and specifically in California, remain matters on which, for good reasons, there is no scientific consensus").

of the manner in which the service is held, which happens to pose a greater risk of exposure to the virus." (Mot. Hr'g Tr. 26:9–25.) The Court further determined that Plaintiffs had "not demonstrated arbitrary exceptions to [the] classification" of restrictions that included in-person worship services. (*Id.* 27:5–6.) Plaintiffs argue the revised restrictions do not pass muster under Free Exercise Clause standards for an assortment of reasons, including that the State's four-tier system gives preferential treatment to secular businesses like supermarkets, retail stores, and factories. (*See* Renewed Mot. 8:11–17:22.)

In resolving Plaintiffs' free exercise arguments, the Court finds persuasive Judge Bernal's decision from the Central District of California that considered the same four-tier system in *Harvest Rock Church, Inc. v. Newsom*, No. LACV 20-6414 JGB (KKx), 2020 WL 5265564 (C.D. Cal. Sept. 2, 2020), and the Ninth Circuit's subsequent opinion, No. 20-55907, 2020 WL 5835219 (9th Cir. Oct. 1, 2020). Judge Bernal denied Harvest International Ministry and Harvest Rock Church's comparable request for injunctive relief, reasoning in part that they had not shown a likelihood of success on the merits of their free exercise claims. 2020 WL 5265564, at *2–3. The plaintiffs appealed, and the Ninth Circuit similarly denied their emergency motion to enjoin "California Governor Gavin Newsom's COVID-19 Executive Orders and related restrictions (Orders) as they apply to in-person worship services." 2020 WL 5835219, at *2. The Ninth Circuit explained:

We find that Harvest Rock has not shown a likelihood of success on its argument that the district court abused its discretion by declining to enjoin the Orders. The evidence that was before the district court does not support Harvest Rock's arguments that the Orders accord comparable secular activity more favorable treatment than religious activity. The Orders apply the same restrictions to worship services as they do to other indoor congregate events, such as lectures and movie theaters. Some congregate activities are completely prohibited in every county, such as attending concerts and spectating sporting events. The dissent states that the restrictions applicable to places of worship 'do not apply broadly to all activities that might appear to be conducted in a manner similar to religious services,' but does not provide support for this point. By our read the restrictions on theaters and higher education are virtually identical.

Harvest Rock also contends that the Governor failed to provide a rationale for the more lenient treatment of certain secular activities, such as shopping in a large store. However, the Governor offered the declaration of an expert, Dr. James Watt, in support of the claim that the risk of COVID-19 is elevated in indoor congregate activities, including in-person worship services. Harvest Rock did not offer a competing expert or any other evidence to rebut Dr. Watt's opinion that congregate events like worship services are particularly risky. Because the district court based its order on the only evidence in the record as to the risk

> of spreading COVID-19 in different settings, Harvest Rock is unlikely to show that the district court abused its discretion.

*Id.* at *1.

The question, then, is whether the evidence before the Court points to a different outcome than in *Harvest Rock*. It does not. As set forth above, the evidence shows that the State's restrictions are based on the elevated risk of transmission of the novel coronavirus in indoor settings, particularly congregate activities and those involving singing and chanting. *See supra* Part II.A, E. The restrictions are tailored to the State's understanding of the risk of certain activities and the potential spread of SARS-CoV-2, not the targeted conduct's religious motivation. *See S. Bay Church*, 959 F.3d at 939 (citing *Lukumi*, 508 U.S. at 532); *see supra* Part II.E. And the State has continued to fine tune its restrictions "to changing facts on the ground." *See S. Bay Church*, 140 S. Ct. at 1614 (Roberts, C.J.). (*See also* Dr. Watt Decl. ¶¶ 47–106.)

That said, unlike the *Harvest Rock* plaintiffs, Plaintiffs here submit evidence that includes a declaration from the medical director of a family medical group, Dr. George Delgado, who has "been intimately involved in planning for the current coronavirus disease . . . for [his] family medical group and hospice." (Dr. Delgado Decl. ¶¶ 2–5, ECF No. 53-4.) Among other things, Dr. Delgado states, "I feel that going to one's church, synagogue or mosque should be much safer than going to the grocery store, participating in a

protest, or working at a manufacturing facility." (*Id.* ¶ 14.) To support this statement in his supplemental declaration,[10] Dr. Delgado sets forth a "comparative risk analysis" that states the risk of contracting COVID-19 at a house of worship is "0.125 or 12.5% the risk at the grocery store," "0.01 or 1% the risk at public protests," and "0.25 or 25% the risk at [a] manufacturing facility." (Dr. Delgado Decl. ¶¶ 25, 33, 43.)[11]

The State argues Dr. Delgado's comparative risk assessment is both baseless and inadmissible for a litany of reasons. (State's Opp'n 18:5–20:17.) The State also supplies the opinion of Peter B. Imrey, Ph.D., a Professor of Medicine at Cleveland Clinic and Case Western Reserve University. Imray explains why Dr. Delgado's broad-brushed assessment that leads to precise probabilities of the risk of COVID-19 spread is not accepted as reliable in the relevant scientific community. (Imrey Decl. ¶¶ 31–40 (explaining that Dr. Delgado's incomplete model "is unscientific" because it does not include supporting data and there is no "practical scientific basis" for "assessing the reliability of such numbers"). *See also Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–94 (1993) (providing the court can consider whether a technique is acceptable

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[10] Dr. Delgado provided a similar declaration in support of Plaintiffs' initial motion for injunctive relief. (*See* Dr. Delgado Decl. ¶¶ 14–23, ECF No. 12-3.)

[11] Although Plaintiffs' other declarants make statements about the danger of COVID-19 to religious congregants and the broader public as part of the debate referenced above, *see supra* note 9, they do not provide this type of comparative risk assessment.

in the relevant scientific community). In rebuttal to Imrey's detailed critique, Dr. Delgado states that "there are presently no adequate models or methodologies to compare risks, and so I cite none" and that his assessment is based "on common scientific sense." (Dr. Delgado Decl. ¶ 36, ECF No. 61-3.) *But see Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1319 (9th Cir. 1995) (explaining that when peer review scrutiny is unavailable, experts should "explain precisely how they went about reaching their conclusions and point to some objective source—a learned treatise, the policy statement of a professional association, a published article in a reputable scientific journal or the like—to show that they have followed the scientific method, as it is practiced by (at least) a recognized minority of scientists in" the relevant field).

The Court assigns Dr. Delgado's declaration minimal weight. Although he may have treated "people with infectious diseases including viral illnesses such as influenza which tend to occur in epidemics," Dr. Delgado lacks significant experience in epidemiology. (Dr. Delgado Decl. ¶¶ 2–5.) Moreover, he does not explain the basis for his model used to assess the precise comparative risk of religious services and other activities—nor does he provide any supporting data for his conclusions. (*See id.* ¶¶ 25, 31, 41 (broadly assigning values for "relative risk" factors like "touching objects" and being in "[c]lose contact with others" for various different environments without offering any data to support them); *see also* Imrey Decl. ¶¶ 31–40 (dissecting Dr. Delgado's comparative risk model).) Therefore,

although the Court has opted to not strictly apply the Rules of Evidence to the parties' submissions, *see supra* note 7, the Court does not believe Dr. Delgado's comparative risk assessment survives scrutiny under *Daubert. See* 509 U.S. 579; *see also* Fed. R. Evid. 702 (providing expert testimony must be "based on sufficient facts or data" and be "the product of reliable principles and methods").

And finally, aside from being unreliable, Dr. Delgado's comparative risk assessment is simply not convincing in light of the evidence before the Court. The COVID-19 pandemic remains an area "fraught with medical and scientific uncertainties." *See S. Bay Church*, 140 S. Ct. at 1613 (Roberts, C.J.). It is one thing for an expert to explain why epidemiologists believe there is a higher risk of transmission of SARS-CoV-2 in large gatherings, indoor spaces, and where groups are singing indoors, it is quite another for someone to purport to calculate—without data—that the risk of contracting COVID-19 at a house of worship is "12.5% the risk at the grocery store" or "1% the risk at public protests." (*See* Dr. Watt Decl. ¶¶ 27–45; Dr. Delgado Decl. ¶¶ 25, 33, 43.) *See also supra* note 7. Probabilities are not derived from only "common scientific sense." (*See* Dr. Delgado Decl. ¶ 36, ECF No. 61-3.) Hence, the Court assigns some weight to Dr. Delgado's opinions about COVID-19, but the Court assigns no weight to the conclusions of his comparative risk assessment.

On balance, having reviewed the parties' evidence, the Court finds Plaintiffs have not shown they are

likely to succeed in demonstrating the State and County's restrictions "infringe upon or restrict practices because of their religious motivation" or "in a selective manner impose burdens only on conduct motivated by religious belief." *See S. Bay Church*, 959 F.3d at 939 (quoting *Lukumi*, 508 U.S. at 533, 543); *see also Harvest Rock Church*, 2020 WL 5835219, at *1–2. This determination does not mean Plaintiffs could not prevail at a trial on the merits. Rather, they merely have not shown they are entitled to the extraordinary remedy that is injunctive relief before trial. *See San Francisco*, 944 F.3d at 789 (providing the court should not issue a preliminary injunction "unless the movant, *by a clear showing*, carries the burden of persuasion").

### C. Discriminatory Enforcement

Last, the Court addresses Plaintiffs' argument that California's restrictions "have been enforced discriminatorily." (Renewed Mot. 9:13–28; *see also id.* 20:16–23:9.) Plaintiffs argue that "despite enforcing its restrictions against houses of worship, California has steadfastly refused to enforce its restrictions against political protests," making "places of worship" ultimately "pay for the sins of protestors . . . a palpable violation of Plaintiffs' rights." (*Id.* 21:11–12, 23:8–9.) *See also Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1083–84 (9th Cir. 2015) (analyzing a claim of whether Washington's Pharmacy Quality Assurance Commission selectively enforced rules concerning emergency contraceptives "against religiously motivated violations but not against secularly motivated

violations" in contravention of the Free Exercise Clause).

