



LIMANDRI & JONNA LLP

CHARLES S. LIMANDRI**
PAUL M. JONNA†

JOHANNA DELEISSEGUES
JEFFREY M. TRISSELL†
B. DEAN WILSON
MILAN L. BRANDON II

BRIAN D. MILLER
GREGORY J. ANTHONY
RICHARD SALPIETRA
Of Counsel

*BOARD CERTIFIED CIVIL TRIAL ADVOCATE
ADMITTED TO THE DISTRICT OF COLUMBIA BAR
ADMITTED TO THE NEW YORK BAR
†ADMITTED TO THE U.S. SUPREME COURT

POST OFFICE BOX 9120
RANCHO SANTA FE, CALIFORNIA 92067
TELEPHONE: (858) 759-9930
FACSIMILE: (858) 759-9938
WEBSITE: www.limandri.com

PHYSICAL ADDRESS:
16236 SAN DIEGUITO ROAD
BUILDING 3, SUITE 3-15
RANCHO SANTA FE, CA 92091
KATHY DENWORTH
Office Administrator

April 15, 2021

Hon. Scott R. Harris, Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *South Bay United Pentecostal Church, et al. v. Newsom, et al.*, No. 20-746

Dear Mr. Harris:

Petitioners write in response to the State-Respondents' letter dated April 12, 2021, regarding California's decision to end "location and capacity limits on places of worship." As this Court has now explained several times, California's withdrawal of the challenged restrictions during litigation does not give rise to mootness, because California remains free to reimpose the restrictions at any time. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020); *Tandon v. Newsom*, __ S. Ct. __, 2021 WL 1328507, at *1 (2021).

Aside from the question of mootness, the Petition merits plenary review because California has not yet remedied its unconstitutional behavior, in two separate ways. First, in response to a specific inquiry from Petitioners' counsel, counsel for the State-Respondents stated in an email dated April 13 that "[t]he State does not foresee re-imposing mandatory capacity restrictions on houses of worship. The State maintains, however, that *it has the authority to impose mandatory capacity restrictions* on activities if necessary to reduce transmission of a deadly and communicable virus and protect public health in the case of a dramatic surge in COVID-19 cases and deaths caused by *a new variant or other unexpected development*, consistent with Supreme Court rulings."¹ D.C. Dkt. 125 at 20–21 (emphasis added). Presumably, the County-Respondents would maintain that they have authority to independently impose such restrictions as well. *Cf. Gateway City Church v.*

¹ See Attachment A.

Newsom, __ S. Ct. __, 2021 WL 753575 (2021) (enjoining Santa Clara County’s distinct indoor worship ban).

Given California’s “track record of ‘moving the goalposts’,” *Tandon*, __ S. Ct. __, 2021 WL 1328507, at *2 (quoting *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 720 (2021) (“*S. Bay II*”) (statement of Gorsuch, J.)), while claiming its restrictions on houses of worship are “consistent with Supreme Court rulings”—a claim this Court has already rejected five times, *id.*—there is still clearly a need for definitive guidance from this Court on the precise question of “the other disparate occupancy caps applicable to places of worship, particularly in ‘Tiers’ 2 through 4.” *S. Bay II*, 141 S. Ct. at 719 n.1 (statement of Gorsuch, J.). Otherwise, it is entirely likely that California, citing “a new variant or other unexpected development,” will “reinstate those heightened restrictions at any time,” *Tandon*, __ S. Ct. __, 2021 WL 1328507, at *2, either in their current form or some other form transgressive of the Free Exercise Clause.

Second, the Petition also presents the question of the validity of California’s prohibition on singing at worship services, which California has not yet remedied, and the Court has not yet addressed. *See* Pet. 19, 34–36, 40; *S. Bay II*, 141 S. Ct. at 719–20 & n.2 (statement of Gorsuch, J.) (noting that the Court did not address the singing ban). California has changed its assertions about what singing it has and has not restricted indoors at church. Before *South Bay II* was decided, citing only its guidance for private gatherings dated November 13, 2020, California told both this Court and the Ninth Circuit that the guidance supplies an indoor singing ban in “*all* indoor activities, sectors, and private gatherings.” Consolidated Opposition, Nos. 20A136, 20A137 at 51 & n.51 (Jan. 29, 2021); *see also* C.A.9 No. 20-56358, ECF No. 28, at 58 (Jan. 7, 2021) (same). The Ninth Circuit apparently was convinced that California prohibited singing in “*all* indoor activities.” *S. Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1151 (9th Cir. 2021). And this Court declined to issue an injunction pending certiorari against California’s congregational singing ban, apparently based on the same representation that the private gatherings guidance created a blanket singing ban. *See S. Bay II*, 141 S. Ct. at 717 (Barrett, J., concurring).

