No. 20-A_____

In The
Supreme Court of the United States

GATEWAY CITY CHURCH; THE HOME CHURCH; THE SPECTRUM CHURCH, ORCHARD COMMUNITY CHURCH; TRINITY BIBLE CHURCH,

Applicants,

v.

GAVIN NEWSOM, in his official capacity as Governor of the State of California; SANDRA SHEWRY, M.D., in her official capacity as Acting Director of California Department of Public Health; SARA H. CODY, M.D., in her official capacity as Santa Clara County Health Officer; COUNTY OF SANTA CLARA,

Respondents.

To the Honorable Elena Kagan,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Ninth Circuit

Emergency Application for Writ of Injunction Or In The Alternative For Certiorari Before Judgment Or Summary Reversal
Relief Requested by Sunday, February 21, 2021

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QUESTION PRESENTED

Does the County of Santa Clara's 0% capacity public health order on indoor worship services violate the Free Exercise clause of the First Amendment?

PARTIES AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the present Emergency Application for Writ of Injunction and the proceedings below:

Applicants are Gateway City Church, The Home Church, The Spectrum Church, Orchard Community Church, and Trinity Bible Church. These are Plaintiffs in the U.S. District Court for the Northern District of California, referred to herein as the District Court, and are the Appellants in the U.S. Court of Appeals for the Ninth Circuit, referred to herein as the Ninth Circuit.

Gateway City Church is a domestic nonprofit religious corporation incorporated under the laws of the State of California, and does not have a parent corporation, or issue stock.

The Home Church, Inc. is a domestic nonprofit religious corporation incorporated under the laws of the State of California, and does not have a parent corporation, or issue stock.

The Spectrum Church, San Francisco Bay Area, Inc. is a domestic nonprofit religious corporation incorporated under the laws of the State of California, and does not have a parent corporation, or issue stock.

Orchard Community Church of Campbell is a domestic nonprofit religious corporation incorporated under the laws of the State of California, and does not have a parent corporation, or issue stock.

Trinity Bible Church is a domestic nonprofit religious corporation incorporated under the laws of the State of California, and does not have a parent corporation, or issue stock.

Respondents are Gavin Newsom, in his official capacity as Governor of the State of California; Sandra Shewry, M.D., in her official capacity as Acting Director of California Department of Public Health, Sara H. Cody, M.D., in her official capacity as Santa Clara County Health Officer, County of Santa Clara. Respondents Newsom and Shewry are jointly represented and referred to herein as the State. Respondents Cody and the County of Santa Clara are jointly represented and referred to herein as the County.

DECISIONS BELOW

All decisions in this case in the lower courts are styled *Gateway City Church v. Newsom*.

- The District Court's decision granting in part and denying in part Plaintiffs' motion for a preliminary injunction is attached hereto as Exhibit D.

- The District Court's order granting in part Plaintiffs' emergency motion to enjoin State and County COVID 19 restrictions pending interlocutory appeal is attached hereto as Exhibit C.

- The District Court's order granting County's motion for leave to file a motion for reconsideration and staying the order granting in part the Plaintiffs' emergency motion to enjoin State and County COVID 19 restrictions pending interlocutory appeal is attached hereto as Exhibit B.

- The Ninth Circuit's order denying the Appellants' emergency motion for injunction pending appeal is attached hereto as Exhibit A.

ADDITIONAL EXHIBITS:

- *Santa Clara County Public Health Directive: CAPACITY LIMITATIONS* attached hereto as Exhibit E (the Capacity Directive).

- *Santa Clara County Public Health Directive: GATHERINGS* attached hereto as Exhibit F (the Gathering Directive).

JURISDICTION

Applicants have pending an interlocutory appeal in the Ninth Circuit. This Court has jurisdiction under 28 U.S.C. § 1651.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to Rules 20, 22, and 23 of the Rules of this Court, and 28 U.S.C. § 1651, Appellants-Applicants Gateway City Church, The Home Church, The Spectrum Church, Orchard Community Church, and Trinity Bible Church ("Churches") respectfully request a writ of injunction precluding enforcement against them of a public health order prohibiting indoor gatherings for worship services by the County of Santa Clara and the Santa Clara County Health Officer, Sara H. Cody, M.D. (collectively "County").

The Supreme Court handed down an order in the case *South Bay United Pentecostal Church, et al. v. Newsom*, 592 U.S. ___ (Feb. 5, 2021) No. 20A136 (20-746) (*South Bay II*) **after** the District Court issued an order denying a request for a preliminary injunction against the 0% capacity restriction on houses of worship by both the State and County Defendants. The Churches submitted a notice of the recent decision in *South Bay II* to supplement their emergency motion in the District Court for an injunction pending interlocutory appeal. The District Court granted that motion as to **both** the State and County Defendants requiring them to allow the Churches to meet at 25% capacity which was consistent with the Supreme Court's order in *South Bay II*. The State Defendants complied with this Court's order in *South Bay II*, allowing houses of worship to meet at 25% capacity. But the next day the County issued a public health order allowing indoor worship services at **only 20%**

capacity. That same day the County filed a motion seeking reconsideration. This motion was granted by the District Court the following evening, further staying its prior order on the injunction pending appeal. The following day the County reposted a public health order which provides in pertinent part as follows:

Business/Entity/Activity Type	**Indoors**	**Outdoors**
Gatherings (*e.g.*, political events, weddings, funerals, worship services, movie showings, cardroom operations)	Prohibited	Allowed up to 200 people per gathering, but subject to the limitations set forth by the State, which generally prohibit all gatherings except religious services, cultural ceremonies, political protests, other gatherings allowed by a State guidance document, and outdoor gatherings of up to 3 households.

The County public health order allows houses of worship to meet at 20% capacity for any purpose **except worship services.**

An emergency motion pending appeal was submitted to the Ninth Circuit's motions panel to compel the County to allow the Churches to meet on Sunday at 25% capacity per *South Bay II*. The Ninth Circuit denied the motion on Friday evening (Feb. 12). (Since the State Defendants have complied with this Court's 25% capacity order, they are **not** the subject of this application).

In a state stretching nearly 800 miles, all houses of worship are allowed to meet at 25% capacity. The lone exception is Santa Clara County where there remains a 0% capacity allowance for indoor worship services. Therefore, the Churches respectfully

request that this Circuit Justice grant the emergency application for writ of injunction or refer this application to the Court. In the alternative, the applicants request the granting of certiorari before judgment or summary reversal.

INTRODUCTION

Despite the *South Bay II* ruling by the Supreme Court which reopened houses of worship to 25% capacity from the Mexican border to Oregon, the County of Santa Clara sits as an island of tyranny with a **0% capacity** for indoor worship services. By this application, the Churches seek to join the rest of the faithful across the State to worship God this Sunday, February 21, or as soon thereafter as this matter can be heard.

SUMMARY OF THE ARGUMENT

For purposes of clarity, this motion seeks immediate relief from the County's order, rather than the State's order. The County public health order provides that "gatherings" which are "worship services" are prohibited indoors. Numerous other entities and activities which were the subject of the Supreme Court's decision in *South Bay II* are allowed in the County at 20%. These are: grocery and retail stores, personal care businesses (e.g., hair salons, nail care, tattoo and body art, skin care, waxing and hair removal), other "non-essential limited services" (e.g., pet grooming and shoe repair), indoor public transit waiting areas, all other essential and critical infrastructure facilities (including government facilities), and any other facility

allowed to open to the public under State and County orders. Exh. E at 2.

The lower courts committed error by finding the County's orders to be a neutral law of general applicability and thus measuring it under rational basis. Because the County orders (1) enumerate religious conduct (worship services) and (2) allow for other types of activities and entities to meet at 20% and churches at 0% capacity for indoor worship services, strict scrutiny review is triggered.

In addition, airport gates are similar comparators to places of worship in terms of time (45-90 minutes), physical space at the gate, and number of persons gathered (100-400 people). The lower court asserted that an airport is not a *gathering* under the County's boutique definition of that term: "bringing together multiple people from separate households in a single space . . . at the same time and in a coordinated fashion." Exh. F. The Churches disagree. Persons at airport gates fall within that meaning because there are multiple people from separate households at the same time for coordinated activity. It is difficult to conceive of a more coordinated gathering than waiting for a flight. In sum, the exemption for airports is not a generally applicable law.

In view of the Supreme Court's decision last week in *South Bay II*, and that houses of worship are meeting at 25% throughout California – except for Santa Clara County – the lower courts committed indisputable error. The harm to the Churches is profound and irreparable. Immediate relief is needed. The Churches have been closed for the better part of a year, and it is in the public interest that they be able to

join houses of worship across California **this weekend** for religious worship.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

General Litigation Challenge

The Churches challenge California's 4-tier Blueprint for a Safer Economy and the County's public health order (Exh. D, Order at 6), both of which completely prohibit indoor gatherings of groups of people for worship. The Churches are located in Santa Clara County, California, and they include thousands of residents who worship in their sanctuaries. They conduct worship services for their congregations each weekend which commonly include the common elements of prayer, reading from sacred texts, music, Holy Communion, and the delivery of a sermon. Like most churches in the Christian faith, such services have been practiced at all times and all places for nearly two millennia without interruption. That is, until now.

Governor Gavin Newsom proclaimed a state of emergency on March 4, 2020, in response to the novel coronavirus ("COVID 19"). The Governor issued Executive Order N-33-20 on March 19, which incorporates an order of the State Public Health Officer and mandates, in pertinent part:

> all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors as outlined at https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19.

The following month the State clarified that "critical infrastructure" generally included

Transportation and Logistics, creating a specific exception to the stay at home order for airports.[1] Places of worship are not listed as essential. Instead, under a complex 4-tier system called "Blueprint For A Safer Economy," places of worship are either (1) banned from meeting in their sanctuaries (Purple Tier 1), (2) are significantly restricted to *the lesser of* 100 persons or 25% capacity (Red Tier 2), (3) are restricted to *the lesser of* 200 persons or 50% (Orange Tier 3), or (4) 50% maximum capacity (Yellow Tier 4).[2] There is no green tier where religious assemblies can gather indoors at full capacity. Per Executive Order N-33-20, the State system also allows local public health officials to subject places of worship to even greater restrictions.

The County did just that. The Santa Clara Director of Public Health forced worshipers outdoors into the heat and smoke of summer and the cold and rain of autumn and winter.

Challenge to County Orders Relevant to this Application

The County promulgated a public health order addressing worship services in its Capacity Directive (Exh. E), which is the subject of this application, and reads,[3]

Business/Entity/Activity Type	**Indoors**	**Outdoors**
Gatherings (*e.g.*, political events, weddings, funerals,	Prohibited	Allowed up to 200 people per gathering, but subject to the

[1] *Id.*, at p. 10 TRANSPORTATION AND LOGISTICS.
[2] *Industry Guidance to Reduce Risk – Places of worship and cultural ceremonies* (updated Nov. 6, 2020). Accessed at https://covid19.ca.gov/industry-guidance/#worship
[3] Except for a 48-hour period of time when the District Court enjoined the County pursuant to *South Bay II* requiring a 25% capacity allowance for places of worship, this essential rule has been in place.

worship services, movie showings, cardroom operations)		limitations set forth by the State, which generally prohibit all gatherings except religious services, cultural ceremonies, political protests, other gatherings allowed by a State guidance document, and outdoor gatherings of up to 3 households.

Numerous other business/entity/activity types are allowed at 20% capacity. These include: grocery and retail stores, personal care businesses (e.g., hair salons, nail care, tattoo and body art, skin care, waxing, and other hair removal), other "non-essential limited services" (e.g., pet grooming and shoe repair), indoor public transit waiting areas, all other essential and critical infrastructure facilities (including government facilities), and any other facility allowed to open to the public under State and County orders. Exh. E at 2.

What is more, the County's *Gathering Directive* creates its own bespoke definition of *gathering*:

> A "gathering" is an event, assembly, meeting, or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and in a coordinated fashion—like a wedding, banquet, conference, religious service, festival, fair, party, performance, competition, movie theater operation, fitness class, barbecue, protest, or picnic. Exh. F at 2; Exh. D, Order at 27.

Of note, airports are exempted from the definition. The County Public Health Director explained:

> As many public health officials have noted, airports present an elevated risk of exposure to COVID-19 given the number of people passing through from different locations.…[T]he Public Health Department is

> not currently recommending closure of the airport given the significant societal harms lack of access to travel would cause.[4]

Of note, all parts of the County, whether incorporated or not, are under the jurisdiction of the Santa Clara Public Health Department.[5] Mineta San Jose International Airport is within that jurisdiction and hosts large gatherings of travelers from all over the world in the seating areas of 30 gates in 2 terminals.

Most churches were initially cooperative with State and County officials because they were led to believe that the restrictions on worship would be a temporary 14-day burden. Instead, the State and County have engaged in a pattern and practice that continually stretches the ban on those who congregate for sacred purposes. This has gone on for nearly a year with no foreseeable end to the County's orders that prohibit indoor worship, i.e., "This ordinance shall stay in full force and effect until repealed by the Board of Supervisors."[6]

In recent months, County officials have monitored, harassed, sued, and fined houses of worship for violating worship restrictions. As their buildings sit abandoned and their liberties under the Bill of Rights continue to be subject to suspension, the Churches have lost patience and seek redress from the courts.

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[4] "County of Santa Clara Public Health Department: Statement Regarding COVID-19 and Airports." Mar. 11, 2020. Accessed at https://www.sccgov.org/sites/phd/news/Pages/covid-19-airports.aspx

[5] Santa Clara County Ordinance NS 9.921. (Aug. 11, 2020) Accessed at https://www.sccgov.org/sites/covid19/Documents/ordinance-ns-9-291.pdf.

[6] Santa Clara County Ordinance NS 9.921, EXPIRATION §14.

Relevant Procedural History

The Churches filed a motion for preliminary injunction. On January 29 the District Court issued an Order granting the motion enjoining enforcement of the State Defendants' 100- and 200-person capacity limits for places of worship in Red Tier 2 and Orange Tier 3 but not the percentage based capacity limitations of any tier. The District Court denied the motion as to the complete ban on indoor worship services under Purple Tier 1. Injunctive relief against the Santa Clara County Defendants' restrictions on gatherings was also denied. Exh. D.

The Churches filed a notice of interlocutory appeal to address those portions of the District Court order denying preliminary injunctive relief (Feb. 1). A motion for injunction pending appeal was filed on February 2. While that motion was pending, on February 5 the Supreme Court reversed the Ninth Circuit in *South Bay II*. A notice of recent decision was filed with the District Court by the Churches on Saturday, February 6. On Monday, February 8, the District Court granted the Churches' motion enjoining **both** the State and County Defendants, allowing the Churches to meet at 25% capacity in compliance with *South Bay II*. Exh. C. The County changed its public health order to allow places of worship to meet, but only at **20% capacity.** However, the County filed a motion seeking leave for reconsideration in the District Court that same day (Feb. 9). Late on the night of February 10, the District Court reversed itself and stayed its order granting the Churches an injunction

pending appeal. Exh. B. The next day (Feb. 10), the County rescinded its 20% gathering rule for places of worship and set them back to **0% capacity** for indoor worship services. An emergency motion seeking a stay was filed with the Ninth Circuit's motion panel (Feb. 11). Late Friday (Feb. 12) the Ninth Circuit denied the motion. Exh. A.

