No. 20A151

In the Supreme Court of the United States

RITESH TANDON, ET AL.,

Applicants,

v.

GAVIN NEWSOM, ET AL.,

Respondents.

OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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PARTIES TO THE PROCEEDING

The application's list of parties (Application iii) is correct, with one exception: the Acting Attorney General of California is Matthew Rodriquez; Assemblymember Robert Bonta has been nominated for the position of Attorney General but has not yet been confirmed.

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INTRODUCTION

Plaintiffs ask the Court to apply the Free Exercise Clause to enjoin a public health policy restricting members of more than three households from gathering together. That policy is entirely neutral toward religion; it applies to gatherings for any purpose—secular or religious. On that basis, the courts below properly held that it does not trigger heightened scrutiny and that it comports with the First Amendment. In any event, the State recently announced that the challenged policy will be significantly modified on April 15, one week from today. In light of improvements in the rates of infection, hospitalization, and death, as well the growing number of vaccinated individuals, the State will be substantially relaxing its restrictions on multiple-household gatherings. Under the new policy, plaintiffs will be able to hold the types of gatherings referenced in their emergency application. *See, e.g.*, Application ii, 18 ("Bible studies, prayer meetings, and worship services at their homes" with "eight to twelve individuals"). There is accordingly no basis and no need for the Court to grant injunctive relief at this time.

STATEMENT

A. Factual Background

1. The COVID-19 pandemic, which has now claimed over 550,000 American lives, continues to be a "dynamic and fact-intensive matter." *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts,

C.J., concurring).[1] COVID-19 is "highly contagious" and is principally transmitted through human interactions. App'x 57. When individuals breathe, talk, sing, cough, or sneeze, they expel small respiratory droplets and aerosolized particles containing the virus that causes the disease. *Id.* at 57-59. Although many people infected by the virus have no symptoms, asymptomatic individuals may still transmit the disease to others. *Id.* at 58. Indeed, the fact that COVID-19 can be spread by individuals who are pre-symptomatic or asymptomatic is one of the aspects of the virus that makes it most "difficult to control." *Id.* "Many people who are infected are not aware that they are sick, so they do not take the appropriate precautions, such as isolating themselves at home." *Id.* While the risk of transmission is diminished by "[w]earing face coverings and maintaining at least six feet of physical distance," "a significant risk of infection remains" even with those precautions—"particularly when people get together for extended periods and in environments with limited ventilation, such as indoors." *Id.* at 60.

2. Throughout the pandemic, the State has adopted a series of public health restrictions designed to curb the virus' spread. These restrictions "have constantly evolved based on the scientific understanding of how COVID-19 spreads, the level of spread of COVID-19 in the State, and the extent to which the State's hospitals and ICUs lacked capacity." App'x 64. The State has, at

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[1] *See* Centers for Disease Control and Prevention, *COVID Data Tracker: United States COVID-19 Cases and Deaths by State*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last visited Apr. 7, 2021).

all times, sought to preserve opportunities for religious worship and other First Amendment-protected activities.

a. In March 2020, Governor Newsom proclaimed a state of emergency and then issued an executive order generally requiring individuals to stay at home, except for those working in certain federally recognized critical infrastructure sectors. App'x 64. Days later, California's Public Health Officer designated additional critical infrastructure sectors, *see* D. Ct. Dkt. 30-6 ¶ 58 (Declaration of Dr. James Watt, M.D., M.P.H.) (Watt Decl.), including "faith-based services that are provided through streaming or other technologies," *id*. The stay-at-home order proved effective and the rate of COVID-19 infection slowed, such that California hospitals were not "strained beyond capacity." D. Ct. Dkt. 30-1 ¶ 51 (Declaration of Dr. George Rutherford, M.D.) (Rutherford Decl.); *see also* Watt Decl. ¶ 51.

The next month, the Governor announced a roadmap to guide reopening of the State. *See* Watt Decl. ¶¶ 59-62. As part of that reopening, the State allowed in-person worship services to resume statewide, but limited attendance to 100 persons or 25% of building capacity, whichever was lower. *See South Bay*, 140 S. Ct. at 1613 (Roberts, C.J., concurring); App'x 66. In June, the State removed numerical limits on outdoor religious services, *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128, 1133 (9th Cir. 2021), and issued a statewide order requiring face coverings in community settings, *see* Rutherford Decl. ¶ 58.