The Court is unconvinced. Plaintiffs are challenging the State and County's restrictions on indoor worship and group singing—not outdoor gatherings or protests. The operative restrictions do not limit attendance for outdoor religious services or outdoor protests. (*See* SAC Ex. 1-7; Grabarsky Decl. Ex. 14.) And the challenged restriction on group singing applies equally to indoor religious services and indoor protests. *See supra* Part II.E. Further, as described above, the distinction between indoor and outdoor gatherings is based on the State's understanding of the increased risk of transmission of the novel coronavirus indoors. The same is true for the distinction between indoor and outdoor group singing. *See supra* Part II.A, E. Hence, the Court agrees that by focusing on outdoor protests, "Plaintiffs are comparing apples and oranges." (State's Opp'n 28:3–4.) Indeed, Judge Bernal rejected a similar argument in *Harvest Rock Church*. *See* 2020 WL 5265564, at *2 (reasoning that "how the Orders treat outdoor protests is irrelevant to whether the Orders' restriction on indoor religious services is constitutional" and "whether the Governor encouraged outdoor protests that violated earlier stay-at-home orders is" likewise "irrelevant").[12] The evidence in this case leads the Court to the same conclusion.

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[12] For this same reason, the Court finds distinguishable the district court's discussion of protests in *Capital Hill Baptist Church v. Muriel Bowser*, No. 20-CV-02710 (TNM), 2020 WL 5995126 (D.D.C. Oct. 9, 2020). (*See* ECF No. 70.) In that case, the

Moreover, the Court agrees that Plaintiffs do not otherwise demonstrate a pattern of discriminatory enforcement. On this point, the County shows that as of August 26, 2020, it "had issued 144 citations for violations of the County's COVID-19 public health orders." (Jordan Decl. ¶ 2, Ex. A, ECF No. 58-1.) None of those 144 citations was issued to places of worship or persons engaged in religious services. (*Id.* ¶ 3.)

In addition, through August 26, 2020, the County had served ten cease-and-desist orders or compliance letters to businesses and other entities with respect to reported violations of the County's public health orders. (Johnston Decl. ¶ 7, Ex. B, ECF No. 58-2.) Only three of those items were issued to places of worship. (*Id.*) The remaining seven were issued to businesses—including gyms and a restaurant with a bar—as well as a college and a public school district. (*Id.*)

Finally, aside from issuing citations and cease-and-desist orders, the County has issued health officer orders that require a business or other organization to immediately close down and cease operations. (Jordan Decl. ¶ 9, Ex. C.) As of August 26, 2020, the County had issued only five of these orders—none to places of worship. (*Id.*) Three of the five immediate-closure orders

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District of Colombia contended it "has a compelling interest in capping the number of attendees at the Church's *outdoor services*." *Id.* at *8 (emphasis added). Here, by contrast, the State and County are not limiting the attendees at outdoor religious services, and the State's restrictions are based on its understanding of the increased risk posed by large *indoor* gatherings that include group singing.

were served on gyms that continued indoor operations in violation of the applicable rules, and the other two were issued to restaurants with bars for repeated violations of social distancing, sanitation, and facial covering requirements. (*Id.*) The County submits that this evidence shows its "enforcement of COVID-19 public health orders and regulations has been uniform, even-handed, and in no way has treated secular businesses or activities more favorably than religious organizations or services." (County's Opp'n 10:11–16.)

In response, Plaintiffs claim the County "misses the point" because the County "treats protestors as first-class citizens." (Reply to County Opp'n 8:16–9:12.) The Court disagrees. The manner in which the County is enforcing the State's COVID-19 restrictions goes to the heart of whether there has been discriminatory enforcement. The evidence does not show a pattern of discriminatory enforcement against religious organizations. Nor does the evidence show the County has treated comparable secular businesses or activities more favorably than religious organizations. Therefore, Plaintiffs do not meet their burden on this point. *See Stormans*, 794 F.3d at 1083–84 (concluding there was no evidence of selective enforcement by the state commission against religiously motivated violations).

Overall, the Court finds that Plaintiffs have not shown they are likely to succeed on their claim that the challenged restrictions are unconstitutional in light of discriminatory enforcement. Hence, injunctive relief is similarly not appropriate on this basis. *See San Francisco*, 944 F.3d at 789 (providing the court should not

issue a preliminary injunction "unless the movant, *by a clear showing*, carries the burden of persuasion").

## V. CONCLUSION

In sum, Plaintiffs have not demonstrated that new developments mean they are likely to succeed on their free exercise claims under the federal and state constitutions. The Court's analysis of the remaining injunctive relief factors remains the same. (*See* Mot. Hr'g Tr. 30:3–19.) Plaintiffs thus have not shown they are entitled to injunctive relief before a trial on the merits. Consequently, the Court confirms its prior conclusions and **DENIES** Plaintiffs' renewed motion for a temporary restraining order or preliminary injunction (ECF No. 53). For the same reasons, the Court also confirms that an injunction pending appeal is not appropriate.

**IT IS SO ORDERED.**

**DATED:** /s/ Cynthia Bashant
**October 14, 2020** Hon. Cynthia Bashant
United States District Judge

**APPENDIX B**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| SOUTH BAY UNITED PENTECOSTAL CHURCH, a California nonprofit corporation; BISHOP ARTHUR HODGES III, an individual,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>GAVIN NEWSOM, in his official capacity as the Governor of California; et al.,<br><br>Defendants-Appellees. | No. 20-55533<br><br>D.C. No. 3:20-cv-00865-BAS-AHG Southern District of California, San Diego<br><br>ORDER<br><br>(Filed Jul. 29, 2020) |

On July 10, 2020, Plaintiffs-Appellants filed a motion for a limited remand to the district court for it to reconsider whether to enjoin California's orders regarding the COVID-19 pandemic, in light of changes to those orders and other developments since Plaintiffs filed the present appeal on May 15, 2020. *See* Dkt. 56. The specific developments relevant to Plaintiffs' request are outlined in Plaintiffs' Motion for Indicative Ruling and the Second Amended Complaint filed with the district court. Case No. 3:20-cv-00865-BAS-AHG, Dkt. Nos. 45, 47.

The panel construes Plaintiffs' request as a renewed application for a temporary restraining order and an order to show cause re: preliminary injunction. The district court presently lacks jurisdiction to consider this request, *G & M, Inc. v. Newbern*, 488 F.2d 742, 746 (9th Cir. 1973), but the district court has issued an indicative ruling stating that the request raises a substantial issue. Dkt. 58. Accordingly, the panel **GRANTS** Plaintiffs' motion for limited remand pursuant to Federal Rule of Appellate Procedure 12.1.

The panel retains jurisdiction of the case and remands it 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. On remand, the district court may order supplemental briefing as necessary to address Plaintiffs' request.[1] The oral argument set for August 12, 2020, is vacated, and this appeal is stayed pending the results of the limited remand ordered herein. The parties shall notify the Clerk of Court when the district court has decided the motion on remand. *See* FRAP 12.1(b).

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[1] The court notes that Defendants did not have the opportunity to respond to the Plaintiffs' motion for indicative ruling filed with the district court, and agrees with Defendants' assertion that they should be afforded an opportunity to respond to the points raised therein in order to assist the district court in making its findings on remand.

**IT IS SO ORDERED.**

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Allison Fung
Deputy Clerk
Ninth Circuit Rule 27-7

**APPENDIX C**

Cite as: 590 U. S. ___ (2020)

ROBERTS, C. J. concurring

**SUPREME COURT OF THE UNITED STATES**

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No. 19A1044

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SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL., *v*. GAVIN NEWSOM, GOVERNOR OF CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

The application for injunctive relief presented to JUSTICE KAGAN and by her referred to the Court is denied.

JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH would grant the application.

CHIEF JUSTICE ROBERTS, concurring in denial of application for injunctive relief.

The Governor of California's Executive Order aims to limit the spread of COVID–19, a novel severe acute respiratory illness that has killed thousands of people in California and more than 100,000 nationwide. At this time, there is no known cure, no effective treatment, and no vaccine. Because people may be infected but asymptomatic, they may unwittingly infect

others. The Order places temporary numerical restrictions on public gatherings to address this extraordinary health emergency. State guidelines currently limit attendance at places of worship to 25% of building capacity or a maximum of 100 attendees.

Applicants seek to enjoin enforcement of the Order. "Such a request demands a significantly higher justification than a request for a stay because, unlike a stay, an injunction does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Respect Maine PAC* v. *McKee*, 562 U. S. 996 (2010) (internal quotation marks omitted). This power is used where "the legal rights at issue are indisputably clear" and, even then, "sparingly and only in the most critical and exigent circumstances." S. Shapiro, K. Geller, T. Bishop, E. Hartnett & D. Himmelfarb, Supreme Court Practice §17.4, p. 17-9 (11th ed. 2019) (internal quotation marks omitted) (collecting cases).

Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither

congregate in large groups nor remain in close proximity for extended periods.

The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts "[t]he safety and the health of the people" to the politically accountable officials of the States "to guard and protect." *Jacobson* v. *Massachusetts*, 197 U. S. 11, 38 (1905). When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall* v. *United States*, 414 U. S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people. See *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U. S. 528, 545 (1985).

That is especially true where, as here, a party seeks emergency relief in an interlocutory posture, while local officials are actively shaping their response to changing facts on the ground. The notion that it is "indisputably clear" that the Government's limitations are unconstitutional seems quite improbable.

