

**In the Supreme Court of the United States**

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**SOUTH BAY UNITED PENTECOSTAL CHURCH, ET AL.,**

Applicants,

v.

**GAVIN NEWSOM, ET AL.,**

Respondents.

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**CONSOLIDATED OPPOSITION TO EMERGENCY  
APPLICATIONS FOR WRIT OF INJUNCTION**

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**HARVEST ROCK CHURCH, INC., ET AL.,**

Applicants,

v.

**GAVIN NEWSOM,**

Respondent.

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## INTRODUCTION

Plaintiffs ask the Court to enjoin public health restrictions on indoor worship services that are part of California’s comprehensive and carefully-calibrated response to the COVID-19 pandemic. The State and the lower courts have taken plaintiffs’ claims seriously. After this Court enjoined restrictions on worship services in New York on free-exercise grounds in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), the lower courts in these cases thoroughly evaluated plaintiffs’ claims in light of that decision: The State introduced detailed evidence regarding its restrictions and the epidemiological and scientific considerations that informed them. The district courts concluded that California’s restrictions are “painstakingly tailored to address the risks of Covid-19 transmission specifically,” e.g., *Harvest Rock Church, Inc. v. Newsom*, 2020 WL 7639584, \*6 (C.D. Cal. Dec. 21, 2020), and were adopted only after less restrictive alternatives were tried but “proved insufficient to prevent outbreaks at houses of worship,” *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974, \*12 (S.D. Cal. Dec. 21, 2020). The court of appeals agreed in substantial part, but enjoined numerical capacity limits on indoor worship in less severely impacted regions, on the view that those limits had not been shown necessary to slow community spread.

No further injunctive relief is warranted. No one doubts that the current restrictions on indoor worship burden the interests of people of faith. And we can all hope and expect that, as vaccines are distributed and administered, the State will soon be able to relax those restrictions and allow worship indoors in

all regions of the State. As the record shows, however, that time has not yet arrived. The policies that plaintiffs challenge are a carefully structured and proportionate response to the unprecedented public health threats facing the State. By contrast, the relief plaintiffs seek would allow churches to be filled to capacity—and to engage in activities such as group singing that are particularly likely to transmit the virus—during the deadliest period of the pandemic.

## STATEMENT

### A. Factual Background

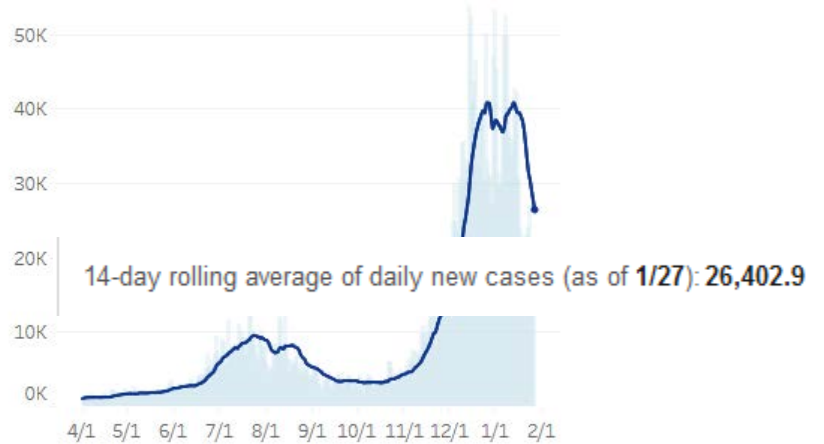
Much of the Nation, including California, is in the midst of the most critical stage of the COVID-19 pandemic. Infections, hospitalizations, and deaths have surged. When this Court last considered California’s policies in early December, about 1.2 million Californians had contracted the virus and more than 19,000 had died.<sup>1</sup> Today, those numbers are 3.1 million infections and nearly 39,000 deaths.<sup>2</sup> It took ten months for California to reach a million confirmed cases; but just six weeks to reach two million cases; and only four weeks more

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<sup>1</sup> The Covid Tracking Project, *California: Cases*, <https://covidtracking.com/data/state/california/cases> (last visited Jan. 26, 2021); The Covid Tracking Project, *California: Outcomes*, <https://covidtracking.com/data/state/california/outcomes> (last visited Jan. 26, 2021).

<sup>2</sup> State of California, *Tracking COVID-19 in California—Coronavirus COVID-19 Response*, <https://covid19.ca.gov/state-dashboard/> (last visited Jan. 28, 2021).

to reach three million.<sup>3</sup> Although the rate of new infections appears to have peaked in December—at least for now—the rolling average of new infections in California still exceeds 26,000 cases per day:



*New Cases in California Per Day*<sup>4</sup>

COVID-19 is transmitted primarily by small respiratory droplets and aerosolized particles containing the virus that causes the disease. *See* Declaration of Dr. James Watt, M.D., M.P.H., D. Ct. Dkt. 81-3 ¶¶ 27-28 (Watt Decl.).<sup>5</sup> Those droplets and particles are exhaled when individuals breathe, talk, sing, cough, or sneeze. *Id.* Many people infected by the virus have no symptoms,

<sup>3</sup> Money, *California Becomes the First State to Surpass 2 Million Coronavirus Cases*, L.A. Times, Dec. 24, 2020, <https://www.latimes.com/california/story/2020-12-23/covid-19-deaths-los-angeles-county-california>; Money, *California Hits 3 Million Coronavirus Cases*, L.A. Times, Jan. 19, 2021, <https://www.latimes.com/california/story/2021-01-19/california-hurtles-toward-3-million-coronavirus-cases>.

<sup>4</sup> State of California, *Tracking COVID-19 in California—Total Cases in California*, <https://covid19.ca.gov/state-dashboard/> (last visited Jan. 28, 2021).

<sup>5</sup> All citations to expert declarations are to the district court docket in *South Bay United Pentecostal Church v. Newsom*, No. 20-CV-00865 (S.D. Cal.).

yet can still transmit the disease to others. *Id.* ¶¶ 30-32; Declaration of Dr. George Rutherford, M.D., D. Ct. Dkt. 81-4 ¶¶ 32-34 (Rutherford Decl.). Indeed, the “fact that [COVID-19] can be spread by individuals who are pre-symptomatic or asymptomatic is one of the aspects of the [virus] that makes it difficult to control.” Watt Decl. ¶ 32. “Individuals without symptoms are generally unaware they are infected and are thus less likely to be taking steps to avoid transmission of the virus.” *Id.*

As the virus evolves, it is becoming easier to spread. Mutated variants of the COVID-19 virus appear to be significantly more transmissible, with one strain increasing transmissibility by 40% to 70%.<sup>6</sup> Those mutations could lead to faster spread and far greater “hospitalizations and deaths.”<sup>7</sup> One of the new and more transmissible variants was detected in Southern California in late December, and scientists have identified a strain in the western United States that has appeared with increasing frequency in California.<sup>8</sup>

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<sup>6</sup> See Healy, *New Evidence that U.K. Coronavirus Variant Spreads More Easily Has Scientists Really Worried*, L.A. Times, Jan. 10, 2021, <https://www.latimes.com/science/story/2021-01-10/new-evidence-that-u-k-coronavirus-variant-spreads-more-easily-has-scientists-really-worried>; Iati, *What You Need to Know About the Coronavirus Variants*, Wash. Post, Jan. 25, 2021, <https://www.washingtonpost.com/health/interactive/2021/01/25/covid-variants/>.

<sup>7</sup> Healy, *supra*, *New Evidence that U.K. Coronavirus Variant Spreads More Easily Has Scientists Really Worried*.

<sup>8</sup> See Cal. Dep’t of Public Health, *COVID-19 Variant First Found in Other Countries and States Now Seen More Frequently in California*, Jan. 17, 2021, <https://www.cdph.ca.gov/Programs/OPA/Pages/NR21-020.aspx>; Healy, *Could a Homegrown Coronavirus Strain Be Partly to Blame for California’s Surge?*,

The risk of transmission presented by any activity depends on several factors. First, the number of people involved in an activity matters: the greater the number of people, the greater the risk that one or more of them is infectious (particularly when community transmission levels are high) and the more people to whom the disease may be spread. Watt Decl. ¶¶ 42-43; Rutherford Decl. ¶¶ 90-91, 94; Declaration of Dr. Michael Stoto, PhD, D. Ct. Dkt. 81-5 ¶ 10 (Stoto Decl.).

Second, the nature of the activity matters. Epidemiologists have concluded that “[v]iral load”—the “number of viable viral particles” to which a person is exposed—determines whether the virus will “overcome [the] body’s defenses and cause” infection. Rutherford Decl. ¶¶ 36, 96. In other words, “[n]ot all exposures . . . will cause an infection; an infection will take place only where there is a sufficient dose of the virus to overcome the body’s defenses.” Watt Decl. ¶ 33. Transmission risk increases when individuals are in close proximity for extended periods of time, which increases the danger that the virus-laden droplets and particles exhaled by an infected individual will accumulate in a dose large enough to overcome the immune system of other nearby participants and infect them. *See* Watt Decl. ¶ 43; Rutherford Decl. ¶¶ 90-91. Transmission risk also increases when infected individuals engage in activities that increase the viral load when they exhale, such as “singing, chanting, shouting,

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L.A. Times, Jan. 23, 2021, <https://www.latimes.com/science/story/2021-01-23/coronavirus-california-strain-homegrown>.



and similar vocalization.” Rutherford Decl. ¶ 96. Transmission risk is reduced by wearing face coverings and by maintaining six feet of separation between individuals from different households; but such measures do not eliminate risk. Rutherford Decl. ¶ 75 (“not a fool-proof intervention for stopping transmission”); *see also* Watt Decl. ¶¶ 38, 50-53, 70.

Third, the location matters. The risk of transmission is higher where there is “limited ventilation and no wind to dissipate respiratory particles into the atmosphere.” Watt Decl. ¶ 44; Rutherford Decl. ¶ 93. Indoor gatherings thus pose substantially greater risk than do outdoor gatherings, because reduced airflow and smaller contained spaces allow droplets containing the virus to accumulate. *See* Watt Decl. ¶ 44; Rutherford Decl. ¶¶ 90-93.

These factors—the number of people, the nature of the activity, and the location—combine to cause especially great risk of transmission for indoor “congregate” activities. *See* Watt Decl. ¶¶ 37-46; Rutherford Decl. ¶¶ 90-112; Brief of Amici Curiae Epidemiologists and Public Health Experts at 10-12, *Harvest Rock Church, Inc. v. Newsom*, No. 20A94 (Nov. 27, 2020). The risk is particularly high when congregate activities involve singing, loud speaking, or chanting, especially when they take place in buildings with limited ventilation. *See* Rutherford Decl. ¶¶ 95-100 (collecting scientific literature); *id.* ¶¶ 104-105. Experience bears this out: many indoor communal gatherings, including in-

door worship services, have become “super-spreader” events, leading to hundreds or even thousands of infections. *See, e.g., id.* ¶¶ 100, 108-112 (collecting examples); Watt Decl. ¶ 46.

There remains no cure for COVID-19, *see* Watt Decl. ¶ 24, though scientists and public-health officials have made substantial progress in developing and distributing a vaccine. The federal government granted emergency-use authorization for two separate vaccines in December, and 3.0 million doses have been administered in California to date.<sup>9</sup> It has been predicted that the general public will have access to the vaccines in the spring.<sup>10</sup> But until these vaccines are widely distributed, the types of gatherings and human interactions that allow for transmission of the virus must be limited in order to effectively slow the spread of COVID-19. *See* Watt Decl. ¶¶ 24, 55.

