

No. 20-746

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

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

v.

GAVIN NEWSOM, ET AL.,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF IN OPPOSITION**

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## QUESTION PRESENTED

This petition was filed in November 2020 as a petition for a writ of certiorari before judgment, following the district court’s denial of a motion to preliminarily enjoin certain restrictions on indoor worship services adopted by California in response to the ongoing COVID-19 pandemic. Thereafter, the Court decided *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), and the court of appeals vacated the challenged order and remanded for reconsideration in light of *Roman Catholic Diocese*. In December 2020, the district court considered the restrictions in place at that time and denied petitioners’ renewed motion for a preliminary injunction. The court of appeals affirmed in part, allowing the State to impose a prohibition on indoor worship services in counties where the virus is especially widespread, but reversing with respect to certain numerical limits on indoor worship where transmission rates are lower. This Court then granted additional injunctive relief, barring the State from enforcing a “prohibition on indoor worship services.” *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021). The Court did not, however, enjoin the State from “imposing a 25% capacity limitation on indoor worship services” or a “prohibition on singing and chanting during indoor services.” *Id.* In response, the State modified its policies to withdraw the prohibition on indoor worship. It also revised the singing policy to permit some singing during indoor services in all parts of the State. The question presented is:

Whether the court of appeals erred by affirming in part the district court’s December 2020 denial of a preliminary injunction with respect to certain restrictions on indoor worship activities in place at that time.

**DIRECTLY RELATED PROCEEDINGS**

U.S. Supreme Court:

*South Bay United Pentecostal Church v. Newsom*,  
No. 20A136 (Feb. 5, 2021) (this case) (granting in  
part application for injunctive relief).

*South Bay United Pentecostal Church v. Newsom*,  
No. 19A1044 (May 29, 2020) (denying application  
for injunctive relief).

U.S. Court of Appeals for the Ninth Circuit:

*South Bay United Pentecostal Church v. Newsom*,  
No. 20-56358 (Jan. 22, 2021) (this case below) (af-  
firming denial of preliminary injunction).

*South Bay United Pentecostal Church v. Newsom*,  
No. 20-55533 (Dec. 8, 2020) (vacating October 15,  
2020 order denying preliminary injunction).

U.S. District Court for the Southern District of Cali-  
fornia:

*South Bay United Pentecostal Church v. Newsom*,  
No. 20-cv-865 (Dec. 21, 2020) (this case below)  
(denying renewed motion for preliminary injunc-  
tion).

*South Bay United Pentecostal Church v. Newsom*,  
No. 20-cv-865 (October 15, 2020) (denying re-  
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## INTRODUCTION

Petitioners filed this petition for a writ of certiorari before judgment in November 2020, following the district court’s October 15, 2020 denial of a motion to preliminarily enjoin California’s restrictions on indoor worship. Since then, this Court issued *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam), and the court of appeals vacated the October 15 order and remanded for further proceedings. On remand, the district court denied a renewed motion for preliminary injunction and, in January 2021, the court of appeals affirmed in part and reversed in part. Following the court of appeals’ decision, petitioners asked this Court to construe their petition as one seeking review of that judgment. *See* Letter from Charles S. LiMandri, to Hon. Scott R. Harris (Jan. 26, 2021).

The State does not object in this context to the Court construing the petition for a writ of certiorari before judgment as a “conventional” petition seeking review of the court of appeals’ January 2021 opinion. *Id.* But circumstances arising after that decision make this case a particularly inappropriate vehicle for plenary review of the free-exercise issues presented in the petition: Petitioners are no longer prohibited from gathering indoors to worship. This Court enjoined the State from enforcing the total prohibition on indoor worship while allowing it to continue to impose certain percentage-capacity limits on attendance, without prejudice to petitioners “presenting new evidence to the District Court” to challenge the percentage-capacity restriction. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021). In response to that ruling, the State swiftly changed its policies, withdrew the prohibition on indoor worship, and allowed indoor

worship subject to percentage-capacity limits. In addition, the State has altered its policies to permit indoor singing and chanting by performers. Although the State continues to impose certain restrictions on indoor worship (and other comparable secular activities), petitioners did not challenge the policies in their current form in the district court until last week, and they have not yet developed a record that would facilitate plenary review by this Court of any remaining disputes between the parties.