**SUPREME COURT OF THE UNITED STATES**

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No. 19A1044

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SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL., *v*. GAVIN NEWSOM, GOVERNOR OF CALIFORNIA, ET AL.

ON APPLICATION FOR INJUNCTIVE RELIEF

[May 29, 2020]

JUSTICE KAVANAUGH, with whom JUSTICE THOMAS and JUSTICE GORSUCH join, dissenting from denial of application for injunctive relief.

I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.

In response to the COVID–19 health crisis, California has now limited attendance at religious worship services to 25% of building capacity or 100 attendees, whichever is lower. The basic constitutional problem is that comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and cannabis dispensaries.

South Bay United Pentecostal Church has applied for temporary injunctive relief from California's 25% occupancy cap on religious worship services. Importantly, the Church is willing to abide by the State's rules that apply to comparable secular businesses, including the rules regarding social distancing and hygiene. But the Church objects to a 25% occupancy cap that is imposed on religious worship services but not imposed on those comparable secular businesses.

In my view, California's discrimination against religious worship services contravenes the Constitution. As a general matter, the "government may not use religion as a basis of classification for the imposition of duties, penalties, privileges or benefits." *McDaniel* v. *Paty*, 435 U. S. 618, 639 (1978) (Brennan, J., concurring in judgment). This Court has stated that discrimination against religion is "odious to our Constitution." *Trinity Lutheran Church of Columbia, Inc.* v. *Comer*, 582 U. S. ___, ___ (2017) (slip op., at 15); see also, *e.g.*, *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U. S. 520 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *McDaniel*, 435 U. S. 618.

To justify its discriminatory treatment of religious worship services, California must show that its rules are "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." *Lukumi*, 508 U. S., at 531-532. California undoubtedly has a compelling interest in combating the spread of

COVID–19 and protecting the health of its citizens. But "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Roberts* v. *Neace*, 958 F. 3d 409, 414 (CA6 2020) (*per curiam*). What California needs is a compelling justification for distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap.

California has not shown such a justification. The Church has agreed to abide by the State's rules that apply to comparable secular businesses. That raises important questions: "Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?" *Ibid.*

The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Ibid.*

California has ample options that would allow it to combat the spread of COVID–19 without discriminating against religion. The State could "insist that the congregants adhere to social-distancing and other health requirements and leave it at that—just as the

Governor has done for comparable secular activities." *Id.*, at 415. Or alternatively, the State could impose reasonable occupancy caps across the board. But absent a compelling justification (which the State has not offered), the State may not take a looser approach with, say, supermarkets, restaurants, factories, and offices while imposing stricter requirements on places of worship.

The State also has substantial room to draw lines, especially in an emergency. But as relevant here, the Constitution imposes one key restriction on that line-drawing: The State may not discriminate against religion.

In sum, California's 25% occupancy cap on religious worship services indisputably discriminates against religion, and such discrimination violates the First Amendment. See *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312 (1986) (Scalia, J., in chambers). The Church would suffer irreparable harm from not being able to hold services on Pentecost Sunday in a way that comparable secular businesses and persons can conduct their activities. I would therefore grant the Church's request for a temporary injunction. I respectfully dissent.

**APPENDIX D**

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| SOUTH BAY UNITED PENTECOSTAL CHURCH, a California nonprofit corporation; Bishop Arthur Hodges III, an individual,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>Gavin NEWSOM, in his official capacity as the Governor of California; Xavier Becerra, in his official capacity as the Attorney General of California; Sonia Angell, in her official capacity as California Public Health Officer; 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; Wiliam D, Gore, in his official capacity as Sheriff of the County of San Diego,<br><br>Defendants-Appellees. | No. 20-55533<br><br>D.C. No. 3:20-cv-00865-Bas-Ahg<br><br>Southern District of California, San Diego<br><br>ORDER<br><br>(Filed May 22, 2020) |

Before: SILVERMAN, NGUYEN, and COLLINS, Circuit Judges.

This appeal challenges the district court's denial of appellants' motion for a temporary restraining order and order to show cause why a preliminary injunction should not issue in appellants' challenge to the application of the State of California and County of San Diego's stay-at-home orders to in-person religious services. Appellants have filed an emergency motion seeking injunctive relief permitting them to hold in-person religious services during the pendency of this appeal.

We have jurisdiction to review the denial of a temporary restraining order where, as here, "the circumstances render the denial 'tantamount to the denial of a preliminary injunction.'" *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (internal citation omitted); *see also* 28 U.S.C. § 1292(a)(1). Accordingly, the motion to dismiss for lack of jurisdiction (Docket Entry No. 24) is denied.

The request to take judicial notice (Docket Entry No. 25) is granted.

In evaluating a motion for an injunction pending appeal, we consider whether the moving party has demonstrated that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016) ("The standard for evaluating an injunction pending

appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction.").

We conclude that appellants have not demonstrated a sufficient likelihood of success on appeal. Where state action does not "infringe upon or restrict practices because of their religious motivation" and does not "in a selective manner impose burdens only on conduct motivated by religious belief," it does not violate the First Amendment. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 543 (1993). We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure. In the words of Justice Robert Jackson, if a "[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

The remaining factors do not counsel in favor of injunctive relief. *See Winter*, 555 U.S. at 20. We therefore deny the emergency motion for injunctive relief pending appeal (Docket Entry No. 2).[1]

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[1] Judge Collins would grant the motion and has filed a dissent.

*South Bay United Presbyterian Church v. Newson*, No. 20-55533

COLLINS, Circuit Judge, dissenting:

Plaintiffs-Appellants South Bay United Pentecostal Church (the "Church") and its Bishop, Arthur Hodges III (collectively, "Plaintiffs"), move for a preliminary injunction pending appeal that would allow them to conduct in-person church services. The State of California's refusal to allow them to hold such services likely violates the Free Exercise Clause of the First Amendment, and so I would grant the requested injunction. Because the majority concludes otherwise, I respectfully dissent.

## I

The Church is a Christian congregation in Chula Vista, California. Until the recent COVID-19 pandemic, the Church held between three and five Sunday services every week, which would attract 200-300 congregants each. Its sanctuary seats 600.

On March 19, 2020, Governor Gavin Newsom issued Executive Order N-33-20. The order generally required "all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." The federal list of critical sectors did not include churches. The State public health officer subsequently designated a comprehensive set of "Essential Critical Infrastructure

Workers." That list designated clergy as essential, but only if they were holding services "through streaming or other technologies that support physical distancing and state public health guidelines."

On April 28, the Governor announced a four-stage "Reopening Plan" or "Resilience Roadmap," under which the State would initially relax the stay-at-home order for some organizations but not others. At Stage 1, only "critical infrastructure" was exempted. At Stage 2, curbside retail and additional factories making previously non-essential "things like toys, clothing, . . . [and] furniture" would be permitted to reopen. Stage 2 entities also included ones that would reopen at a later date within that stage, such as schools (in an adapted form), childcare, dine-in restaurants, outdoor museums, "destination retail, including shopping malls and swap meets," and office-based businesses where telework is not possible. At Stage 3, "higher risk workplaces" like churches could reopen, along with bars, movie theaters, hair salons, and "more personal & hospitality services." And at Stage 4, concerts, conventions, and spectator sports could reopen. The Governor predicted that while Phase 2 would begin in "weeks, not months," Phase 3 would begin in "months, not weeks."

On May 4, the Governor announced that Stage 2 would commence within a week. On May 8, Plaintiffs sued the Governor and several other state officers (collectively, "the State") as well as various local officials, claiming that the Reopening Plan's decision to place churches within Stage 3 instead of Stage 2 violated the

Free Exercise Clause of the First Amendment. The County of San Diego implemented the Reopening Plan in an order dated May 9, 2020. Plaintiffs filed an amended complaint on May 11.

On May 15, 2020, the district court denied Plaintiffs' motion for both a temporary restraining order ("TRO") and an order to show cause ("OSC") why a preliminary injunction allowing the Church to hold in-person services should not issue. Plaintiffs appealed and concurrently moved for a preliminary injunction in this court.

## II

We have jurisdiction over this appeal under our controlling decision in *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306 (9th Cir. 1989).[1] Both in *Religious Tech. Ctr.* and in this case, the plaintiffs filed a motion for a TRO and for an OSC why a preliminary injunction should not issue; the district court denied the motion "for a TRO and an OSC following a hearing at which all parties were represented"; and the specific grounds on which the district court denied the motion "foreclosed any interlocutory relief." *Id.* at 1308–09. As to the latter point, the district court below agreed with the State that the Reopening Plan is a "neutral law of general application" that is

[1] The State questioned our jurisdiction in its initial opposition to Plaintiffs' motion in this court, but it did not renew that objection in its subsequent formal opposition. Nonetheless, we have an obligation to consider the issue *sua sponte*.

therefore subject only to rational basis review under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Given that this threshold legal conclusion is indisputably fatal to Plaintiffs' Free Exercise claim, "[t]he futility of any further hearing was thus patent; there was nothing left to talk about." *Id.* at 1309. The order was thus "tantamount to a denial of a preliminary injunction," *id.* at 1308, and we therefore have jurisdiction under 28 U.S.C. § 1292(a)(1).

## III

Plaintiffs seek a preliminary injunction pending appeal, and the standards for such relief are well-settled. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is 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 v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Under our 'sliding scale' approach, 'the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.'" *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017) (quoting *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012)). Here, all of these factors favor the Plaintiffs.

**A**

In seeking injunctive relief pending appeal, Plaintiffs principally rely on their claim under the First Amendment's Free Exercise Clause, which provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof.*" U.S. CONST. amend. I (emphasis added). This restriction is fully applicable to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). I conclude that Plaintiffs have established a very strong likelihood of success on the merits of their Free Exercise claim.