REASONS FOR GRANTING THE APPLICATION

When the legal rights in an application are indisputably clear, a Circuit Justice has authority to provide the requested relief. *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1302 (1993) (Rehnquist, C.J., in chambers). During the last three months, the Supreme Court has issued two pinpoint decisions removing any doubt that public health orders placing religious institutions or activities in a disfavored position are not neutral or generally applicable and must be reviewed under strict scrutiny. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 590 U.S. __, 14 S.Ct. 63 (2020) and *South Bay II*. Further, in addition to the nearly identical legal premises at issue, this application sits in the same procedural posture as the religious institutions in *Roman Catholic Diocese of Brooklyn v. Cuomo* and *South Bay II*, in that both were brought as emergency applications. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 14 S.Ct. at 65, *South Bay II* at ___. Moreover, there is a significant possibility that this Court would grant certiorari and reverse because the violation of the Churches' right is indisputably clear. *Am. Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987).

I. THE VIOLATION OF THE CHURCHES' RIGHTS IS INDISPUTABLY CLEAR.

The Churches concede for purposes of this application that slowing the spread of COVID 19 stands as an interest which is compelling. *South Bay II*, 592 U.S. ___ (2021) (Gorsuch, J., concurring). But the Bill of Rights cannot be placed on the injured-reserved list to be brought back out on the civic field of play after the pandemic is over. To the contrary, the liberties secured by the Constitution stand as all the more precious when the nation faces crisis. The architects of our Constitution knew that the faithful need the solace of their faith in perilous times. Article III courts have a duty to jealously and zealously protect the peoples' rights from the other two branches of government and the States in times like these. *Id.* Since the Thanksgiving holiday, this Court has twice intervened when religious institutions or their activities appeared on government lists of the dangerous, the unessential, and the unwanted. Because it is self-evident that nothing is more central to the life of a religious congregation than its worship services, explicitly forbidding that most meaningful weekly event fails the requisite of general applicability and neutrality. Thus, it is indisputably clear that the lower courts failed to measure the County's public health order on the scales of strict scrutiny.

A. The County's 0% capacity for indoor worship services is neither neutral nor generally applicable.

At issue is whether the County public health orders completely prohibiting indoor worship services are neutral laws of general applicability. Beginning with the challenged text, the County has promulgated the Capacity Directive and Gathering Directive. *See* Exhs. E at 2, F. The Capacity Directive reads in chart form as follows:

Business/Entity/Activity Type	**Indoors**	**Outdoors**
Gatherings (*e.g.*, political events, weddings, funerals, worship services, movie showings, cardroom operations)	Prohibited	Allowed up to 200 people per gathering, but subject to the limitations set forth by the State, which generally prohibit all gatherings except religious services, cultural ceremonies, political protests, other gatherings allowed by a State guidance document, and outdoor gatherings of up to 3 households.

The District Court Order maintains that the Gathering Directive, under the County Orders, "applies regardless of whether the event has a religious or secular purpose" (Exh. D, Order at 27) and thus is subject to and survives rational basis review. *Id.* at 28. Not true.

First, the Gathering Directive identifies a specific religious activity, i.e., "Gatherings – worship services." The operative language of the County public health order restricts a religious activity by explicit reference to the conduct's sacred character. *McDaniel v. Paty*, 435 U.S. 618 (1978). Because the restriction enumerates

religious practice, conduct, belief, or motivation "without a secular meaning discernable from the language or context," it falls short of "facial neutrality." *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 533 (1993).

Second, the Gathering Directive subjects religious activities and entities to especially harsh treatment in view of other businesses/entities/activities/types. Consider these indoor examples:

- grocery and retail stores at 20% capacity – worship services 0%
- personal care businesses at 20% capacity – worship services 0%
- public transit waiting areas at 20% capacity – worship services 0%
- "non-essential" limited services at 20% capacity – worship services 0%
- all essential and critical infrastructure facilities and government facilities of any kind at 20% capacity – worship services 0%
- any other facility allowed to open to the public under State and County orders at 20% – worship services 0%

In addition to the above, airports operate at 100% capacity but indoor worship services are banned. As recently explained, "When a State so obviously targets religion for differential treatment, our job becomes that much clearer." *South Bay II*, 592 U.S. ___ (Gorsuch, J., concurring).

Unlawful discrimination, which stands as the antithesis of neutrality, involves making a distinction between a group of people, an entity, or related activity based

upon a protected characteristic (e.g., religion) coupled with the imposition of special disabilities on that basis. *Lukumi,* 508 U.S. at 533 citing *McDaniel*, 435 U.S. 618 (1978). In *Lukumi,* a municipality banned animal sacrifices. Here, the County bans indoor worship services. This indisputably triggers strict scrutiny review. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 590 U.S. __ (2020) citing *Lukumi,* 508 U.S. at 543. "[I]t does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe…treatment…Rather, once a State creates a favored class of businesses…the State must justify why houses of worship are excluded from that favored class." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 590 U.S. __ (Kavanaugh, J., concurring).

The lower courts committed error by viewing the Gathering Directive as "not impos[ing] any express restrictions on 'places of worship.'" Exh. D, Order at 26. This reads "worship services" out of the text. The plain meaning of the Gathering Directive is that it explicitly applies to worship services. It requires little explanation that places of worship sit as the venue for worship services. Worship services are not conducted at city hall, public transit waiting areas, or grocery stores. Rather, they occur at churches, synagogues, temples, and mosques. Indeed, the Capacity Directive states that under its boutique definition, prohibited indoor "gatherings" explicitly includes "worship services." Exh. E. What is more, the Gathering Directive most clearly gives preferential treatment to a host of other activities. Many of these are the very ones that the Supreme Court found problematic in *Roman Catholic Diocese of*

Brooklyn v. Cuomo and *South Bay II*, e.g., grocery stores, transportation facilities, liquor stores, airports, body piercing, and hair salons.

Turning specifically to airports, the allowance for 100% capacity is particularly troubling because these restrictions are underinclusive. The District Court's analysis in this regard is not convincing. The Court Order states that groups of people awaiting flights at airport gates do not fall under the definition of a "gathering" because they do not "bring[] together multiple people from separate households in a single space . . . at the same time and in a coordinated fashion." Exh. D, Order at 27, quoting the Gathering Directive.

There are two primary problems with this. First, the definition of "gathering" that the County has created excludes activities and entities which the Supreme Court has found to be proper comparators to places of worship, e.g., big box stores, retail, grocery, personal services, transportation, and airports. The County's essential strategy is: "We're going to say those gatherings aren't 'gatherings' according to our self-created definition."

What is more is that exempting airports from gatherings as the County defines it is inconsistent with its own definition -- the "bringing together [of] multiple people from separate households in a single space . . . at the same time and in a coordinated fashion." Exh. F. This is exactly what occurs at the gate of an airport. Passengers, typically from multiple separate households, are explicitly directed to a given gate to wait in a designated area for a scheduled, coordinated departure; this is the very

definition of a "gathering" under the Gathering Directive as contained within the County Orders. *Id.*

Congregants at a worship service and passengers at a gate not only both fall within the operational definition of the Gathering Directive, but also are remarkably similar in terms of the number of people present (100-400 people), the time seated together (approximately one hour), and the nearness of physical proximity due to that seating. In his concurrence denying emergency relief in a challenge to the State's restrictions on gatherings at houses of worship – restrictions far less draconian than those at issue here -- Chief Justice Roberts explained that the crucial inquiry is whether there is a comparable secular gathering where "large groups of people gather in close proximity for extended periods of time." *South Bay United Pentecostal Church v. Gavin Newsom*, 590 U.S. __ (2020); 140 S.Ct. 1613, 1614 (Roberts, C.J., concurring in denial of application for injunctive relief) (*South Bay I*). Of course, since *South Bay I* two other Supreme Court decisions (***Roman Catholic*** *Diocese of Brooklyn v. Cuomo* and *South Bay II*) have greatly broadened the scope of comparators.

What is more, the record is clear that at the time the County promulgated the Gathering Directive, it never claimed that an airport falls outside of the definition. Instead, the County *exempted* airports from its definition of gatherings. "[T]he Public Health Department is not currently recommending closure of the airport given the

significant societal harms lack of access to travel would cause… ."[7] The evidence is not subject to reasonable dispute that airports were not exempted because they are safe. They were exempted because the State and County considered them *essential* or *critical* entities. This is admitted. Airports were left open "given the significant societal harms lack of access to travel would cause."[8] But "once [the government] creates a favored class of businesses…[it] must justify why houses of worship are excluded from that favored class." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 590 U.S. __ (2020) (Kavanaugh, J., concurring). This leads to the indisputable conclusion that strict scrutiny must apply to the County's Capacity Directive and Gathering Directive.

B. Use of the wrong legal standard by the lower courts is a sufficient ground to grant the application until the County carries its legal burden.

The lower court's application of rational basis review was indisputable error. Because strict scrutiny review applies, the County must prove a compelling interest. As conceded in the courts below, slowing the spread of the pandemic is a compelling interest. But the burden remains for the County to prove that its rules are narrowly tailored and the means are the least restrictive on the liberty interests of the Churches. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 590 U.S. __ (2020). Because the lower

[7] "County of Santa Clara Public Health Department: Statement Regarding COVID-19 and Airports." Mar. 11, 2020. Accessed at https://www.sccgov.org/sites/phd/news/Pages/covid-19-airports.aspx.
[8] *Id.*

courts used the wrong standard of review, the writ of injunction should be granted until the County carries its legal burden.

The County cannot do so because of the exemptions for numerous businesses and airport gates. Orders allowing gatherings at departure gates and other business activities but restricting religious assemblies fail to meet the narrowly tailored requirement for the same reason that the orders are not generally applicable. The stated purpose of the County's Capacity Directive and Gathering Directive is to prevent the spread of a contagious disease. Despite this claim, the County allows the public to congregate as passengers at the gate of an airport but restricts those same persons from congregating at a church as worshipers. The County also allows the public to be at a variety of entities to conduct business at 20% capacity but limits worship services at places of worship to 0% capacity. *See Lukumi*, 508 U.S. at 543 ("The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause.").

Specifically, as to airports, there is no claim by the County, nor can there be, that congregating at airports is safe whereas gathering at a place of worship is not. Just five days before the issuance of the first County worship ban and the shuttering of churches, the County Public Health Director released a statement directly addressing airports: "As many public health officials have noted, **airports present an**

elevated risk of exposure to COVID-19 given the number of people passing through from different locations."[9]

Here the County's orders related to gatherings "fail to prohibit nonreligious conduct" at the airport or other businesses "that endangers these [public health] interests in a similar or greater degree" than the religious conduct of sitting in a church. *Lukumi*, 508 U.S. at 543. The public health orders that have left church buildings abandoned throughout the County are underinclusive and thus fall short of the requirements for narrow tailoring.

II. THE CHURCHES FACE IRREPARABLE HARM BY THE CONTINUED EXCLUSION OF CONGREGANTS FROM INDOOR WORSHIP SERVICES

The Churches have endured eleven months with only the slimmest of opportunities to gather indoors for worship services. Absent immediate judicial relief, by the time briefing is completed at the end of March on the interlocutory appeal, the Churches will have sat mostly empty for a year. "The deprivation of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). As stated in their numerous declarations without objection or dispute, the Churches are mandated by Scripture to meet in-person for corporate worship, prayer, fellowship, and communion. Watching online services is not sufficient. Streaming a prayer service

[9] *CPHD Statement Regarding Airports* (Mar. 11, 2020) (emphasis added). Accessed at https://www.sccgov.org/sites/phd/news/Pages/covid-19-airports.aspx

cannot be an adequate substitute for in-person worship any more than streaming *MasterChef* can be an adequate substitute for sitting down to a meal. Without injunctive relief, the Churches will continue to struggle to meet with severe restrictions and the continued threat of civil and criminal penalties.

III. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN THE CHURCHES' FAVOR.

The balance of equities tips sharply in the Churches favor, as there is no substitute for in-person religious worship and the freedom to assemble peacefully is a core constitutional right. Given their showing of the invalidity of the public health orders, the Churches necessarily have demonstrated that leaving those orders in place for even a brief period of time "substantially chill[s] the exercise of fragile and constitutionally fundamental rights," for many thousands of parishioners who attend the Churches and thereby constitutes an intolerable hardship. *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1011 (N.D. Cal. 2007) (citing *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002). This is all the more true as the one-year anniversary of the suspension of the Churches' First Amendment rights approaches.

The Churches do not question the importance of health and safety. The Churches do question, however, the means by which that end is achieved – "an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640

(1943). The Churches continue to face extreme restrictions on their ability to gather for worship services.

The County would not need to be exposed to meaningful harm as a result of injunctive relief. Moreover, public health officials can still impose reasonable health and safety requirements like they do for numerous entities and activities. The Churches are prepared to follow all reasonable safety precautions equal to those imposed on others. "California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices." *South Bay I* at 1615 (Kavanaugh, J., dissenting). If the County allowed church services, the impact on public health would, at best, be less than and, at worse, be identical to, the impact currently experienced by allowing "essential" and "non-essential" businesses and activities to operate at 20% capacity or by allowing mass gatherings at airport gates.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST

The County has proffered no proof, nor can it, that attendance at the applicant Churches spreads COVID 19. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 592 U.S. ___ (2020). Further, the free exercise of religion and peaceful assembly are core constitutional rights under the First Amendment. "It is always in the public interest to prevent the violation of a party's constitutional rights." *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotation marks omitted). As the County's District Attorney Ms. Alvarado stated, "I don't feel comfortable being in

that position of saying, 'You know, your constitutional rights don't really matter right now,' but I've had to."[10] After eleven months, "it is time -- it is past time" (*Roman Catholic Diocese of Brooklyn v. Cuomo*, (Gorsuch, J., concurring) for these Churches to be able to meet this weekend in a manner consistent with the 25% capacity the Supreme Court granted to the rest of California in *South Bay II*.

V. IN THE ALTERNATIVE, THE COURT SHOULD ALSO GRANT CERTIORARI BEFORE JUDGMENT.

In the alternative to entering an injunction pending appeal, the Court should grant certiorari before judgment in the Court of Appeals and enjoin the Governor's actions pending disposition by this Court. *See* 28 U.S.C. § 2101(e). Religiously discriminatory COVID-19 restrictions are an ongoing problem of nationwide scope—yet without prompt action the Court will be unable to give additional guidance on these issues until next Term.

CONCLUSION

In frustration, Justice Gorsuch wrote, "Today's order should have been needless; the lower courts in these cases should have followed the extensive guidance this Court already gave." *South Bay II*, (Gorsuch, J., concurring). The Churches share that frustration. Enforced by seven-figure administrative fines and the threat of prosecution and incarceration, the County continues to place governmental restraints

[10] Katey Rusch. "How Do You Enforce a Law That Tramples the Land of the Free?" *The New York Times*, May 11, 2020, quoting Santa Clara County Deputy District Attorney, Angela Alvarado. Accessed at https://www.nytimes.com/2020/05/11/us/coronavirus-california-lockdowns.html.

on First Amendment liberties never seen or imagined in this nation prior to 2020. As articulated, perhaps ironically, by the Santa Clara County Deputy District Attorney, "Right now we're putting parts of the Constitution on hold. We really are. Freedom of assembly. Right to practice religion."[11] By this application, the Churches seek the restoration of those rights to open their doors this Sunday and grant the emergency application for writ of injunction. In the alternative, the applicants request the granting of certiorari or summary reversal.

Dated: February 16, 2021

s/ Kevin Snider

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[11] *Id.*

EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 12 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

GATEWAY CITY CHURCH; et al., Plaintiffs-Appellants, v. GAVIN NEWSOM; et al., Defendants-Appellees.	No. 21-15189 D.C. No. 5:20-cv-08241-EJD Northern District of California, San Jose ORDER

Before: CANBY, GRABER, and FRIEDLAND, Circuit Judges.