Following a resurgence in infections and deaths over the summer, *see* App'x 64, the State developed the "Blueprint for a Safer Economy," a detailed plan for limiting COVID-19 transmission and reopening the State when conditions improved, *id.* at 65-67. The Blueprint imposes restrictions on various sectors or activities based on the risk that they pose to public health (including restrictions concerning the location where activities may take place and the number of people that may interact). *See id.*[2] For most sectors and activities, the stringency of these restrictions varies depending on the background public health conditions in each county. *Id.* Counties are assigned to one of four tiers, ranging from Tier 1 ("Widespread") to Tier 4 ("Minimal"), based on the county's adjusted case rate and related objective criteria. *See id.*[3]

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[2] The Blueprint thus layers additional restrictions atop preexisting statewide rules (such as mask-wearing requirements) and industry-specific restrictions (such as those requiring regular testing of workers and installation of plexiglass barriers in certain industries). *See generally* Cal. Dep't of Public Health, *About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last visited Apr. 7, 2021); Cal. Dep't of Public Health, *Industry Guidance to Reduce Risk*, https://covid19.ca.gov/industry-guidance/ (last visited Apr. 7, 2021).

[3] On March 4, 2021, and again on April 6, the Blueprint was modified to take into account vaccination levels: while positivity rates and case rates continue to be the key factors in determining a county's tier, counties may shift into a less restrictive tier with higher case and positivity rates than previously allowed now that the State has met certain vaccination benchmarks within communities disproportionately impacted by COVID-19. *See* Cal. Dep't of Public Health, *Blueprint for a Safer Economy: Current Tier Assignments as of April 6, 2021*, https://covid19.ca.gov/safer-economy/ (last visited Apr. 7, 2021).

The Blueprint originally allowed public indoor assembly events—such as lectures, movie screenings, and worship services—in all tiers except Tier 1; attendance at such events in Tiers 2 through 4 was subject to capacity restrictions that varied by tier. *See* App'x 65-66. On February 5, 2021, the Court enjoined application of that Tier 1 restriction with respect to indoor worship services. *See South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021). The State swiftly responded by amending the Blueprint to allow indoor worship services in all tiers, subject to capacity limits and certain other public health restrictions. [4]

b. This application concerns the State's restrictions on "gatherings," defined as "social situations that bring together people from different households at the same time in a single space or place." App'x 190. On November 13, 2020, the State issued guidance "[l]imiting attendance at gatherings" as part of its effort to "reduce the risk of spread" and provide "an improved ability to perform effective contact tracing if there is a positive case discovered." *Id.* [5] That guidance has two components. First, individuals may

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[4] *See In re South Bay United Pentecostal Church*, __ F.3d __, 2021 WL 1232108, at *1 (9th Cir. Apr. 2, 2021). Throughout the pandemic, California has periodically revised the Blueprint in response to changing circumstances. *See, e.g.*, App'x 183-189 (revised Blueprint of March 11, 2021).

[5] The November guidance superseded earlier, similar policies that had been in place since March 2020. *See* Cal. Dep't of Public Health, *Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Oct. 9, 2020), https://tinyurl.com/44f526zd; Cal. Dep't of Public Health, *Guidance for the Prevention of COVID-19 Transmission for Gatherings* (Sept. 12, 2020),

attend a "private gathering" outdoors in all parts of the State, and indoors in all counties except those in Tier 1. App'x 191-192. Such gatherings must be limited to no more than three households (whether indoor or outdoor) and attendees are required to wear masks and physically distance from one another. *Id.* at 191-193. Singing, chanting, and use of wind instruments is prohibited at private gatherings held indoors. *Id.* at 193-194. And persons with COVID symptoms may not attend. *Id.* at 192.[6]

Second, all other gatherings are prohibited unless they are covered by "existing sector guidance." App'x 190. For example, the gatherings restrictions do not apply at manufacturing facilities and certain other "public-facing businesses" (such as retail stores and grocery stores) which may continue to operate with various restrictions and modifications in place. *Id.* at 22.[7] Nor does the guidance apply to gatherings for worship services, *see supra* p. 5,

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https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Guidance-for-the-Prevention-of-COVID-19-Transmission-for-Gatherings.aspx;
Cal. Dep't of Public Health, *Guidance for the Prevention of COVID-19 Transmission for Gatherings* (March 16, 2020), https://tinyurl.com/22xwszy4.