### STATEMENT

1. The State has explained in detail the background epidemiological and public health considerations informing its evolving response to the COVID-19 pandemic. *See* State of California’s Consolidated Opp’n to Emergency App. for Writ of Injunction at 2-16, No. 20A136 (Jan. 29, 2021). In brief, the State’s emergency measures have been “adjusted in real time based on new data” and the latest scientific understanding of how the virus transmits. E.R. 520 ¶ 59.<sup>1</sup> In the earliest phase of the State’s response to COVID-19, the Governor issued an executive order generally requiring individuals to stay at home, E.R. 1167-1168; since then, the State has modified its policies several times in response to changing rates of transmission, as well as evidence showing which activities pose the greatest risk of contributing to spread of the virus, *id.* at 351-384, 520-532. Throughout the pandemic, the State has sought to limit the potential for large numbers of people from different households to gather indoors for extended periods of time. It has thus

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<sup>1</sup> “E.R.” refers to the Excerpts of Record filed in the court of appeals, C.A. No. 20-56358, Dkt. 18 (Dec. 31, 2020).

imposed limits on indoor worship services, restaurants, lectures, concerts, movie showings, spectator sports, and theatrical performances, among other activities. *See, e.g.*, E.R. 379-384.

2. Petitioner South Bay United Pentecostal Church is a church located near San Diego, California and petitioner Bishop Arthur Hodges III serves as its Senior Pastor. Pet. 17. They filed a complaint in May 2020 alleging that the State's earliest restrictions regarding indoor and outdoor gatherings violated the Free Exercise Clause by prohibiting "out-of-home religious services." D.Ct. Dkt. 1 ¶ 115. Petitioners simultaneously sought a temporary restraining order, which the district court denied. *Id.* Dkt. 3; Pet. App. F.

Petitioners appealed and moved for an injunction pending appeal. The Ninth Circuit denied immediate injunctive relief, reasoning that petitioners had not demonstrated a likelihood of success on the merits. C.A. No. 20-55533, Dkt. 28, 29; Pet. App. D. Meanwhile, as the rate of COVID-19 infection slowed, the Governor announced a roadmap to guide reopening of the State. *See* E.R. 1193-1203. 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. *Id.* at 1211. This Court denied an emergency request by petitioners to enjoin those revised policies. *See South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020).

In July, while petitioners' appeal of the denial of the preliminary injunction was still pending before the court of appeals, the State tightened restrictions in response to a resurgence in COVID infections and deaths. For example, the State closed indoor operations of certain activities, including worship services,

in counties with elevated infection levels. E.R. 525-526 ¶¶ 79-81. In light of those changes, petitioners requested a limited remand to the district court to develop a record with respect to the operative restrictions and to renew their motion for a preliminary injunction. C.A. No. 20-55533, Dkt. 56. The court of appeals granted that request. Pet. App. B.

On remand, the district court considered evidence relating to the State’s “Blueprint for a Safer Economy.” See E.R. 351-384. Under that Blueprint, many restrictions in a county varied with the level of community transmission: for example, Tier 1 counties had significant viral transmission and correspondingly stringent restrictions, and Tier 4 counties had lesser transmission and more relaxed restrictions. *Id.* Indoor gatherings for certain businesses and activities—including museums, movie theaters, restaurants, and worship services—were thus prohibited in Tier 1 counties. *Id.* at 379-384. In counties where the virus was not widespread, the State allowed 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.*<sup>2</sup>

On October 15, the district court denied petitioners’ renewed motion for injunctive relief. The court concluded that it was unlikely that petitioners would

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<sup>2</sup> On March 14, 2021, the State adjusted the framework to allow a county to move to less restrictive tiers even with somewhat higher case rates than under the prior framework because two million vaccine doses had been administered to the hardest-hit portions of the State. See State of California, *Blueprint for a Safer Economy—Vaccine Equity Metric*, <https://covid19.ca.gov/safer-economy/> (last visited Mar. 17, 2021).

succeed on their 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.” Pet. App. A 31a. The parties then returned to the court of appeals and filed supplemental briefing. C.A. No. 20-55533, Dkt. 80, 83, 89. On November 24, before the court of appeals issued a decision, petitioners filed this petition for a writ of certiorari before judgment, seeking review of the district court’s October 15 order denying a preliminary injunction. *See* Pet. 1.