But California has now changed its tune. In the *Tandon* litigation, California told the Court that its private gatherings guidance does indeed apply only to “private gatherings” indoors and not across the board to all indoor gatherings: “Instead, more specific guidance and protocols regulate when, where, and how [other] types of activities may be held.” *See* Opposition, *Tandon v. Newsom*, No. 20A151, at 5–7 (Apr. 8, 2021). In other words, California now agrees with Petitioners’ characterization of its singing regime as providing unique and disparate singing restrictions for private gatherings, restaurants, schools, the music and film industries, protests, and worship services (and no singing restrictions for any other activities), Application, No. 20A136 at 22–23 (Jan. 25, 2021), all of which are in the record. *See* C.A.9 No. 20-55533, ECF No. 89, at 17 n.6 (Nov. 12, 2020). On that score, along with its letter to the Court of April 12, California now provides the Court with its most recent “Industry Guidance” for “Places of Worship and cultural

ceremonies.” That guidance shows that, on February 24, 2021, California modified its restrictions on singing in church to only allow singing by “performers,” defined as singers who “sit or stand separately from the visitors or congregants. . . .” State-Respondents’ Apr. 12 Letter at Attch. p. 7.²

Thus, the record is now far clearer than it was at the time *South Bay II* was decided: California does *not* restrict indoor singing “across the board,” but has distinct regulations for distinct activities, and allows “performers” to sing indoors but not religious congregations. This second issue thus remains very much alive, and the Court can provide much needed guidance on California’s disparately applied singing restrictions.

Finally, should the Court deem it advisable not to grant plenary review on these remaining issues, it should nevertheless grant the Petition, vacate the decisions below, and remand for further proceedings in light of *Tandon*.

We respectfully request that this letter response be circulated to the Justices for their review in connection with the upcoming conference in this case.

Sincerely,

LiMANDRI & JONNA LLP



Charles S. LiMandri

² This expedient adjustment led to denial of an application for a preliminary injunction in *Calvary Chapel of Ukiah v. Newsom*, No. 2:20-cv-01431-KJM-DMC, 2021 WL 916213, at *12 (E.D. Cal. Mar. 10, 2021). The *Ukiah* case shows that California’s February 24 update was attempting to create more of an appearance of neutrality, but without showing that banning congregational singing is the least restrictive means of curbing the spread of COVID-19. *See id.* at *9.

ATTACHMENT A

From: [Todd Grabarsky](#)
To: [Paul Jonna](#); [Jeffrey Trissell](#); [Kathy Denworth](#); [Jeffrey.Michalowski@sdcounty.ca.gov](#); [valerie.palid@sdcounty.ca.gov](#); [diana.gaitan@sdcounty.ca.gov](#); [mmeuser@dhillonlaw.com](#); [docketing@thomasmoresociety.org](#); [tbrejcha@thomasmoresociety.org](#); [harmeet@dhillonlaw.com](#); [hkchoi@dhillonlaw.com](#); [htoschi@dhillonlaw.com](#); [pbreen@thomasmoresociety.org](#); [timothy.white@sdcounty.ca.gov](#); [Lisa Plank](#); [cferrara@thomasmoresociety.org](#); [Anna Ferrari](#); [Daniel Lucas](#); [Kathryn Megli](#); [Charles Limandri](#); [Milan Brandon](#); [Paul Stein](#); [Helen Hong](#); [Samuel Harbourt](#)
Subject: Re: South Bay United Pentecostal Church v. Newsom
Date: Tuesday, April 13, 2021 11:55:00 AM
Attachments: [image001.png](#)

Dear Paul,

State Public Health officials have lifted all mandatory capacity restrictions on houses of worship and plan to lift all current capacity restrictions on June 15. The State does not foresee re-imposing mandatory capacity restrictions on houses of worship. The State maintains, however, that it has the authority to impose mandatory capacity restrictions on activities if necessary to reduce transmission of a deadly and communicable virus and protect public health in the case of a dramatic surge in COVID-19 cases and deaths caused by a new variant or other unexpected development, consistent with Supreme Court rulings.