[6] The guidance also strongly encourages individuals to gather with a "stable" group of households (as opposed to "[p]articipating in multiple gatherings with different households") and recommends that gatherings be limited to two hours or less. App'x 191, 193.

[7] *See also* Cal. Dep't of Public Health, *COVID-19 Industry Guidance: Manufacturing* (July 29, 2020), https://files.covid19.ca.gov/pdf/guidance-manufacturing--en.pdf.

schools, or certain sporting events.[8] Instead, more specific guidance and protocols regulate when, where, and how those types of activities may be held.

c. In recent weeks, the number of COVID-19 cases has fallen substantially relative to the winter months, and the number of vaccinated adults has grown rapidly.[9] In response to these trends, the State developed a revised policy on private gatherings. The new policy, announced earlier this month, will take effect on April 15. *See* Cal. Dep't of Public Health, *Blueprint for a Safer Economy: Activity and Business Tiers* (April 2, 2021) (April Gatherings Policy).[10] Under the new policy, individuals may host and attend private gatherings in greater numbers, both indoors and outdoors. *See id.* at 1-2. For example, in Tier 3 counties (including Santa Clara, where plaintiffs reside, *infra* p. 10), up to 50 persons may attend an outdoor gathering and up to 25 persons may attend an indoor gathering in a private home. *See* April

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[8] *See* Cal. Dep't of Public Health, *Industry Guidance to Reduce Risk*, https://covid19.ca.gov/industry-guidance/ (last visited Apr. 7, 2021) (drop-down menu, "Schools—updated March 20, 2021" and "Youth and adult recreational sports—updated April 7, 2021").

[9] *See, e.g.*, *Tracking Coronavirus Vaccinations in California*, L.A. Times, https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/covid-19-vaccines-distribution/ (last visited Apr. 7, 2021); Centers for Disease Control and Prevention, *COVID Data Tracker: Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (last visited Apr. 7, 2021) (see under the "Select a state or territory" box, enter "California").

[10] *Available at* https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/Dimmer-Framework-September_2020.pdf.

Gatherings Policy at 1-2. [11] There is no household-based limit on attendance. *See id.* And if a gathering has a "defined guest list" and "[a]ssigned seating" to facilitate contact tracing, the gathering will qualify as a "private event," allowing attendance of up to 100 persons outdoors. *Id.* at 2. The permissible number of guests is even higher if all attendees are tested or vaccinated before the event: 150 for indoor private events and 300 for outdoor private events. *Id.*

Similar rules apply in Tiers 2 and 4. In Tier 2, up to 25 individuals may attend an outdoor gathering, and 10 may attend an indoor gathering in a private home (unless the gathering is limited to three households or less, in which case a greater number may attend). *See* April Gatherings Policy at 1-2. And in Tier 4, 100 people may attend an outdoor gathering, and 50 may attend an indoor gathering. *Id.* "Private events" are also allowed in those tiers: If all guests are tested or vaccinated, up to 100 individuals may attend an indoor event in Tier 2 (or 200 outdoors), and up to 200 may attend an indoor event in Tier 4 (or 400 outdoors). *Id.* at 2. If not all guests are tested or vaccinated, the

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[11] In "settings where capacity limits exist," the cap on attendance at indoor gatherings is the lower of a percentage of total capacity or an absolute number specified in the guidance. *See* April Gatherings Guidance at 1-2. For purposes of applying that restriction, a building or other space has a "capacity limit" if it has posted a sign with the maximum occupancy (usually posted near the main entry or exit of the building or space). Private homes do not typically have such occupancy limits. *See, e.g.*, Cal. Code Regs. tit. 19, § 3.30 (requiring any "room having an occupant load of 50 or more persons" to post an occupancy limit if it is "used for assembly, classroom, dining, drinking, or similar purposes").

event may be held outdoors with up to 50 attendees in Tier 2 and up to 200 in Tier 4. *Id.*