2. California and many other jurisdictions have adopted emergency measures to slow the spread of the virus. As the Chief of the Division of Communicable Disease Control for California’s Department of Public Health has

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<sup>9</sup> *See* U.S. Food and Drug Administration, *Pfizer-BioNTech COVID-19 Vaccine Emergency Use Authorization*, Dec. 13, 2020, *available at* <https://www.fda.gov/media/144412/download>; U.S. Food and Drug Administration, *ModernaTX Vaccine Emergency Use Authorization*, Dec. 18, 2020, *available at* <https://www.fda.gov/media/144636/download>; State of California, *COVID-19 Vaccine Dashboard*, <https://covid19.ca.gov/vaccines/#California-vaccines-dashboard> (last visited Jan. 29, 2021).

<sup>10</sup> Linskey, *Biden Now Hopes for 1.5 Million Vaccinations A Day, A Big Jump From Earlier Comments*, Wash. Post, Jan. 25, 2021, [https://www.washingtonpost.com/politics/biden-vaccine-coronavirus/2021/01/25/f1ce56dc-5f2e-11eb-9430-e7c77b5b0297\\_story.html](https://www.washingtonpost.com/politics/biden-vaccine-coronavirus/2021/01/25/f1ce56dc-5f2e-11eb-9430-e7c77b5b0297_story.html).

explained, the State’s response “was designed to be, and has been, a work in progress that must be adjusted in real time based on new data and circumstances that arise during the course of the pandemic.” Watt Decl. ¶ 59; *see also* Rutherford Decl. ¶ 52; Stoto Decl. ¶ 32. From the earliest days of the pandemic, those policies have recognized the importance of religious activities and have preserved opportunities for religious worship.

a. *Early policies.* In March 2020, Governor Newsom proclaimed a state of emergency and then issued an executive order generally requiring individuals to stay at home except for those involved in certain federally recognized critical infrastructure sectors. Harvest Rock App. I 75-79.<sup>11</sup> Days later, California’s Public Health Officer designated additional critical infrastructure sectors, *see* Harvest Rock App I 97-98, 112-134, including “faith-based services that are provided through streaming or other technologies,” *id.* at 127. The stay-at-home order proved effective, and the rate of COVID-19 infection slowed, such that California hospitals were not “strained beyond capacity.” Rutherford Decl. ¶ 53; *see also* Watt Decl. ¶ 54; Declaration of Dr. Yvonne Maldonado, M.D., D. Ct. Dkt. 81-6 Ex. 1 ¶ 15 (citing study estimating “that without the shelter-in-place orders in place at the outset of the pandemic, the viral spread would have been ten times greater”) (Maldonado Decl.).

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<sup>11</sup> “Harvest Rock App.” refers to the appendix submitted by the Harvest Rock Applicants in No. 20A137; “South Bay App.” refers to the appendix submitted by the South Bay Applicants in No. 20A136; the subsequent letter refers to the appendix tab.

The next month, the Governor announced a roadmap to guide reopening of the State. *See* Harvest Rock App. I 135-142; Watt Decl. ¶¶ 62-63. As part of that reopening, on May 25, the State allowed in-person worship services to resume statewide, but limited attendance to 100 persons or 25% of building capacity, whichever was lower. Harvest Rock App. I 145; Watt Decl. ¶¶ 66-70. Shortly thereafter, this Court denied an application for an emergency injunction against that restriction. *See infra* pp. 18-19.

In June, relying on emerging scientific evidence about COVID-19 and how it spreads, the State removed attendance limits on outdoor religious services. Watt Decl. ¶ 71. Later in the month, the State also issued a statewide order requiring face coverings in community settings. *See* Rutherford Decl. ¶ 71.

Unfortunately, the summer months saw a resurgence in COVID-19 infections and deaths. *See* Watt Decl. ¶ 72. In response, the State tightened restrictions. *Id.* ¶¶ 73-81; Harvest Rock App. I 184-188. Among other things, the State discontinued indoor singing and chanting in schools, in restaurants, at protests, and during worship services, recognizing that such activities “negate the risk-reduction achieved through six feet of physical distancing.” Harvest Rock App. I 172.<sup>12</sup> Later in July, the State closed indoor operations of restaurants, bars, movie theaters, zoos, and museums statewide, and closed indoor operations of certain other activities (including worship services, gyms,

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<sup>12</sup> *South Bay*, No. 20-CV-00865, D. Ct. Dkt. 47-1, Ex. 1-9, 1-10; D. Ct. Dkt. 57-1, Ex. 15-16.

and hair salons) in counties with elevated infection levels. Watt Decl. ¶¶ 79-81; Harvest Rock App. J. Given the more limited risk of transmission outdoors, however, singing and chanting during outdoor worship services remained permissible, so long as congregants wore masks and physically distanced. *See id.* Harvest Rock App. I 172.

b. *The Blueprint.* In August, the State developed the “Blueprint for a Safer Economy,” a detailed plan for loosening restrictions based on the experiences of the first six months of the pandemic and the latest scientific evidence about how the virus is transmitted. *See* South Bay App. G-1, G-2, G-3; Watt Decl. ¶¶ 82-88. The Blueprint built on state-wide regulations such as the masking requirement and on industry-specific guidance, and created a framework to permit “a broader range of reopening” based on “risk-based criteria pertinent to each sector.” South Bay App. G-1. Under that framework, certain lower-risk activities are permitted so long as they operate “with modifications”—*i.e.*, in compliance with statewide and industry-specific guidance. South Bay App. at G-1, G-2, G-3. But the Blueprint imposes additional restrictions on indoor operations for higher-risk activities for which statewide and industry-specific guidelines are insufficient to adequately lower the risk of transmission. *Id.* at G-1, G-2.

The need for such additional restrictions is based on relative transmission risk, assessed in light of objective criteria such as the number of people, the nature of the activity, its duration, the ability to limit physical interactions and

mixing of people from different communities, the ability to employ protective measures such as masks and physical distancing, and the degree of ventilation. *See* South Bay App. G-2 at 6-7.

For most sectors and activities, the stringency of the restrictions varies depending on the background public health conditions in each county. *See* South Bay App. G-1, G-2, G-3. Counties are assigned to one of four tiers, ranging from Tier 1 (“Widespread”) to Tier 4 (“Minimal”), based on the county’s adjusted case rate and related objective criteria. *See id.* The State re-evaluates each county’s tier status on a continual basis; as the objective indicators of local conditions change, the State moves counties into tiers with greater or lesser restrictions. *Id.*; Watt Decl. ¶¶ 84-85.

Under this risk-based approach, in Tier 1 counties where COVID-19 is widespread, the Blueprint prohibits indoor gatherings for certain businesses and activities—including museums, movie theaters, restaurants, and worship services—but allows such gatherings outside. *See* South Bay App. G-3; *see also id.* A 55-56. In counties where the virus is not widespread, the State allows these activities to operate indoors with capacity limitations: from the lesser of 25% capacity or 100 persons in Tier 2, to the lesser of 50% capacity or 200 persons in Tier 3, to 50% capacity in Tier 4. *See id.* G-3. Indoor protests and

college lectures are separately subject to the same percentage capacity restrictions and numerical caps as worship services.<sup>13</sup>

Sectors and activities that pose less risk of transmission are subject to less-stringent restrictions. For example, personal care services, hair salons, hotels, and “limited services” (such as laundromats and auto repair shops) are permitted to open in all risk tiers subject to industry-specific restrictions—like plexiglass shields and face guards—because they do not typically involve large numbers of people and thus pose less risk of transmission to multiple individuals.<sup>14</sup> Other indoor activities that involve large numbers of people but only short periods of close proximity, such as retail stores and shopping malls, are permitted to open indoors; but they are subject to capacity restrictions in Tiers 1 and 2. *See* South Bay App. G-3.<sup>15</sup>

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<sup>13</sup> *See* Cal. Dep’t of Public Health, *About COVID-19 Restrictions*, <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (drop down menu “Can I engage in political rallies and protest gatherings?”) (last visited Jan. 26, 2021); Cal. Dep’t of Public Health, *Industry Guidance to Reduce Risks*, <https://covid19.ca.gov/industry-guidance/> (drop down menu “Higher education—updated October 1”) (last visited Jan. 26, 2021).

<sup>14</sup> *See* Cal. Dep’t of Public Health, *Industry Guidance to Reduce Risks*, <https://covid19.ca.gov/industry-guidance/> (drop down menu “Limited Services—updated October 20”) (last visited Jan. 26, 2021); Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Expanded Personal Care Services*, <https://files.covid19.ca.gov/pdf/guidance-expanded-personal-care-services--en.pdf> (last visited Jan. 26, 2021).

<sup>15</sup> *See* Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Shopping Malls, Destination Shopping Centers, and Swap Meets*, <https://files.covid19.ca.gov/pdf/guidance-shopping-centers--en.pdf> (last visited Jan. 26, 2021) (requiring common areas and food courts to be closed or subject

Still other sectors and activities, such as gyms, wineries, bars, cardrooms, amusement parks, and offices, are subject to even more stringent restrictions. *See* South Bay App. G-3. Indoor concerts, plays, and other artistic performances, which are congregate activities similar to worship services, are entirely prohibited.<sup>16</sup> Other gatherings not covered by specific guidance are permitted only outdoors in Tier 1, and are subject to a maximum of three households in all other tiers.<sup>17</sup>

c. *The December Surge, Temporary Regional Stay at Home Order, and January Return to the Blueprint.* On December 3, 2020, in light of skyrocketing case rates and hospitalizations, *supra* pp. 2-3, the State tightened restrictions again.<sup>18</sup> The Governor issued a Regional Stay at Home Order, dividing the State into five regions subject to tighter restrictions if their regional

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to the restrictions for restaurants).

<sup>16</sup> *See* Cal. Dep't of Public Health, *About COVID-19 Restrictions*, <https://covid19.ca.gov/stay-home-except-for-essential-needs/> (drop down menu "Are gatherings for musical, theatrical, or artistic performances permitted?") (last visited Jan. 26, 2021).

<sup>17</sup> Cal. Dep't of Public Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Nov. 13, 2020) <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx> (last visited Jan. 26, 2021).

<sup>18</sup> *See* State of California, *Regional Stay at Home Order* (Dec. 3, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/12/12.3.20-Stay-at-Home-Order-ICU-Scenario.pdf>.



ICU capacity fell below 15%.<sup>19</sup> By December 17, 2020, four of the five regions had dropped below that threshold.<sup>20</sup>

Under that Order, many activities permitted under Tier 1 of the Blueprint were prohibited. The Order forbid all outdoor dining, socializing with friends or family members from other households, and visits to zoos, museums, and outdoor movie screenings. *See* South Bay App. H-1, H-2; *id.* at A 55-56. The Order also closed personal-care businesses (including hair salons, nail salons, acupuncture, and massage services) and required hotels not to honor out-of-state reservations for non-essential travel. *See id.* at H-1, H-2. And the Order reduced maximum grocery store capacity from 50% to 35% in Tier 1 of the Blueprint, and all other retail from 25% to 20% capacity. *See id.* Outdoor worship services, however, were allowed to continue without any attendance limits. *Id.* at H-1.