Sincerely,

Todd Grabarsky

Deputy Attorney General
California Department of Justice
Office of the Attorney General
300 S. Spring St., Ste. 1700
Los Angeles, CA 90013
(213) 269-6044

From: Paul Jonna <pjonna@limandri.com>
Sent: Tuesday, April 13, 2021 7:13 AM
To: Todd Grabarsky; Jeffrey Trissell; Kathy Denworth; Jeffrey.Michalowski@sdcounty.ca.gov; valerie.palid@sdcounty.ca.gov; diana.gaitan@sdcounty.ca.gov; mmeuser@dhillonlaw.com; docketing@thomasmoresociety.org; tbrejcha@thomasmoresociety.org; harmeet@dhillonlaw.com; hkchoi@dhillonlaw.com; htoschi@dhillonlaw.com; pbreen@thomasmoresociety.org; timothy.white@sdcounty.ca.gov; Lisa Plank; cferrara@thomasmoresociety.org; Anna Ferrari; Daniel Lucas; Kathryn Megli; Charles Limandri; Milan Brandon; Paul Stein
Subject: Re: South Bay United Pentecostal Church v. Newsom

Dear Todd:

In case my email below wasn't clear, we require a response to my question below by 12pm PDT today. If we don't hear from you or your response is qualified and uncertain, we will proceed with the assumption (based on past experience) that the State believes it has the right to reimpose the challenged restrictions at any time in the future.

Thank you.

Paul M. Jonna | Partner
LIMANDRI & JONNA LLP | P.O. Box 9120 | Rancho Santa Fe, CA 92067
Tel: (858) 759-9930 | Direct: (858) 759-9133 | Fax: (858) 759-9938
pjonna@limandri.com | www.limandri.com

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From: Paul Jonna

Sent: Monday, April 12, 2021 9:59:19 PM

To: Todd Grabarsky <Todd.Grabarsky@doj.ca.gov>; Jeffrey Trissell <jtrissell@limandri.com>; Kathy Denworth <kdenworth@limandri.com>; Jeffrey.Michalowski@sdcounty.ca.gov <Jeffrey.Michalowski@sdcounty.ca.gov>; valerie.palid@sdcounty.ca.gov <valerie.palid@sdcounty.ca.gov>; diana.gaitan@sdcounty.ca.gov <diana.gaitan@sdcounty.ca.gov>; mmeuser@dhillonlaw.com <mmeuser@dhillonlaw.com>; docketing@thomasmoresociety.org <docketing@thomasmoresociety.org>; tbrejcha@thomasmoresociety.org <tbrejcha@thomasmoresociety.org>; harmmeet@dhillonlaw.com <harmmeet@dhillonlaw.com>; hkchoi@dhillonlaw.com <hkchoi@dhillonlaw.com>; htoschi@dhillonlaw.com <htoschi@dhillonlaw.com>; pbreen@thomasmoresociety.org <pbreen@thomasmoresociety.org>; timothy.white@sdcounty.ca.gov <timothy.white@sdcounty.ca.gov>; Lisa Plank <Lisa.Plank@doj.ca.gov>; cferrara@thomasmoresociety.org <cferrara@thomasmoresociety.org>; Anna Ferrari <Anna.Ferrari@doj.ca.gov>; Daniel Lucas <Daniel.Lucas@doj.ca.gov>; Kathryn Megli <Kathryn.Megli@doj.ca.gov>; Charles Limandri <climandri@limandri.com>; Milan Brandon <mbrandon@limandri.com>; Paul Stein <Paul.Stein@doj.ca.gov>

Subject: RE: South Bay United Pentecostal Church v. Newsom

Dear Todd:

I see that you notified the U.S. Supreme Court of the revisions to CA's guidance on places of worship. As you know, the Supreme Court held the following in *Tandon v Newsom*:

“Fourth, even if the government withdraws or modifies a COVID restriction in the course of litigation, that does not necessarily moot the case. And so long as a case is not moot, litigants otherwise entitled to emergency injunctive relief remain entitled to such relief where the applicants “remain under a constant threat” that government officials will use their power to reinstate the challenged restrictions.”

Does the governor maintain that he retains the power to reimpose the challenged restrictions if he deems it necessary? Please advise by 12pm PDT so that we can inform the Supreme Court of the State's position and decide how best to proceed with the upcoming evidentiary hearing.

Thank you.

Paul M. Jonna | Partner

LIMANDRI & JONNA LLP | P.O. Box 9120 | Rancho Santa Fe, CA 92067

Tel: (858) 759-9930 | Direct: (858) 759-9133 | Fax: (858) 759-9938

pjonna@limandri.com | www.limandri.com



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