Stricter limits apply in Tier 1 counties, where all private gatherings subject to the new policy must be held outdoors. *See* April Gatherings Policy at 1-2. If the gathering qualifies as a "private event," 100 guests may attend if they are all tested or vaccinated beforehand (and 50 may attend if not). *Id.* at 2. If the gathering does not qualify as a "private event," the guests must come from no more than three households. *Id.* As of April 7, only two counties (representing just 0.8% of the State's population) remain in Tier 1.[12]

d. On April 6, Governor Newsom announced that the State will "fully reopen" on June 15 so long as hospitalizations remain "stable and low" and all state residents 16 or older have access to a vaccine.[13] Assuming the State meets those benchmarks, the "Blueprint for a Safer Economy will end," *id.*, thereby allowing "all sectors listed in the current Blueprint"—including indoor worship services—to "return to usual operations."[14] The Blueprint's restrictions on gatherings and private events will terminate at that time as

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[12] *See* Cal. Dep't of Public Health, *Blueprint for a Safer Economy: Current Tier Assignments as of April 6, 2021*, https://covid19.ca.gov/safer-economy/ (last visited Apr. 7, 2021).

[13] Statement of Governor Gavin Newsom (Apr. 6, 2021), https://www.gov.ca.gov/2021/04/06/governor-newsom-outlines-the-states-next-step-in-the-covid-19-pandemic-recovery-moving-beyond-the-blueprint/.

[14] Cal. Dep't of Public Health, *Beyond the Blueprint for a Safer Economy* (Apr. 6, 2021) https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/beyond_memo.aspx.

well. *See id.* "Common-sense health measures such as masking," however, "will remain across the state" for the foreseeable future. *Id.*

B. Proceedings Below

1. On October 13, 2020, ten individual plaintiffs brought suit challenging various aspects of California's pandemic response, including its restrictions on private gatherings, under the Free Exercise Clause, Free Speech and Assembly Clauses, and several other constitutional provisions. D. Ct. Dkt. 1 at 19-26. As relevant here, plaintiffs Jeremy Wong and Karen Busch, residents of Santa Clara County, allege that the restrictions violate their free-exercise rights by preventing them from holding Bible studies, collective prayer, and other religious gatherings in their homes with members of more than three households. *See id.* at 21-22. Wong and Busch hosted these gatherings on a weekly basis before the pandemic began, with about eight to twelve individuals in attendance. Application 18.

Plaintiffs moved for a preliminary injunction. D. Ct. Dkt. 18. After inviting briefing, argument, and submission of expert declarations—including supplemental briefing addressing this Court's ruling in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (per curiam)—the district court denied the motion on February 5, 2021. *See* App'x 54-133. The court concluded that the private gatherings restrictions did not violate the Free Exercise Clause because they "'[are] neutral and of general applicability.'" App'x 122 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,

508 U.S. 520, 531 (1993)); *see* App'x 121-136. The court explained that the restrictions "make no reference to any religious practice, conduct, belief, or motivation," and apply "to all gatherings, whether religious or secular." *Id.* at 123 (internal quotation marks and emphasis omitted).

2. Plaintiffs appealed and then asked the court of appeals to enter an injunction pending appeal. *See* C.A. Dkt. 9 (Mar. 4, 2021). On March 30, a motions panel denied relief. *See* App'x 1-30 (Smith, M., Bade, JJ.); *id.* at 31-52 (Bumatay, J., dissenting in part and concurring in part). The panel majority agreed with the district court that the State's private gatherings restrictions are "neutral and generally applicable." App'x 8. It rejected plaintiffs' contention that the State unconstitutionally failed to apply the same restrictions—including the three-household limitation—to "a host of comparable secular activities," such as "entering crowded train stations, airports, malls, salons, and retail stores, waiting in long check-out lines, and riding on buses." *Id.* As the majority explained, plaintiffs "are making the wrong comparison because the record does not support that private religious gatherings in homes are comparable—in terms of risk to public health or reasonable safety measures to address that risk—to [the] commercial activities" listed by plaintiffs. *Id.*; *see also id.* at 8-27.