This appeal challenges the district court's January 29, 2021 order denying in part appellants' motion for a preliminary injunction. Appellants move for an injunction pending appeal, seeking to prohibit the enforcement of Santa Clara County, California's restrictions on indoor gatherings as applied to their places of worship.

"The standard for evaluating an injunction pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (stating standard). We review the district court's denial of a preliminary injunction for abuse of discretion, although we review de novo the district court's interpretation

of the underlying legal principles. *See Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003).

On the basis of the record before us, we conclude that appellants have not demonstrated a sufficient likelihood of success on the merits to warrant injunctive relief pending appeal. *See Winter*, 555 U.S. at 20.

The challenged ban on indoor "gatherings" currently in effect for Santa Clara County applies equally to all indoor gatherings of any kind or type, whether public or private, religious or secular. The Directive, which appears to affect far more activities than most other jurisdictions' health measures, does not "single out houses of worship" for worse treatment than secular activities. *See Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020). Nor does the Directive affect whether appellants may continue to remain open for purposes that do not involve "gatherings."

Accordingly, appellants have not demonstrated that the district court likely erred in determining that the County's prohibition on indoor gatherings is a neutral law of general applicability and therefore properly subject to rational basis review. *See S. Bay United Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258, at *1 (U.S. Feb. 5, 2021) (Barrett, J., concurring) (observing that where a ban on prohibited conduct "applies across the board," it "thus constitutes a neutral and generally applicable law").

Appellants' emergency motion for injunctive relief pending this appeal (Docket Entry No. 6) is therefore denied.

EXHIBIT B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GATEWAY CITY CHURCH, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 5:20-cv-08241-EJD

ORDER GRANTING MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION

Re: Dkt. No. 76

On February 8, 2021, the Court granted Plaintiffs' Emergency Motion for relief pending appeal in light of the Supreme Court's decision in *South Bay United Pentecostal Church, et al. v. Newsom*, 592 U.S. ___ (Feb. 5, 2021) No. 20A136 (20-746) (*South Bay II*). Dkt. No. 75 ("February 8 Order"). On February 9, 2021, Defendants County of Santa Clara and County Health Officer Dr. Sara H. Cody (collectively "County") filed a Motion for Leave to File Motion for Reconsideration of the Court's February 8, 2021 Order. Dkt. No. 76 ("Motion for Leave"). Later that day, Plaintiffs filed a Preliminary Opposition to the County's Motion for Leave. Dkt. No. 77 ("Preliminary Opposition").

The County argues that this Court erred in relying on the Supreme Court decision in *South Bay II*, which addressed the State's restrictions, to enjoin the County's restrictions on gatherings because the County's restrictions remain neutral and generally applicable. In their Preliminary Opposition, Plaintiffs argue that a motion for reconsideration is procedurally improper under Civil Local Rule 7-9(b). Under that rule, a motion for reconsideration is appropriate where "a material difference in fact or law exists from that which was presented to the Court before entry of the

interlocutory order for which reconsideration is sought." Civil L.R. 7-9(b). Although *South Bay II* was published before this Court's February 8 Order, neither party had the opportunity to present arguments related to the new precedent. Having considered the Motion for Leave and Preliminary Opposition, the Court finds that further argument is warranted regarding how *South Bay II* affects Plaintiffs' request to enjoin the County restrictions.

The Court, therefore, orders as follows:

1. The County's Motion for Leave is GRANTED.
2. Enforcement of the February 8 Order is STAYED until the County's motion for reconsideration is resolved.
3. The Court deems the County's Memorandum of Points and Authorities in Support of the Motion for Leave as the County's Memorandum of Points as Authorities in Support of Reconsideration. Plaintiffs' response to the motion for reconsideration shall be due no later than March 8, 2021. The County's reply, if any, shall be due no later than March 12, 2021. A hearing on the motion is tentatively set for March 19, 2021 at 9:00 a.m. via Zoom videoconference.

IT IS SO ORDERED.

Dated: February 10, 2021

EDWARD J. DAVILA
United States District Judge

United States District Court
Northern District of California

EXHIBIT C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GATEWAY CITY CHURCH, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 5:20-cv-08241-EJD

ORDER GRANTING IN PART PLAINTIFFS' EMERGENCY MOTION TO ENJOIN STATE AND COUNTY COVID-19 RESTRICTIONS PENDING INTERLOCUTORY APPEAL

Re: Dkt. No. 47

Plaintiffs Gateway City Church, The Home Church, The Spectrum Church, Orchard Community Church, Trinity Bible Church (collectively "Plaintiffs") move to enjoin the State and County's enforcement of restrictions on indoor worship services or, alternatively, for immediate relief in the form of a temporary injunction of seven days to enable Plaintiffs to file a motion with the Ninth Circuit. Dkt. No. 67 ("Emergency Motion"). The State and the County filed separate responses opposing the Emergency Motion. Dkt. Nos. 71, 72.

On January 29, 2021, this Court issued an Order granting in part and denying in part Plaintiffs' Motion for a Preliminary Injunction seeking relief from the same restrictions. Dkt. No. 64 ("Order"). Specifically, this Court enjoined the 100-person capacity limit for places of worship in Tier 2 and the 200-person capacity limit in Tier 3 of the State's Blueprint but not the percentage based capacity limitations of any tier, nor the prohibition on indoor worship under Tier 1. *See* Order at 29. The Court further enjoined the State from enforcing the Blueprint's restrictions on

activities at places of worship other than worship services, except to the extent that it enforces such restrictions against secular businesses or activities. Relying in part on the decision of the Court of Appeals for the Ninth Circuit in *South Bay United Pentecostal Church v. Newsom*, No. 20- 56358, 2021 WL 222814 (9th Cir. Jan. 22, 2021) (*South Bay*), the Court denied the preliminary injunction in all other respects, finding that Plaintiffs were unlikely to succeed on the merits of their Free Exercise claim because the State and County restrictions were likely to survive strict scrutiny.

On February 5, 2021, the United States Supreme Court granted an application for injunctive relief pending disposition of the petition for a writ of certiorari in *South Bay United Pentecostal Church, et al. v. Newsom*, 592 U.S. ___ (Feb. 5, 2021) No. 20A136 (20-746) (*South Bay II*). The decision reverses in part the decision of the Ninth Circuit in *South Bay*. Specifically, the Supreme Court enjoined the State from enforcing the Blueprint's Tier 1 prohibition on indoor worship services against the applicants in that case, but left in place the State's percentage capacity limitations and the prohibition on singing and chanting indoor. The statement of Justice Gorsuch, with whom a majority of the justices join or concur, found that the State restrictions failed strict scrutiny because "the State fails to explain why narrower options it finds sufficient in secular contexts do not satisfy its legitimate interests" in religious contexts. *See, e.g.*, *id.* at 4 ("The State does not force [hairstylists or manicurists] or retailers to do all their business in parking lots and parks. And California allows people to sit in relatively close proximity inside buses too.").

Justice Gorsuch went on to find that the State's ban on indoor singing and chanting similarly failed to survive strict scrutiny, in part because the ban did not appear to apply to the entertainment industry. *Id.* at 5 ("once more, we appear to have a State playing favorites during a pandemic, expending considerable effort to protect lucrative industries (casinos in Nevada; movie studios in California) while denying similar largesse to its faithful."). Justices Barrett and

Kavanaugh diverged from Justice Gorsuch on this point, finding that there was not enough evidence in the record to support the claim that the entertainment industry was exempt from the singing ban.

In light of the Supreme Court's decision, this Court GRANTS Plaintiffs' Emergency Motion in part. As the Supreme Court set forth, the State shall be enjoined from enforcing against Plaintiffs the prohibition of indoor worship, currently applicable under Tier 1 of the Blueprint. This Court's previously issued injunction against the numerical capacity limitations remains in effect, however, nothing in this order nor in *South Bay II* prevents the State from imposing a 25% capacity limitation on indoor worship services in any Tier.

South Bay II did not consider the County restrictions that are also at issue in this case. This Court previously held that the County restrictions were subject to a rational basis review because the County's ban on indoor gatherings is facially neutral towards religion and is generally applicable to secular and religious gatherings alike. The Court relied in part on the Ninth Circuit's application of rational basis review to the State's ban on indoor singing. Order at 27-28 (citing *South Bay*, 2021 WL 222814, at *18 (holding that California's ban on indoor singing and chanting was subject to deferential rational basis review because it "applies to all indoor activities, sectors, and private gatherings" and there was no evidence that "this ban results in disparate treatment of religious gatherings")). In *South Bay II*, however, a plurality of justices joined or concurred in Justice Gorsuch's application of strict scrutiny to the singing ban. Thus, this Court finds that under *South Bay II*, the County's restrictions on gatherings will likely be subject to strict scrutiny and, under that standard, are likely to fail for the same reasons as the State restrictions. The Court, therefore, GRANTS in part Plaintiffs' Emergency Motion to enjoin enforcement of the County restrictions to the same extent as the State restrictions.

Plaintiffs Emergency Motion is GRANTED in part and DENIED in part. The State and County are hereby enjoined from enforcing a prohibition on indoor worship services pending

Plaintiffs' interlocutory appeal to the Ninth Circuit. Neither the State nor the County are enjoined from enforcing percentage-based capacity limitations on indoor worship services to the same extent that such limitations are enforced against secular business and activities.

IT IS SO ORDERED.

Dated: February 8, 2021

EDWARD J. DAVILA
United States District Judge

EXHIBIT D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

GATEWAY CITY CHURCH, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 5:20-cv-08241-EJD

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Re: Dkt. No. 47

Plaintiffs Gateway City Church, The Home Church, The Spectrum Church, Orchard Community Church, Trinity Bible Church (collectively "Plaintiffs") brought the present motion for a preliminary injunction against Defendants Gavin Newsom, in his official capacity as Governor of California, Sandra Shewry, M.D., in her official capacity as Acting Director of California Public Department of Health (collectively, "State"), the County of Santa Clara, and Sara H. Cody, M.D., in her official capacity as Santa Clara County Health Officer (collectively "County"), and their agents, employees, attorneys, law enforcement, and those acting in concert (altogether, "Defendants"). Plaintiffs seek to restrain enforcement of certain State and County public health orders that prohibit indoor worship services or restrict the number of people permitted in places of worship as part of the State's and County's efforts to slow the spread of COVID-19.

Plaintiffs' motion requires the Court to balance two competing interests of utmost importance: the public interest in the First Amendment freedom to exercise religion and the public health interest in preventing and protecting against the spread of the unprecedented COVID-19

pandemic. The stakes are very high; the ever-increasing number of people afflicted by COVID-19 is devasting. The far-reaching effects of this devastation on the public, in turn, makes communities of faith and spiritual well-being evermore vital.

Courts across the country, including the United States Supreme Court and the Ninth Circuit Court of Appeal, have been weighing these competing interests since the onset of the pandemic, and the case law has evolved alongside our understanding of the virus. After careful consideration of recent precedent, as well as the parties' briefing, evidentiary submissions, and oral arguments, the Court **GRANTS in part and DENIES in part** Plaintiffs' motion for a preliminary injunction.

I. Background

A. COVID-19

The severe respiratory syndrome coronavirus type-2 known as COVID-19 is now the world's deadliest infectious disease. It has killed approximately 430,000 Americans, including nearly 40,000 people in California.[1] Indeed, by some measures, COVID-19 is now the leading cause of death in the United States. *See* Dkt. No. 52-1, Declaration of Todd Grabarsky (First) In Support Of State Defendants' Opposition ("Grabarsky Decl."), Exs. 58-59. There is no known cure and only limited treatment options for the disease. Dkt. No. 52-4, Declaration of George Rutherford, MD, In Support Of State Defendants' Opposition ("Rutherford Decl.") ¶¶ 39-41. New vaccines promise an eventual end to this crisis, however, they are not yet widely available and cases continue to rise. At least 706 new coronavirus deaths and 18,628 new cases were reported in California on January 27, 2021, which will further encumber California's already overburdened health care facilities and intensive care units ("ICUs").[2]

[1] New York Times, *Coronavirus in the U.S.: Latest Map and Case Count*, available at https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html (last updated Jan. 28, 2021); New York Times, *California Coronavirus Map and Case Count*, available at https://www.nytimes.com/interactive/2020/us/california-coronavirus-cases.html (last updated Jan. 28, 2021).

[2] *Id.*

Although much is still unknown about the virus, there is scientific consensus that COVID-19 is transmitted primarily by respiratory droplets containing virus, which are exhaled when individuals breathe, speak, sing, or chant. Rutherford Decl., ¶¶ 29-34; Dkt. No. 52-3, Declaration of Dr. James Watt, MD, MPH, In Support Of State Defendants' Opposition ("Watt Decl.") ¶¶ 25–28. It is also widely acknowledged that many people infected with the virus do not experience any symptoms but may nonetheless transmit COVID-19 to others. *Id.* ¶¶ 30-32; Rutherford Decl. ¶¶ 32-34. Not all exposure to the virus will result in infection, rather, epidemiologists have found 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 a COVID 19 infection." *Id.* ¶¶ 35-36; *see also* Watt Decl. ¶¶ 33, 44.

The risk that the virus will transmit between persons depends on a number of factors, which affect the viral load a person could be exposed to. These include: how many people are gathered in a single space (the more people, the more likely it is that one or more people are infectious), the physical distance between those people (the closer they are, the more likely it is that respiratory droplets from one person will reach another person), the amount of time those people are in close proximity (the longer the time, the more potentially infectious droplets there will be), and the amount of ventilation in the space (the more air flow, the more likely it is that infectious droplets will dissipate before reaching another person), among others. *Id.* ¶¶ 37-46. Transmission risk also increases when infected individuals engage in activities such as speaking, singing, or shouting that increase their breathing and, by extension, exhalations. *Id.* ¶¶ 45-46; Rutherford Decl. ¶¶ 75, 95-100.

Transmission risk may be reduced, but not eliminated, by precautions such as wearing a face mask over the nose and mouth and maintaining a distance of at least six feet from individuals of other households. *Id.* ¶ 75; Watt Decl. ¶¶ 47–53. In order to reduce the risk of transmission and stem the spread of COVID-19, a wide variety of restrictions have been imposed at the local, state, and federal level across the country, including the restrictions at issue in this case.

B. Procedural History

Plaintiffs filed their original complaint on November 23, 2020, followed soon after by an *ex parte* application for a temporary restraining order. Dkt. Nos. 1, 13. On December 2, 2020, this Court issued an order denying the application for a temporary restraining order without prejudice and setting a status conference to discuss the substantive and procedural impact of similar cases then-pending before the Supreme Court. The relevant cases were resolved before the status conference and the Court then set a schedule to proceed with Plaintiffs' preliminary injunction motion. The Court also expressed some doubt about Plaintiffs' standing to challenge past orders which were no longer in effect and permitted Plaintiffs to file an amended complaint and motion focusing solely on the operative State and County orders.

On December 9, 2020, Plaintiffs filed an Amended Complaint. Dkt. No. 40. The Amended Complaint asserts six claims under 42 U.S.C. § 1983: (1) violation of the First Amendment freedom of assembly; (2) violation of the First Amendment Free Exercise Clause; (3) violation of the right to equal protection under the First Amendment; (4) violation of the First Amendment freedom of speech; (5) unreasonable seizure of property in violation of the Fourth Amendment; and (6) violation of the Fourteenth Amendment "privileges and immunities" clause. Plaintiffs also assert a seventh claim for declaratory relief. Alongside the Amended Complaint, Plaintiffs filed 159 exhibits (Dkt. Nos. 41-46), a Motion for Preliminary Injunction (Dkt. No. 47, "Motion") and 25 declarations from Plaintiffs' pastors and other church personnel in support of that motion (Dkt. No. 50).