The next day, 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 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.

Following that decision, the court of appeals in this case vacated the district court’s October 15 order denying a preliminary injunction and remanded for further consideration in light of *Roman Catholic Diocese*. *See South Bay United Pentecostal Church v. Newsom*, 981 F.3d 765 (9th Cir. 2020). In those remand proceedings, the district court considered an up-to-date record and again denied preliminary injunctive relief. The district court read *Roman Catholic Diocese* to require “strict scrutiny review when a state imposes different capacity restrictions on religious worship services as compared to non-religious activities and entities.” *South Bay United Pentecostal Church v. Newsom*,

2020 WL 7488974, at \*8 (S.D. Cal. Dec. 21, 2020). Applying that standard, the court concluded that California “did exactly what the narrow tailoring requirement mandates,” by “carefully design[ing]” its restrictions based on a “neutral . . . risk analysis.” *Id.* at \*11. Petitioners appealed. C.A. No. 20-56358.

The court of appeals affirmed in part and reversed in part. *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021). The court affirmed the prohibition on indoor worship in Tier 1 counties. *Id.* at 1142-1147. But it concluded that petitioners were likely to succeed in their challenge to the 100- and 200-person numerical capacity limits in Tiers 2 and 3. *Id.* at 1151-1152. 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 lower. *Id.* at 1151. The court declined to reach the validity of percentage-capacity limitations (25% in Tier 2 and 50% in Tiers 3 and 4) because “the district court did not rule on this challenge, nor did the parties present specific evidence regarding the narrowly tailored inquiry with respect to the percentage limitations below or make meaningful arguments here.” *Id.* at 1151 n.38; *see id.* (“If South Bay desires to challenge these percentage limitations, it must return to the district court.”).

After the court of appeals issued its decision, petitioners notified this Court of the decision below and asked the Court to construe their pending petition for a writ of certiorari before judgment as a “conventional” petition. Letter from Charles S. LiMandri, to Hon. Scott R. Harris (Jan. 26, 2021). Petitioners also filed an emergency application in this Court, asking the

Court to enjoin any capacity restriction on indoor worship as well as the State’s “outright prohibition on singing or chanting during indoor worship services.” Application at 5, No. 20A136 (Jan. 25, 2021).

On February 5, the Court granted the application in part, enjoining enforcement of the Tier 1 prohibition on indoor worship services pending disposition of a petition for a writ of certiorari. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021). The Court denied the application with respect to the percentage capacity limitations and permitted the State to impose a “25% capacity limitation on indoor worship services in Tier 1.” *Id.* The Court also denied the application with respect to the prohibition on singing and chanting during indoor services. *Id.* The Court’s order was without prejudice to petitioners “presenting new evidence to the District Court that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner.” *Id.*; *see also id.* at 717 (Barrett, J., concurring) (observing that “the record is uncertain” and that petitioners “remain free to show that the singing ban is not generally applicable and to advance their claim accordingly”).

3. In response to this Court’s order, the State amended its restrictions on February 6, withdrawing the total prohibition of indoor worship in Tier 1 (and eliminating the numerical capacity limits in Tiers 2 and 3 to adhere to the decision below). The modified policies now allow indoor worship in Tiers 1 and 2 at 25% capacity and in Tiers 3 and 4 at 50% capacity.<sup>3</sup>

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<sup>3</sup> The State’s website refers to these policies as “interim capacity limits” because the guidance for places of worship (dated July 29, 2020), is “in the process of being updated” to reflect those

The State also modified its singing and musical performance guidance, allowing “performers” (but not congregants) to sing, chant, or play wind instruments during indoor worship services provided that they comply with certain physical distancing and masking requirements.<sup>4</sup>

On March 11, petitioners filed a motion for a temporary restraining order in the district court with respect to the percentage-capacity restriction in Tier 2. D. Ct. Dkt. 100 (Mar. 11, 2021). Briefing on that motion will be complete on March 26 and a hearing is scheduled for March 29. *Id.* at 106 (Mar. 17, 2021).<sup>5</sup>