**1**

As a threshold matter, the State contends that, in light of the ongoing pandemic, the constitutional standards that would normally govern our review of a Free Exercise claim should *not* be applied. "Although the Constitution is not suspended during a state of emergency," the State tells us, "constitutional rights may be reasonably restricted 'as the safety of the general public may demand' " (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)). According to the State, the current emergency conditions preclude us from applying *Lukumi*'s familiar framework for evaluating Free Exercise claims and require us instead to apply *Jacobson*'s "highly deferential" standard of review, under which we are supposedly limited " 'to a determination of whether the [Governor's] actions were taken in good faith and whether there is some factual basis for

[the] decision'" (quoting *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971)). As the State sees it, there is no "reason why *Jacobson* would not extend *to the First Amendment and other constitutional provisions*" (emphasis added). I am unable to agree with this argument, which seems to me to be fundamentally inconsistent with our constitutional order. *Cf. Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932) ("If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases[.]").

The State's motion cites no authority that can justify its extraordinary claim that the current emergency gives the Governor the power to restrict any and all constitutional rights, as long as he has acted in "good faith" and has "some factual basis" for his edicts. Nothing in *Jacobson* supports the view that an emergency *displaces* normal constitutional standards. Rather, *Jacobson* provides that an emergency may justify temporary constraints *within* those standards. As the Second Circuit has recognized, *Jacobson* merely rejected what we would now call a "substantive due process" challenge to a compulsory vaccination requirement, holding that such a mandate "was within the State's police power." *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015); *see also Zucht v. King*, 260 U.S. 174, 176(1922) (*Jacobson* "settled that it is within the police power of a state to provide for compulsory

vaccination"). *Jacobson*'s deferential standard of review is appropriate in that limited context. It might have been relevant here if Plaintiffs were asserting a comparable substantive due process claim, but they are not.

Instead, Plaintiffs assert a claim under the Free Exercise Clause, whose standards are well-established and which applies to the States under the Fourteenth Amendment. *Cantwell*, 310 U.S. at 303. *Jacobson* had no occasion to address a Free Exercise claim, because none was presented there. (That is unsurprising, because the Free Exercise Clause had not yet been held to apply to the States when *Jacobson* was decided in 1905. *See Phillips*, 775 F.3d at 543.) Consequently, *Jacobson* says nothing about what standards would apply to a claim that an emergency measure violates some other, *enumerated* constitutional right; on the contrary, *Jacobson* explicitly states that other constitutional limitations may continue to constrain government conduct. *See* 197 U.S. at 25 (emergency public health powers of the State remain subject "to the condition that no rule . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument"). The State suggests that the Second Circuit's decision in *Phillips* applied *Jacobson* to bar a First Amendment challenge, but *Phillips* actually confirms my narrower reading of *Jacobson*. After applying *Jacobson* to reject the plaintiffs' *substantive due process* challenge to New York's vaccination requirement, the court then addressed (and rejected) the plaintiffs' Free Exercise challenge by

applying not *Jacobson*, but the familiar *Lukumi* framework that governs all Free Exercise claims. *See Phillips*, 775 F.3d at 543.

The Fourth Circuit's decision in *Chalk* likewise provides no support for the State's position. In *Chalk*, the defendants were pulled over for driving at 11:00 PM in violation of Asheville, North Carolina's four-night curfew, and a search of their car revealed dynamite caps and other "materials from which an incendiary bomb could be readily produced." *See* 441 F.2d at 1278–79. On appeal from the defendants' subsequent convictions, the Fourth Circuit rejected the defendants' challenge to the traffic stop, which was "focused on the curfew imposed by the mayor as a restriction on *their right to travel*." *Id.* at 1283 (emphasis added). Applying a deferential standard of review, the court held that the temporary travel restrictions imposed by the short-lived curfew were justified in light of the significant civil unrest in Asheville that had led to the curfew order. *Id.* at 1282–83. Given that the defendants were not engaged in any expressive (or religious) activity while driving, the First Amendment was not directly implicated by the traffic stop in *Chalk*, and so the decision has little relevance here. If anything, *Chalk*'s discussion of the First Amendment undercuts the State's argument. The Fourth Circuit stated in dicta that any incidental impact on First Amendment rights from the curfew would be governed by the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367 (1968), and the court likened the brief restriction on travel to a time, place, and manner restriction. *See* 441

F.2d at 1280–81, 1283. The fact that *Chalk* attempted to fit its comments within such existing First Amendment categories refutes the State's notion that the existence of an emergency results in a wholesale displacement of conventional constitutional standards.

Moreover, the State overlooks that we have expressly rejected a comparably broad reading of *Chalk* in addressing a First Amendment challenge to "an emergency order prohibiting access to portions of downtown Seattle, Washington, during the 1999 World Trade Organization (WTO) conference." *Menotti v. City of Seattle*, 409 F.3d 1113, 1117, 1142 n.55 (9th Cir. 2005). Instead of applying a broad " 'emergency exception' " based on *Chalk*, we analyzed the emergency order *within* the rubric of established First Amendment time, place, and manner principles, which we held provided ample room to "take[] into account a balance of the competing considerations of expression and order." *Id.* at 1142 & n.55.

Accordingly, I conclude that Plaintiffs' challenge must be evaluated under the traditional *Lukumi* framework that governs Free Exercise claims.[2]

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[2] Notably, the State does not cite or rely upon the circuit court decision that most directly supports its reading of *Jacobson*, which is *In re Abbott*, 954 F.3d 772 (5th Cir. 2020). For the reasons stated, I am unable to agree with the Fifth Circuit's conclusion that "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." *Id.* at 786 (emphasis in original); *see also In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (generally endorsing the Fifth Circuit's

**2**

In addressing a Free Exercise claim under *Lukumi*, the first question is whether the challenged restriction is one "that is neutral and of general applicability." 508 U.S. at 531. If the answer is yes, then "we review [it] for a rational basis." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015). If the answer is no, then the restriction is subject to strict scrutiny—that is, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32, 113 S.Ct. 2217. In denying the requested relief, the district court held that the State's Reopening Plan is a "neutral law of general application" and that it "is rationally based on protecting safety and stopping the virus spread." Alternatively, the district court held that the Reopening Plan is narrowly tailored to promote the State's compelling interest in public health.[3] In my view, Plaintiffs have a high likelihood of success in their appeal of these rulings.

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description of emergency powers under *Jacobson*). Beyond that limited observation, I express no view on the very different substantive constitutional questions presented in those cases.

[3] The district court actually reached this alternative conclusion in the context of addressing Plaintiffs' likelihood of success on their Free Exercise claim under the *California* Constitution. Reliance on the California Constitution, however, would be inappropriate here. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

**a**

As the Supreme Court explained in *Lukumi*, "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. Accordingly, where a regulation's operative language restricts conduct by *explicit* reference to the conduct's religious character, it is not facially neutral. *Id.* (citing the law at issue in *McDaniel v. Paty*, 435 U.S. 618 (1978), which applied specifically to members of the clergy, as an example of a law that on its face "imposed special disabilities on the basis of religious status") (cleaned up). Because the restrictions at issue here explicitly "reference . . . religious practice, conduct, belief, or motivation," they are not "facially neutral." *Stormans*, 794 F.3d at 1076.

In framing its restrictions in response to the pandemic, California did not purport simply to proscribe specific forms of underlying physical conduct that it identified as dangerous, such as failing to maintain social distancing or having an excessive number of persons within an enclosed space. Instead, Executive Order N-33-20 presumptively prohibited California residents from leaving their homes for any reason, except to the extent that an *exception* to that order granted *back* the freedom to conduct particular activities or to travel back and forth to such activities. *See* Cal. Exec. Order N-33-20 (Mar. 19, 2020)[4] (ordering "all individuals living in the State of California to stay

[4] *See* https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf.

home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors," except as the State "may designate additional sectors as critical").[5] In announcing its Reopening Plan, the State has adopted a phased approach that will progressively add more and more exceptions to the baseline stay-at-home prohibition by designating additional specific categories of activities that, in the State's judgment, do not present an undue risk to public health. *See* Order of the Cal. Pub. Health Officer (May 7, 2020)[6] ("I will progressively designate sectors, businesses, establishments, or activities that may reopen with certain modifications, based on public health and safety needs, and I will add additional sectors, businesses, establishments, or activities at a pace designed to protect public health and safety.").

As set forth by the State, the four-stage Reopening Plan assigns "retail (curbside only), manufacturing & logistics" to the initial portion of "Phase 2," and in-store retail, "child care, offices & limited hospitality, [and] personal services" to a later portion of Phase 2. (On May 20, 2020, San Diego County was given approval to begin this later portion of Phase 2; it aims to promptly

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[5] Even the most ardent proponent of a broad reading of *Jacobson* must pause at the astonishing breadth of this assertion of government power over the citizenry, which in terms of its scope, intrusiveness, and duration is without parallel in our constitutional tradition. But since Plaintiffs do not directly challenge the validity of the original Order here, I do not address the point further.

[6] *See* https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH Document Library/COVID-19/SHO Order 5-7-2020.pdf.

reopen both dine-in restaurants and in-store retail businesses.[7]) By contrast, "religious services" are *explicitly* assigned to a "Stage 3" that also includes "movie theaters" and other "personal & hospitality services." All reopenings under the Plan are subject to detailed, activity-by-activity State guidance that sets forth the specific actions that each activity (such as "manufacturing" or "warehousing facilities") must take (*e.g.*, use of face coverings, social distancing, sanitation, and employee training) in order to reopen, and to stay open.