On December 23, 2020, the State and the County filed separate responses to the Motion. Dkt. No. 52 ("State Opp."); Dkt. No. 53 ("County Opp."). The County attached exhibits A-S, and the State attached exhibits 1-64, many of which overlap with Plaintiffs' exhibits. Defendants also filed multiple declarations, including the expert declarations of Dr. Watt and Dr. Rutherford, whose qualifications and expertise in epidemiology and public health are undisputed. On December 30, 2020, Plaintiffs filed a Reply (Dkt. No. 55) accompanied by 5 supplemental

declarations and 19 additional exhibits (exhibits 159-175).

Plaintiffs also filed objections to the Declaration of the Health Officer for the County of Santa Clara Sara H. Cody ("Cody Declaration") and the Declaration of Dr. Marc Lipsitch ("Lipsitch Declaration"). Dkt. No. 55-7. Specifically, Plaintiffs objected to Dr. Cody's statements about the relative transmission risks of shopping and attending worship services, and her rejection of Plaintiffs' categorical assertions that they have not contributed to the spread of COVID-19. *See, e.g.*, Cody Decl. ¶ 64 (refuting Plaintiffs' assertion that they have not contributed to the spread because "we know that persons who are asymptomatic, but infected, can spread the SARS-CoV-2 infection to others—meaning that a person could become infected by SARS-CoV-2 at a worship service held indoors, remain asymptomatic, and unknowingly transmit the infection to persons who may have never set foot into any of the place of worship's facilities."). Plaintiffs also object to both Dr. Cody's and Dr. Lipsitch's statements about Plaintiffs' failure to comply with county health orders at past indoor worship services. For the reasons stated at the preliminary injunction hearing held January 15, 2021, the Court overrules Plaintiffs' objections.[3]

C. Challenged Orders

Plaintiffs' Motion for Preliminary Injunction specifically seeks to enjoin the State and County's enforcement of four interrelated public health orders.

[3] The Federal Rules of Evidence do not strictly apply to preliminary injunction proceedings. *See Houdini Inc. v. Goody Baskets LLC*, 166 F. App'x 946, 947 (9th Cir. 2006) ("the district court did not abuse its discretion in considering hearsay and biased evidence . . . because the rules of evidence do not strictly apply to preliminary injunction proceedings.") (citing *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (en banc); *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). This flexibility exists because "[t]he urgency of obtaining a preliminary injunction necessitates a prompt determination" and makes it difficult for a party to procure supporting evidence in a form that would be admissible at trial. *Id.* "While district courts may consider inadmissible evidence in the context of a preliminary injunction, this does not mean that evidentiary issues have no relevance to this proceeding. Such issues, however, properly go to weight rather than admissibility." *Disney Enterprises, Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 966 (C.D. Cal. 2016), *aff'd*, 869 F.3d 848 (9th Cir. 2017) (quoting *Am. Hotel & Lodging Ass'n v. City of Los Angeles*, 119 F. Supp. 3d 1177, 1185 (C.D. Cal. 2015), *aff'd,* 834 F.3d 958 (9th Cir. 2016)).

i. The Blueprint

The California Department of Public Health ("CDPH") Statewide Public Health Officer Order dated August 28, 2020, known as the Blueprint for a Safer Economy ("Blueprint") is a framework of risk tiers and sector-specific restrictions, applied and periodically adjusted county-by-county through the State. Plaintiffs' Exs. 25-27. Counties are assigned tiers ranging from "Tier 1-Widespread" to "Tier 4-Minimal" based on testing positivity and "case rate," defined as rate of new Covid-19 infection per capita, excluding prison cases, on a seven-day average. Tier 1 restrictions are the most severe. In counties designated Tier 1, social gatherings (predominately but not exclusively secular) are only permitted outdoors and may only consist of up to three households. Shopping centers and all retail may operate at a maximum of 25% capacity but must close common areas and food courts. Museums, zoos, movie theaters, gyms, restaurants, wineries, cardrooms, family entertainment centers (which include batting cages and mini golf), and importantly, "places of worship" are permitted to operate outdoors only.

In Tier 2 social gatherings are "strongly discouraged" but permitted indoors and may consist of up to three households. Retail and shopping centers may open indoors at 50% capacity. Places of worship, movie theaters, and restaurants may open at 25% capacity or up to 100 people, whichever is fewer. In Tier 3, retail and shopping centers may open "with modifications" but without capacity restrictions, while places of worship may open indoors at 50% capacity or 200 people, whichever is fewer. Regardless of Tier, the Blueprint permits "critical infrastructure," including airports, to open with modifications.

ii. State Regional Order

Issued on December 3, 2020, the State Regional Stay at Home Order (Plaintiffs' Ex. 144) ("Regional Order," together with the Blueprint, "State Orders") imposes further restrictions on top of the Blueprint. This order goes into effect automatically the day after a region has been announced to have less than 15% availability in its hospital Intensive Care Units ("ICUs"). The Regional Order prohibits all gatherings with members of other households, both indoor and

outdoor, but makes an exception for outdoor worship and political expression. In other words, worship services are subject to the Blueprint's Tier 1 restrictions, even in a county where the Regional Order is in effect.

At the time of the preliminary injunction hearing on January 15, 2021, the Regional Order was in effect in three of the five regions in the state, including that Bay Area region. On January 25, 2021, the State lifted the Regional Order completely, as projected ICU availability over 4 weeks in all regions rose to over 15%. Once a region exited the Regional Stay Home Order, counties within that region returned to the applicable tier and rules under the Blueprint. Because the Regional Order could go back into effect if ICU capacity falls again, the Court considers this order even though it is not currently in effect.

iii. The Capacity Directive

The Santa Clara County Capacity Limitations Directive (December 4, 2020) (Plaintiffs' Ex. 159) ("Capacity Directive") was issued November 15, 2020 and was most recently revised January 25, 2021. It establishes capacities for various sectors and activities based on their risk profiles and reflects the rules in the County's various Mandatory Directives as well as the State's Blueprint and other orders. For example, the Capacity Directive provides indoor and outdoor limitations for a number of businesses and activity types, including retail stores (20% capacity indoor), gyms, bars, restaurants, and museums (all prohibited indoor), among others.

The Capacity Directive has been modified since Plaintiffs submitted their motion and supporting exhibits. Whereas the version Plaintiffs submitted had one column capacity limitations generally, the current version splits the capacity limitations into two columns: "indoor" and "outdoor." The current version indicates that "Gatherings (e.g., political events, weddings, funerals, worship services, movie showings, cardroom operations)" are "prohibited" indoors and outdoors are "[a]llowed up to 200 people per gathering, but subject to the limitations set forth by the State, which generally prohibit all gatherings except religious services, cultural ceremonies, political protests, other gatherings allowed by a State guidance document, and outdoor gatherings

of up to 3 households." *See* Mandatory Directive on Capacity Limitations, revised and effective January 25, 2021, available at https://www.sccgov.org/sites/covid19/Documents/Mandatory-Directives-Capacity-Limitations.pdf ("Revised Capacity Directive"). These revisions do not impact the Court's analysis.

iv. The County Regional Stay At Home Order

The County Regional Stay At Home Order (December 3, 2020) (Plaintiffs' Ex. 150-1; Kieschnick Ex. L) (together with the Capacity Directive, the "County Orders") operates to implement the State's Regional Order on a faster timeline. Based on local data that ICU capacity had already fallen below 15% and considering the lag between infection and hospitalization, the County Health Officer determined it was necessary to implement the stricter Stay At Home restrictions on December 6, 2020. Ultimately, the State's Regional Order was triggered for the entire Bay Area on December 16, 2020 when ICU capacity fell to 12.9%.

Also relevant to Plaintiffs' claims is the County Mandatory Directive for Gatherings, which was first issued July 14, 2020. Kieschnick Ex. J at 1 ("Gatherings Directive"). The Gatherings Directive applies to any "event . . . that brings together multiple people from separate households in a single space . . . in a coordinated fashion." The directive applies regardless of whether the event has a religious or secular purpose, such as a wedding, conference, religious service, festival, performance, political event, protest, or sporting event. Plaintiffs do not specifically challenge this order, but it is key to understanding the other County Orders' restrictions on gatherings.

D. Recent Precedent

Courts have been struggling with the questions presented in Plaintiffs' Motion since shortly after the pandemic began. As Defendants point out, up until the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), every federal court to consider challenges to California's limits on worship services found the challenges unlikely to

succeed.[4] The legal landscape, however, has evolved since *Roman Catholic Diocese* and the few cases that have followed it, all of which inform the Court's analysis in this case.

i. *Roman Catholic Diocese of Brooklyn v. Cuomo*

In *Roman Catholic Diocese*, two houses of worship sought an injunction from the Supreme Court pending their appeal in the Second Circuit, seeking relief from an New York Executive Order aimed at stemming the spread of COVID-19 in the state ("New York Order"). *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020). The New York Order imposed restrictions on attendance at religious services in areas classified as "red" or "orange" zones. In red zones, religious service attendance was capped at 10 people, and in orange zones, it was capped at 25. *Id.* at 66. In both zones, however, the order provided that essential businesses could "admit as many people as they wish[ed]." *Id.* The Court noted that "acupuncture facilities, camp grounds, garages, . . . plants manufacturing chemicals and microelectronics[,] and all transportation facilities" were considered "essential." *Id.* Moreover, in orange zones, even "non-essential businesses [could] decide for themselves how many persons to admit." *Id.*

The Supreme Court held that the New York Order, "violate[d] 'the minimum requirement of neutrality' to religion." *Id.* (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). Under the Court's reasoning, the New York Order was not neutral because it "single[d] out houses of worship for especially harsh

[4] *See e.g., S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 207 L. Ed. 2d 154 (2020); *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728 (9th Cir.), *vacated on denial of reh'g en banc*, 981 F.3d 764 (9th Cir. 2020); *South Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020); *South Bay United Pentecostal Church v. Newsom*, No. 20-CV-00865-BAS-AHG, 2020 WL 6081733 (S.D. Cal. Oct. 15, 2020), *vacated and remanded*, 981 F.3d 765 (9th Cir. 2020); *Harvest Rock Church v. Newsom*, 2020 WL 5265564 (C.D. Cal. Sept. 2, 2020), *vacated*, 2020 WL 7061630; *Ministries v. Newsom*, 465 F. Supp. 3d 1068 (S.D. Cal. 2020); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758 (E.D. Cal. 2020), *appeal dismissed*, No. 20-15977, 2020 WL 4813748 (9th Cir. May 29, 2020); *Gish v. Newsom*, No. EDCV20755JGBKKX, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020); *Whitsitt v. Newsom*, No. 220CV00691JAMCKDPS, 2020 WL 5944195 (E.D. Cal. Oct. 7, 2020); *Calvary Chapel San Jose v. Cody*, No. 20-CV-03794-BLF, 2020 WL 6508565 (N.D. Cal. Nov. 5, 2020).

treatment." *Id.* For example, "a large store in Brooklyn . . . could literally have hundreds of people shopping there on any given day," whereas "a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for worship service." *Id.* at 67. The Court held that this "disparate treatment" of religion rendered the COVID-19 restrictions in the order not neutral or generally applicable. *Id.* Thus, the Court applied strict scrutiny.

Applying strict scrutiny, the Court held that "[s]temming the spread of COVID-19 is unquestionably a compelling interest," but concluded the challenged order was not narrowly tailored. *Id.* The Court reasoned that there was no evidence that the two houses of worship had contributed to the spread of COVID-19 and that "there were many other less restrictive rules that could be adopted to minimize the risk to those attending religious services." *Id.* The Court emphasized that the New York Order was "far more severe than has been shown to be required to prevent the spread of the virus," and suggested that as an alternative, New York could have tied maximum attendance at a religious service "to the size of the church or synagogue." *Id.* Because the COVID-19 restrictions in the New York Order did not survive strict scrutiny the Court granted the requested injunction pending appeal.

ii. *Calvary Chapel Dayton Valley v. Sisolak*

On December 15, 2020, the Ninth Circuit issued a published decision reversing a district court's denial of a preliminary injunction to bar enforcement of a Nevada public health order. *Calvary Chapel Dayton Valley v. Sisolak*, 982 F.3d 1228, 1233 (9th Cir. 2020) ("*Dayton Valley*"). The Ninth Circuit held that *Roman Catholic Diocese* compelled strict scrutiny review of Nevada's public health directive, which imposed a fifty-person capacity limit on houses of worship but a 50% capacity limit on certain other businesses ("Nevada Order"). *Id.* at 1232. The panel wrote that *Roman Catholic Diocese* "arguably represented a seismic shift in Free Exercise law." *Id.* Explaining that the Nevada Order "treats numerous secular activities and entities significantly better than religious worship services" including "[c]asinos, bowling alleys, retail businesses, restaurants, arcades," leading to "the same 'disparate treatment' of religion" as the New York

Order. *Id.* at 1233. Thus, the Ninth Circuit applied strict scrutiny. The court found that Nevada held a compelling interest in slowing the spread of COVID-19 but concluded that the directive was not narrowly tailored to the compelling interest "because, for example, 'maximum attendance at a religious service could be tied to the size of the [house of worship].'" *Id.* at 1234. (citing *Roman Catholic Diocese*, 141 S. Ct. at 66-67).

v. South Bay United Pentecostal Church v. Newsom

The South Bay United Pentecostal Church first requested a preliminary injunction against the State Orders in May 2020. After that request was denied, the church sought emergency relief from the Ninth Circuit and then the Supreme Court. The Supreme Court denied the church's application for relief, *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 207 L. Ed. 2d 154 (2020), and remanded to the district court, where injunctive relief was once again denied. *South Bay United Pentecostal Church v. Newsom*, No. 20-CV-00865-BAS-AHG, 2020 WL 7488974 (S.D. Cal. Dec. 21, 2020).

On January 22, 2021, the Ninth Circuit published its opinion affirming the district court's denial of the preliminary injunction. *South Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2021 WL 222814 (9th Cir. Jan. 22, 2021) (*South Bay*). The Ninth Circuit considered the State Orders at issue in this case and much of the same evidence presented by the State. The court concluded that under the standards set forth in *Roman Catholic Diocese* and *Dayton Valley*, the State Orders were subject to a strict scrutiny review. After a careful examination of the State's justification for each restriction on worship services, the Ninth Circuit determined that "given the contagiousness of this deadly virus and the dire circumstances facing Southern California's healthcare system at this moment in its history," the prohibition on indoor worship services was Constitutional because "there exist no less restrictive means to alleviate the situation." *South Bay*, 2021 WL 222814, at *16. In contrast, the court found that the 100- and 200-person limits on capacity at worship services in Tiers 2 and 3 of the Blueprint were not narrowly tailored, and the plaintiff was therefore likely to succeed on its Free Exercise challenge to those specific

restrictions. *Id.* at *18. Finally, the court found that the State's separate ban on indoor singing and chanting was subject only to a rational basis review, which it was likely to survive. *Id.* Thus, the court affirmed the district courts denial of a preliminary injunction but remanded with instructions for the district court to enjoin the numerical limits on capacity.

vi. Harvest Rock Church v. Newsom

Following *Roman Catholic Diocese*, the Supreme Court declined to consider a similar application for emergency relief from a California church, Harvest Rock. Instead, the Supreme Court remanded the case to the district court for further consideration in light of *Roman Catholic Diocese*. *Harvest Rock Church v. Newsom, Gov. of CA*, No. 20A94, 2020 WL 7061630, at *1 (U.S. Dec. 3, 2020). The district court denied the requested preliminary injunction, finding that the Blueprint was neutral and generally applicable. *Harvest Rock Church, Inc. v. Newsom*, No. EDCV206414JGBKKX, 2020 WL 7639584, at *6 (C.D. Cal. Dec. 21, 2020). The court further found that the Blueprint would nevertheless survive strict scrutiny because it was "painstakingly tailored to address the risks of Covid-19 transmission specifically." *Id.*

Harvest Rock Church sought an emergency injunction pending appeal at the Ninth Circuit. On January 25, 2021, in accordance with its decision in *South Bay*, the Ninth Circuit granted the preliminary injunction as to the fixed 100- and 200-person capacity limitations on indoor worship services in Tiers 2 and 3 of the Blueprint, but denied the injunction in all other respects. *Harvest Rock Church, Inc. v. Newsom*, No. 20-56357, 2021 WL 287832, at *2 (9th Cir. Jan. 25, 2021). In a concurring opinion, Judge O'Scannlain acknowledged that the outcome was warranted under *South Bay* but expressed strong disagreement with the court's decision in *South Bay*. *Id.* at *2-4 (O'Scannlain, J., concurring).