Judge Bumatay dissented in relevant part. He reasoned that the commercial businesses and other secular activities referred to by plaintiffs, such as "salons" and other providers of "personal-care services," qualify as

"analogous comparators to religious practice in the pandemic context." App'x 36, 38-39. Because the State's private gatherings restrictions did not apply to those activities, he would have held that the policy was subject to strict scrutiny. *Id.* at 42. In his view, the State had not "met its burden" under that standard. *Id.*[15]

ARGUMENT

Plaintiffs ask the Court to enjoin the State's private gatherings restrictions. The State recognizes that these generally applicable restrictions presently limit the size of certain religious gatherings that plaintiffs wish to host in their homes, such as Bible study sessions and prayer meetings. But the restrictions have also helped to reduce the spread of COVID-19 by limiting opportunities for the types of human interactions that transmit the virus. And they are entirely neutral toward religion, applying to all "private gatherings," App'x 190, secular and religious alike. For that reason, plaintiffs have not carried their burden of establishing that injunctive relief is appropriate. Indeed, injunctive relief is particularly inappropriate at this time because the State—in recognition of the improving public health circumstances discussed by plaintiffs (*see, e.g.*, Application 37)—has announced a new policy that will

[15] Plaintiffs' underlying appeal remains pending. On March 9, plaintiffs filed their opening brief, C.A. Dkt. 12; on April 6, the State filed its answering brief, C.A. Dkt. 25.

take effect in a week and that fully accommodates the gatherings that plaintiffs wish to host.

I. THERE IS NO BASIS FOR GRANTING INJUNCTIVE RELIEF

A request for injunctive relief from this Court in the first instance "'demands a significantly higher justification' than a request for a stay, because unlike a stay, an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.'" *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). Accordingly, the applicants must demonstrate not only that they satisfy the ordinary criteria for injunctive relief, *see generally Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), but also that the Court is likely to grant certiorari and reverse, *see* Shapiro et al., *Supreme Court Practice* § 17.13(b), p. 17-38 (11th ed. 2019), and that the "legal rights at issue" are "'indisputably clear,'" *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). Plaintiffs fail to satisfy those requirements.

A. Plaintiffs Have Not Demonstrated a Clear Entitlement to Relief

The "protections of the Free Exercise Clause" apply if a law or policy "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 532 (1993); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66-67 (2020) (per curiam). As the courts below properly concluded, the State's restrictions on private gatherings

do none of those things. *See supra* pp. 10-11. They are "neutral and generally applicable," App'x 8, applying to all "private gatherings," secular or religious, "that bring together people from different households at the same time in a single space or place," *id.* at 190. The State's policy, in other words, imposes a "blanket ban[]" on noncompliant gatherings, *id.* at 103; it does "not list examples of prohibited gatherings or single out religious gatherings," *id.* at 12; *see also supra* pp. 5-6. And "there is no indication, or claim, of animus toward religious gatherings." App'x 12. To the contrary, the State's objective is to limit the spread of COVID-19: as the guidance document itself explains, "the more people from different households a person interacts with at a gathering, the closer the physical interaction is, and the longer the interaction lasts, the higher the risk that a person with a COVID-19 infection, symptomatic or asymptomatic, may spread it to others." *Id.* at 190; *see also id.* at 85, 105-109 (undisputed findings by the district court to the same effect).

Plaintiffs contend that the State's restrictions on private gatherings unconstitutionally burden their free-exercise rights by limiting their ability to host "weekly in-person Bible studies and communal worship in their homes with groups of eight to twelve individuals." Application 18. But a law of "neutral and general applicability" does not violate the Free Exercise Clause, "even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 532; *see also Roman Catholic Diocese*, 141 S. Ct. at 66 & n.1. And while "[f]acial neutrality is not determinative," *Lukumi*, 508

U.S. at 534, there is "nothing in the record" here or in the State's broader pandemic-response framework, App'x 18 & n.8, suggesting that "religious observers" have been treated "unequally," *id.* at 13 (internal quotation marks omitted).