By *explicitly* and categorically assigning all in-person "religious services" to a future Phase 3—without any express regard to the number of attendees, the size of the space, or the safety protocols followed in such services[8]—the State's Reopening Plan undeniably "discriminate[s] on its face" against "religious conduct." *Lukumi*, 508 U.S. at 533. Although the State insists that it has not acted out of antipathy towards religion, the "constitutional benchmark is 'government *neutrality,*' not 'government avoidance of bigotry.'" *Roberts*, 958 F.3d at 414-15, (quoting *Colorado Christian Univ.*

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[7] *See* Lori Weisberg, *San Diego County gets the OK from state to resume dining-in at restaurants*, SAN DIEGO UNION-TRIBUNE (May 20, 2020), https://www.sandiegouniontribune.com/business/story/2020-05-20/san-diego-county-gets-the-ok-from-state-to-resume-dining-in-at-restaurants.

[8] In this respect, this case differs from *Roberts v. Neace*, 2020 WL 2316679 (6th Cir. May 9, 2020), in which the challenged order prohibited "[a]ll mass gatherings," and "faith-based" events were merely listed as one *example* of such "mass gatherings." *Id.* at 2020 WL 2316679.

*v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008)). Because the Reopening Plan, on its face, is not neutral, it is subject to strict scrutiny. *Lukumi*, 508 U.S. at 531–32.

**b**

Even if the Reopening Plan were not facially discriminatory, it would still fail *Lukumi*'s additional requirement that the restrictions be "of general applicability." 508 U.S. at 531.

Under California's approach—in which an individual can leave the home only for the *enumerated* purposes specified by the State—these categories of authorized activities provide the operative rules that govern one's conduct. While the resulting highly reticulated patchwork of designated activities and accompanying guidelines may make sense from a public health standpoint, there is no denying that this amalgam of rules is the very antithesis of a "generally applicable" prohibition. The State is continually making judgments, at the margins, to decide what additional activities its residents may and may not engage in, and thus far, "religious services" have not made the cut. I am at a loss to understand how the State's current maze of regulations can be deemed "generally applicable." *See Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) ("At some point, an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy.").

The State contends that its plan is generally applicable because it assertedly classifies activities neutrally, in accordance with the State's sense of their perceived risk. But that is not how the Reopening Plan works. Warehousing and manufacturing facilities are categorically permitted to open, so long as they follow specified guidelines. But in-person "religious services"—merely *because* they are "religious services"—are categorically *not* permitted to take place *even if they follow the same guidelines.* This is, by definition, *not* a generally applicable regulation of underlying physical conduct.

**3**

The only remaining question is whether the Reopening Plan's treatment of religious services satisfies strict scrutiny. The district court concluded that it did, but that is plainly wrong.

The State's undeniably compelling interest in public health "could be achieved by narrower [regulations] that burdened religion to a far lesser degree." *Lukumi*, 508 U.S. at 546. As Plaintiffs have reiterated throughout these proceedings, they will "comply[ ] with every single guideline that other businesses are required to comply with." In their papers in the district court, Plaintiffs provided a list illustrating the range of measures they are ready and willing to implement on reopening, including spacing out the Church's seating, requiring congregants to wear face coverings, prohibiting the congregation from singing, and banning

hugging, handshakes, and hand-holding. By regulating the specific underlying risk-creating *behaviors*, rather than banning the particular *religious setting* within which they occur, the State could achieve its ends in a manner that is the "least restrictive way of dealing with the problem at hand." *Roberts*, 2020 WL 2316679 at *5.[9]

The State's only response on the narrow-tailoring point is to insist that there is too much risk that congregants will not follow these rules. But as the Sixth Circuit recently explained in *Roberts*, the State's position on this score illogically assumes that the very same people who cannot be trusted to follow the rules at their place of worship *can* be trusted to do so at their workplace: the State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Roberts*, 2020 WL 2316679 at *3.

* * *

Therefore, I conclude that Plaintiffs are highly likely to succeed on the merits of their Free Exercise Clause claim.

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[9] On this score, it is noteworthy that, earlier today, the CDC issued "Interim Guidance for Communities of Faith." *See* https://www.cdc.gov/coronavirus/2019-ncov/php/faith-based.html.

**B**

All of the remaining considerations strongly favor the entry of an injunction pending appeal. The Bishop's inability to hold in-person worship services, and the Church members' inability to attend them, are certainly irreparable injuries. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1008 (10th Cir. 2004) (en banc) (Seymour, J., concurring in relevant part for a majority of the court) ("[T]he violation of one's right to the free exercise of religion necessarily constitutes irreparable harm."), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006). The injury here is particularly poignant, given that Pentecost—which the eponymously named Church greatly desires to celebrate—falls on May 31. Indeed, the State explicitly "does not question the sincerity of Plaintiffs' belief that it is essential to gather in person for worship services."

I do not doubt the importance of the public health objectives that the State puts forth, but the State can accomplish those objectives without resorting to its current inflexible and overbroad ban on religious services. The balance of equities, and the public interest, strongly favor requiring the State to honor its constitutional duty to accommodate a critical element of the free exercise of religion—public worship.

For these reasons, I would grant Plaintiffs' request for a preliminary injunction. I respectfully dissent.

**APPENDIX E**

**UNITED STATES DISTRICT COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

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| SOUTH BAY UNITED PENTECOSTAL CHURCH, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>GAVIN NEWSOM, in his official capacity as the Governor of California, *et al.*,<br><br>Defendants. | Case No. 20-cv-865-BAS-AHG<br><br>**ORDER DENYING PLAINTIFFS' EX PARTE MOTION FOR AN INJUNCTION PENDING APPEAL**<br><br>**[ECF No. 36]**<br><br>(Filed May 18, 2020) |

Plaintiffs South Bay United Pentecostal Church and Bishop Arthur Hodges III filed a motion for temporary restraining order. (ECF No. 12.) On May 15, 2020, the Court held a telephonic hearing on the motion and denied the motion. (ECF No. 32, 38 (transcript of hearing).) That same day, Plaintiffs filed a notice of appeal. Plaintiffs also filed an ex parte motion seeking an injunction pending the appeal. (ECF No. 36.)

Federal Rule of Appellate Procedure 8(a)(1) provides that "[a] party must ordinarily move first in the district court for . . . (C) an order . . . granting an injunction while an appeal is pending." Fed. R. App. Proc. 8(a)(1). Federal Rule of Civil Procedure 62(d) provides that "[w]hile an appeal is pending from an

interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(d). The standard for granting an injunction pending appeal is generally the same as the standard for granting a preliminary injunction. *Humane Soc'y of U.S. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008).

Having reviewed Plaintiffs' arguments, the Court **DENIES** the instant Motion for the same reasons stated on the record at the telephonic hearing on Plaintiffs' motion for temporary restraining order. (*See* ECF No. 38.)

**IT IS SO ORDERED.**

**DATED: May 18, 2020**

/s/ Cynthia Bashant
**Hon. Cynthia Bashant**
**United States District Judge**

## APPENDIX F

## U.S. District Court

## Southern District of California

**Notice of Electronic Filing**

The following transaction was entered on 5/15/2020 at 11:48 AM PDT and filed on 5/15/2020

**Case Name:** South Bay United Pentecostal Church et al v. Newsom et al
**Case Number:** 3:20-cv-00865-BAS-AHG
**Filer:**
**Document Number:** 32(No document attached)

**Docket Text:**
Minute Order for proceedings held before Judge Cynthia Bashant: Motion Hearing (telephonic) held on 5/15/2020. For the reasons stated in the hearing, the Court grants [29] Ex Parte MOTION for Leave to File Supplemental Authority in Support of Plaintiffs Application for a Temporary Restraining Order filed by South Bay United Pentecostal Church, Bishop Arthur Hodges III; denies [12] Ex Parte MOTION for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction filed by South Bay United Pentecostal Church, Bishop Arthur Hodges III; and denies [21] Ex Parte MOTION for Leave to File Application for Leave To File Request for Judicial Notice Pursuant to Federal Rule of Evidence 201 filed by South Bay United Pentecostal Church, Bishop Arthur Hodges III (Court Reporter/ECR Dana Peabody). (Plaintiff Attorney Paul Jona, Charles LiMandri, Jeffrey Trissell, and Mark Meuser).(Defendant Attorney Todd Grabarsky,

Lisa Plank, and Timothy White). (no document attached) (sxm)

United States District Court

for the Southern District of California

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| SOUTH BAY UNITED PENTECOSTAL CHURCH, etc., et al.,<br>Plaintiffs,<br>v.<br>GAVIN NEWSOM, etc., et al.,<br>Defendants. | ) | No. 20cv0865-BAS<br>May 15, 2020<br>San Diego, California |

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CYNTHIA BASHANT
United States District Judge

APPEARANCES:

For the Plaintiffs: LiMANDRI & JONNA LLP
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MARK PHILIP MEUSER
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For the Defendants: CALIFORNIA ATTORNEY GENERAL'S OFFICE
TODD GRABARSKY
Attorney at Law

OFFICE OF THE COUNTY
COUNSEL TIMOTHY M.
WHITE
Attorney At Law

[2] San Diego, California, May 15, 2020

* * *

THE CLERK: Thank you, Counsel, and everybody for being on the line so promptly.

This is Stephanie, Judge Bashant's clerk. I just wanted to give a quick admonishment before we get started and I call the case.

The same courtroom decorum applies as though we were actually in the courtroom versus telephonic. The members of the public and media, if you could please mute your phones and make sure they stay muted. Counsel is the only one permitted to provide argument. There are also no recordings of any type. We have our Official Court Reporter, Dana Peabody, on the phone, and she is the one who will provide the official court transcript, and you may request it through her.

And with that, I believe I will go ahead and call the case.

Calling Matter Number 1, 20cv0865, South Bay United Pentecostal Church versus Newsom, et al., on calendar for a motion hearing telephonically.

THE COURT: Counsel, state your appearances for the record, please.