II. Legal Standard

The Supreme Court has emphasized that preliminary injunctions are an "extraordinary remedy never awarded as of right." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249

(2008). To secure a preliminary injunction Plaintiffs must make a clear showing that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20–22. In the Ninth Circuit, the first element may also be met where there are "'serious questions going to the merits' and a hardship balance that tips sharply towards the plaintiff [which] can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

III. Discussion

Plaintiffs' Amended Complaint raises seven claims, however, their Preliminary Injunction Motion only argues the merits of their First Amendment Free Exercise claim (Claim Two).

a. Likelihood of Success on the Merits as to the State Orders

"The first factor under *Winter* is the most important—likely success on the merits." *Garcia*, 786 F.3d at 740 (citing *Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) ("We begin with the first and most important factor: whether petitioners have established a likelihood of success on the merits.")).

"The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment . . . provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]'" *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 876–77, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (internal citations and emphasis omitted). In determining whether a law prohibits the free exercise of religion, courts first ask whether the law "is neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531 (citing *Employment Div., Dept. of Human Resources of Oregon*, 494 U.S. at 879). If it is, then the law need only survive rational basis review—even if it "has the incidental effect of burdening a particular religious practice." *Id.* If a law is not neutral and generally applicable, the law must

survive strict scrutiny review. *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. 520.

i. Level of Scrutiny

The first step in the analysis is to determine whether the State Orders are neutral and generally applicable, or whether "the object of a law is to infringe upon or restrict practices because of their religious motivation." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533. Traditionally, under *Lukumi*, courts determine whether a law is "neutral and of general applicability," by considering whether the law treats religious conduct less favorably than "analogous non-religious conduct." *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531–32, 546; *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (examining "comparable secular conduct").

In *Roman Catholic Diocese*, the Supreme Court found that New York's orders "cannot be viewed as neutral because they single out houses of worship for especially harsh treatment." *Roman Catholic Diocese of Brooklyn*, 141 S. Ct. at 66. The Supreme Court explained:

> In a red zone, while a synagogue or church may not admit more than 10 persons, businesses categorized as "essential" may admit as many people as they wish. And the list of "essential" businesses includes things such as acupuncture facilities, camp grounds, garages, as well as many whose services are not limited to those that can be regarded as essential, such as all plants manufacturing chemicals and microelectronics and all transportation facilities. . . . The disparate treatment is even more striking in an orange zone. While attendance at houses of worship is limited to 25 persons, even non-essential businesses may decide for themselves how many persons to admit.
>
> These categorizations lead to troubling results. At the hearing in the District Court, a health department official testified about a large store in Brooklyn that could "literally have hundreds of people shopping there on any given day." . . . Yet a nearby church or synagogue would be prohibited from allowing more than 10 or 25 people inside for a worship service. And the Governor has stated that factories and schools have contributed to the spread of COVID–19, . . . but they are treated less harshly than the Diocese's churches and Agudath Israel's synagogues, which have admirable safety records.

Id. at 66–67. Thus, in determining whether the New York Orders were neutral and generally applicable, the Supreme Court did not specifically consider whether houses of worship were

treated less favorably than analogous secular facilities. Rather, the Supreme Court emphasized the disparate treatment of non-analogous places such as campgrounds, garages, manufacturing plants, and all transportation facilities. The per curium opinion did not elaborate on these points of comparison, however, Justice Kavanaugh's concurring opinion succinctly captures the approach the Court appeared to take. He writes:

> "[U]nder this Court's precedents, it does not suffice for a State to point out that, as compared to houses of worship, *some* secular businesses are subject to similarly severe or even more severe restrictions. . . . Rather, once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class."

Id. at 73 (Kavanaugh, J., concurring); *see also Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2613, 207 L. Ed. 2d 1129 (2020) (Kavanaugh, J., dissenting) ("The point is not whether one or a few secular analogs are regulated. The question is whether a single secular analog is not regulated.").

In *Dayton Valley*, the Ninth Circuit noted that the Supreme Court's approach in *Roman Catholic Diocese* "arguably represented a seismic shift in Free Exercise law." *Dayton Valley*, 982 F.3d at 1232. In evaluating Nevada's public health restrictions on places of worship, the panel held that *Roman Catholic Diocese* compelled the application of strict scrutiny because "[j]ust like the New York restrictions, the Directive treats *numerous secular activities and entities* significantly better than religious worship services." *Id.* (emphasis added). Notably, the panel dropped the "comparable" or "analogous" requirement. *Cf. Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 531–32, 546 (considering whether the law treats religious conduct less favorably than "*analogous* non-religious conduct") (emphasis added); *Stormans, Inc.*, 794 F.3d at 1079 (examining "*comparable* secular conduct") (emphasis added). The Ninth Circuit instead pointed to "[c]asinos, bowling alleys, retail businesses, restaurants, arcades, and other similar secular entities," which were allowed to operate at a higher capacity than houses of worship. As a result, the panel found the Nevada restrictions created the same disparate treatment of religion as the

New York Orders, triggering strict scrutiny review.

Similarly, in *South Bay*, the Ninth Circuit explained that *Roman Catholic Diocese* compels courts to apply strict scrutiny "whenever a state imposes different capacity restrictions on religious services relative to non-religious activities and sectors. *South Bay*, 2021 WL 222814, at *8 (citing *Roman Catholic Diocese*, 141 S. Ct. at 66–67). Both the Regional Order and the Blueprint were at issue in *South Bay*. The court explained that "the restrictions do permit grocery stores and retail establishments to operate at 35% and 20% of capacity, respectively, under the Regional Stay at Home Order and at 50% and 25% of capacity, respectively, under Tier 1 of the Blueprint. Tier 1 also permits certain personal care services, such as hair and nail salons, to open indoors subject to additional modifications and strict industry guidance." The court concluded that given these lesser restrictions on secular activities, the total prohibition of indoor worship constitutes "'disparate treatment' of religion [and] triggers strict scrutiny review." *Id.* at *9 (citing *Dayton Valley*, 982 F.3d at 1233).[5] Pursuant to *South Bay*, *Dayton Valley*, and the Ninth Circuit's application of *Roman Catholic Diocese*, this Court holds that the State Orders are subject to strict scrutiny.

To satisfy strict scrutiny, the State must demonstrate that the State Orders are "'narrowly tailored' to serve a 'compelling' state interest." *Roman Catholic Diocese*, 141 S. Ct. at 67 (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 546). Although strict scrutiny imposes a high bar, courts have "upheld laws—even under strict scrutiny." *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 449, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015) (collecting cases).

[5] In finding that strict scrutiny applies, the panel noted that they found "no record evidence of animus toward religious groups" by the state. *South Bay*, 2021 WL 222814, at *9, n.21; *cf. Roman Catholic Diocese*, 141 S. Ct. at 66 (noting "a variety of remarks made by the Governor" that the restrictions were intended to "specifically target[] the Orthodox Jewish community"). This Court likewise finds no evidence of animus by the State or County in the extensive record before it. Indeed, Plaintiffs do not argue that the State or County demonstrated animosity towards religion, rather, they argue that strict scrutiny applies even in the absence of animosity. Mot. at 6-7 (citing *Roberts v. Neace*, 958 F.3d 409, 415 (6th Cir. 2020) ("The constitutional benchmark is 'government neutrality,' not 'governmental avoidance of bigotry.")); *see also Roman Catholic Diocese*, 141 S. Ct. at 66 ("even if we put those [hostile] statements aside, the regulations cannot be viewed as neutral because they single out houses of worship for especially harsh treatment").

ii. Compelling Government Interest

The Supreme Court expressly held that "[s]temming the spread of COVID-19 is unquestionably a compelling interest." *Roman Catholic Diocese*, 141 S. Ct. at 68. The Ninth Circuit held the same. *South Bay*, 2021 WL 222814, at *10 (concluding, over plaintiff's objections, that "California has a compelling interest in reducing community spread of COVID-19"); *Dayton Valley*, 982 F.3d at 1234 ("though slowing the spread of COVID-19 is a compelling interest, the [Nevada Order] is not narrowly tailored to serve that interest."). Moreover, although Plaintiffs make an argument that the situation is no longer one of exigency, they also concede that "[s]lowing the spread of COVID-19 certainly qualifies as a compelling interest." Motion at 13. Thus, the likelihood of success of Plaintiffs' Free Exercise claim turns on whether the State can demonstrate that its restrictions on places of worship are narrowly tailored to achieve this compelling interest.

iii. Narrow Tailoring

In order to show that the restrictions on indoor worship are narrowly tailored, the State must show that they are "the least restrictive means of achieving some compelling state interest." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981).

1. Prohibition of indoor worship

The State argues that the restrictions on places of worship in the State Orders, including the prohibition of indoor worship under Tier 1 and the Regional Order, are narrowly tailored to stem the spread of COVID-19 because they are based on objective data and a science-driven risk assessment process. Specifically, the risk associated with each activity listed in the Blueprint was evaluated according to seven risk factors focused on the method by which the virus is transmitted. *South Bay*, 2021 WL 222814, at *10. These factors are: (1) ability to accommodate wearing masks at all times; (2) ability to allow physical distancing; (3) ability to limit the duration of exposure; (4) ability to limit the amount of mixing of people from differing households and

communities; (5) ability to limit the amount of physical interactions of visitors/patrons; (6) ability to optimize ventilation; and (7) ability to limit activities that are known to cause increased spread.

According to the State, these factors are based on a scientific understanding of the way the virus is transmitted, including the fact that "viral load"—the amount of virus a person is exposed to during any given activity—affects how likely a person is to become infected and to become ill. This means that the length and concentration of a person's exposure to the virus matters. In light of that understanding, the State carefully crafted the risk factors laid out above and used those factors to assess the risk of transmission associated with various activities. In doing so, the State determined that indoor worship services pose an enormous risk of transmission because they bring a large group of people together to sit near one another in the same space for an extended period of time, indoors, where air flow is limited, with socializing, singing, chanting and other conduct that increases transmission risk. Watt Decl. ¶¶ 38, 53, 70 99; Rutherford Decl. ¶¶ 90-94, 106. These characteristics of indoor worship services increase the viral load that a person might be exposed to during the activity, which in turn increases the risk of infection and illness. The risky nature of worship services can be alleviated, in part, by increasing ventilation, which is why the State Orders permit worship services outdoors.

State health experts determined that indoor worship services were riskier than shopping at retail or grocery stores, both of which are treated more favorably under the State Orders, because people tend to move quickly through retail and grocery stores and are less likely to interact with people outside of their households. Rutherford Decl. ¶¶ 112-18. These differences meaningfully decrease the viral load a shopper might be exposed to, which makes the activity significantly less risky. *Id.* at 112, 116. Other activities, such as personal care services, are less risky because although they "may bring together people in close contact with one another, they involve small numbers of individuals interacting, in contrast to the numbers of individuals commonly present at indoor worship services. *South Bay*, 2021 WL 222814, at *12 (internal quotations omitted). Moreover, personal care services are more easily subject to additional mandatory hygienic

requirements—*e.g.*, a mandatory secondary barrier in addition to a face mask—that further decrease risk. The number of people and nature of worship services make these more burdensome requirements impractical.

In *South Bay*, both the district court and the Ninth Circuit carefully examined the State's application of its seven risk factors to the sectors and activities that are subject to lesser restrictions than places of worship. *Id.* at *11-13. The district court held, and the Ninth Circuit affirmed, that the State's risk assessment of each activity justified the restrictions applied to each activity. Specifically, the Ninth Circuit found that the State "tailored its 'restrictions to the specific mechanism of Covid-19 transmission: viral droplets which travel through the air from person to person.'" *Id.* at *15 (quoting *Harvest Rock Church, Inc.*, 2020 WL 7639584, at *7).

The *South Bay* court distinguished the State Orders from the restrictions at issue in *Roman Catholic Diocese* and *Dayton Valley*, finding that the State Orders were not "especially harsh" toward religion. *Id.* at *15. On the contrary, the State's "objective risk assessment treats all communal gatherings the same across activities and sectors." *Id*. Indeed, the Supreme Court itself described the New York Order as "far more restrictive" than a previous iteration of the State restrictions, which have been incorporated into Tier 2 of the Blueprint. *Roman Catholic Diocese*, 141 S. Ct. at 67 n.2 (citing *South Bay United Pentecostal Church*, 140 S. Ct. 1613); *see also id.* at 74 (Kavanaugh, J., concurring) ("New York's restrictions on houses of worship are much more severe than the California and Nevada restrictions at issue in *South Bay* and [*Dayton Valley*] . . . ."); *id.* at 75 (Roberts, C.J., dissenting) (observing that the New York restrictions are "distinguishable from those we considered in [*South Bay*]").

Plaintiffs primarily argue that the State's proffered justification for its prohibition of indoor worship is undermined by the fact that the State Orders completely fail to restrict similarly risky activity. Plaintiffs focus on airport gates as an example of an unregulated, similarly risk activity. They argue that airport gates present substantially similar risk to indoor worship services because people at airport gates gather in large groups, sit near each other, in rows, for extended periods of

time while waiting for their flight. Yet, airports are not subject to *any* restrictions under the State Orders, let alone the strict capacity limitations or prohibition on indoor operations that places of worship are subject to. Plaintiffs, therefore, specifically request that they be allowed to resume indoor operations to the same extent as airports.

In response, the State first argues that the comparison fails because federal law preempts state regulation of airports and air travel, and therefore, the State does not have the power to regulate airports in the same way it regulates other activities. Opposition at 15 (citing *Montalvo v. Spirit Airlines*, 508 F.3d 464, 468 (9th Cir. 2007) ("the FAA preempts the entire field of aviation safety through implied field preemption")). Whether and the extent to which hypothetical restrictions at airports, such as capacity limitations or social distancing, would be preempted by federal law is outside the scope of this motion. Suffice it to say that the federal government does not categorically prohibit local governments from imposing public health ordinances on airports; rather, it has indicated that any such measures must be approved by the FAA. *See* Grabarsky Decl. Ex. 51 (stating that "all proposed closing of airport access," "closing of gates or sections of terminals," and "screening or quarantining of passengers" among other restrictions must be approved by and coordinated with the FAA). It does not follow that the State and County cannot impose *any* public health measures on airports at all. Thus, the possibility that measures taken without FAA approval might be preempted does not, in itself, explain the difference in treatment of airports and places of worship.