Plaintiffs argue that the State has treated their private in-home "religious activities less favorably than 'comparable' nonreligious activities," Application 18, pointing to an array of public-facing commercial enterprises and other activities, such as "restaurants, buses, salons, movie theaters, airports, trains, movie studios, [and] government offices," *id.* at 4. As the court of appeals explained, however, plaintiffs "are making the wrong comparison because the record does not support that private religious gatherings in homes are comparable" to those activities either "in terms of [the] risk to public health" they pose or the availability of "reasonable safety measures to address that risk." App'x 8. The "district court found . . . that when people gather in social settings, their interactions are likely to be longer than they would be in a commercial setting; that participants in a social gathering are more likely to be involved in prolonged conversations; that private houses are typically smaller and less ventilated than commercial establishments; and that social distancing and mask-wearing are less likely in private settings and enforcement is more difficult." *Id.* at 19. Plaintiffs failed to "dispute any of these findings." *Id.*; *cf.* Application 25 (asserting, without support, that "it does

not require any special expertise to appreciate that the exempted conduct" presents the "same risks of viral spread" as certain indoor gatherings).

Plaintiffs' application in this Court, much like the dissent below, focuses on the State's treatment of "personal care services businesses," such as "hair salons" and "tattoo parlors." Application 5 (internal quotation marks and alterations omitted); *see also id.* at 21, 23-24; App'x 38-40, 44, 48. As the panel majority recognized, however, the State requires these "public-facing businesses" to "implement extensive safety protocols" designed to minimize the risk of COVID transmission. *Id.* at 20. Among other things, they must "'[e]stablish a written workplace-specific COVID-19 prevention plan'" and "train workers on that plan"; "'[p]rovide temperature and/or symptom screenings for all workers at the beginning of their shifts'"; "'[u]se hospital grade . . . products to clean and disinfect anything the client came in contact with'"; and comply with a host of related "ventilation, cleaning, and disinfecting protocols." *Id.* at 20-21. The panel majority properly found "very little basis for comparing these businesses to private in-home religious gatherings"—and no basis in the record for concluding that "the detailed restrictions that apply to businesses that provide personal care services" are "less onerous" than the "three-household limit" challenged by plaintiffs. *Id.* at 22 & n.9.[16]

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[16] Plaintiffs argue that the State has unconstitutionally "exempted" certain "indoor 'political activities,'" such as debates and fundraisers, from the restrictions on private gatherings. Application 24. But no such exemption exists. The court of appeals' observation to the contrary was incorrect. *See*

Plaintiffs also contend that the State has improperly distinguished between "indoor religious gatherings at 'houses of worship'" and "religious gatherings held in the privacy of a home or backyard." Application 19. That is incorrect. With respect to indoor worship, as the court of appeals recognized, there are significant differences between "religious gatherings in homes" and religious activities that take place in "public buildings." App'x 8; *see, e.g.*, *id.* at 19 ("private houses are typically smaller and less ventilated"). And to the extent plaintiffs seek to hold religious gatherings outdoors in a "backyard," they may do so under the current policy: Since the summer of 2020, the State has allowed outdoor religious services without any limit on the number of attendees or households in attendance, so long as the hosts and attendees adhere to appropriate protocols (such as wearing masks, physically distancing, disinfecting any bathrooms or high-traffic areas that attendees will access, and providing hand sanitizer for attendees). *Supra* p. 3.[17] Nothing in the State's policy on outdoor religious gatherings requires that the gathering be hosted by

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App'x 28-29 & n.13 (noting that this portion of the court's analysis was "without prejudice" to clarification by the State). The State's answering brief in the underlying appeal—filed earlier this week, *supra* p. 12, n.15—clarifies that indoor political events have been (and remain) subject to the State's generally applicable restrictions on private gatherings. *See* C.A. Dkt. 25 at 37-38.

[17] *See* Cal. Dep't of Public Health, *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* 3 (July 29, 2020), https://files.covid19.ca.gov/pdf/guidance-places-of-worship--en.pdf.