While the Regional Stay at Home Order was initially designed to expire three weeks after being implemented in a region, the State extended the order in late December for three regions where ICU capacity remained at 0%.<sup>21</sup> By

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<sup>19</sup> *Id.*

<sup>20</sup> *See* State of California, *Regional Stay at Home Order, Current ICU % Availability*, <https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional-stay-home-order> (last visited Jan. 26, 2021).

<sup>21</sup> Money, *Stay at Home Order For Much of California Extended Amid Covid-19 Overload at Hospitals*, L.A. Times, Dec. 29, 2020, <https://www.latimes.com/california/story/2020-12-29/california-breaks-single-day-record-coronavirus-cases-66811>; *see* Kelliher, *State Extends Stay-At-Home Order in Bay Area as ICU Capacity Dwindles*, Mercury News, Jan. 9, 2021,

mid-January, however, case counts and hospitalizations began leveling off.<sup>22</sup> On January 12, public health officials lifted the Order in the Greater Sacramento region.<sup>23</sup> Two weeks later, even though ICU capacity at the time was low, the Order was lifted in the remaining three regions based on projections of ICU capacity in four weeks.<sup>24</sup> As a result, the Blueprint is currently the operative framework for COVID-related restrictions in every California county.

Despite those positive developments, the strain on California’s hospitals and healthcare workers has been devastating. Through mid-January, emergency rooms were “turn[ing] patients away,” and hospitals were “being quickly overwhelmed.” *South Bay*, 2020 WL 7488974, at \*12; see Watt Decl. ¶¶ 91, 93, 96-97. Some hospitals ran low on basic supplies for treating COVID patients, such as oxygen.<sup>25</sup> Ambulances were directed to avoid transporting patients to

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<https://www.mercurynews.com/2021/01/09/state-extends-stay-at-home-order-in-bay-area-as-icu-capacity-dwindles/>.

<sup>22</sup> Lin, *More Contagious COVID-19 Variants Bring New Uncertainties To California*, L.A. Times, Jan. 20, 2021, <https://www.latimes.com/california/story/2021-01-20/vaccines-aggressive-strains-and-fatigue-california-hits-3-million-covid-cases-and-a-crossroads>.

<sup>23</sup> State of California, *Regional Stay at Home Order*, <https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional-stay-home-order> (last visited Jan. 26, 2021).

<sup>24</sup> *Id.*

<sup>25</sup> Karlamangla et al., *Darkest Days for L.A. Doctors, Nurses, EMTs: ‘The Way Most People Leave is by Dying,’* L.A. Times, Jan. 11, 2021, <https://www.latimes.com/california/story/2021-01-11/los-angeles-coronavirus->

hospitals if they had a “limited chance of survival”; other ambulances had to wait as long as seventeen hours to offload patients into overflowing emergency rooms; and gurneys were set up in hospital areas not intended for patient care, such as lobbies and gift shops.<sup>26</sup>

Conditions have just begun to improve; that trend, along with the emerging availability of vaccines for some portions of the population, offers hope that the worst of the pandemic has passed. *Supra* p. 15.<sup>27</sup> But rates of new infections and deaths remain alarmingly high. *Supra* pp. 2-3.

## **B. Procedural History**

Plaintiffs are churches that are principally located in Southern California. They separately filed lawsuits challenging the State’s public-health related restrictions on indoor worship.

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hospitals-ambulances-horror; *see also* Money et al., *L.A. County Hospitals Running Dangerously Low on Oxygen, Supplies as ER Units Are Overwhelmed*, L.A. Times, Dec. 25, 2020, <https://www.latimes.com/california/story/2020-12-25/l-a-county-hospitals-running-dangerously-low-on-oxygen-supplies-as-er-units-are-overwhelmed>.

<sup>26</sup> Karlamangla et al., *supra*, *Darkest Days for L.A. Doctors, Nurses, EMTs: ‘The Way Most People Leave is by Dying’*; *see also* Weber, *California Hospitals Discuss Rationing Care as Virus Surges*, Associated Press, Dec. 21, 2020, <https://apnews.com/article/us-news-los-angeles-health-coronavirus-pandemic-california711b71eea782c900efdc07156b76a5b9>; Arango, *Southern California’s Hospitals are Overwhelmed, and It May Get Worse*, N.Y. Times, Dec. 25, 2020, <https://www.nytimes.com/2020/12/25/us/southern-california-hospitals-covid.html?smtyp=cur&smid=tw-nytimes>.

<sup>27</sup> Recent scholarship suggests that excess deaths have been avoided through California’s COVID-related policies. *See, e.g.*, Chen, *Excess Mortality in Cal. During the Coronavirus Disease 2019 Pandemic, March to August 2020*, J. of Am. Med. Ass’n Internal Medicine, Dec. 21, 2020, <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2774273>.

## 1. Proceedings prior to *Roman Catholic Diocese*

a. Shortly after the Governor announced the State’s plan for reopening the state in May 2020, *supra* p. 8, the plaintiffs in No. 20A136 (South Bay) filed a complaint alleging that the order (and related orders issued by county public health officials) violated the Free Exercise Clause by prohibiting “out-of-home religious services.” *South Bay United Pentecostal Church v. Newsom*, No. 20-CV-00865 (S.D. Cal.), Dkt. 1 ¶ 115. Plaintiffs simultaneously sought a temporary restraining order. *Id.* Dkt. 3. On May 15, the district court denied the requested restraining order. *Id.* Dkt. 32, 38.

South Bay appealed, moving for expedited briefing and an injunction pending appeal. The Ninth Circuit agreed to expedite the briefing but denied immediate injunctive relief, reasoning that South Bay had not demonstrated a likelihood of success on the merits. C.A. No. 20-55533, Dkt. 28, 29. On May 26, South Bay filed an emergency application for injunctive relief with this Court, challenging guidelines that limited indoor worship to 25% of building capacity or a maximum of 100 attendees. *See* No. 19A1044. This Court denied the injunction, with the Chief Justice reasoning in his concurrence that the State applied “[s]imilar or more severe restrictions” to “comparable secular gatherings” where “large groups of people gather in close proximity for extended periods of time.” *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring). While certain other activities were exempt from such restrictions, such activities were “dissimilar” because “people neither congregate in large groups nor remain in close proximity for extended

periods.” *Id.* Four Justices dissented, including Justice Kavanaugh. Although Justice Kavanaugh recognized that “the State has substantial room to draw lines, especially in an emergency,” he saw no “compelling justification” in the record to support a “looser approach” with some secular activities “while imposing stricter requirements on places of worship.” *Id.* at 1615.

While South Bay’s appeal was still pending in the Ninth Circuit, South Bay requested a limited remand to the district court to renew its motion in light of the State’s modifications to its COVID-related restrictions. C.A. No. 20-55533, Dkt. 56. The court of appeals granted that request in late July. *Id.*, Dkt. 74. In those remand proceedings, the district court considered the terms of the Blueprint and denied South Bay’s renewed motion for injunctive relief on October 15, finding it unlikely that South Bay would succeed on its free-exercise claim because “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.” *South Bay United Pentecostal Church v. Newsom*, 2020 WL 6081733 (S.D. Cal. Oct. 15, 2020). The parties then filed supplemental briefing in the court of appeals. C.A. No. 20-55533, Dkt. 80, 83, 89. On November 24, 2020, South Bay filed a petition for a writ of certiorari before judgment, seeking review of the district court’s October 15 order denying a preliminary injunction. *See* No. 20-746.<sup>28</sup>

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<sup>28</sup> The State’s response to that petition is due on March 18.

b. The plaintiffs in No. 20A137 (Harvest Rock) filed their lawsuit in July 2020, shortly after California tightened its early restrictions. *Harvest Rock Church, Inc. v. Newsom*, No. 20-CV-6414 (C.D. Cal.), Dkt. 1. Harvest Rock alleged various constitutional violations, including a violation of the Free Exercise Clause, *id.*, and moved for a temporary restraining order and a preliminary injunction, *id.* Dkt. 4.

The district court denied the motion for a preliminary injunction on September 2. Harvest Rock App. G. Harvest Rock appealed the denial of the motion for a preliminary injunction and filed an emergency motion in the court of appeals for an injunction pending appeal. C.A. No. 20-55907, Dkt. 6. A motions panel of the court of appeals heard argument on that motion on September 21 and denied it on October 1. *See* C.A. No. 20-55907, Dkt. 17, 26. The court concluded that “[t]he 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.” Harvest Rock App. E 3. To the contrary, the evidence established that “[t]he Orders apply the same restrictions to worship services as they do to other indoor congregate events, such as lectures and movie theaters,” and that the State “completely prohibited” certain other comparable indoor activities such as attending concerts and watching sporting events. *Id.*

Judge O’Scannlain dissented. Harvest Rock App. E 7-20. He acknowledged that fighting “the ongoing global COVID-19 pandemic” is a “compelling

goal.” *Id.* at 8. In his view, however, California was pursuing public health restrictions “against religious practices more aggressively than it does against comparable secular activities” that share some of the risk factors associated with worship services. *Id.* at 8-9, 13-18.

On October 15, Harvest Rock filed a petition for rehearing en banc. C.A. No. 20-55907, Dkt. 37. And on November 23, Harvest Rock filed an application for an injunction with this Court. *See* No. 20A94.

## **2. Proceedings following *Roman Catholic Diocese***

a. While Harvest Rock’s application was pending in this Court, and while the Ninth Circuit was considering South Bay’s appeal of the denial of its renewed motion for a preliminary injunction, this Court issued its decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam). In that decision, the Court granted an injunction pending appeal with respect to certain occupancy limits on worship in New York, reasoning that, on the record before it, the plaintiffs had made a “strong showing that [New York’s] restrictions violate ‘the minimum requirement of neutrality’ to religion” and were not “narrowly tailored” to the State’s interest in “[s]temming the spread of COVID-19.” *Id.* at 66, 67.

Shortly after *Roman Catholic Diocese*, this Court construed Harvest Rock’s application for a writ of injunction as a petition for certiorari before judgment, vacated the September 2 district court order in *Harvest Rock*, and remanded for further consideration in light of that decision. *See* 2020 WL 7061630 (Dec. 3, 2020). At the State’s suggestion, the court of appeals granted

comparable relief in *South Bay*. See 981 F.3d 765 (9th Cir. Dec. 8, 2020). Those remands allowed the parties an opportunity, during expedited proceedings, to submit briefing regarding *Roman Catholic Diocese* and additional evidence regarding the scientific basis for California’s restrictions.

b. In light of that evidence, including multiple declarations from experts in epidemiology and public health provided by the State, both district courts issued reasoned decisions denying the plaintiffs’ renewed motions for injunctive relief. The district courts concluded that California’s current restrictions are based on a “neutral,” multi-factor “risk analysis,” *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974, at \*12 (S.D. Cal. Dec. 21, 2020), resulting in a “painstakingly tailored” framework that “address[es] the risks of Covid-19 transmission” through “sliding levels of restriction based on scientific likelihood of viral spread,” *Harvest Rock Church, Inc. v. Newsom*, 2020 WL 7639584, at \*6, 9 (C.D. Cal. Dec. 21, 2020). Thus, “[b]y contrast to . . . New York[,] California treats houses of worship like or more favorably than similar secular institutions.” *Harvest Rock*, 2020 WL 7639584, at \*5; see *id.* at \*4 (concluding that California’s policies are “neutral or generally applicable”). California prohibits activities that pose the greatest risk—such as indoor gatherings that “involve large groups of people coming together.” *Id.* at \*8-9; *South Bay*, 2020 WL 7488974, at \*9-11 (similar). At the same time, the State restricts (without totally barring) activities that pose comparatively less risk—such as



visiting “retail shopping centers, hotels, laundromats, and liquor stores.” *Harvest Rock*, 2020 WL 7639584, at \*8-9. Those activities involve “much smaller groups of people” who are unlikely “to remain in proximity for longer than a brief interlude,” and are also subject to industry-guidance that can mitigate risk. *Id.*; *see also id.* at \*9 (distinguishing personal care services and worksites such as warehouses, factories and film production).