The State next argues that airport gates are not comparable to indoor worship services because they pose a lesser risk of transmission. Airports like the Norman Y. Mineta San Jose International Airport are immense facilities with efficient airflow and ventilation systems and are subject to a host of federal rules and regulations not applicable or feasible for places of worship, all of which greatly lower transmission risk. Rutherford Decl. ¶¶ 105, 123-29; Grabarsky Decl. Exs. 56-57. Unlike at worship services, people in airports typically do not interact with members of other households, carry on social conversations, sit in one place for an hour or more, or engage

in singing, chanting, or other activities that increase viral exposure. *See South Bay*, 2021 WL 222814, at *13 ("unlike worship services, interactions in a transit setting are likely to be asocial, brief and distant . . . Furthermore, chanting or yelling is uncommon—perhaps even alarming—in these environments").

Plaintiffs' assertion that "[t]he reality of gatherings at airport gates is that they are quite social with tremendous interaction," is entirely anecdotal and speculative. Reply at 13. On the other hand, the State's characterization of behavior at worship services—*i.e.*, that it is inherently social and interactive—is supported by countless declarations from Plaintiffs' pastors and personnel. *See, e.g.*, Decl. Jonathan Reynolds Support ¶ 11 ("Our services at GCC are spiritual events, but also very social. Our people love to gather, greet each other, and enjoy the company of each other as they worship, pray, and hear a message. Our services consist of times of corporate singing and prayers").[6] As these declarations make clear, the fellowship of worshipping together is central to the practice of Plaintiffs' faith and the absence of such fellowship has undeniably caused harm to individuals and communities of Plaintiffs' faith. But it is, in part, this social aspect of worship that distinguishes worship services from airport gates in a way that makes worship services substantially riskier activities.

Plaintiffs further contend that the total prohibition of indoor worship under the Regional Order and Tier 1 of the Blueprint is overinclusive because it prohibits more activity than necessary

[6] *See also* Declaration of Rev. George Kistler ¶ 7 ("God has created humans as social beings, . . . we must be able to meet together in person with real human interaction. We must be able to freely exercise our religious expression and have interaction with our God together through our worship, which must include singing."); Declaration of Rev. Cobb ¶ 27 ("it is imperative that we gather as a church body to fellowship, worship and connect relationally. . . . It is only through gathering as a church body can we experience the benefits of receiving teaching on moral Biblical truths, encouragement by physical connection, [and] singing as a group which release the soul to a state of peace and joy."); Declaration of Rev. Hector Moreno ¶ 66 ("Worship services are participatory responsive gatherings where people actively 'come before his presence with singing' and 'enter into his gates with thanksgiving', worshipping the Lord together, in songs of praise, songs of thanksgiving, songs of joy, new songs, and songs in the Spirit . . . God's people worship, speak, inquire, teach and hear the word of God together, and partake of the sacraments together of communion . . . people assemble for fellowship and breaking bread and for prayer"); Declaration of Dr. Samuel ¶ 36 ("Worship[] services are vital to the social and spiritual health."); Declaration of Rev. Todd Burgett ¶ 55 (same).

to prevent the spread of COVID-19. Plaintiffs argue that "[s]ocial distancing, masks, and hand washing will protect congregants from exposure to the virus." Mot. at 8. The State's health officials concluded that these measures are "good . . . but insufficient" to reduce community transmission. Watt Decl. ¶¶ 100-01. In support of their assertion that lesser protective measures would suffice, Plaintiffs rely on their own observations that none of the Plaintiff churches experienced an outbreak nor "contributed to the spread of COVID-19" when they were operating indoor worship and taking these basic safety precautions. Reply at 3. Because of the reality that the virus may transmit through asymptomatic individuals, the Court does not find Plaintiffs' observations reliable or compelling. *See South Bay*, 2021 WL 222814, at *14 (finding that plaintiff's "self-serving assertion that it has experienced no incidence of the virus among its worshipers is entirely anecdotal and undermined by evidence of outbreaks in similarly situated places of worship.").

Plaintiffs also rely on the Declaration of Dr. Jayanta Bhattacharya, a Professor of Medicine at Stanford University, who recommends that public health officials adopt an approach of "focused protection of those at higher risk of serious injury instead of shutting down society." Dkt. No. 50-24, Declaration of Dr. Jayanta Bhattacharya In Support Of Plaintiffs' Ex Parte Application For Temporary Restraining Order and Order to Show Cause Why a Preliminary Injunction Should Not Issue Against Defendants ("Bhattacharya Decl.") ¶ 4. According to this theory, the State does more harm by imposing harsh lockdown measures than would be done by allowing COVID-19 to spread freely because only a minority of those who contract COVID-19 become seriously ill or die. *Id.; see generally*, The Great Barrington Declaration, Plaintiffs' Ex. 98. Dr. Bhattacharya opines that given the very high infection survival rate of most age groups, the public health benefits of worship services outweigh the public health risks of transmission. Bhattacharya Decl. ¶¶ 45-49. As an initial matter, the Court is not persuaded by Dr. Bhattacharya's focus on infection survival rates, considering that many individuals who survive COVID-19 suffer serious long-term side effects and many others experience significant suffering

before recovering. Watt Decl. ¶¶ 21-23. Preventing suffering and long-term side-effects are legitimate public health benefits not taken into account in Dr. Bhattacharya's approach.

More fundamentally, Dr. Bhattacharya does not contradict any of the State's evidence or conclusions regarding viral transmission, rather, he questions the wisdom of restricting activities based on transmission risk without considering the countervailing benefits of those activities. *Id.* ¶ 39. Regardless of the merits of Dr. Bhattacharya's critique, this cost-benefit analysis is a matter of public policy. Courts have recently and consistently reiterated that matters of public health policy are best left to politically accountable public health officials, not the courts. *See Roman Catholic Diocese*, 141 S. Ct. at 74 (Kavanaugh, J., concurring) ("Federal courts [] must afford substantial deference to state and local authorities about how best to balance competing policy considerations during] the pandemic."); *id.*, at *3 ("Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area."); *Dayton Valley*, 982 F.3d at 1232 n.3 (same); *South Bay*, 2021 WL 222814, at *14 ("[W]hile some may disagree with the local public health officials' assessments of what constitutes comparable activities based on the seven risk factors, . . . such risk assessment—which necessarily reflects the local climate, infrastructure, and public health outcomes of prior policies—is a question of policy-making better deferred to the local public health officials."). This deference is particularly important where there is disagreement in the scientific community. As Chief Justice Roberts explained in his concurring opinion to the denial of emergency relief in *South Bay*:

> When [politically accountable] officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

South Bay United Pentecostal Church, 140 S. Ct. at 1613–14 (Roberts, C.J., concurring) (citations omitted and altered).

In the context of a dynamic and unprecedent pandemic, this Court is satisfied that "California did exactly what the narrow tailoring requirement mandates—that is, California has carefully designed the different exemptions to match its goal of reducing community spread, based on a neutral, seven-factor risk analysis." *South Bay United Pentecostal Church*, 2020 WL 7488974, at *11; *see also Harvest Rock Church, Inc.*, 2020 WL 7639584, at *9 ("[i]f 'narrowly tailored' does not mean based on the specific mechanism of Covid-19 infection with sliding levels of restriction based on scientific likelihood of viral spread in any given scenario, it means nothing.").

2. Numerical Capacity Restrictions

Although the prohibition of indoor worship currently in effect under Tier 1 of the Blueprint (and previously in effect under the Regional Order) survives strict scrutiny, the Court must also consider the restrictions imposed under Tiers 2, 3, and 4 of the Blueprint that will go into effect as the infection rate in the county decreases. Specifically, the State must also justify its imposition of a 25% or 100-person (whichever is fewer) capacity limitation on places of worship in Tier 2 and a 50% or 200-person capacity limitation in Tier 3, when certain secular activities are not similarly subject to a fixed capacity limitation. The Ninth Circuit considered this question in *South Bay*:

> Whereas the State has submitted substantial evidence as to why indoor worship is unsafe at any level in counties where COVID-19 is "widespread" and ICU capacity is non-existent, we cannot find record evidence to support its assertion that the 100-person cap in Tier 2 and 200-person cap in Tier 3 are necessary to achieve its goal in further slowing community spread. As in *Roman Catholic Diocese*, "there are many other less restrictive rules that could be adopted to minimize the risk to those attending religious services." . . . And while 100 or 200 people could overwhelm a small chapel, a large church the size of South Bay could easily implement social distancing with much higher numbers. Accordingly, we conclude that South Bay is likely to succeed on the merits of its Free Exercise claim with respect to the numerical caps in Tiers 2 and 3."

South Bay, 2021 WL 222814, at *18 (citations omitted).

As in *South Bay*, the State in this case has not shown any scientific basis for why the transmission risk would increase with over 100 people present regardless of the size of the church.

Nor have they explained why less restrictive measures, such as the percentage caps alone, would cause any greater peril to the public. Thus, the Court finds that the 100- and 200-person limitations under Tiers 2 and 3 of the Blueprint are not narrowly tailored to serve a compelling interest and Plaintiffs are likely to succeed on the merits of this portion of their claim.

3. Restrictions on "Places of Worship"

The State Orders mandate that in Tier 1 of the Blueprint and under the Regional Order, "places of worship" may operate "outdoor only with modifications." Blueprint, Plaintiffs' Ex. 27. As discussed above, the State has presented compelling evidence that a prohibition on indoor *worship services* is narrowly tailored, however, Plaintiffs contend that the restriction prohibits all other activities at places of worship as well. Plaintiffs maintain that "not one pastor could assemble with one parishioner in any church" while subject to Tier 1 or Regional Order restrictions. Amended Complaint ¶ 8.

At the preliminary injunction hearing on January 15, 2021, the State insisted that "what the State's orders address are worship services . . . it's not true that all houses of worship are shuttered, . . . the state isn't regulating building by building, rather it's the activity that occurs in any building [that is prohibited]." Transcript, Dkt. No. 62, at 34:20-25:6. Despite the State's assurances, the Court finds that the restriction as written is not limited to worship services. On its face, the phrase "places of worship" refers to the buildings, facilities, or locations where worship occurs, not the activity of worshipping. The State has not offered and the Court is not aware of any guidance or order from the State indicating that "places of worship" are free to operate indoors for purposes other than worship services. The Court, therefore, agrees with Plaintiffs' interpretation of the State Orders as prohibiting even one parishioner from entering his or her place of worship for any purpose, including solitary prayer, confession, or making an offering.

The Court further finds that this overinclusive drafting results in restrictions on the free exercise of religion that are not narrowly tailored to combatting COVID-19. The State's justification for the restrictions on places of worship pertain solely to worship services. The risks

associated with people of separate households gathering in close proximity for extended periods of time, or involved in singing or chanting, are not present when individual parishioners, or even multiple members of the same household, enter a place of worship for a purpose other than attending a worship service. When not attending worship services, people are likely to move through places of worship in a manner similar to the way they move through retail stores or grocery stores. To the extent individual parishioners interact with clergy, those interactions likely involve no more risk than certain personal care services, and that risk could be mitigated in similar ways. Thus, the Court finds that Plaintiffs are likely to succeed on their Free Exercise claim to the extent that the State Orders restrict activity at places of worship other than worship services.

b. Likelihood of Success on the Merits as to the County Orders

Although the Ninth Circuit's express holding in *South Bay* and the standard set forth in *Dayton Valley*, compel a strict scrutiny review of the State Orders, neither of those courts had reason to consider the County Orders at issue in this case. Thus, this Court must first consider what level of scrutiny applies to the County Orders.

Unlike the State Orders, the County Orders do not impose any express restrictions on "places of worship." Rather, the County Orders regulate "gatherings" generally. *See* Capacity Directive, Plaintiffs' Ex. 147. Specifically, the current version of the Capacity Directive states that indoor operation is "prohibited" for "Gatherings (e.g., political events, weddings, funerals, worship services, movie showings, cardroom operations)." Revised Capacity Directive. In the County's Mandatory Directive on Gatherings, a gathering is defined as "an event, assembly, meeting, or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and in a coordinated fashion—like a wedding, banquet, conference, religious service, festival, fair, party, performance, movie theater operation, barbecue, protest, or picnic." *See* Gatherings Directive, Kieschnick Ex. J at 1. Apart from the gatherings that take place within them, places of worship themselves presumably fall into the category of "Any Other Facility Allowed to Open to the Public Under State and Local Orders,"

which is subject to a 20% capacity limitation. Revised Capacity Directive.[7]

Plaintiffs slightly mischaracterize the Capacity Directive. Plaintiffs argue that "SCC's Mandatory Directive on Capacity Limitations (Ex 147), states specifically that 'indoor operations are prohibited' for places of worship." Motion at 12. It does not. The Capacity Directive limits gatherings of all types, which includes worship services. Plaintiffs further argue that the Capacity Directive is not neutral because it references "worship services" as an example of a gathering and that laws "referenc[ing] . . . any religious practice, conduct, belief, or motivation" are not facially neutral. Motion at 15 (citing *Stormans, Inc.*, 794 F.3d at 1076). The County argues that listing worship services as one of many examples of activities captured by the definition of gatherings does not evidence any discriminatory or even disparate treatment of worship services. County Opp. at 9 (citing *Gish*, 2020 WL 1979970, at *5 ("[F]acial neutrality does not require freedom from any mention of religion.")). On the contrary, the inclusion of worship services in a non-exclusive list of both religious and secular activities demonstrates that all similar activities are treated the same under the law.

As with the State Orders, Plaintiffs argue that the County restrictions on gatherings are underinclusive because they do not reach groups of people at airport waiting gates. For the reasons stated above, this is unpersuasive. Moreover, groups of people at airport gates do not meet the definition of "gathering" because they do not "bring[] together multiple people from separate households in a single space . . . at the same time and in a coordinated fashion." *See* Gatherings Directive at 1–2. This definition of gatherings is entirely neutral toward religion. The capacity limitations are generally applicable to any gathering—religious or secular—that meets the neutral definition. In other words, worship services are not "single[d] out" nor are they subject to "especially harsh treatment" under the County Orders. *Cf. Roman Catholic Diocese*, 141 S. Ct. at 66; *see also South Bay*, 2021 WL 222814, at *18 (holding that California's ban on indoor

[7] Under the previous version submitted by Plaintiffs, this category consists of "All Other Facilities (including Governmental Facilities)," in which "[a]ny indoor areas accessible to the public are limited to 10% capacity." Capacity Directive at 7.

singing and chanting was subject to deferential rational basis review because it "applies to all indoor activities, sectors, and private gatherings" and there was no evidence that "this ban results in disparate treatment of religious gatherings"). The Court, therefore, applies a rational basis review of the County Orders.

The County Orders survive a rational basis review because they further the government's interest in preventing community spread as well as protecting worshippers, the communities in which they live, and the public in general. As discussed above, gatherings of people from multiple households, particularly indoors, carry a high risk of transmission. Preventing people from gathering indoors and limiting the number of people permitted to gather outdoors rationally furthers the legitimate goal of slowing transmission of the virus.

c. Irreparable Harm

It is well-settled that loss of First Amendment freedoms, for even minimal periods of time "unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (plurality opinion); *Roman Catholic Diocese*, 141 S. Ct. at *67 ("There can be no question that the challenged restrictions, if enforced, will cause irreparable harm."); *South Bay*, 2021 WL 222814, at *16 (holding that plaintiff was "suffering irreparable harm by not being able to hold worship services in the Pentecostal model to which it subscribes").

d. Balance of Equities and Public Interest

Where the government is a party to a case in which a preliminary injunction is sought, the balance of the equities and public interest factors merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014)).

The COVID-19 pandemic continues to pose unprecedented risk to public health. As the rate of new infections in California has started to decline in recent weeks, the Regional Order was lifted. Nevertheless, most counties in the state, including Santa Clara County, are still in Tier 1 of the Blueprint, meaning that the restrictions on worship services have remained the same. If the injunction is not granted, Plaintiffs will continue to be deprived of their ability to worship

collectively indoors. Although the Court has found that this burden on their free exercise of religion is constitutional, the Court acknowledges that it is a heavy burden nevertheless.