(or on the premises of) a "church" or a "formally established 'house[] of worship.'" Application 6.[18]

Finally, plaintiffs maintain that relief is "dictated by" this Court's decision in *Roman Catholic Diocese* and its recent orders in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021), and *Gateway City Church v. Newsom*, __ S. Ct. __, 2021 WL 753575, at *1 (Feb. 26, 2021). *See* Application 6, 26, 32-35. As the court of appeals explained, however, those cases "differ significantly" from this one. App'x 12; *see also id.* at 14-19, 26-27. In *Roman Catholic Diocese*, the Court concluded that New York had "single[d] out houses of worship for especially harsh treatment" by barring them from admitting more than 25 persons (and 10 persons in certain places), while at the same time allowing many secular businesses to "admit as many people as they wish." 141 S. Ct. at 66. The Court determined that New York's restrictions could not "be viewed as neutral." *Id.*; *see also id.* at 66 n.1 (distinguishing a law or policy "'neutral on its face'"). In *South Bay*, members of the Court identified a similar

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[18] The focus of the proceedings below was on the types of *indoor* gatherings that plaintiffs wish to hold. *See, e.g.*, C.A. Dkt. 9 at 9, 16-17, 19 (plaintiffs' motion for an injunction pending appeal). Although Judge Bumatay's dissent suggested that the State's "outdoor-gatherings rules" would bar the plaintiffs from holding religious gatherings in their backyards, App'x 40, he did not address the possibility that those gatherings were already permissible under the State's general guidance on outdoor worship services, *see id.* at 40-41. The State has now made clear—both in this response and its recently filed merits brief in the court of appeals, *see* C.A. Dkt. 25 at 28-29 & n.11, 30-31 & n.12—that religious gatherings are allowed in outdoor spaces, including backyards, so long as they are conducted in accordance with required precautions and protocols. *See supra* n.17.

defect in California's temporary restrictions on in-person worship in counties with the highest rates of COVID-19 transmission. *See, e.g.*, 141 S. Ct. at 717 (Roberts, C.J., concurring) (concluding that the State had not adequately substantiated a determination "that the maximum number of adherents who can safely worship" indoors in Tier 1 counties "is zero"); *see also Gateway City*, 2021 WL 753575, at *1 (similar).

The policy on private gatherings challenged here, by contrast, is "'neutral on its face.'" *Roman Catholic Diocese*, 141 S. Ct. at 66 n.1; *supra* pp. 5-6. "[N]othing in the record supports" plaintiffs' contention that the State has unjustifiably treated comparable activities more favorably. App'x 18; *supra* pp. 15-17. And unlike the policies considered in *South Bay* and *Gateway City*, the "gatherings restrictions at issue here do not impose a total ban on all indoor religious services, but instead limit private indoor and outdoor gatherings to three households." App'x at 12.

The State recognizes that its restrictions on private gatherings have limited plaintiffs' ability to meet with others for certain forms of communal worship, study, and prayer, and that these activities are central tenets of plaintiffs' faith. *See* Application 35.[19] But these temporary restrictions are entirely neutral toward religion and have served important public health

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[19] *See also* Cal. Dep't of Public Health, *About COVID-19 Restrictions*, https://covid19.ca.gov/stay-home-except-for-essential-needs/ (last visited Apr. 7, 2021) (drop-down menu, "Can I practice my religious faith?") ("Yes. Practicing your faith is a constitutionally-protected activity and may manifest in many different forms.").

interests throughout the present pandemic. *See supra* pp. 2, 5-6, 14. They do not violate the Free Exercise Clause.

B. In Any Event, the Expiration of the Challenged Policy Makes Injunctive Relief Unnecessary

As noted, after careful consideration and in accordance with the State's commitment to review and revise public health policies in light of changing public health conditions, the State will soon be relaxing the current restrictions on private gatherings. *See supra* pp. 7-9. Under the new gatherings policy, effective April 15, individuals may host and attend gatherings in greater numbers, both indoors and outdoors (in all counties except the two that remain in Tier 1). *Id.* In Tier 3 counties—including Santa Clara, where plaintiffs live—up to 50 persons may attend an outdoor gathering and up to 25 may attend an indoor gathering, without any household limit. *Supra* pp. 7-8.[20] In addition, if the event has "assigned seating" and a "defined guest list" (to facilitate contact tracing), it qualifies as a "private event"; and if all attendees at a private event in a Tier 3 county have either been vaccinated or obtained negative COVID test results beforehand, then up to 300 persons may attend outdoors and up to 150 may attend indoors. *Supra* p. 8.