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changes. See State of California, *Industry Guidance to Reduce Risk*, <https://covid19.ca.gov/industry-guidance/#worship> (drop down menu “Places of worship and cultural ceremonies—updated February 22, 2021”) (last visited Mar. 17, 2021). A chart of permissible activities has been updated to reflect the change. See Cal. Dep’t of Public Health, *Blueprint for a Safer Economy*, [https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September\\_2020.pdf](https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf) (last visited Mar. 17, 2021). As of March 16, with improving infection rates across the State, only 11 of 58 counties remain in Tier 1. See State of California, *Blueprint for a Safer Economy—Current tier assignments as of March 16, 2021*, <https://covid19.ca.gov/safer-economy/>.

<sup>4</sup> In addition, worshippers may sing along with performers during outdoor worship services while masked. See State of California, *Industry Guidance to Reduce Risk*, <https://covid19.ca.gov/industry-guidance/#worship> (drop down menu “Places of worship and cultural ceremonies—updated February 22, 2021”) (last visited Mar. 17, 2021).

<sup>5</sup> In a separate matter, a district court recently denied a motion to enjoin the percentage-capacity and singing restrictions. See *Cross-Culture Christian Center v. Newsom*, D. Ct. No. 20-cv-832-JAM (E.D. Cal.), Dkt. 126 (Mar. 9, 2021); see also *id.* 102 (Mot. for Preliminary Inj.); *id.* 118 (Opp’n to Mot. for Preliminary Inj.);

## ARGUMENT

Petitioners filed their petition for a writ of certiorari before judgment on November 24, 2020. Petitioners now ask the Court to treat the petition as a conventional petition for a writ of certiorari with respect to the court of appeals' January 22 decision, which partially affirmed the district court's December 21 denial of their renewed motion for a preliminary injunction. The State has no objection to that request under the unusual circumstances presented here.<sup>6</sup> But there is no persuasive reason for the Court to grant plenary review in this case at this time.

Petitioners have already obtained the principal relief sought by the petition. Their petition urges the Court to grant review and hold that they may “access their Places of Worship to pray.” Pet. 5. The Court's February 5 order allowed places of worship to conduct indoor worship services at up to 25% capacity in Tier 1 counties, the most stringently regulated parts of the

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*see also Calvary Chapel of Ukiah v. Newsom*, D. Ct. No. 20-cv-1431-KJM (E.D. Cal.), Dkt. 75 (denying preliminary injunction of singing restriction).

<sup>6</sup> Rule 15 directs that a “brief in opposition should address any perceived misstatement of fact or law in the petition.” In this case, the petition for a writ of certiorari before judgment—which was directed at a district court decision that has since been vacated and that pre-dates the decisions at issue here—contains a number of misstatements of both fact and law. Respondents will not catalog those misstatements here; should the Court grant plenary review of the court of appeals' January 22 decision, the State would expect to advance arguments on the merits similar to those presented in its briefing below and the consolidated opposition to petitioners' application for an emergency injunction.

State. *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021). Since then, the State has revised its policies in accordance with the Court’s order. *Supra* pp. 7-8. And the State intends to continue to allow in-person worship in all counties regardless of how this Court disposes of the pending petition.<sup>7</sup>

While the petition also seeks review of the State’s percentage capacity limitations and its “ban on singing,” Pet. 34, the Court’s recent order recognized that the record is too uncertain at present to review those policies. *See South Bay*, 141 S. Ct. at 716 (“This order is without prejudice to the applicants presenting new evidence to the District Court that the State is not applying the percentage capacity limitations or the prohibition on singing and chanting in a generally applicable manner.”); *id.* at 717 (Barret, J., concurring) (similar); *id.* at 719 n.1 (Gorsuch, J., statement) (“[N]othing in our order precludes future challenges to the other disparate occupancy caps applicable to places of worship, particularly in ‘Tiers’ 2 through 4.”). Petitioners have just recently initiated proceedings to