On the other hand, if the injunction is granted large groups of congregants will undoubtedly gather for indoor worship services at Plaintiffs' churches. Unlike in *Roman Catholic Diocese*, there is strong evidence to conclude that such gatherings would introduce significant risk of transmission and lead to avoidable infections and death in the community. *See South Bay*, 2021 WL 222814, at *17 ("Indeed, it is difficult to see how allowing more people to congregate indoors will do anything other than lead to more cases, more deaths, and more strains on California's already overburdened healthcare system."). As the Ninth Circuit explained,

> [E]ven if an individual congregant is willing to accept the risk of contracting the virus by partaking in such conduct, the risk is not an individual's risk to take. The risk is also to the lives of others with whom an asymptomatic person may come into close contact, to the healthcare workers who must care for the person one infects, and to California's overwhelmed healthcare system as a whole.

Id. at *15.

Given the significant risk to the general public associated with worship services at Plaintiffs' churches, the Court finds that the balance of equities and public interest favors denying the injunction.

IV. Conclusion

For the reasons stated, the Court GRANTS in part and DENIES in part Plaintiffs' motion for a preliminary injunction. IT IS HEREBY ORDERED THAT:

1) The State is enjoined from enforcing the 100-person capacity limit applicable in Tier 2 of the Blueprint and the 200-person capacity limit applicable in Tier 3 of the Blueprint. This order shall not affect the State's ability to enforce the percentage-based capacity limitations applicable in any tier.

2) The State is enjoined from enforcing the Blueprint's restrictions on activities at places of worship other than worship services, except to the extent that it enforces such

restrictions against secular businesses or activities.

3) The preliminary injunction is denied in all other respects.

IT IS SO ORDERED.

Dated: January 29, 2021

EDWARD J. DAVILA
United States District Judge

EXHIBIT E

Santa Clara County
PUBLIC HEALTH

MANDATORY DIRECTIVE:

Capacity Limitations

Issued November 15, 2020

sccgov.org/coronavirus

Revised and Effective: February 12, 2021

County of Santa Clara
Public Health Department

Health Officer
976 Lenzen Avenue, 2nd Floor
San José, CA 95126
408.792.5040

MANDATORY DIRECTIVE ON CAPACITY LIMITATIONS

Please confirm that your facility may open under the State Order. Where there is a difference between the local County Order and the State Order, the more restrictive order must be followed. The State also has specific guidance for certain facilities that must be followed in addition to this mandatory directive.

Information on the State's Order and State guidance is available at covid19.ca.gov.

Issued: November 15, 2020
Revised and Effective: February 12, 2021
Effective Upon Release

On August 28, 2020, the State issued a Statewide Public Health Officer Order ("State Order," available here) and the Blueprint for a Safer Economy ("Blueprint," available here). The State Order and Blueprint establish statewide restrictions applicable to each "tier" to which counties are assigned.

All businesses, as that term is defined in the County Health Officer's Revised Risk Reduction Order issued on October 5, 2020 ("Revised Risk Reduction Order"), including any for-profit, non-profit, or educational entity, must follow the mandatory requirements in this Directive and any other applicable County Health Officer Directive, the Revised Risk Reduction Order, the applicable restrictions under the State Order and Blueprint, the State's COVID-19 Industry Guidance documents, and any applicable health and safety regulations. Where there is a difference between these rules, the most restrictive rule must be followed.

This Directive establishes the County Health Officer's rules on capacity. The risk of COVID-19 transmission increases when there is a higher number and density of people present at a facility, particularly when indoors. To reduce this risk, the County Health Officer has established limitations on the number of people who can be present at a facility at any given time. These limitations are based on the capacity of the facility and/or the overall number of people who may be present at any given time. These limitations vary depending on the risk of COVID-19

transmission associated with the business or activity, and the risk of the business or activity causing a super-spreader event.

This Directive is mandatory, and failure to follow it is a violation of the Health Officer's Order issued on October 5, 2020 ("Order").

Mandatory Capacity Limitations

1. Capacity limitations

a. All gatherings, businesses, and entities must limit capacity to allow everyone to easily maintain at least six feet of physical distance from everyone not in their household at all times.

b. A business's "outdoor operations" must meet the definition of that term from the State's Use of Temporary Structures for Outdoor Business Operations guidance.

c. The following capacity limitations apply to publicly accessible areas of the following businesses, entities, and activities:

Business/Entity/Activity Type	Indoors	Outdoors
Gyms and Fitness Centers (including swimming pools, hot tubs, and saunas)	Prohibited, except indoor pools may operate at 20% capacity for drowning prevention instruction with certified instructors.	Allowed, except hot tubs and saunas must remain closed.
Gatherings (e.g., political events, weddings, funerals, worship services, movie showings, cardroom operations)	Prohibited.	Allowed up to 400 people per gathering, but subject to the limitations set forth by the State, which generally prohibit all gatherings except religious services, cultural ceremonies, political protests, other gatherings allowed by a State guidance document, and outdoor gatherings of up to 3 households. Note: All gatherings must comply with the Mandatory Directive for Gatherings, including rules for multiple gatherings.

Business/Entity/Activity Type	Indoors	Outdoors
Museums, Zoos, and Aquariums	Prohibited.	N/A
All Retail Stores (including grocery stores, drug stores, and pharmacies)	20% capacity.	N/A
Indoor Shopping Centers	Allowed. Total indoor capacity for the shopping center as a whole is calculated by adding together the Reduced Maximum Capacity for each individual tenant business of the shopping center that is allowed to open indoors. Common areas and food courts must remain closed.	N/A
Restaurants	Prohibited (except for take-out service; after ordering, customers may not wait for takeout orders indoors).	N/A
Bars, Breweries, Distilleries	Prohibited (except for take-out service; after ordering, customers may not wait for takeout orders indoors).	Prohibited (unless alcohol is served with a meal purchased in the same transaction).
Wineries	Prohibited (except for take-out service; after ordering, customers may not wait for takeout orders indoors).	N/A
Smoking Lounges	Prohibited.	N/A
Family Entertainment Centers and Other Entertainment Facilities	Prohibited.	N/A
Recreational Facilities	Prohibited.	N/A
Lodging Facilities	Allowed for purposes specified in Mandatory Directive for Lodging; specific use areas (e.g., gyms and retail) are	N/A

Business/Entity/Activity Type	Indoors	Outdoors
	subject to specific capacity limitations in this Directive.	
Personal Care Businesses (e.g., hair salons and barber shops; nail care; body art, tattoo, and piercing shops; esthetician, skin care, and cosmetology services; electrology, waxing, threading, and other hair removal services)	20% capacity.	N/A
Non-essential Limited Services (e.g., pet grooming, shoe repair)	20% capacity.	N/A
Public Transit	All indoor waiting areas accessible to the public are limited to 20% capacity.	N/A
Healthcare Facilities	Limit the number of people entering the facility to allow people to easily maintain at least six feet of physical distance from everyone outside their household at all times (unless it would interfere with provision of care).	N/A
All Other Essential Critical Infrastructure Facilities (including governmental facilities)	20% capacity.	N/A
Any Other Facility Allowed to Open to the Public Under State and Local Orders	20% capacity.	N/A

Metering Requirement

2. System to "Meter" the Number of People in a Facility

a. Except acute care hospitals, any business with an indoor facility that members of the public are allowed to enter must develop and implement written procedures to "meter" or track the number of persons entering and exiting the facility to ensure that the maximum capacity for the facility or area is not exceeded. For example,

an employee of the business may be posted at each entrance to the facility to perform this function. The written procedures must also require staff to ensure all members of the public entering the facility who are required to wear face coverings are wearing them properly to cover both their nose and mouth.

b. The business must provide a copy of its written "metering" procedures to an Enforcement Officer upon request and disclose the number of members of the public currently present in the facility.

Workplace Breakrooms and Break Areas

3. Limit access to indoor breakrooms and break areas

a. In all facilities except acute care hospitals, businesses must prohibit personnel from using any indoor breakrooms or break areas for eating, drinking, or resting (even if they are alone in the room at the time), or for any gathering. Businesses may allow personnel to access these spaces only as necessary to use appliances (such as coffee makers, refrigerators, or microwaves), or to use alone for other purposes provided by law (such as lactation).

b. A business is required to limit access to indoor breakrooms or break areas as described in Section 3(a) above *unless* it can demonstrate that (1) federal or state labor or workplace safety laws prohibit the business from limiting access to its indoor breakrooms and break areas as described in Section 3(a), *and* (2) the business is unable to implement any alternatives (such as setting up outdoor spaces where personnel can maintain distancing of at least six feet from one another while taking breaks; staggering break times to ensure employees have sufficient time for outdoor or other socially distanced breaks; or any other appropriate measures).

i. To invoke this provision, the business must do **all** of the following:

1. Implement procedures to help employees use indoor breakrooms more safely (such as staggering break times, limiting the number of employees using the break room at one time, increasing ventilation in the room, and regularly cleaning and disinfecting high-touch surfaces); AND

2. Draft a written protocol that (1) identifies the specific federal or state law(s) prohibiting it from limiting access to its indoor breakrooms or break areas as required by Section 3(a), (2) explains why it cannot implement alternatives to an indoor breakroom or break area, and (3) identifies the steps it is taking to ensure indoor breakrooms and break areas are operated safely; AND

3. Prominently post its written protocol in or near its indoor breakrooms and break areas; AND

4. Immediately provide a copy of its written protocol to any employee or County Enforcement Officer upon request.

Calculating Maximum Capacity

4. Calculating indoor capacity limitations

a. Capacity limitations apply to every room or area in a facility in which members of the public spend time or engage in regulated activities. Rooms or areas that are subject to capacity limitations are considered "capacity-limited rooms/areas."

b. Capacity limitations must be based on the normal maximum occupancy for each capacity-limited room/area that has a posted maximum occupancy. If there is not a posted normal maximum occupancy, capacity limitations must be based on the square footage of each capacity-limited room/area.

c. Gyms, fitness facilities, and family entertainment centers must use *gross* square footage for each capacity-limited room/area (when indoor operation is allowed). All other facilities must use *net* square footage for each capacity-limited room/area.

d. Capacity limitations establish the maximum number of people who may be present, including both members the public and personnel.

e. For assistance in calculating capacity limitations and answers to frequently asked questions, please visit www.sccgov.org/covidcapacity.

Signage

5. Signage Requirements

a. Reduced Maximum Capacity signs must be posted for each capacity-limited room/area that is subject to a specific percentage capacity limitation identified in Section 2 of this Directive.

b. Each sign must clearly state the maximum number of people who may be inside that particular capacity-limited room/area at the same time under this Directive. A template of the Reduced Maximum Capacity sign is available here.

c. Each room/area must have one Reduced Maximum Capacity sign posted at each entrance. The signs must be clearly visible to anyone entering the room.

d. Reduced Maximum Capacity signs must be updated to reflect any changes in the allowable capacity.

e. For assistance in completing Reduced Maximum Capacity signage, please visit www.sccgov.org/covidcapacity.

Stay Informed

For answers to frequently asked questions about capacity limitations and other topics, please see the FAQ page. **Please note that this Directive may be updated**. For up-to-date information on the Health Officer Order, visit the County Public Health Department's website at www.sccgov.org/coronavirus.

EXHIBIT F

Santa Clara County
PUBLIC HEALTH

MANDATORY DIRECTIVE:

Gatherings

Issued July 14, 2020

sccgov.org/coronavirus

Revised and Effective: February 12, 2021

County of Santa Clara
Public Health Department

Health Officer
976 Lenzen Avenue, 2nd Floor
San José, CA 95126
408.792.5040

MANDATORY DIRECTIVE FOR GATHERINGS

Please confirm that your gathering is allowed under the State Order. Where there is a difference between the local County Order and the State Order, the more restrictive order must be followed.

Information on the State's Order and State guidance is available at covid19.ca.gov.

Issued: July 14, 2020
Revised and Effective: February 12, 2021
Effective Upon Release

Every person, business, and entity in Santa Clara County must follow *both* the County and the State Public Health Officer Orders. Below is information on: (1) the State's general gathering rules, and (2) the current rules for *indoor* gatherings in Santa Clara County.

1. General State Gatherings Rules:

As of January 25, 2021, the State's Regional Stay at Home Order is ***no longer in effect*** in Santa Clara County.

On August 28, 2020, the State issued a Statewide Public Health Officer Order ("State Order," available here and the Blueprint for a Safer Economy ("Blueprint," available here). The State Order and Blueprint establish statewide restrictions applicable to each "tier" to which counties are assigned.

The State Health Officer has generally prohibited gatherings of all kinds statewide, with limited exceptions for worship services, cultural ceremonies like weddings and funerals, protest or political activities, and any gathering that is explicitly allowed by a State COVID-19 Industry Guidance document (https://covid19.ca.gov/industry-guidance/) or by the State's "Stay home Q&A" page (https://covid19.ca.gov/stay-home-except-for-essential-needs/). The State also allows private gatherings consisting of no more than three households pursuant to the State's rules, but such gatherings must be outdoors while the County is in the Purple Tier.

All gatherings are subject to the mandatory requirements in this Directive and any other applicable County Health Officer Directive, the County Health Officer's Revised Risk Reduction Order issued on October 5, 2020, the applicable restrictions under the State Order and Blueprint, the State's COVID-19 Industry Guidance documents, and any applicable health and safety regulations.

Note: While wedding ceremonies may occur outdoors subject to the mandatory requirements of this Directive, the State has clarified that "[w]edding receptions/parties/celebrations are NOT permitted at this time" under State Public Health Officer orders.

2. Current Rules for Indoor Gatherings in Santa Clara County:

Religious worship services may occur indoors at 20% capacity. They must comply with all rules listed in this Directive for indoor gatherings. The Health Officer strongly discourages such indoor gatherings and urges religious institutions and congregants not to attend indoor gatherings.

Because indoor gatherings continue to pose a severe risk of COVID-19 transmission, **all other indoor gatherings are currently prohibited**. No gatherings other than religious worship services may occur indoors, and the rules listed below for indoor gatherings **do not apply** to any gatherings other than religious worship services until this restriction is lifted.

While COVID-19 is still circulating in our community, the Health Officer strongly discourages any gathering together with people from other households. Indoor gatherings are particularly risky because COVID-19 transmission occurs more easily indoors than outdoors, and COVID-19 continues to circulate widely. The most recent scientific evidence underscores the risk of transmission indoors, and **indoor gatherings are always strongly discouraged, even when allowed**. But gatherings are not prohibited by this Directive as long as everyone attending the gathering strictly complies with all the requirements set forth below to reduce risk and keep everyone who attends as safe as possible.

A "gathering" is an event, assembly, meeting, or convening that brings together multiple people from separate households in a single space, indoors or outdoors, at the same time and in a coordinated fashion—like a wedding, banquet, conference, religious service, festival, fair, party, performance, competition, movie theater operation, fitness class, barbecue, protest, or picnic. Although the County allows all types of gatherings to occur in compliance with this Directive, at this time the State generally allows gatherings only for purposes of worship services, cultural ceremonies like funerals and weddings (but not wedding receptions, which are prohibited), and protest or political activities. The State also allows gatherings for purposes identified in the State's Industry Guidance or any other State guidance document. The State also allows small gatherings of any type with no more than three households. These gatherings must follow the

County's rules (contained in this Directive) and the State's rules, including the State requirement that such gatherings must be outdoors when counties are in the Purple Tier. Because the stricter of the requirements applies, the only types of gatherings allowed in the County are those allowed by the State.