The district courts credited evidence showing that “lesser restriction[s]”—“for example, allowing indoor worship relying only on mask wearing, social distancing, and sanitization measures”—would not have “achieved California’s compelling interest in curbing the community spread of the virus.” *South Bay*, 2020 WL 7488974, at \*12. Those measures “reduce[] the likelihood of transmission per interaction, whereas stay-at-home orders and capacity regulations reduce the number of interactions of people from different households.” *Id.*; *see Harvest Rock*, 2020 WL 7639584, at \*8. Moreover, California had tried alternatives such as percentage capacity restrictions, but they “proved insufficient to prevent outbreaks in the San Diego County and Southern California Region.” *South Bay*, 2020 WL 7488974, at \*12. “If the dire trend of COVID-19 in Southern California—which has left the Region’s ICU capacity at 0%—proves anything, it is that the State’s efforts to implement curfews and less restrictive restrictions were not enough.” *Id.* The courts acknowledged that “not being

able [to] congregate indoors imposes a burden on [p]laintiffs’ religion,” but emphasized that “the burden is a temporary one, with widespread vaccination in close sight.” *Id.* at \*13.

For that reason, and because California’s current policies are “narrowly tailored to prevent the spread of COVID-19,” both courts determined that the State’s restrictions satisfy any applicable standard of scrutiny, including “strict scrutiny.” *Harvest Rock*, 2020 WL 7639584, at \*7, \*9; see *South Bay*, 2020 WL 7488974, at \*11 (“California did exactly what the narrow tailoring requirement mandates—that is, California has carefully designed [its policies] to match its goal of reducing community spread.”).

c. In both cases, the plaintiffs promptly appealed and moved for injunctions pending appeal. In *South Bay*, the court of appeals denied the motion without prejudice to South Bay renewing the request in conjunction with its merits appeal, see *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7681858, at \*1 (9th Cir. Dec. 24, 2020), which the court expedited and set for argument on January 15, see C.A. No. 20-56358, Dkt. 15. In *Harvest Rock*, a separate panel of the court of appeals received expedited briefing on the motion for an injunction pending appeal and heard argument on January 4. See C.A. No. 20-56357, Dkt. 4, 21.

On January 22, the court of appeals issued a published decision in *South Bay*, affirming the denial of a preliminary injunction in part and reversing in part. *South Bay App. A 1-54*. The court affirmed the prohibition on indoor

worship in regions where the virus is widespread (Tier 1). Crediting the evidence presented in the district court, the court of appeals concluded that California tailored its guidelines to “the transmission risk of *all* activities and sectors.” *Id.* at 27.<sup>29</sup> The court of appeals reasoned that the State’s policies treat religious gatherings similar to, or “more favorably” than, several comparable secular activities, *id.* at 28-29, and that a “mountain of scientific evidence” supported the different treatment of activities permitted to operate indoors because those activities posed a “lower transmission risk,” *id.* at 31, 38.

Specifically, the court of appeals concluded that indoor religious services involve “an exceptionally high risk of COVID-19 transmission” because they bring together multiple households in “close proximity”; the duration of services increases the “risk of a viral load sufficient to infect an individual”; and they often involve activities known to increase viral spread, like “singing, chanting and responsive reading.” *Id.* at 30-31. In contrast, the evidence demonstrated that activities permitted to continue indoors posed comparatively lower risk. Retail and grocery stores “do not involve individuals congregating to participate in a group activity” and must adhere to “mandatory industry guidance” designed to reduce transmission risk. *Id.* at 32. Personal care services like barbershops and nail salons are likewise subject to special

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<sup>29</sup> See South Bay App. A 30 (holding that the district court’s findings were “fully supported by the record and not contradicted by any evidence submitted by South Bay”); *id.* at 37 (“[T]he district court’s factual findings based on the scientific evidence before it confirms that it correctly concluded that the framework’s restrictions on religious worship are narrowly tailored.”).

precautions in the relevant industry guidance and, in any event, involve “small numbers of individuals interacting,” reducing the risk of asymptomatic individuals transmitting the virus to crowds. *Id.* at 33. Interactions on public transit are likely to be “asocial, brief and distant.” *Id.* at 34. And worksites in critical infrastructure sectors may operate only under “strict modifications,” such as worker screening measures, engineering controls, and (in some cases) binding labor agreements imposing routine testing requirements, all of which reduce the risk of transmission. *Id.* at 34-35.

Those “factual findings based on the scientific evidence in the record” demonstrated that the State’s “restrictions on religious worship are narrowly tailored,” and that California “seriously undertook to address” the challenges presented by COVID-19 with “the least intrusive tools readily available to it.” *Id.* at 37 (internal quotation marks omitted). While the court of appeals acknowledged that South Bay suffered harm by “not being able to hold worship services” indoors, it also recognized that South Bay could hold “in-person services outdoors in unlimited numbers,” without restrictions on “attendance or singing and chanting.” *Id.* at 45; *see also id.* at 44. The temporary prohibition on indoor worship services would avoid “more cases, more deaths, and more strains on California’s already overburdened healthcare system.” *Id.* at 46.

Although the court of appeals upheld the current restrictions on indoor worship in Tier 1 counties where community transmission levels are especially high, it concluded that plaintiffs were likely to succeed in their challenge to the

100- and 200-person numerical capacity limits in Tier 2 and Tier 3 counties, where virus transmission is less widespread. *Id.* at 47-49. The court reasoned that it could not “find record evidence” establishing that those numerical restrictions would be “necessary to achieve [the State’s] goal in further slowing community spread” when virus transmission was low. *Id.* at 48. It therefore enjoined those numerical limits. *Id.* at 47; *see also id.* at 49-50 (finding no disparate treatment concerning singing and chanting).<sup>30</sup>

In light of the court of appeals’ published decision in *South Bay*, the panel in *Harvest Rock* denied in part and granted in part Harvest Rock’s motion for an injunction pending appeal. *See* Harvest Rock App. A. The order “mirror[ed] the relief granted in *South Bay*.” *Id.* at 11 (Christen, J., concurring).<sup>31</sup> Judge O’Scannlain specially concurred, *id.* at 3-9, explaining his view that the State had not demonstrated that a “total ban” on indoor worship was the “least restrictive means available to mitigate the risk at places of worship.” *Id.* at 6. He posited that the State could impose alternative restrictions on churches, like “occupancy limitations; facemask, physical-distancing, and disinfection

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<sup>30</sup> The court did not reach the validity of percentage-capacity limitations (25% in Tier 2 and 50% in Tiers 3 and 4) because that issue was not properly presented. *South Bay* App. A at 47 n.38.

<sup>31</sup> As Judge Christen explained, the *South Bay* panel gained priority to issue a merits ruling under the court’s general orders, and the *Harvest Rock* panel refrained from issuing an opinion “that might have conflicted with *South Bay*’s merits ruling.” *Harvest Rock* App. A at 10-11.

protocols; installation of plexiglass barriers; regular COVID-19 testing practices; and penalties the State might enforce for failures to comply with such requirements.” *Id.*

d. On January 25, plaintiffs submitted the pending emergency applications in No. 20A136 and No. 20A137. South Bay asks the Court to enjoin the State from imposing any percentage capacity restrictions on indoor worship or any “outright prohibition on singing and chanting during indoor worship services.” South Bay Application 5. Harvest Rock seeks similar relief. *See* Harvest Rock Application 5, 29-31.

### ARGUMENT

Plaintiffs seek an order from this Court enjoining California’s public health restrictions on indoor worship services. As this Court has made clear in *Roman Catholic Diocese* and elsewhere, plaintiffs’ constitutional claims are serious ones, requiring close attention to whether the restrictions “treat houses of worship . . . more harshly than comparable secular facilities” and whether they are unduly restrictive when considered in light of the public health risks of the moment and the available alternatives. 141 S. Ct. at 66; *see id.* at 67. The State has taken these issues seriously: it has adopted a careful approach that tailors restrictions to the degree of risk posed by each regulated activity, and it has adjusted those policies as appropriate in response to new scientific evidence and improving or worsening public health circumstances. The lower courts have taken these issues seriously as well: they have conducted expedited remand proceedings; carefully reviewed an extensive record of scientific

and epidemiological evidence; applied the principles of *Roman Catholic Diocese* to California’s current policies; and ultimately, in the court of appeals, decided to enjoin certain aspects of the State’s policies but not others.

As the evidentiary records and the lower courts’ decisions demonstrate, there is no need for this Court to grant any further injunctive relief. Plaintiffs and other people of faith undoubtedly have a powerful interest in worshipping in the place and manner of their choosing. The State recognizes that the current restrictions interfere with that interest, and it is committed to relaxing those restrictions as soon as public health circumstances allow—as it has in the recent past. Increasing vaccination rates and declining infections offer hope that indoor worship will be able to resume before long. At present, however, the pandemic continues to rage at heightened levels in California, and the State’s current restrictions on indoor worship services are a proportionate and constitutional response to that unprecedented public health threat.

#### **I. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF**

A request for injunctive relief from this Court in the first instance “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). The applicant must show that the “legal rights at issue” are “indisputably clear,” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), and that the Court is likely to grant certiorari and reverse, *see Shapiro et. al.*, Supreme

Court Practice § 17.13(b), pp. 17-38 (11th ed. 2019). As with injunctive relief generally, the applicant must also show “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 v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); see *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam).

### **A. Plaintiffs Cannot Establish a Clear Right to Relief**

1. The “protections of the Free Exercise Clause” apply if a law or policy “discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.” *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993); see *id.* at 533 (describing “requirement of neutrality”); see also *Roman Catholic Diocese*, 141 S. Ct. at 66-67. Plaintiffs contend that California has violated the Free Exercise Clause by “discriminat[ing] against” houses of worship, asserting that the State has restricted indoor worship but permitted “comparable congregate assemblies” indoors. Harvest Rock Application 3; see also *id.* at 8-20; South Bay Application 21-30, 34-36.<sup>32</sup> As the lower courts recognized, however, that is incorrect. See South Bay App. A (court of appeals decision); *Harvest Rock Church, Inc. v.*

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<sup>32</sup> Harvest Rock also briefly asserts that the State’s policies violate the Establishment Clause because they “do not treat religious activity the same as non-religious activity.” Harvest Rock Application 31. Its claim that the State displays “official hostility towards religion” appears to be substantially similar to its claim under the Free Exercise Clause that the State’s policies single out religious worship for “especially harsh treatment.” *Id.* at 18; see *infra* p. 53.