MR. JONNA: Good morning, Your Honor. Paul Jonna on behalf of plaintiff South Bay United Pentecostal Church and Bishop Arthur Hodges III, and I'm joined by my colleague, Jeffrey Trissell.

[3] THE COURT: Good morning.

MR. MEUSER: Mark Meuser, also here on behalf of the plaintiff, with the Dhillon Law Group.

MR. LiMANDRI: Charles LiMandri with my partner, Mr. Jonna, who will be arguing the case this morning.

THE COURT: Good morning.

MR. WHITE: Good morning, Your Honor. This is County of San Diego for the – County Counsel's office for the County of San Diego, defendant.

THE COURT: And I missed the name.

MR. WHITE: Timothy White.

THE COURT: Thank you.

MR. GRABARSKY: And good morning, Your Honor. This is Deputy Attorney General Todd Grabarsky on behalf of the state defendants, Governor Gavin Newsom, Attorney General Xavier Becerra, and Public Health Officer Dr. Sonia Angell.

THE COURT: Okay. Good morning, everyone, and thank you all for agreeing to appear telephonically. I know it's not easy. We're kind of talking on top

of each other. I'll try to make sure that I give you each a chance to be heard.

If anyone has any difficulty hearing anything, don't hesitate to let me know, and I'll make sure that it gets repeated. Sometimes when people come on the phone last minute, there's a beep, and it blocks out whatever anyone is saying, so feel free to let me know if you're having any difficulty [4] hearing what anyone has said.

First of all, I want to let everyone know I've reviewed plaintiffs' amended complaint, I reviewed all the attached rules promulgated by the State of California that were attached to the complaint, I reviewed plaintiffs' motion for a TRO with the various requests for judicial notice, the state and the county's office, I reviewed plaintiffs' objections to defendants' responses as untimely. That will be denied.

I also reviewed plaintiffs' leave to file supplemental authorities, which will be granted. I have reviewed those authorities.

My understanding is the plaintiffs are not objecting to the initial closure order or the initial decision classifying some businesses as essential and others as not, and, therefore, this is not challenging the same order as the one I already addressed in the *Abiding Ministry* case.

Instead, plaintiffs have filed this amended complaint objecting to the state's plans for reopening,

specifically the classification of churches and religious services as Stage 3 out of four stages of reopening.

Plaintiffs ask that religious services be classified as Stage 2 and that they be allowed to begin services immediately.

As a preliminary matter, there are numerous requests for judicial notice, most of which I think should be denied as moot or unnecessary.

[5] First of all, with respect – with respect to the request that has to do with the number of deaths, I think that the actual request for judicial notice talks about deaths and population and types of death in the State of California, although I think the numbers actually reflect those that are for San Diego County, not for the State of California, but regardless, I think that the numbers in San Diego County are largely irrelevant.

Plaintiffs seem to concur that the coronavirus is real, that the Government has a compelling interest in curbing the virus, that the stay-at-home orders further that interest, and simply focusing on one county in a state that is as mobile as California is too limiting.

Ultimately I don't find that the number of deaths in San Diego County are particularly helpful in my analysis of the stages of reopening.

I also don't think I need to take judicial notice of the governor's orders. They're attached to the complaint already, but to the extent it is necessary, I'll take judicial notice of the orders, particularly those that

outline the plan for reopening because ultimately that's what plaintiffs are challenging in this case.

And finally, I don't think I need to take judicial notice of opinions from other courts. I can actually look at them and consider them without taking judicial notice of them. The ones [6] from other district courts are not binding, but certainly the analysis of other courts can be helpful.

So let me talk about the actual restraining order request. First of all, I'm prepared to find that irreparable harm will occur to the plaintiffs if I don't grant the TRO. Plaintiffs don't have to address that prong.

But I do have concern about all the other prongs, and here's sort of my preliminary thoughts, and then I'll be interested in hearing from each of you:

First of all, it appears to me that the stages in California's reopening plan are carefully focused on the risk each workplace poses. In other words, we have Stage 2, which is a lower-risk workplace; initially curbside only and then types of facilities where one moves through quickly without long periods of time together. Entering these workplaces in the Stage 2 are – they're places that are by their nature transitory. You're just going in for the purpose of picking something up, and then you're leaving.

Stage 3 are higher-risk workplaces, those which by their nature involve people gathering in close proximity with one another for extended periods.

And then we've got Stage 4, which is the highest risk, so very large groups, like rock concerts, conventions, events held at sporting venues.

None of this seems to me to be targeted or focused on [7] limiting religion. If your religion involves walking into a church, a few people at a time, keeping six feet apart, picking something up from the church, and going home with you, then it seems to me that would be a Stage 2 workplace.

But unfortunately, religious services generally involve sitting together as a group. I note that in plaintiffs' case, plaintiffs are proposing services involving groups of 200 to 300 congregants per service, and beginning with Bible classes of ten to 100 people, and that they describe practices – or Bishop Hodges describes practices consisting of having people with special needs or sickness come stand around an alter where hands are laid on them and they are anointed, challenging congregants to all approach the alter at once to come believing, come praying, and practicing baptism by full immersion in the water on a weekly or daily basis.

This seems to me to be a higher-risk environment than one where you just pick something up either at curbside or walk through a store, pick something up, pay for it, and walk out. It's not a value judgment. It's not a judgment about what's more important or what's more valuable than the other. It's simply a determination of what activity poses the higher risk for infecting others.

So I just don't see how strict scrutiny applies, but I'll certainly be interested in hearing what you have to say.

So let me start with the plaintiff. I believe it's [8] Mr. Jonna who is going to be speaking. Those are my preliminary thoughts.

MR. JONNA: Yes, Your Honor. This is Paul Jonna.

Thank you for those thoughts, and thank you for reviewing the voluminous materials in such a short amount of time.

Your Honor, the problem with these orders in the reopening plan is that there's arbitrary exceptions and unequal treatment of churches.

So the government can't explain, for example, why factories and schools, which don't involve transitory – you know, transitory measures – why those places can open in Stage 2 but not churches.

So what they've tried to argue without support is that places of worship are sidelined for scientific reasons, but we – large gatherings at factories and schools where people gather indoors for hours are able to reopen.

So under *Lukumi*, the state has the burden to explain why they're making the distinction in order to meet strict scrutiny, and they have not.

The answer can't be that factories and schools are just more important. The right to practice your faith,

you know, is a first right in the First Amendment. The government has to treat it equally. It can't be viewed as less important, and that's why most other states, Your Honor, took steps to protect the constitutional rights of churches and religious believers. [9] California was one of only nine states that didn't, and as the Court knows, there's four federal courts that have held that these types of orders are not generally applicable and that they must satisfy strict scrutiny. And we have a Sixth Circuit case, we have the *On Fire Christian* case, which said, "No place, not even the unknown, is worse than any place the state forbids the exercise of your sincerely held religious beliefs." And we have the *First Baptist* case in the District of Kansas, which involves in-person services. And the *Tabernacle Baptist* case, which is very similar to our case, where the Court said, "If social distancing is good enough for Home Depot and Kroger, it's good enough for in-person religious services, which, unlike the foregoing, benefit from constitutional protection."

So we believe strict scrutiny applies because gathering for worship is prohibited, but not other gatherings.

And, Your Honor, we're not dealing with neutral laws of general applicability. The orders are riddled with exceptions. For example, Governor Newsom just last week said that churches fall under the category of, quote, low-reward activity. Those were his words. He didn't just say high risk, but he said "low reward." He initially determined that marijuana dispensaries, liquor stores, the entire entertainment industry, and now

factories and museum, those are higher-reward activities, so those are the kinds of arbitrary assessments, Your Honor, that are unconstitutional. Going to a factory or a museum is not [10] constitutionally protected, but freely exercising –

THE COURT: Let me just – I'm going to interrupt you for a minute because when I read through the order, I didn't see that museums – I have to hear from the state about exactly what is, but I don't believe that some of the things you're saying should be opened under Stage 2 or were listed as being opened under Stage 2.

MR. JONNA: Sure, Your Honor. The fact – certain manufacturing factories were allowed to be opened from the beginning, and certain ones – the rest of them are allowed to reopen in Phase 2, and if I'm misstating that, I'm sure the state will correct me.

As far as museums, what the governor said is outdoor museums can start opening in Stage 2, but an outdoor museum is, you know – I'm not sure why they're making the distinction with a museum versus an outdoor church service, for example. Again, freely exercising your religion is the very first right in the First Amendment. And for the millions of faithful in California, religion is needed in these times more than ever. It might be hard for government officials to understand that, especially if they're hostile to religion or don't see its relevance or they think it's low reward, but to Bishop Hodges and millions of Californians, free exercise of religion is eternally important. To them, it's the

most essential of activities. It's the reason why many people came to this great [11] country to begin with, including the Pilgrims, who were religious refugees.

So basically, Your Honor, the government officials shouldn't be able to tell millions of people of faith that their religious worship is low reward and nonessential. That's hostility toward religion, and this Court has an incredible opportunity to correct these constitutional violations.

And as Your Honor knows, the Department of Justice, the U.S. Department of Justice, shares these concerns. They've issued statements and intervened in multiple similar federal actions, and, Your Honor, the facts have changed considerably since Your Honor ruled in the *Abiding Place Ministries* case. Mr. White, who's on the phone, who also argued that matter, he said on April 10th that the next few weeks were critical and necessary to flatten the curve. And that's now happened. The curve has flattened, and the healthcare system has not been overwhelmed. In fact, they've had to lay off workers. The governor acknowledged these facts, and they're supported by Dr. Delgado's declaration.

And, Your Honor, we had – and I know you said in your initial remarks that you weren't focused so much on San Diego, but I do think it's significant that we've had less than 200 deaths in a county with a population of 3.3 million. I mean, every human life is precious, and we all wish there were zero deaths, but the data has to matter, Your Honor. And it's that [12] data the

government is relying on to say that you can now gather at factories and schools.