This Directive does not regulate whether a facility is open or closed. For example, facilities that are typically used for gatherings—such as places of worship, meeting halls, and event spaces—may remain open for purposes that do not involve gatherings, even when gatherings are prohibited indoors.

This Directive explains the local requirements for gatherings in Santa Clara County. **This Directive is *mandatory*, and failure to follow it is a violation of the Health Officer's Order issued October 5, 2020 ("Order").**

The Order Issued October 5, 2020

The Order imposes several restrictions on all businesses and activities to ensure that the County stays as safe as possible. All persons and businesses (including nonprofits, educational entities, and any other business entity, regardless of its corporate structure) that organize or host gatherings—such as religious institutions, wedding venues, wedding planners/coordinators, convention centers, and conference/meeting room rental facilities—must comply with the following requirements, and must ensure that participants comply with all applicable requirements:

- **Social Distancing Protocol:** All businesses and governmental entities that have not already done so must fill out and submit an updated Social Distancing Protocol under the October 5, 2020 Health Officer Order. **Social Distancing Protocols submitted prior to October 11, 2020 are no longer valid.** The Revised Social Distancing Protocol must be filled out using an updated template, which is available here. The Protocol is submitted under penalty of perjury, meaning that everything written on the form must be truthful and accurate to the best of the signer's knowledge, and submitting false information is a crime. The Protocol must be distributed to all workers, and it must be accessible to all officials who are enforcing the Order.

- **Signage:** All businesses and governmental entities must print (1) an updated COVID-19 PREPARED Sign and (2) a Social Distancing Protocol Visitor Information Sheet, and both must be posted prominently at all facility entrances. These are available for printing after submission of the Revised Social Distancing Protocol online. The Revised Social Distancing Protocol specifies additional signage requirements.

- **Face Coverings:** Everyone must wear face coverings at all times specified in the California Department of Public Health's mandatory Guidance for the Use of Face Coverings ("Face Covering Guidance") and in any specific directives issued by the

County Health Officer. **Unless otherwise stated in this Directive, face coverings must be worn at all times when attending a gathering.**

- **Capacity Limitation:** All businesses must comply with the capacity limitations established in the Mandatory Directive on Capacity Limitations.

Mandatory Requirements for All Gatherings

In general, the more people a person interacts with at a gathering, the closer the physical interaction is, the more enclosed the gathering space is, and the longer the interaction lasts, the higher the risk that a person with an unknown SARS-CoV-2 infection (the infection that causes COVID-19) might spread it to others. If not everyone follows the rules to safely gather, the risk of spreading SARS-CoV-2 is even higher. Based on those principles, the Health Officer's directives for *all* gatherings are:

1. *If Gathering, the Health Officer Strongly Urges You to Gather Outdoors*

    a. Gatherings that occur outdoors are significantly safer than indoor gatherings. To qualify as an outdoor gathering, the gathering must be held entirely outdoors, except that attendees may go inside to use restrooms as long as the restrooms are frequently disinfected.

    b. The maximum number of people allowed at an outdoor gathering is specified in the Mandatory Directive on Capacity Limitations. This includes everyone present, such as hosts, workers, and guests. The space must be large enough so that everyone at a gathering can maintain at least 6-foot social distance from anyone (other than people from their own household).

        i. Example 1: A small church hosts a funeral ceremony in its churchyard. The churchyard is only big enough to allow 25 people to easily maintain 6-foot social distancing between households at all times. **No more than 25 people may be present at the funeral ceremony**.

        ii. Example 2: A couple holds their wedding ceremony outdoors at a historic hotel. The outdoor ceremony space is big enough for 1,000 people to maintain 6-foot distancing. **Even so, no more than the maximum number of people allowed by the Mandatory Directive on Capacity Limitations may be present at the wedding ceremony**.

    c. A gathering is considered an outdoor gathering only if it is held at a facility that allows the free flow of outdoor air through the entire space, as specified in the California Department of Public Health's mandatory guidance on Use of Temporary Structures for Outdoor Business Operations.

d. Fences and screens that do not impede airflow are not considered walls or sides for purposes of determining whether an area is outdoors. Partitions around or within the facility may be used and do not qualify as sides so long as they are no more than 3 feet in height as measured from the floor.

2. *The Health Officer Strongly Discourages Indoor Gatherings, Even When They Are Allowed*

   a. Indoor gatherings may not be allowed depending on the County's current tier under the State's Blueprint for a Safer Economy and other local factors. See the "Current Rules for Indoor Gatherings in Santa Clara County" box at the top of this Directive for information on current rules.

   b. When indoor gatherings *are* allowed, the maximum number of people allowed at an indoor gathering is specified in the Mandatory Directive on Capacity Limitations. This includes everyone present, such as hosts, workers, and guests.

3. *Don't Attend Gatherings If You Feel Sick or You Are in a High-Risk Group*

   a. If you feel sick or have any COVID-19-like symptoms (fever, cough, shortness of breath, chills, night sweats, sore throat, nausea, vomiting, diarrhea, tiredness, muscle or body aches, headaches, confusion, or loss of sense of taste/smell), **you must stay home and may not attend any gatherings**.

   b. As explained on the People Who Need Extra Precautions page, people at higher risk of severe illness or death from COVID-19 are strongly urged not to attend any gatherings.

4. *All Gatherings Must Have an Identified and Designated Host Who Is Responsible for Ensuring Compliance with All Requirements*

   a. A specific person or business (including nonprofits, religious organizations, educational entities, or any other business entity) must be the designated host for a gathering and ensure compliance with all requirements in the Order and this Directive. **The host is responsible and subject to enforcement for any failure by participants to comply with the Order and this Directive.**

   b. The host also must maintain a list with names and contact information of all participants at the gathering. If a participant tests positive for COVID-19, the host is legally required to assist the County Public Health Department in any case investigation and contact tracing associated with the gathering. Public Health will ask for the list of attendees *only* if an attendee tests positive for COVID-19. The

County Public Health Department will keep this information confidential and use it only for case investigation and contract tracing purposes. Hosts must maintain these records for at least 21 days. The host must provide the list to any County Enforcement Officer immediately upon request.

5. *Practice Physical Distancing and Hand Hygiene at Gatherings*

    a. At all gatherings, **everyone must stay at least 6 feet away from other people (except people in their own household) at all times**.

    b. Seating arrangements must provide at least 6 feet of distance (in all directions—front-to-back and side-to-side) between different households. This can be done by spacing chairs apart, or for fixed seating like benches or pews, by marking off rows and indicating seating areas with tape. Seating and tables must be sanitized after each use.

    c. Everyone at a gathering should frequently wash their hands with soap and water, or use hand sanitizer if soap and water are not available. The host must make handwashing facilities or hand sanitizer available for participants to use.

6. *Rules for Face Coverings, Singing, Chanting, Shouting, and Playing Wind Instruments*

Current scientific evidence shows that COVID-19 spreads primarily through respiratory droplets and fine aerosols that are released from the body when people breathe, sing, shout, or otherwise expel air from their lungs. Face coverings prevent many of these droplets and aerosols from escaping into the air, and wearing a face covering has been shown to significantly decrease the risk of COVID-19 transmission. Conversely, singing, chanting, shouting, and playing wind instruments have all been shown to significantly *increase* the risk of COVID-19 transmission, because these activities all release increased amounts of respiratory droplets and fine aerosols into the air. To reduce the risk of spreading COVID-19, the following rules apply to gatherings:

    a. For all *indoor* gatherings (when indoor gatherings are allowed):

        i. **Everyone, including performers/presenters, must wear a face covering at all times** (except for very young children, people for whom face coverings are medically inadvisable, or for communication by or with people who are hearing impaired).

            1. Food and drink may not be served at indoor gatherings—including at movie theaters—even when indoor gatherings are allowed, except as necessary to carry out a religious ceremony.

2. Face coverings may be removed to meet urgent medical needs (for example, to use an asthma inhaler, consume items needed to manage diabetes, take medication, or if feeling light-headed).

ii. Singing, chanting, shouting, and playing wind instruments are **strictly prohibited**.

b. For all *outdoor* gatherings:

i. **Except as described below or in other directives issued by the County Health Officer, everyone must wear a face covering at all times** (except for very young children, people for whom face coverings are medically inadvisable, or for communication by or with people who are hearing impaired).

1. Attendees may remove their face coverings to eat or drink but must put their face covering back on as soon as they are finished eating or drinking.

2. Attendees may remove their face coverings to meet urgent medical needs (for example, to use an asthma inhaler, consume items needed to manage diabetes, take medication, or if feeling light-headed).

ii. If an outdoor gathering involves a performance/presentation, performers/presenters may remove their face coverings while they are performing/presenting, but they must replace their face coverings after they finish.

1. No more than 12 performers/presenters are permitted in the performance/presentation area at a time.

2. Until their face covering is back on, any performer/presenter who removes their face covering to speak must maintain at least **12 feet** of social distance from everyone not in their household.

3. Until their face covering is back on, any performer/presenter who removes their face covering to sing, chant, shout, or play a wind instrument must maintain at least **12 feet** of social distance from all other performers/presenters who are not in their household and at least **25 feet** from all attendees who are not performing/presenting.

4. Any performer/presenter playing a wind instrument must cover the opening of the instrument (e.g., with cloth) to reduce the spread of respiratory droplets from the instrument.

5. Performers/presenters who are singing or chanting are strongly encouraged to do so at a quiet volume (at or below the volume of a normal speaking voice).

iii. All attendees who are not performing/presenting **must wear a face covering at all times** while singing, chanting, or shouting. Because these activities pose a very high risk of COVID-19 transmission, face coverings are particularly essential to reduce the spread of respiratory droplets and fine aerosols. People who cannot wear a face covering for medical or other reasons are strongly discouraged from singing, chanting, or shouting.

1. Attendees who are singing, chanting, or shouting are strongly encouraged to maintain increased social distancing greater than 6 feet to further reduce risk.

2. Attendees who are singing or chanting are strongly encouraged to do so at a quiet volume (at or below the volume of a normal speaking voice).

7. Stagger Attendance at Gatherings

a. For gatherings that have the potential to draw larger groups, like community meetings or religious services, consider offering multiple sessions, requiring reservations that cap attendance at each session, staggering arrivals and departures, and encouraging or requiring that the same group stays together (for example, Group A attends the Sunday morning worship service every week, and Group B attends the separate Tuesday evening worship service every week).

b. There is no limit on the number of gatherings that may be held at different times on a single day—for example, a mosque may hold prayer services five times a day—as long as (i) each gathering follows all the rules, and (ii) restrooms, chairs and tables, and any other high-touch surfaces are properly sanitized between groups.

c. A venue may host *multiple outdoor gatherings* at the same time (for example, multiple small barbecues in a large outdoor space like a 20-acre ranch)—as long as:

i. Each gathering follows all the rules in the Order and in this Directive. Each gathering must, for instance, have its own designated host who must maintain a list of participant names and contact information.

ii. Each gathering has its own area marked by prominent signage, barriers, or ropes, and there is a buffer zone of at least 100 feet between the boundaries of any two separate gatherings.

iii. The participants at a gathering, including hosts, workers, and guests, do not mix between or among different gatherings and stay strictly in their own area.

iv. There are sufficient restroom facilities, or a system of using the restroom facilities, such that participants from different gatherings do not have contact with one another when they use the restroom.

d. When indoor gatherings are allowed, a venue may host multiple indoor gatherings at the same time (for example, multiple gatherings in separate rooms within a building)—as long as:

i. Each gathering follows all the rules in the Order and in this Directive. Each gathering must, for instance, have its own designated host who must maintain a list of participant names and contact information.

ii. Each gathering is fully separated by solid, floor-to-ceiling walls or partitions from any other gathering.

iii. Where possible, the HVAC system for each space with a gathering should ventilate to the outdoors, rather than into a space with another gathering.

iv. The participants at a gathering, including hosts, workers, and guests, do not mix between or among different gatherings and do not enter into a common space with participants from any other gathering.

v. There are sufficient restroom facilities, or a system of using the restroom facilities, such that participants from different gatherings do not have contact with one another when they use the restroom.

8. Livestreaming, Broadcasting, and Recording with No Audience Present

Businesses may livestream, broadcast, or record performances, services, and classes at indoor facilities without live audiences or members of the public present. All such livestreamed, broadcasted, or recorded events at indoor facilities **must** comply with the following rules:

a. When livestreaming under this provision, only personnel may be present at the facility. Audiences or other members of the public are strictly prohibited. The number of personnel inside the facility must be limited to the minimum necessary to conduct the event (and may never exceed 12 people or the maximum number of people allowed under the facility's current capacity limitation as dictated by the Mandatory Directive on Capacity Limitations, whichever is fewer).

b. All personnel, including performers/presenters in the performance area, must maintain at least 6 feet of physical distance from everyone outside their household at all times.

c. People performing or presenting during a livestreamed event may remove their face coverings during the performance or presentation if everyone maintains at least 12 feet of physical distance from everyone outside their household at all times. Even so, the Health Officer strongly urges people performing or presenting to wear a face covering whenever possible. All others on-site must wear a face covering in compliance with State and County Health Officer requirements.

d. When livestreaming under this provision with no audience present, singing, chanting, or playing wind instruments indoors is strongly discouraged but may occur so long as everyone maintains at least 12 feet of physical distance from everyone outside their household.

For clarity, the above rules for livestreaming, broadcasting, and recording do not apply if any member of the public is present for the event. Businesses may livestream, broadcast, or otherwise record an event at which members of the public are present (so long as current State and County Health Officer orders allow members of the public to be present for such an event), but there are no special rules that would apply to the livestream, broadcast, or recording. Instead, these events must comply with all rules currently governing the business's general operations. Note that these rules may be stricter those listed above.

9. Maximize Ventilation for Indoor Gatherings (When Indoor Gatherings Are Allowed)

a. Open doors and windows to maximize circulation of outdoor air whenever environmental conditions and building requirements allow. Consider modifications to the facility to increase outdoor air exchange, such as replacing

non-opening windows with openable screened windows. Contact your local Building Department for more information on permit requirements.

b. Indoor facilities with central air handling/HVAC systems must ensure that HVAC systems are serviced and functioning properly and, to the extent feasible and appropriate to the facility:

    i. Evaluate possibilities for and implement upgrades to the system to ensure that air filters are functioning at the highest efficiency compatible with the currently installed filter rack and air handling system (ideally MERV-13 or greater).

    ii. Increase the percentage of outdoor air through the HVAC system, readjusting or overriding recirculation ("economizer") dampers.

    iii. Disable demand-control ventilation controls that reduce air supply based on temperature or occupancy.

    iv. Implement the additional measures set forth in the County's Guidance for Ventilation and Air Filtration Systems.

c. Indoor facilities that do not have central air handling/HVAC systems or that do not operate or control the system must take the following measures, to the extent feasible and appropriate to the facility:

    i. Set any ceiling fans to draw air upwards away from participants.

    ii. If using portable fans, position them near open doors/windows and use them to draw or blow inside air to the outside of the facility. Position fans to minimize blowing air between occupants, which may spread aerosols.

    iii. Consider installing portable air filters appropriate to the space.

    iv. Implement additional applicable measures set forth in the County's Guidance for Ventilation and Air Filtration Systems.

d. Upon request by a County Enforcement Officer or County Public Health Department Staff, the facility may be required to perform a comprehensive evaluation of the facility's ventilation and air filtration system by an appropriately licensed professional, and produce documentation regarding this evaluation to the County.

Stay Informed

For answers to frequently asked questions about this industry and other topics, please see the FAQs page. **Please note that this Directive may be updated.** For up-to-date information on the Health Officer Order, please visit the County Public Health Department's website at www.sccgov.org/coronavirus.