*Newsom*, 2020 WL 7639584, at \*9 (C.D. Cal. Dec. 21, 2020); *South Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974, at \*9 (S.D. Cal. Dec. 21, 2020).

a. The restrictions imposed by California’s Blueprint are non-discriminatory and are “narrowly tailored to meet [the] compelling interest in reducing community spread of COVID-19.” *South Bay App. A 30*.<sup>33</sup> They are based on the transmission risk posed by the activities in question, assessed using several objective criteria. *Id.* at G-2. These criteria, and by extension the Blueprint, focus on the “specific mechanism of COVID-19 transmission: viral droplets which travel through the air from person to person.” *Id.* at A 37 (quoting *Harvest Rock*, 2020 WL 7639584, at \*7). And the resulting restrictions are proportional to the risk. Activities with lower risk profiles are permitted to operate indoors “with modification”—that is, subject to the limitations imposed by statewide requirement and industry-wide guidance—or with capacity limitations. *Id.* at 29-38.

The State’s restrictions on religious gatherings are the same as—or more permissive than—restrictions on “other activities that similarly may involve gathering in groups for a prolonged period,” including restrictions on “weddings, funerals, college lectures,” “political [gatherings],” “[c]ardrooms” and other gambling venues, “concert[s],” “movie theatres, family entertainment

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<sup>33</sup> Because the Regional Stay at Home Order was lifted in all regions on January 25, *supra* pp. 14-15, the State focuses on the restrictions contained in the Blueprint.

centers, live performances,” and “live audience” spectators at “professional sports.” *South Bay*, 2020 WL 7488974, at \*9; *see also* *South Bay App. A* 28-29. Each of those activities is prohibited indoors in regions where COVID transmission is widespread. *South Bay App. A* 28-29, 53-54; *South Bay*, 2020 WL 7488974, at \*4-5; *supra* pp. 10-13. Other indoor activities posing similarly high risks of transmission, such as dining in restaurants, exercising in gyms, or socializing in bars, are subject to the same or greater restrictions. *See South Bay App. A* 28, 53-54; *South Bay*, 2020 WL 7488974, at \*4-5.

These tailored restrictions are supported by abundant scientific evidence. After *Harvest Rock* and *South Bay* were remanded for further consideration in light of *Roman Catholic Diocese*, *supra* p. 20, the Governor supplemented the record in both cases with evidence on the State’s current COVID restrictions and justifications for those policies, including declarations from multiple experts with decades of experience in epidemiology and public health. *See, e.g.*, Declaration of Dr. James Watt, M.D., M.P.H., D. Ct. Dkt. 81-3 (Watt Decl.); Declaration of Dr. George Rutherford, M.D., D. Ct. Dkt. 81-4 (Rutherford Decl.); *South Bay App. A* 17 nn.14, 15. That evidence demonstrates that “the risk of transmission of the COVID-19 virus is higher” when “large numbers of people from different households” gather indoors for congregate activities, including in-person worship services. Watt Decl. ¶ 44; *see South Bay App A* 27-28; *South Bay*, 2020 WL 7488974, at \*3, 9-11 & nn. 3-10 (crediting evidence); *Harvest Rock*, 2020 WL 7639584, at \*6-9 (same).

As described in greater detail above, *supra* pp. 3-7, COVID-19 spreads primarily through respiratory droplets and aerosolized particles that are transmitted from one individual to another. Watt Decl. ¶¶ 27-28. The risk of transmission is greatly increased when large numbers of people from different households gather, both because “[t]he more people that gather, the higher the likelihood that an infected person will be present” and because “the larger the gathering, the higher the number of people who may be . . . infected by [any] infected person” present. *Id.* ¶ 42. Transmission risk is increased further when groups gather in close proximity for extended periods of time. That is especially so when the groups engage in vocal activities, which increase the volume of respiratory droplets and aerosolized particles containing the virus, thereby increasing the risk that others in the group will receive a sufficiently high dose to overcome their immune system and cause infection. *Id.* ¶¶ 43-45; Rutherford Decl. ¶¶ 90-91, 96. The risk is increased even further when such gatherings take place indoors, where ventilation is limited and droplets containing the virus may accumulate. *See* Watt Decl. at ¶ 44; Rutherford Decl. at ¶¶ 91-92.

Other leading epidemiologists have confirmed that the “activities that present the highest risk of COVID-19 transmission are thus those which occur indoors, . . . where many people from different social ‘bubbles’ congregate in close proximity for an extended period.” Brief of Amici Curiae Epidemiologists and Public Health Experts at 13, *Harvest Rock Church, Inc. v. Newsom*, No.

20A94 (Nov. 27, 2020). “This includes indoor cultural events and performances, indoor demonstrations, and indoor religious worship services.” *Id.*; see also Watt Decl. ¶¶ 44-46; Rutherford Decl. ¶¶ 95-112; Stoto Decl. ¶ 29; see also South Bay App. A 30-31; *South Bay United Pentecostal Church v. Newsom*, 2020 WL 6081733, at \*3 (S.D. Cal. Oct. 15, 2020) (“[A]ttending indoor worship services (and similar cultural events . . .) presents an exceptionally high risk of COVID-19 transmission because [such events] involve a combination of many high risk factors.”).<sup>34</sup>

The scientific evidence also supports the lower courts’ findings that the indoor activities that are subject to less stringent restrictions than worship services—such as shopping in “retail shops and grocery stores” and other activities discussed in detail below, *see infra* pp. 38-47—pose a lower risk of

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<sup>34</sup> Harvest Rock asserts that its “state-of-the-art concert venue” has better ventilation than “other commercial operation[s].” Harvest Rock Application 25. But even if that is so, the lower courts’ assessment of the risk associated with indoor worship activities did not focus exclusively on the available ventilation. *Cf.* South Bay App. A 31 (acknowledging that “increased ventilation” could “alleviate[]” some of the risks associated with congregate activities). Regardless of what ventilation system a church uses, indoor worship brings “many different households” “physically closer together” in a confined space; services typically “last for at least one hour,” increasing the risk of a sufficient viral load accumulating; and they often involve “singing, chanting, and responsive reading.” *Id.* And while plaintiffs assert that the State’s experts cannot know “how people interact” at worship services, Harvest Rock Application 25, they acknowledge that their services involve the features identified by the experts, *see, e.g., id.* at 20 (services require “assembling together”); *id.* at 29 (singing); *id.* at 31 (chanting); South Bay Application 14 (“[s]inging comprises 25-50% of a typical Pentecostal worship gathering”); *id.* at 10, 37 n.20 (“altar calls” and “laying of hands”).

transmission because they typically involve brief encounters between individuals rather than gatherings of large groups in close proximity for an extended duration. South Bay App. A 31-32; *see* Rutherford Decl. ¶¶ 113-133. Such fleeting encounters are unlikely to transmit the virus because uninfected individuals “are less likely to receive a sufficient viral load of droplets or aerosolized particles sufficient to overcome their defenses and cause a COVID 19 infection.” Rutherford Decl. ¶ 113; *see also* Watt Decl. ¶ 86; *id.* ¶¶ 103-108. Both “the proximity of a non-infected person to an infected person” and “the length of time they spend in proximity” affect the dose that the uninfected person will receive. Brief of Amici Curiae Epidemiologists and Public Health Experts, *supra*, at 8.

b. The restrictions on indoor worship also present “the least restrictive means for regulating the activity” in areas where community transmission is widespread. South Bay App. A 30. The State’s epidemiological experts concluded that lesser precautions—including capacity limits, masking, and social distancing—did not sufficiently mitigate the risks posed by indoor worship services and other comparable indoor activities. They explained that “keeping six feet of separation between individuals and wearing face coverings can reduce the risk of disease transmission,” but that “any gathering increases the risk of individual and community transmissions.” Watt Decl. ¶ 38. And that risk is increased even further where individuals are in close proximity for extended periods of time indoors—especially in regions where infection rates are high

and when people engage in vocal activities like talking or singing. *Id.* ¶¶ 39-45, 60; *see* Rutherford Decl. ¶ 75 (“[f]ace coverings . . . are not a fool-proof intervention for stopping transmission”); Stoto Decl. ¶¶ 10, 37 (similar).<sup>35</sup> In such regions, indoor worship services—even with masks, distancing, and other precautions, and regardless of building size—still pose too great a risk of community spread. Watt Decl. ¶¶ 98-99; Rutherford Decl. ¶¶ 94, 106; Stoto Decl. ¶¶ 33-41. After reviewing that evidence, the district courts below found that “[m]ask wearing, social distancing, and sanitization” would not, on their own, be sufficient to address the risk posed by large indoor gatherings when community transmission is high. *South Bay*, 2020 WL 7488974, at \*12; *see Harvest Rock*, 2020 WL 7639584, at \*8. The court of appeals agreed with those findings. *South Bay App. A* 38-39.

California’s experience confirms the inadequacy of alternative, less restrictive measures. Shutdown orders like those instituted by the State early

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<sup>35</sup> *See also* Centers for Disease Control and Prevention, *Scientific Brief: Community Use of Cloth Masks to Control the Spread of SARS-CoV-2*, <https://www.cdc.gov/coronavirus/2019-ncov/more/masking-science-sars-cov2.html> (discussing evidence that cloth masks can block only approximately “50-70%” of “fine droplets and particles”) (last visited Jan. 26, 2021); Xi et al., *Effects of Mask-Wearing on the Inhalability and Deposition of Airborne SARS-CoV-2 Aerosols in Human Upper Airway*, 32 *Physics of Fluids* 123312 (2020), available at <https://aip.scitation.org/doi/10.1063/5.0034580> (similar); Brief of Amici Curiae Epidemiologists and Public Health Experts, *supra*, at 14 (although wearing a mask or face covering while singing decreases the risk of transmission, “when infected persons sang, they produced a number of droplet particles comparable to those produced through ordinary speech *without a mask*”).

in the pandemic “substantially slow[ed] the spread of COVID-19.” Maldonado Decl., Ex. 1 ¶ 16; *see also* Stoto Decl. ¶¶ 13-15, 19. Accordingly in the early summer, California loosened its initial restrictions and “tried . . . [allowing] indoor worship at 25%” of the “church’s maximum capacity.” *South Bay*, 2020 WL 7488974, at \*12. But that “restriction proved insufficient to prevent outbreaks at houses of worship” across the State, including in “the Southern California Region” where plaintiffs’ churches are located. *Id.*<sup>36</sup> “If the dire trend of COVID-19 in Southern California—which has left the Region’s ICU capacity at 0%—proves anything, it is that the State’s efforts to implement . . . less restrictive restrictions were not enough.” *South Bay*, 2020 WL 7488974, at \*12; *see* *South Bay* App. A 39 (“[A]s the district court correctly found, these less restrictive measures proved inadequate in reducing community spread.”).