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[20] The only exception is for gatherings in spaces with posted occupancy limits, which may not exceed 25% of capacity. *Supra* p. 8, n.11. Private homes do not typically have posted occupancy limits. *Id.*

Because of these changes, starting next week plaintiffs will be able to resume hosting their "weekly in-person Bible studies and communal worship in their homes with groups of eight to twelve individuals"—or even larger groups, if they choose. Application 18.[21] And, at present, there is no reason to think that they will be unable to continue hosting those gatherings going forward. Santa Clara County, where plaintiffs reside, continues to make substantial progress against the spread of COVID-19.[22] Indeed, if present trends continue, it will soon enter Tier 4, enabling plaintiffs to host as many as 50 guests at indoor gatherings in their homes. *See supra* p. 8. And the State has announced plans to terminate the Blueprint's restrictions on gatherings entirely, effective June 15, assuming similar trends continue across the rest of the State. *Supra* p. 9.

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[21] Respondents informed plaintiffs of the new gatherings policy shortly after that policy was announced on April 2. Plaintiffs have not yet indicated whether they will seek to enjoin the new gatherings policy. Of course, any such claim is beyond the scope of the present proceeding and would need to be presented to the lower courts in the first instance. *See* Sup. Ct. R. 23.3.

[22] Over the past seven days, the county has had an average of just five new cases per 100,000 residents per day; its test positivity rate is less than 1%. *See* Cal. Dep't of Public Health, *Tracking COVID-19 in California*, https://covid19.ca.gov/state-dashboard/ (last visited Apr. 7, 2021) (under the "See the data statewide and in each county" box, enter "Santa Clara"). In addition, over 40% of the county's adult population has received at least one dose of the vaccine. *See* County of Santa Clara Emergency Operations Center, *COVID-19 Vaccinations Among County Residents Dashboard*, https://www.sccgov.org/sites/covid19/Pages/dashboard-vaccine-CAIR2.aspx (last visited Apr. 7, 2021).

These circumstances render injunctive relief particularly unwarranted here. Only "critical and exigent circumstances" justify injunctive relief from this Court in the first instance. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (Roberts, C.J., concurring) (internal quotation marks omitted). There is no reasonable prospect that the Court will ultimately grant certiorari to review any lower-court decisions addressing the State's since-expired restrictions on private gatherings. *Supra* p. 13; *cf. Jackson v. District of Columbia Bd. of Elections*, 559 U.S. 1301, 1303 (2010) (Roberts, C.J., in chambers) (denying stay because "Court is unlikely to grant certiorari" of the underlying decision). And the "balance of equities," *Winter*, 555 U.S. at 20, tilts sharply against injunctive relief because any harm to plaintiffs in the few remaining days before the current restrictions expire on April 15 will be limited.

Indeed, this Court recently denied injunctive relief in similar circumstances. In *Danville Christian Academy, Inc. v. Beshear*, 141 S. Ct. 527, 528 (2020), the Court declined to enjoin an expiring restriction that required the closing of both secular and religious schools in Kentucky (while leaving open the possibility that a party could seek injunctive relief if the State renewed the policy). There, as here, the plaintiffs challenged an order that was neutral on its face; and there, as here, the plaintiffs argued that the policy triggered "heightened scrutiny" because it treated certain religious activities "worse than restaurants, bars, and gyms." *Id.* Because the order was set to

expire the week of the Court's decision "or shortly thereafter," the Court declined to issue an injunction. *Id.*; *see also* Shapiro et al., *Supreme Court Practice* § 17.13(d)(12), p. 17-45 (11th ed. 2019) (noting cases where the Court has denied injunctive relief in light of a "change in circumstances or an anticipated change in circumstances"). The same result is appropriate here.[23]

CONCLUSION

The Court should deny the application.

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[23] Alternatively, the Court could consider treating plaintiffs' application as a petition for certiorari before judgment, granting the petition, vacating the district court's denial of preliminary injunctive relief, and remanding in light of the State's new policy on gatherings. Indeed, plaintiffs have urged the Court to construe the application as a petition for certiorari before judgment. *See* Application 39. While they do not even attempt to satisfy the demanding standard for obtaining plenary review before judgment, *see* S. Ct. R. 11, the Court sometimes does grant review, vacate, and remand in light of "recent legislation" or other changes in government policy, Shapiro et al., *Supreme Court Practice* § 5.12(a), p. 5-38 (11th ed. 2019) (collecting examples).

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