So even if the numbers go up again in the fall, the solution can't be to close the churches again. There has to be a balance where the Constitution is followed and people can still practice their faith without the government dictating that it has to be done in the confines of their home.

And I read statements in both the defendants' briefs that are simply not true, and Your Honor repeated some of them, I assume, because they were stated in the defendants' briefs, but let me just clarify. My clients do not want to resume normal worship services. That's just not true. We made it clear many times that they should only be allowed to open in Stage 2 provided that they follow all of the government public health measures and social distancing guidelines, and that's exactly what the court said in the recent *Tabernacle Baptist* case, which is very instructive and similar to our case.

In that case the Court granted the plaintiffs' TRO and found that the church should be allowed to hold in-person services, not drive-in, since the church was committed to following the CDC's guidelines on large gatherings, practicing social distancing, and –

THE COURT: I'm confused. Let me interrupt you a minute because – and I can see why the state might have been confused as well because Bishop Hodges talks about how [13] important it is to resume the religious activities, including the laying on of

hands and approaching the alter. Is he not requesting to do that by this TRO?

MR. JONNA: Your Honor, no. I mean – essentially, I think in these papers he described what they do – what's important to their faith, but he made it abundantly clear multiple times, and he will certainly reaffirm it if it's necessary, that he will only resume services by complying with every single guideline that other businesses are required to comply with.

So if, for example, that means that certain things that are done normally have to be suspended because of these guidelines, these social distancing guidelines, that will be done.

And then the Delgado declaration, Your Honor, had a long list of things that churches could and should do to responsibly resume services, and it included not singing, for example, it included not having booklets or hymnals that would be reused, it included single-file lines, it included, you know, not having Holy water in the church. All sorts of things can be done, and people of faith are willing to do them, and Bishop Hodges is certainly willing to do them, so it's absolutely not the case that he just wants to get 300 people in there this Sunday. I mean, he wants to meticulously follow these guidelines, and he can.

He's proven he can, Your Honor, by virtue of the fact that [14] they feed thousands of people. They're one of the most charitable organizations in the South Bay region. They're using masks and gloves. They're

distributing food to thousands of people. We included a photo. They've done it safely, and, you know, the county and the government are happy to have the church, you know, serve in that way, and they're willing to resume services in a responsible way, and they've shown they can, and other churches across the country have shown they can, and so – and, Your Honor, again, I would say the Delgado declaration has a great summary of how this can be done, how it should be done, how it has to be done.

And I'm not going to address irreparable harm because Your Honor correctly pointed out that that's easily shown, and I do have some thoughts on *Jacobson*, but I won't get into that since Your Honor didn't mention it.

I do also have some thoughts on other cases, but that's – those are my main points, and I'm happy to address the state or the county's argument on rebuttal.

THE COURT: Okay. Let me hear from the state then first.

MR. GRABARSKY: Good morning, Your Honor. This is Deputy Attorney General Todd Grabarsky on behalf of the state defendants.

We're dealing with an emergency situation involving a highly technical public health issue where, really, the stakes [15] couldn't be higher, and those stakes being a significant risk of severe illness and death on a massive scale. It is these – the situation that warrants judicial deference to the governor's good-faith order.

And Your Honor has already stated in Your Honor's opening remarks that this order furthers a compelling government interest. *Jacobson* acknowledged this over a hundred years ago, that it is no part of the function of the Court to determine which one of two modes is likely to be the most effective for the protection of the public against disease.

And in the *Abiding Place* ruling, Your Honor recognized this important principle briefly quoting, "It's important that this Court not usurp the state's authority to craft emergency health measures. The Court shouldn't be second-guessing the wisdom or efficacy of these measures as long as they have some basis in reality and they aren't pretextual."

And that's exactly what plaintiffs are asking the Court to do in this case; not only to second-guess the well-reasoned decisions of the governor and the public health officer that based on science, data, facts, and experts in infectious disease and epidemiology and public health, but more so, they're asking the Court to disrupt the state's careful and well-reasoned measures to combat this extraordinary once-in-a-century public health emergency.

I'll note that – and the reopening road map is really a [16] crucial part of those measures, and I'll note that the road map is – it's a work in progress. It's going to change based on the data and how conditions on the ground change, and once we gather the data based on how the virus responds to some reopenings, the state

and the public health officer will make adjustments based on that data and those responses.

The reopening road map calls for careful and gradual measures to see how the virus and the contagion responds to a step-by-step staggered reopening. The state will look at that data, whether infection or death rates change, and adapt the reopening measures accordingly.

THE COURT: What about the argument of plaintiff that there's so many arbitrary exceptions that it's, they feel, singling out religion?

MR. GRABARSKY: I'll underscore Your Honor's remarks this morning that the exceptions are based on the risk factors. They're not arbitrary based on the content of what's going on at the different activities. They're based on the risk factors. And I'll note that contrary to what plaintiffs' counsel is saying, schools, as of yet, are not open. The reopening road map suggested in the future that schools might reopen, but at present, schools are not permitted – they're still operating remotely, and they're not permitted to be – to hold in-person classes or instruction.

With regard to factories, again, that's based on the risk [17] factors. As Your Honor pointed out, these are leaving transitions. These aren't mass groups of people gathered together for a communal experience.

What plaintiffs are seeking to do, and I understand perhaps the confusion behind this, given that the temporary restraining order they've requested is a bit

vague and abstract, but it appears that what they're asking to do is gather indoors with groups of hundreds of people together for the same purpose.

And I'll also note that from the onset, the state has recognized the fundamental rights of religious exercise. Since the beginning of the executive order, faith-based services have been deemed as essential services that would allow plaintiff to leave their home to provide congregants with worship opportunities through various technology and free – the free online streaming or teleconferencing platform or through drive-in services provided that congregants remain in their cars, observe distancing, and refrain from physical contact.

This notion that the state has been hostile to religion just simply isn't supported by the facts and how the executive order has treated religion and faith-based groups from the onset.

In other words, there's no complete or total prohibition on the ability to worship. This argument was addressed by these other district courts in California, the *Gish* case and the *Cross Culture* case – the *Gish* case from the Central District [18] and the *Cross Culture* case from the Eastern District.

With regard to plaintiffs' counsel citing to the Sixth Circuit case, I think it's important to note that the Sixth Circuit didn't go so far as to enjoin Kentucky's prohibition on any person gathering for worship. The Sixth Circuit injunction only applied to the prohibition on drive-in services, and that was true with the *On Fire* district court Kentucky case. With regard

to the reference to the Tabernacle, the Tabernacle case, also from Kentucky, that seems to go against the Sixth Circuit's, I guess, refusal to enjoin the in-person ban on – the ban on in-person gatherings.

I'll also note that plaintiffs' counsel has suggested that the United States Department of Justice had intervened in other cases. That doesn't seem to be supported by the facts.

I think in two cases, U.S. DOJ had issued letters. There was no motion to intervene in those cases at all.

And yeah, and finally just to touch on the notion that there have been arbitrary exceptions, again, the exceptions are not arbitrary. They're based on what are gatherings, what are groups of people gathered together for communal experience, and plaintiffs simply haven't shown that comparable analogous gatherings to the hundreds of people in an enclosed space that they're seeking have been permitted.

And I'm happy to address any other questions that the Court has or that plaintiffs may raise.

[19] THE COURT: Okay. Does the county have anything to add?

MR. WHITE: Just briefly, Your Honor.

I think the state has done a great job explaining their orders because they are state orders, and the county has adopted them by incorporation or reference.

I would just point out that the state had the second highest number of deaths since this pandemic started just the week ending on Mother's Day, so this is not over by a long shot. This still is a public health danger that the state and the county officials, the public health officials, are responding to and trying to protect the community as best as they can while also protecting everybody's constitutional rights.

There have been churches, as we've mentioned in our briefs, that have been found, church settings to be what they call superspreader events, and there seems to be something about indoor congregation, for extended periods of time especially, that are dangerous with this virus.

Everything's still being learned in real time, but that seems to be a real concern, a real threat, especially when you have people singing and standing close together, and I think that's why in Stage 3, you'll see that movie theaters, concerts, other events that may be similar that are not religious are also in Stage 3 and so I don't think there [20] really can be an argument that the state or the county are targeting religion or religious practices. That's just not borne out by the facts or the order.

I think it would be a mistake to constitutionalize on a church-by-church basis, for example, these public health issues that are – that public health experts need flexibility.

Things are changing rapidly. New data are coming in all the time and new studies are being released and

analyzed. And the public health officials have scarce resources, so they set up these stages to really protect the community on a general level based on the science and the data at that time. To have to have them analyzed on a church-by-church basis based on whether this church is going to have 50 people in a room, what size the room is, what square feet, or versus 200, it's not something I think that is reasonable in the middle of a public health crisis, in the pandemic, when they're trying to protect an entire county or an entire state.

I think under *Jacobson*, this is just the type of situation that Jacobson applies to, and I think that's why all three courts that have reviewed the state stay-at-home order in California of the churches so far have upheld it and found that it is not discriminatory, that it is not arbitrary, and if *Jacobson* would not apply, then certainly *Smith* applies.

Under *Lukumi*, we need to show, either by express actions or implication, some desire or intent on public officials to [21] target or discriminate against a religious practice from animus. That's certainly not shown here.

These are orders that apply to religious and secular practices. Thank you.

THE COURT: Okay. Mr. Jonna, any rebuttal or any response?

MR. JONNA: Yes, Your Honor. Thank you.

As far as *Jacobson*, I know the Court is familiar with the case which involves vaccination and didn't

deal with the constitutional right to free exercise of religion, and it's not clear that *Jacobson* applies to free exercise.