At the same time, California has made sure to leave open alternatives that do not pose the same, heightened transmission risk of indoor worship services. Since the beginning of the pandemic, California has treated clergy as critical infrastructure workers and allowed them, among other things, to conduct worship services through on-line streaming and drive-in services. *Supra*

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<sup>36</sup> The record reflects multiple instances where indoor worship services at other churches in California have led to super-spreader events. *See, e.g.*, D. Ct. Dkt. 81-1 at Ex. 23 (71 infections linked to a single Sacramento service in March); *id.* 57-1 at Exs. 23-27 (multiple outbreaks tied to indoor services in May); *id.* 81-1 at Exs. 17-20 (outbreak at church in San Diego in November), Exs. 21-23 (outbreak at church in Los Angeles in late October); *see also* Rutherford Decl. ¶¶ 108-110 (listing incidents involving coronavirus transmission at houses of worship); Watt Decl. ¶ 46 (same).

p. 8. And since June—in light of evidence that transmission risk is substantially lower outside—the State has allowed outdoor worship services without any capacity limitations. *Supra* pp. 9-10. While the State recognizes that these are imperfect substitutes, *see infra* p. 54; *see, e.g., Roman Catholic Diocese*, 141 S. Ct. at 68, they allow for religious worship in Tier 1 counties without the grave risks that would be presented by indoor worship under the present conditions.

c. Plaintiffs have not introduced any evidence rebutting the scientific and epidemiological basis for the State’s current restrictions. *See* South Bay App. A 38. Instead, plaintiffs ignore some scientific evidence, disparage other expert testimony as “pseudo-scientific,” and ask the Court to reject the factual findings drawn by the courts below. South Bay Application 27; *see, e.g., id.* at 25; Harvest Rock Application 25. But this Court does not ordinarily disturb “findings of fact concurred in by two lower courts.” *See, e.g., Rogers v. Lodge*, 458 U.S. 613, 623 (1982).<sup>37</sup> And there is certainly no basis for doing so here. While the judicial branch should never blindly defer to the expert judgments of local officials, courts “must afford substantial deference to state and local authorities” regarding their scientific assessments and judgments about how “to im-

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<sup>37</sup> South Bay App. A 30 (“The district court’s thorough analysis and conclusions, which we examined below, are fully supported by the record and not contradicted by any evidence submitted by South Bay.”); *South Bay*, 2020 WL 7488974, at \*8-11; *Harvest Rock*, 2020 WL 7639584, at \*6-9.



pose tailored restrictions” that “balance competing policy considerations during the pandemic.” *Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh J., concurring).

2. Plaintiffs principally argue that they are entitled to injunctive relief based on this Court’s decision in *Roman Catholic Diocese*. See South Bay Application 5, 26-27; Harvest Rock Application 8-9, 18-19, 33-38. As the courts below recognized, that argument is ultimately unpersuasive.

a. Plaintiffs first contend that this Court already “rejected” California’s risk-based justifications in *Roman Catholic Diocese* and that it follows that the Court must enjoin California’s current policies. Harvest Rock Application 26, 28. But *Roman Catholic Diocese* addressed a different set of restrictions, from a different State, which were not tailored to the transmission risk of specific activities or based on neutral criteria. See *Agudath Israel of Am. v. Cuomo*, 980 F.3d 222, 230 (2d Cir. 2020) (Park, J., dissenting) (New York’s “Governor himself admitted [that] the [challenged] executive order [was] ‘not a policy being written by a scalpel,’ but rather [was] ‘a policy being cut by a hatchet.’”). It was also decided on a different and far more limited record.<sup>38</sup> And when this

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<sup>38</sup> As the court of appeals below observed, the “evidentiary record” in *Roman Catholic Diocese* was “quite different” from the record here, which includes “extensive testimony of public health officials and the studies they relied upon,” offering a sector-by-sector analysis of risk. South Bay App. A 42. In contrast, the declarations submitted in *Roman Catholic Diocese* contained virtually no discussion of comparative risk, nor did New York submit any evidence demonstrating that the policies at issue were narrowly tailored or the least restrictive alternative. See *Roman Catholic Diocese v. Cuomo*, No. 20A87, Resp. App. 32-284.

Court considered Harvest Rock’s request to enjoin California’s restrictions just days after it issued the *Roman Catholic Diocese* decision, instead of granting injunctive relief, the Court remanded to the district court for further examination of the particular features of California’s restrictions under the standards set out in that decision. *See supra* p. 20.

After carefully reviewing California’s restrictions and all of the evidence submitted in support of them, the lower courts explained why California’s restrictions do not “single out” “houses of worship for especially harsh treatment” like the restrictions that troubled this Court in *Roman Catholic Diocese*. 141 S. Ct. at 66; *see, e.g.*, South Bay App. A 40-42 (“New York’s restrictions were ‘especially harsh’ towards religion . . . whereas California’s objective risk assessment treats all communal gatherings the same across activities and sectors.”); *Harvest Rock*, 2020 WL 7639584, at \*5 (“By contrast to . . . New York,” “California treats houses of worship like or more favorably than similar secular institutions.”); *see also South Bay*, 2020 WL 7488974, at \*9 (similar).

Plaintiffs nonetheless assert that California’s “restrictions on churches are plainly far more severe than those imposed on other industries,” South Bay Application 22, and that the State has failed to “produce one shred of evidence” that indoor worship services are “more dangerous” than those other activities. Harvest Rock Application 25, 26. Among other activities, plaintiffs reference “big-box stores,” “retail,” “personal care services,” “public transportation,” and worksites in certain critical infrastructure sectors, like “manufacturing.” *E.g.*,

South Bay Application 29-30, 35, 37 n.20; Harvest Rock Application 11-17. This Court expressed similar concerns in *Roman Catholic Diocese*, concluding that New York had not provided sufficient evidence to justify vastly disparate treatment of businesses such as “large store[s],” 141 S. Ct. at 66, 67; “hardware stores, acupuncturists, and liquor stores,” *id.* at 69 (Gorsuch, J., concurring); or “grocery store[s]” and “pet store[s],” *id.* at 70 (Kavanaugh J., concurring).

Here, however, the State responded to each these concerns when the cases were remanded in light of *Roman Catholic Diocese*. The record developed during those remand proceedings shows that California’s policies are “pains-takingly tailored to address the risks of Covid-19 transmission.” *Harvest Rock*, 2020 WL 7639584, at \*6; *see also* South Bay App. A 37. The State’s epidemiological experts examined each of the sectors referenced by plaintiffs and offered concrete public health reasons for the differential treatment. *See, e.g.*, Watt Decl. ¶¶ 98-108; Rutherford Decl. ¶¶ 113-133; Stoto Decl. ¶¶ 22, 29-32; *infra* pp. 38-47. The experts specifically described how the risk of transmission “increases commensurately with the size of the group”; with the nature of the activity (including the extent to which members of the group are in close proximity to one another and remain “in close proximity for an extended period”); and with the location of the activity. Watt Decl. ¶¶ 38, 39, 43; *see id.* ¶¶ 44-46; Rutherford Decl. ¶¶ 37-38, 90-110; Stoto Decl. ¶¶ 29-32. Those considerations explain why the State has adopted less stringent capacity limits for the activi-

ties referenced by plaintiffs—which are subject to industry-specific requirements and pose lesser risks of COVID-19 spread than prolonged indoor congregate activities. *See* South Bay App. A 30-40; *South Bay*, 2020 WL 7488974, at \*8-11; *Harvest Rock*, 2020 WL 7639584, at \*5-9.

For example, “shopping at a grocery or big box store ‘involves less risk’ of Covid-19 transmission than attending an indoor worship service.” *Harvest Rock*, 2020 WL 7639584, at \*8. Unlike a worship service, these establishments “do not involve individuals congregating to participate in a group activity.” South Bay App. A 32. “[I]nteractions between patrons in these places are typically asocial, distanced, and *short in time*—with patrons generally seeking to leave the store as soon as possible.” *South Bay*, 2020 WL 7488974, at \*10 (emphasis added). That means shoppers are unlikely to “receive a sufficient viral load of droplets or aerosolized particles . . . to overcome their defenses and cause a COVID 19 infection.” *Harvest Rock*, 2020 WL 7639584, at \*8; *see* Rutherford Decl. ¶¶ 114-119.

Even so, California has imposed significant restrictions on shopping, which are commensurate with the risk it poses. *See* South Bay App. A 32-33. All retail stores—including grocery stores, big-box stores, and liquor stores—are subject to “strict” indoor capacity limitations. *Id.* at 33; *see supra* pp. 11-13. In particular, in regions where community transmission levels are high, shopping malls and other retailers may not exceed 25% capacity while grocery stores may not exceed 50% capacity. South Bay App. A 53; *supra* pp. 11-12.

They must also adhere to “mandatory industry guidance,” requiring plexiglass barriers where physical distancing cannot be maintained and closures of any “areas that encourage congregating,” like “in-store bars, seating areas, and product sampling.” South Bay App. A 32. This case is thus significantly different from *Roman Catholic Diocese*, where the Court noted that comparable categories of businesses were free to “admit as many people as they wish.” 141 S. Ct. at 66; *see id.* at 69 (Gorsuch, J., concurring) (emphasizing that New York “impose[d] no capacity restrictions” on many comparable activities).<sup>39</sup>

Plaintiffs also refer to personal care services, such as “massage and tattoo parlors” and visiting a “nail salon.” *See, e.g.*, South Bay Application 37 n.20. But those activities are not comparable to indoor congregate activities because they do not bring large numbers of people from different households into close proximity; they thus are far less likely to involve an infected individual—or to

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<sup>39</sup> Plaintiffs seem to believe that equivalent treatment would require placing the same percentage-of-occupancy limits on indoor church assemblies as on indoor grocery stores, offices, and the like. But that is incorrect. The posted capacity of a given building is calculated based on the density of occupancy that ordinarily attends to an expected use. To achieve the same actual density of people for a building that is ordinarily densely packed, there must be a greater percentage reduction from the posted occupancy level than would be the case for a less-dense space. *See* Cal. Fire Code, pt. 3, ch. 10, table 1004.5 (“maximum floor area allowance[.]” of 60 square feet of space per occupant in “mercantile”-use spaces); *id.* (seven square-feet per occupant for assembly-use spaces); *see also* U.S. Fire Admin., *Understanding the Impact of Social Distancing on Occupancy*, [https://www.usfa.fema.gov/coronavirus/planning\\_response/occupancy\\_social\\_distancing.html](https://www.usfa.fema.gov/coronavirus/planning_response/occupancy_social_distancing.html) (“in order to operate while practicing social distancing, an office building might need to reduce the number of people inside by about 11% whereas a bar might need to reduce its number by as much as 95%”) (last visited Jan. 26, 2021).

spread the virus to numerous other people. *See* Watt Decl. ¶ 38 (“risk increases commensurately with the size of the group”); Rutherford Decl. ¶¶ 62, 120 (similar). Instead, they involve one-on-one encounters. While those encounters bring two individuals into close contact, the lesser risk of transmission can be mitigated by masks, secondary barriers such as plastic shields or safety goggles, and other precautions mandated by relevant industry guidance. *See* South Bay App. A 33.

Nor do “warehouses and factories” or other worksites in critical infrastructure sectors (South Bay Application 25) present the same risks as indoor worship services. They do not typically “involve people in close proximity to others for extended periods of time. *Harvest Rock*, 2020 WL 7639584, at \*9. When they do, employers are required to “screen workers,” “develop safety plans,” or install engineering controls such as “plexiglass barriers” or similar partitions to protect workers. South Bay App. A 34; *see also* *South Bay*, 2020 WL 7488974, at \*10; Rutherford Decl. ¶ 121.<sup>40</sup> And unlike indoor worship services, these workspaces are “closed systems in which employers can determine who is allowed ‘in the bubble.’” *Harvest Rock*, 2020 WL 7639584, at \*9; *see also* South Bay App. A 34. “Work shifts may be grouped to control personnel to

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<sup>40</sup> *See also* Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Manufacturing* (July 29, 2020), <https://files.covid19.ca.gov/pdf/guidance-manufacturing--en.pdf> (last visited Jan. 26, 2021); Cal. Dep’t of Public Health, *COVID-19 Industry Guidance: Logistics and Warehousing* 8 (July 29, 2020), <https://files.covid19.ca.gov/pdf/guidance-logistics-warehousing--en.pdf> (last visited Jan. 26, 2021).

whom the employees are regularly exposed, thus diluting the risk presented by likelihood of strangers from different bubbles randomly mixing at each gathering.” *South Bay*, 2020 WL 7488974, at \*10.