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<sup>7</sup> The State is also subject to this Court’s February 5 order in *Harvest Rock v. Newsom*, No. 20A137, which enjoins the State from enforcing the prohibition on indoor worship in Tier 1 pending disposition of the appeal and disposition of the petition for a writ of certiorari, if such writ is timely sought. In that case, the State filed an answering brief in the court of appeals on February 26 and any reply brief is due March 19. *See Harvest Rock v. Newsom*, C.A. No. 20-56357, Dkt. 50, 51. In a separate case, a district court recently enjoined the State from enforcing the prohibition on indoor worship in Tier 1 pending appeal, citing this Court’s February 5 order. *See Order Granting in Part Emergency Mot. to Enjoin State and Cty. COVID-19 Restrictions Pending Interlocutory App. at 4, Gateway City Church v. Newsom, et al.*, D. Ct. No. 20-cv-8241, Dkt. 75 (N.D. Cal. Feb. 8, 2021).

challenge certain remaining aspects of the State’s policies that they oppose. *Supra* p. 8.<sup>8</sup> There is no reason for the Court to intervene now.

Nor have petitioners identified any other basis for the Court to grant further review in this case. To be sure, aspects of the court of appeals’ decision below may be in tension with this Court’s February 5 order. But this Court does not ordinarily grant plenary review to consider “a decision that has been discredited . . . by reason of intervening decisions.” Shapiro, et al., *Supreme Court Practice* § 4.4(d) (11th ed. 2019). And that customary reluctance is particularly appropriate here, given that the State has now changed those portions of its policies that prompted this Court to grant an injunction pending certiorari.<sup>9</sup>

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<sup>8</sup> The lower courts in this case have not yet addressed the State’s new 25% capacity restriction in Tier 1 or its new singing policy, which allows performers to sing, chant, or play wind instruments during indoor worship services. *Supra* p. 8 & n.4. The latter policy addresses any concerns that the State did not previously permit “a single masked cantor [to] lead worship behind a mask and a plexiglass shield” or for a “lone muezzin [to] sing the call to prayer from a remote location inside a mosque as worshippers file in.” *South Bay*, 141 S. Ct. at 720 (Gorsuch, J., statement). Other courts have recently denied injunctive relief with respect to those policies. *See supra* n.5.

<sup>9</sup> If the Court deems it necessary and appropriate, the State would have no objection to the Court vacating the court of appeals’ decision upholding the prohibition on indoor worship. The Court may also wish to consider holding this case for *Fulton v. City of Philadelphia*, No. 19-123, where the Court is considering, among other things, whether “*Employment Division v. Smith* should be revisited.” Pet i, *Fulton v. City of Philadelphia*, No. 19-123 (July 22, 2019).

Petitioners originally contended that the Court should grant review to resolve a conflict among the lower courts about the level of scrutiny to apply to free-exercise challenges to pandemic restrictions. Pet. i, 22-29. But each of the decisions cited in the petition pre-dated the Court’s decision in *Roman Catholic Diocese*, 141 S. Ct. at 63. See Pet. 23-31. Since *Roman Catholic Diocese*, no court of appeals has denied a free-exercise challenge on the view that strict scrutiny does not apply under *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Pet. 19, 20, 22.<sup>10</sup>

While the district court in this case did not initially “apply strict scrutiny” (Pet. 29) in its October 15, 2020 order (see Pet. App. A 34a-35a), that decision preceded *Roman Catholic Diocese* and was later vacated by the court of appeals, *supra* p. 5. The lower courts in this matter subsequently applied *Roman Catholic Diocese* and assessed California’s capacity restrictions on religious gatherings under strict scrutiny. See, e.g., *South Bay*, 985 F.3d at 1140; *supra* pp. 5-6. Going forward, there is every reason to expect that lower courts will continue to apply this Court’s guidance in *Roman Catholic Diocese* when addressing free-exercise challenges to pandemic-related restrictions and other laws and policies.

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<sup>10</sup> See, e.g., *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 632 (2d Cir. 2020) (the challenged “limits on houses of worship are subject to strict scrutiny”); *Monclova Christian Acad. v. Toledo-Lucas Cty. Health Dep’t*, 984 F.3d 477, 482 (6th Cir. 2020) (same); *Cassell v. Snyders*, 2021 WL 852227, \*4 (7th Cir. Mar. 8, 2021) (similar); *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020) (same), *cert. denied*, No. 20-639 (Jan. 25, 2021).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

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