The Court in *First Baptist Church* refused to apply it. And under the case, an emergency rule is, as the Court knows, invalid if it has no real or substantial relation to those objects of protecting public health or if it's beyond all question a plain, palpable invasion of rights secured by the fundamental law. And the state or – neither the state nor the county have really explained why letting large numbers of people sit together indoors in a factory is okay, but not getting together for an hour of worship following the government guidelines.

And that's really the issue. You know, the county focuses on the fact that the coronavirus is serious and needs to be curbed, and we're not disputing that, but it doesn't answer the question of what the factual or scientific basis for [22] distinguishing manufacturing from churches, and there is a palpable invasion of free exercise of rights. Under *Lukumi* and *Fraternal Order of Police*, churches have a right to be treated equally to secular interests, and if one exception that undermines that interest is granted, then religious exemptions must be granted too.

And it's also clear from the governor's statements that they – that the state views religion as a low-reward activity despite the fact that it's constitutionally protected activity.

And as far as, Your Honor, the evidence that shows that schools, factories, and museums are all part of Phase 2, I would point the Court to Exhibit 1-3 attached to our first amended complaint. It's not really – I think the state was careful in how they phrased it. They said they're not yet open in Phase 2, but they are definitely unquestionably part of the Stage 2 reopening whereas churches are not.

As far as, you know, I think the state or someone mentioned indoors – I mean, I'm sure many churches will be willing and glad to have services outdoors if that was an option.

And as far as, you know, just telling all the people of faith in California that they have to – that drive-in services and live-stream services are going to have to suffice for your constitutionally protected exercise of religion, that's going to have to suffice until we say so, without looking at the data, without looking at the numbers, that's just not [23] acceptable to people of faith, and it's not consistent with our Constitution.

As far as the cases, Your Honor, there are cases, and that I cited, the *First Baptist* case and the *Tabernacle Baptist* case, which both deal with in-person services, not drive-in services.

And as far as the superspreading that the state mentioned, that church activities, there's no evidence before this Court that any of those services were following the government guidelines that my client and all the other churches are willing to responsibly follow

to resume responsible worship services like millions of other faithful are doing across this country.

So I think there's just – there is no evidence that allowing – you know, making an exception for churches similar to the ones they're making for factories and schools is going to really make this – make the epidemic any worse than it already is. In fact, I think the evidence is to the contrary.

THE COURT: Okay. Thank you, all.

Go ahead.

MR. GRABARSKY: This is Todd Grabarsky for the state defendants. May I just respond to one point very briefly?

THE COURT: Sure.

MR. GRABARSKY: To plaintiff counsel's contention that just because there's secular exception means that there has [24] to be an exception for religious practices, that's just simply not supported by the case law. This Court in *Whitlow* acknowledged that, quote, nowhere has the supreme court stated that if the government provides secular exception, it must also provide a religious exception. Indeed, a majority of circuit courts have refused to interpret *Employment Division versus Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption, and this principle has been acknowledged in over – I think over 15 – or over a dozen cases dealing – across the country dealing with religious challenges to stay-home orders across the

country that plaintiffs, in this argument or in their briefings, have not addressed. They've only touched on a few cases from Kentucky, and again, those cases go against the Sixth Circuit ruling, which did not enjoin in-person religious services.

THE COURT: Thank you, all.

MR. JONNA: There was one last thing – this is Paul Jonna – I wanted to say, and I'm sorry, Your Honor. It's the last thing.

To the extent the Court is willing to reconsider the tentative, I just respectfully ask the Court to take a quick look at the ex parte *Milligan*, U.S. Supreme Court case, because it makes clear that the reason the Bill of Rights was added was out of a concern that rulers would use the fear of an emergency [25] to seize power and take away constitutional rights, and I really think that – it's an old case, but it's a very interesting and on-point case that I think is worth consideration.

Thank you, Your Honor.

THE COURT: Okay. Thank you.

And by the way, I have read *Milligan*. I've worked my way through it this morning. But, you know, I don't really find *Milligan* – you know, it has some wonderful phrasing, but I don't really find it that applicable given the fact that it has to do with suspending the writ of habeas corpus during a time of war when there was a trial by jury available. There were a lot of things about it that were distinguishing, but I did review it.

So, first of all, I will deny the motion for a temporary restraining order. I do not find that plaintiff has shown a likelihood of success on the merits of any of its four causes of action.

First of all, with respect to the Free Exercise Clause causes of action from the U.S. Constitution, as I said in the *Abiding Place Ministries* case, the state may limit an individual's right to freely exercise his religious beliefs when faced with a serious health crisis such as the one we're facing now with covid-19, and I don't think plaintiffs really disagree with that.

[26] The right to practice religion freely does not include the liberty to expose the community to communicable disease or to ill health or death.

And despite plaintiffs' objections, I find that *Jacobson* is still good law and still applicable to this case.

California's reopening plan seems to me to be a neutral law of general application that happens to have the incidental effect of burdening a particular religious practice.

Under *The Church of Lukumi*, L-U-K-U-M-I for our court reporter, *Babalu Aye*, B-A-B-A-L-U A-Y-E, *versus city Hialeah*, H-I-A-L-E-A-H, and that's at 508 U.S. 520 – under that case, it talks about what a law of neutrality and general applicability is and if it does not aim to, quote, infringe upon or restrict practices because of their religious motivation, closed quote, and if it does not, quote, in a selective manner impose

burdens only on conduct motivated by religious belief, closed quote.

And it seems to me that a religious service falls within Stage 3 not because it's a religious service, but because the services involve people sitting together in a closed environment for long periods of time. Thus, any burden placed by classifying church services as Stage 3 are not because of a religious motivation, but because of the manner in which the service is held, which happens to pose a greater risk of exposure to the virus. And I note, there's lots of other [27] things: The SATs; the California Bar exam; lots of other events that involve people sitting together in a closed environment for long periods of time that are also not being allowed to go forward.

Plaintiffs have not demonstrated arbitrary exceptions to this classification, and the fact that there may be a secular exemption, as the state points out, does not automatically give a religious exemption, and again, as the state did, I refer to the *Whitlow* case. I don't find that strict scrutiny applies, and I do find that the reopening order is rationally based on protecting safety and stopping the virus spread.

Turning to the California Constitution claim, again, that reopening violates the California Free Exercise Clause, first, I'd note that although plaintiff cites the *Catholic Charities* case to argue that strict scrutiny should be applied to any California Constitution claim, I think the *Catholic Charities* case doesn't find that strict scrutiny applies. Instead, the Court in that case

found that they didn't need to determine the appropriate test because even under a strict scrutiny analysis, the claims pass muster, and I find the same in this case.

To satisfy strict scrutiny, the state must demonstrate that the order is narrowly tailored to further compelling government interests.

First, of course, there's a compelling government interest in safety and health. I don't think plaintiffs dispute this, [28] and I do find that the order is narrowly tailored to this purpose as well. The order allows congregants to gather remotely, to gather over the phone, or via video conference, in person with members of the same household, it allows clergy to travel to churches to set up services for congregants to experience remotely, the county now has opened to allow congregations to gather by car in drive-in style services as long as the physical distancing guidelines are followed and as long as people don't touch each other. Individuals can practice religion in whatever way they wish as long as they're not sitting with each other in large groups inside.

Thus, I find that the reopening plan has been narrowly tailored to further a compelling government interest, and it does pass the strict scrutiny analysis.

Therefore, I find that plaintiff has not established that they are likely to succeed on their California Constitution claim.

Turning to the equal protection claim, the Equal Protection Clause does not forbid classification. It simply keeps governmental decision-makers from treating differently persons who are in all relevant aspects of life, and that's a quote from *Nordlinger*, N-O-R-D-L-I-N-G-E-R, *versus Hahn*, H-A-H-N, 505 U.S. 1 at 10.

Here the state's distinguishing between businesses where people are more at risk and businesses where people are less at [29] risk, and the classification between these stages is based on the type of activity that occurs within the business and the risk of contracting the virus while participating in that activity; therefore, the government is not treating differently businesses that are alike. Religious services are treated similar to other activities where large groups come together for a period of time, like movies, concerts, theater, or dance performances.

Because plaintiff has no evidence that similarly situated persons or businesses are treated differently, they failed to show a likelihood of success on their equal protection claim.

And then finally, plaintiffs claim that the reopening plan violates the 14th Amendment, Due Process Clause. Substantive due process, quote, forbids the government from depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. And that's a quote from *Nunez versus City of Los Angeles*, 147 F.3d 867. It's a Ninth Circuit case, and

that's at 871. Any shock-the-conscience analysis necessarily requires consideration of the justification the government offers, if any, for the alleged infringement, and that's referring to *Reno versus Flores*, 507 U.S. 292 at 301 and 302.

I find that given the circumstances and the state's justification for the stay-at-home orders as well as the [30] planned reopening of the state in stages, plaintiffs have not established that the state order shocks the conscience.

Furthermore, I don't find that either the balance of equities or the public interest supports issuing a TRO. This virus poses a serious health risk to everyone in the state; in fact, everyone in the world. I don't think anyone here is arguing with that. The only way currently known to curb the disease is to limit personal exposure. California seems to be doing a pretty good job of controlling the spread, but they have to continue to monitor how each stage of reopening with the increasing risk of each one affects the overall number of infections.

I understand it's difficult for everyone involved, but it is in the public interest to continue to protect the population as a whole.

Therefore, the motion for the temporary restraining order is denied.

Okay. Thank you, all, for your patience and working through this together. I appreciate it.

MR. JONNA: Thank you, Your Honor.

MR. WHITE: Thank you, Your Honor.

MR. GRABARSKY: Thank you.

THE COURT: Okay. Thank you.

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[31] [Certification Omitted]