Employers are also “better positioned to control [their] employees’ behavior,” and are subject to a host of “health and safety requirements enforced by State labor authorities,” *South Bay*, 2020 WL 7488974, at \*10, including requirements to report exposure incidents and to track when workers are present and for how long.<sup>41</sup> These stringent regulations are appropriate for workplace settings, facilitating “contact tracing” and allowing employers to identify and contain an exposure before numerous workers become infected. But of course it would not be feasible for the State to regulate religious services in the same way. *See, e.g.*, *South Bay App. A 35* (“Nor do we see how mandated testing would be practicable for those who participate in weekly or daily worship.”). Indeed, it is plaintiffs’ position that such regulation would be unconstitutional.

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<sup>41</sup> *See, e.g.*, Cal. Labor Code § 226(a) (requiring employers to track a specific worker’s “total hours worked”); 8 Cal. Code Regs. § 340 (requiring employers to notify workers of their right to report dangerous conditions and request inspection by state authorities); Cal. Dep’t of Public Health, *AB 685 COVID-19 Workplace Outbreak Reporting Requirements* (Dec. 10, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/ab685.aspx> (last visited Jan. 26, 2021) (employers must notify employees who may have been exposed to COVID-19); Cal. Dep’t of Public Health, *COVID-19 Employer Playbook: Supporting a Safer Environment for Workers and Customers* 9 (Sept. 25, 2020), <https://files.covid19.ca.gov/pdf/employer-playbook-for-safe-reopening--en.pdf>. (last visited Jan. 26, 2021) (“employers are required to report outbreaks to the [local health department] in the jurisdiction where the workplace is located and the [local health departments] of residence of employees with COVID-19”); *see also id.* at 20-21 (discussing other reporting requirements).

*See, e.g.*, Harvest Rock Application 29 (“[I]nternal micromanagement of the affairs of Applicants’ religious activities is plainly unconstitutional.”); *id.* at 30 (“The Governor has no authority to dictate the proper manner of religious worship.”); *cf.* South Bay Application 37 n.20.

Plaintiffs suggest that critical infrastructure sectors are permitted to operate “regardless of transmission risk” because they are deemed “essential.” South Bay Application 29-30; *see id.* at 6-7, 16; Harvest Rock Application 14-17, 28. That is incorrect. As the court below explained, the Blueprint’s risk factors “do cover critical infrastructure, which can only operate with significant mandatory modifications” and under “stringent requirements in comparison to many other sectors.” South Bay App. A 35; *see also id.* G-2 at 6-7; *id.* H-3; *compare* South Bay Application 34 (incorrectly stating that industries may operate “with only neutral requirements of social distancing and face coverings”).

Plaintiffs assert that the State’s restrictions are based on “secular value judgments” rather than risk assessment, and attempt to support that assertion by pointing to the policies governing the entertainment industry. South Bay Application 16; *see id.* at 29-30. But the court of appeals properly concluded that film and production studios are subject to labor agreements that impose onerous safety requirements, including, among other things, tri-weekly and sometimes even daily testing requirements. South Bay App. A 35-36; *see also id.* at 36 (noting similar agreements for professional sports teams). As these



labor agreements are incorporated into the applicable industry-specific guidelines, this sector is even “*more strictly*” regulated than others such as worship services. *Id.* at 35.<sup>42</sup>

Finally, California treats “transportation facilities” and “schools,” *Roman Catholic Diocese*, 141 S. Ct. at 66-67, very differently from how New York did. Public transit is “subject to modifications, such as reduced occupancy and increased sanitation” requirements. *South Bay App.* A 33. In any event, interactions in a “transit setting” pose a far lower risk of spreading COVID than large indoor gatherings because they are “likely to be asocial, brief and distant.” *Id.*; *see also* Watt Decl. ¶ 103; Rutherford Decl. ¶¶ 126-128. And most California schools are closed for in-person classes. While “[l]ocal school and health officials may decide to open elementary schools,” *South Bay*, 2020 WL 7488974,

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<sup>42</sup> Cal. Dep’t of Public Health, *Industry Guidance to Reduce Risks*, <https://covid19.ca.gov/industry-guidance/> (drop down menu “Movies, film and TV production”) (last visited Jan. 26, 2021). The court below noted that such “mandated testing would be impracticable for those who participate in weekly or daily worship.” *South Bay App.* A 35. Although plaintiffs assert that this focus on practicability “assum[es] the worst of worshippers,” *South Bay Application* 26 (quotations omitted), plaintiffs do not explain how they would offer such testing to worshippers or that they would welcome such a requirement as a precondition to worship.

at \*5 n.29, those schools “are required to have small, stable groupings” to reduce mixing and lower transmission risk. Rutherford Decl. ¶ 129.<sup>43</sup> And epidemiological evidence shows that the young children who attend elementary schools pose a significantly “lower transmission risk” than adults do. *Id.*<sup>44</sup>

b. Plaintiffs also argue that California could adopt “less restrictive” rules to minimize the risk to those attending religious services. Harvest Rock Application 22; *see* South Bay Application 30-31; *see generally Roman Catholic Diocese*, 141 S. Ct. at 67.<sup>45</sup> They point to “mask-wearing, social distancing, and sanitation protocols” as alternative measures to mitigate virus transmission. South Bay Application 11, 30-31; Harvest Rock Application 36. But the records below provide ample support for the State’s conclusion—and the lower courts’ holdings—that less-restrictive measures, including capacity limitations, would be inadequate to prevent the spread of COVID-19 in areas where community transmission levels are high. *Supra* pp. 34-37; South Bay App. A 39-40.

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<sup>43</sup> *See, e.g.*, Cal. Dep’t of Public Health, *Guidance Related to Cohorts* (Sept. 4, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/small-groups-child-youth.aspx> (last visited Jan. 26, 2021) (describing small cohorts to diminish widespread mixing of students).

<sup>44</sup> *See* Parshley, *Kids Catch and Spread Coronavirus Half As Much As Adults*, National Geographic, Dec. 10, 2020, <https://www.nationalgeographic.com/science/2020/12/we-now-know-how-much-children-spread-coronavirus/> (collecting scientific studies showing that children under age 12 are less likely to get sick and “transmit the virus to others”).

<sup>45</sup> To be sure, plaintiffs apparently do not believe that *any* restriction on capacity would be a constitutional alternative. *See, e.g.*, South Bay App. A 38 (noting that South Bay demands “100% occupancy”); South Bay Application 4 (seeking injunction with “no percentage cap”); Harvest Rock Application 5 (seeking injunction of current policies).

Plaintiffs contend that they have superior hygiene policies that will inhibit such outbreaks and that “the vast majority” of the other churches that experienced outbreaks were “not following CDC guidelines, were not socially distancing, [and] were not wearing masks.” South Bay Application 32. There is no concrete support for that assertion in the record. The declaration referenced by South Bay mostly speculates about how the other churches were operating; and the district court concluded that the declarant’s testimony on other issues was not reliable. *See id.*; South Bay App. A 18. In any event, recent reports reflect additional outbreaks stemming from indoor worship services in which churches followed safety protocols.<sup>46</sup>

Plaintiffs also suggest that Los Angeles County has permitted churches to conduct indoor worship services, tending to show that lesser restrictions are feasible. *See* South Bay Application 31.<sup>47</sup> As the court of appeals recognized below, however, South Bay “has made repeated misrepresentations” regarding the status of Los Angeles County’s policies. South Bay App. A 38 n.34. Contrary to South Bay’s characterization, Los Angeles County’s public health order

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<sup>46</sup> *See, e.g.*, Enos, *Dozens of Covid-19 Cases Linked to Christmas Eve Gatherings at Woburn Church*, Boston Globe, Jan. 2, 2021, <https://www.bostonglobe.com/2021/01/02/metro/dozens-covid-19-cases-linked-christmas-eve-gatherings-woburn-church/> (outbreak from services linked to 44 cases, despite reduced capacity limitations, masking requirements, social distancing and strict hygiene controls).

<sup>47</sup> In addition, the state trial court order (South Bay Application 3, 5) suspending restrictions on several churches in Los Angeles County has been temporarily stayed by the California Court of Appeal. *Burfitt v. Newsom*, No. F082235 (Cal. Ct. App. Jan. 28, 2021).

does not permit churches to open. *Id.* And even if the County had purported to open churches, such an order would have been invalid. *T-Mobile W. LLC v. City & Cty. of San Francisco*, 6 Cal. 5th 1107, 1116 (2019) (“[L]ocal legislation that conflicts with state law is void.”). More importantly, the county never purported to conduct a public-health assessment of whether church re-openings would be appropriate from a transmission-risk perspective. South Bay App. A 38 n.34.

c. Other considerations that led this Court to conclude that the restrictions challenged in *Roman Catholic Diocese* were likely unconstitutional are also absent here. There is no evidence that the State has “specifically targeted” any religious communities or “gerrymandered” its public health restrictions to ensure certain communities would be included. *Roman Catholic Diocese*, 141 S. Ct. at 66. Plaintiffs attempt to take an April 2020 statement from the Governor out of context, asserting that he called religion a “low-reward” activity. *See, e.g.*, South Bay Application 8. As the lower courts explained, however, plaintiffs’ interpretation makes “multiple assumptions and leaps in logic.” *South Bay*, 2020 WL 7488974, at \*7. Moreover, when read in context, the Governor’s statement does not reflect any “discriminatory value judgment against religion.” South Bay Application 8. In the same exchange, the Governor emphasized he was “very sensitive to those that want to get back into church” and that the State would “see what [it] can do to accommodate that.” South Bay App. A 25 n.21; *see also id.* (“[W]e, like the district court, find

no record evidence of animus toward religious groups.”); *South Bay*, 2020 WL 7488974, at \*7 (“The Court finds no evidence . . . that can be viewed as targeting [p]laintiffs’ faith or singling out any other religion.”).

Indeed, unlike New York, California has made clear since the early days of the pandemic that “faith based services” are a “critical infrastructure sector[]” and that workers providing faith-based services are an “essential workforce.” *Harvest Rock App. I 127*; compare *Roman Catholic Diocese*, 141 S. Ct. at 69 (Gorsuch, J., concurring) (the “only explanation for treating religious places differently [under New York regime] seems to be a judgment that what happens there just isn’t as ‘essential’ as what happens in secular spaces”).

Finally, the Court in *Roman Catholic Diocese* noted the lower court’s finding “that the Diocese had been constantly ‘ahead of the curve, enforcing stricter safety protocols than the State required.’” 141 S. Ct. at 67 (per curiam). While the same can be said of many congregations in California, it cannot be said of the plaintiffs here. For example, the record reflects that Harvest Rock’s Pasadena church “is not operating in compliance with” state and local policies regarding “indoor services and the wearing of protective masks along with the requirement of social distancing.” *Harvest Rock App. L* (August 13, 2020 letter from Pasadena Office of the City Attorney to Harvest Rock Church). Earlier this month, in the midst of the gravest period of the pandemic, Harvest Rock’s counsel told the court of appeals that his clients were continuing to violate the

State’s public health policies.<sup>48</sup> Harvest Rock’s YouTube channel corroborates that, displaying videos of lengthy indoor worship services, from recent weeks, including singing.<sup>49</sup> South Bay, too, has publicized videos of recent indoor services lasting two hours and involving singing and worshippers in close physical proximity.<sup>50</sup>

3. Plaintiffs also contend that the State’s policy on indoor singing reflects “callous indifference” to religion and unconstitutionally discriminates against them, and they ask the Court to enjoin the restriction on that basis. Harvest Rock Application 30; *see id.* at 29-31; South Bay Application 22, 36-37. They assert that the prohibition applies “only [to] religious worship services.” Harvest Rock Application 31. As the court of appeals recognized, however, the restriction at issue “applies to *all* indoor activities, sectors, and private gatherings.” South Bay App. A 49-50.<sup>51</sup> That universal prohibition is currently in

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<sup>48</sup> *See* Ninth Circuit Court of Appeals, Video of Oral Argument in *Harvest Rock v. Newsom*, No. 20-56357 (9th Cir. Jan. 4, 2021), available at <https://www.youtube.com/watch?v=-B5BHjGOqAA> (at 9:50-10:45) (“Harvest Rock is doing services.”).

<sup>49</sup> Harvest Rock Church, Youtube Channel, <https://www.youtube.com/channel/UCQ6JeHDg7scluMqxGJpd5NQ> (last visited Jan. 26, 2021).

<sup>50</sup> *See, e.g.*, South Bay United Pentecostal Church Facebook Page, <https://www.facebook.com/SouthBayPentecostal/videos/824360748385966> (last visited Jan. 26, 2021).

<sup>51</sup> California Department of Public Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Nov. 13, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx> (prohibiting singing, chanting, shouting and cheering at all indoor

place because public health experts have determined that the activity is especially dangerous. *Supra* pp. 5-6.<sup>52</sup> The court of appeals credited that expert testimony, South Bay App. A 50, and plaintiffs offer no persuasive reason for this Court to accept their view of the science over the experts' testimony and the lower courts' findings, *see* South Bay Application 36-37; Harvest Rock Application 31 n.2. Indeed, this is the very sort of scientific assessment entitled to "substantial deference." *Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh J., concurring); *see also id.* at 69 (Gorsuch, J., concurring) (suggesting "forgoing singing" as a risk-mitigation measure).

4. Nor do any of plaintiffs' remaining arguments establish that the State is discriminating against religious institutions. Plaintiffs object that churches are allowed to provide "food, shelter, and social services, and other necessities of life for economically disadvantaged or otherwise needy individuals," but are restricted from holding worship services in the same building. Harvest Rock Application 28-29. As the district court previously noted, however, plaintiffs "failed to establish that these activities are anything like indoor worship" in terms of the associated public health risks. *Harvest Rock v. Newsom*, 2020 WL

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gatherings).

<sup>52</sup> Plaintiffs assert that singing is permitted in certain industries indoors, quoting Judge O'Scannlain's dissenting opinion from October 2020 and pointing to declarations from music and film producers. *See* South Bay Application 22, 23; *see also* Harvest Rock Application 31. But both that dissent and the declarations pre-dated the currently-applicable November 2020 guidance prohibiting singing at all indoor gatherings. *See* South Bay App. A 35-36.

5265564, at \*3 (C.D. Cal. Sept. 2, 2020), *vacated and remanded*, 981 F.3d 764 (9th Cir. 2020). For example, “distributing food at a church is analogous to a grocery store, not an indoor event such as a concert.” *Id.* And, by definition, individual or family counseling does not involve large numbers of people.

Plaintiffs also contend that the State has prohibited in-home worship meetings and Bible studies. *See* Harvest Rock Application 32-33. But so long as the requirements in the relevant guidelines are satisfied, in-home worship services are allowed on the same terms as indoor worship services at churches. And any other restrictions on plaintiffs’ in-home activities are the result of the State’s neutral and generally-applicable policy on in-home gatherings.<sup>53</sup>

Finally, plaintiffs assert that the State violates the Establishment Clause by engaging in “openly disparate treatment” of individuals who violate the State’s restrictions, by threatening houses of worship but not others with criminal enforcement. Harvest Rock Application at 33. That is simply incorrect.<sup>54</sup>

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<sup>53</sup> *See* Cal. Dep’t of Public Health, *CDPH Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Nov. 13, 2020) <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings-November-2020.aspx>.

<sup>54</sup> For example, the Attorney General recently sent well-publicized cease-and-desist orders to entertainment clubs that flouted the State’s restrictions, and the State’s agencies have issued citations for COVID-19 related violations. *See* Associated Press, *California Attorney General Warns San Diego Clubs that are in Violation of Stay-at-Home Order*, L.A. Times, Dec. 12, 2020, <https://www.latimes.com/california/story/2020-12-12/california-attorney-general-tells-san-diego-clubs-to-follow-stay-at-home-order>; *see also* State of Cali-



And while plaintiffs assert that the Governor encouraged “mass protesters” to violate COVID-19 restrictions, Harvest Rock Application 3, the Governor in fact has urged anyone participating in protests to follow physical distancing and other COVID-19 precautions.<sup>55</sup>

**B. Equitable Considerations Also Weigh Against Injunctive Relief**

Any challenged restriction that limits the ability of people of faith to attend services at their chosen place of worship “will cause irreparable harm” to some degree. *Roman Catholic Diocese*, 141 S. Ct. at 67. The State has endeavored to address the grave public health challenges of this moment while also accommodating the important interests of its residents in participating in religious services. At present, in Tier 1 counties, indoor services are temporarily prohibited because of exigent public health circumstances, but worship services are permitted outdoors (and through streaming video or other remote technology) without any limit on attendance. *Supra* pp. 11, 13. As the State and others have recognized, these are imperfect substitutes. *See, e.g., Roman Catholic Diocese*, 141 S. Ct. at 68 (“such remote viewing is not the same as

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fornia, Dep’t of Industrial Relations, *Citations for COVID-19 Related Violations*, <https://www.dir.ca.gov/dosh/COVID19citations.html> (last visited Jan. 28, 2021).

<sup>55</sup> *See* Gardiner, *Newsom Appeals to California Protesters: Consider Others, Stay Home*, *San Francisco Chron.*, July 2, 2020, available at <https://www.sfchronicle.com/politics/article/Newsom-appeals-to-California-protesters-Consider-15383308.php>.

personal attendance”). But these policies reflect the State’s recognition of the great value of religious freedom and free exercise to our society—and the State’s commitment to allowing indoor, in-person worship to resume when the public health circumstances allow it.<sup>56</sup>

Apart from the injury that is inherent in any restriction on worship, plaintiffs have not substantiated any other concrete or imminent harm flowing from the challenged policies. They assert that the existence of the challenged policies injures them by “singl[ing] out houses of worship for especially harsh treatment.” *E.g.*, Harvest Rock Application 18; *see* South Bay Application 22. As explained above, however, the restrictions on indoor worship activities are the same as—or more permissive than—those imposed on comparable secular gatherings that occur indoors and pose an equivalent threat to public health. And science and epidemiology offer compelling reasons for imposing different restrictions on sectors and activities that pose materially different levels of risk.

Moreover, the equitable inquiry also considers “the balance of equities” and “the overall public interest.” *Winter*, 555 U.S. at 26. States and local governments have the right and responsibility to protect residents against deadly communicable diseases and to restrict conduct that threatens to overwhelm our hospitals and healthcare workers. *See, e.g., Prince v. Massachusetts*, 321

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<sup>56</sup> Churches throughout the State have been holding outdoor services during the pandemic. *See, e.g., Coronado, Christmas Mass Celebrated Outdoors Because of Pandemic*, NBC San Diego, Dec. 24, 2020, <https://www.nbcsandiego.com/news/coronavirus/christmas-mass-celebrated-outdoors-due-to-pandemic/2480318/>. California has no attendance cap on outdoor services.

U.S. 158, 166-167 (1944); *Roman Catholic Diocese*, 141 S. Ct. at 67. The restrictions challenged here impose temporary restrictions on indoor gatherings “to address this extraordinary health emergency,” *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring), by diminishing the serious risk of widespread transmission of the COVID-19 virus that would occur if those gatherings were not regulated, *see* Watt Decl. ¶ 83. By contrast, the relief plaintiffs seek from this Court would imperil public health. It would remove all capacity limitations on indoor services and lift the prohibition on indoor singing. *See* South Bay Application 4-5. It would allow South Bay, for example, to fill to capacity its 731-person facility, *see* South Bay Application 10, and then engage in group singing that epidemiologists and public health officials have concluded poses a grave threat of transmitting the virus—during a period of alarmingly high infection rates, *see supra* pp. 2-3.

Responding to the pandemic remains “a dynamic and fact-intensive matter.” *South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring). Consistent with the State’s science-based approach to combatting the coronavirus, it will re-assess the COVID-19 transmission risk across the State on a continual basis and will relax or remove restrictions when considerations of safety and public health allow. But in light of the continued uncertainty surrounding this deadly virus, the recent surge in case counts and hospitalizations, and the lack of any

cure or widely administered vaccine, that moment has not yet arrived. Plaintiffs have not established that they are entitled to any further injunctive relief at this time.

Should this Court disagree, however, it would be critical for it to tailor any injunction and preserve some latitude for state public health officials to limit the number of people attending large and communal gatherings indoors, in order to mitigate the virus's spread. *Cf. Roman Catholic Diocese*, 141 S.Ct. at 68 (“[W]e should respect the judgment of those with special expertise and responsibility in this area.”). The court of appeals has already enjoined the numerical capacity limitations in Tiers 2 and 3, *South Bay App. A 47-49*, and this Court has recognized that, even with those caps, the limitations in Tiers 2 through 4 are “far” less restrictive than the New York restrictions that were enjoined in *Roman Catholic Diocese*, 141 S.Ct. at 67 & n.2.<sup>57</sup> While the State firmly believes that the Tier 1 restrictions are constitutional and critical to preventing excessive spread of the virus, if the Court were to enjoin those restrictions, it should leave the percentage capacity restrictions in Tiers 2 through 4 in effect, and specify that the State may impose the Tier 2 percentage capacity limitations on counties in Tier 1. *Cf. Roman Catholic Diocese*, 141 S.

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<sup>57</sup> As Justice Kavanaugh explained, “New York’s 10-person and 25-person caps on attendance” went “much further” and were “much more severe than” the restrictions at issue in *South Bay*, which are equivalent to the current Tier-2 restrictions. *Roman Catholic Diocese*, 141 S. Ct at 73 (Kavanaugh, J., concurring) (“In *South Bay*, houses of worship were limited to 100 people (or, in buildings with capacity of under 400, to 25% of capacity).”).

Ct. at 68 (leaving in place proportional capacity limitation). It would also be critical to allow the State to continue imposing requirements such as “social distancing, wearing masks, leaving doors and windows open, forgoing singing, and disinfecting spaces between services.” *Id.* at. 69 (Gorsuch, J., concurring).

### CONCLUSION

The Court should deny the applications.

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