No. 20-A_____

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

SOUTH BAY UNITED PENTECOSTAL CHURCH, AND
BISHOP ARTHUR HODGES III,

*Applicants*,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California, SONIA ANGELL, in her official capacity as California Public Health Officer, WILMA J. WOOTEN, in her official capacity as Public Health Officer, County of San Diego, HELEN ROBBINS-MEYER, in her official capacity as Director of Emergency Services, County of San Diego, and WILLIAM D. GORE, in his official capacity as Sheriff, County of San Diego

*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**
**Relief Requested by Sunday, May 24, 2020**


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## QUESTION PRESENTED

Does California's four stage Reopening Plan, which permits manufacturing, warehousing, retail, offices, seated dining at restaurants, and schools to reopen, but not places of worship, violate the Free Exercise clause of the First Amendment to the U.S. Constitution?

## 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 SOUTH BAY UNITED PENTECOSTAL CHURCH and BISHOP ARTHUR HODGES III. Both are Plaintiffs in the U.S. District Court for the Southern District of California and are the Appellants in the U.S. Court of Appeals for the Ninth Circuit. South Bay Pentecostal Church is a nonprofit public benefit corporation organized under the laws of the State of California. It does not have any parent corporation or any stock. Bishop Hodges is the Senior Pastor and Chief Executive Officer of South Bay Pentecostal Church.

Respondents are GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California, SONIA ANGELL, in her official capacity as California Public Health Officer, WILMA J. WOOTEN, in her official capacity as Public Health Officer, County of San Diego, HELEN ROBBINS-MEYER, in her official capacity as Director of Emergency Services, County of San Diego, and WILLIAM D. GORE, in his official capacity as Sheriff,

County of San Diego. Respondents Newsom, Becerra, and Angell are jointly represented and referred to as the State. Respondents Wooten, Robbins-Meyer, and Gore are jointly represented and referred to as the County.

Both the State and the County are Defendants in the U.S. District Court for the Southern District of California and are the Appellees in the U.S. Court of Appeals for the Ninth Circuit.

## DECISIONS BELOW

All decisions in this case in the lower courts are styled *South Bay United Pentecostal Church v. Newsom*. The district court minute order denying Applicants' motion for a temporary restraining order and motion for an order to show cause re: preliminary injunction is attached hereto as Ex. B. The transcript of the district court hearing is attached hereto as Ex. C. The order of the U.S. Court of Appeals for the Ninth Circuit denying Applicants' motion for an injunction pending appeal is attached hereto as Ex. A. That order is designated "For Publication," but is not yet available in legal databases.

## JURISDICTION

Applicants have a pending interlocutory appeal in the U.S. Court of Appeals for 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 South Bay United Pentecostal Church and Bishop Arthur Hodges III ("Plaintiffs") respectfully request a writ of injunction precluding enforcement against them of various "Stay-at-Home" orders that were issued by the State of California and the County of San Diego to help mitigate the effects of the COVID-19 pandemic. Although curbing the pandemic is a laudable goal, those orders arbitrarily discriminate against places of worship in violation of their right to the Free Exercise of Religion under the First Amendment of the U.S. Constitution.

On May 19, 2020, all four of California's U.S. Attorneys authored a letter to California Governor Newsom informing him that his Stay-at-Home orders were unconstitutional, and on May 22, 2020, President Trump announced that all state governors must immediately lift (by the weekend of May 23–24) their executive orders that discriminate against religious conduct, or he will "override them." Relying on these actions, thousands of churches across the country and in California plan to reopen by May 31, 2020—the Christian holy day of Pentecost—in defiance of any state executive orders, leading to widespread civil unrest. Thus, this application concerns an issue of widespread national importance whose resolution is needed to avert a constitutional crisis, which may occur without guidance from this Court.

Plaintiffs initially sought an injunction from the Southern District of California and the Ninth Circuit—both of which denied the injunction. However, the Ninth Circuit's decision was accompanied by a vigorous dissent and is having the

effect of deepening a circuit split as to the constitutionality of similar executive orders. According to the Fifth and Sixth Circuits, the violation of Plaintiffs' rights is "indisputably clear," while according to the Seventh and Ninth Circuits, no such violation occurred whatsoever.

The COVID-19 pandemic is a national tragedy, but it would be equally tragic if the federal judiciary allowed the "fog-of-war" to act as an excuse for violating fundamental constitutional rights. As this Court said in the aftermath of the Civil War, "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any provisions [of the Bill of Rights] can be suspended during any of the great exigencies of government." *Ex Parte Milligan*, 71 U.S. 2, 121 (1866). This Court then concluded with these sobering words: "[I]t could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." *Id*. at 126

Plaintiffs thus respectfully request that this Circuit Justice grant the applied for injunction or refer this application to the Court. Plaintiffs request that the injunction stay in effect until such time as the State of California and the County of San Diego voluntarily withdraw their executive orders discriminating against religious conduct, which Plaintiffs understand to be forthcoming within days or weeks.

## INTRODUCTION

Plaintiffs' applied for injunction concerns a series of "Stay-At-Home" Orders issued by the State of California and the County of San Diego, as most recently amended on May 7 and 10, 2020, as part of an effort to curb the COVID-19 pandemic.

Plaintiffs' application is not about whether state governments have a compelling interest in curbing pandemics. They do. Nor is it about whether state governments may limit some personal liberties. They may. Nor is it about the constitutionality of California's prior executive orders issued in March that permitted "life-sustaining" businesses to stay open.

No, this application is about California's modifications to its Stay-At-Home order made by California Governor Newsom's May 7, 2020, "Resilience Roadmap," and the County of San Diego's May 10, 2020, order implementing it. (generally, the "Reopening Plan"). 3ER559–97.[1] Under the Reopening Plan, all manufacturing and logistics (warehousing) facilities opened in full on Friday, May 8 (Stage 2a). All retail, for curbside pickup only, also opened on that day. (Stage 2a). Individual counties could open further after certifying to the state that certain statistical benchmarks were met. As a result, on May 20 in San Diego, offices, seated dining at restaurants, visiting retail, and schools opened (Stage 2b). 9th Cir. Dkt. 14, at 17.[2]

Places of worship will open sometime after that, alongside movie theaters as well as hair and nail salons, and tattoo parlors (Stage 3). 3ER568–69. In late April, Governor Newsom said that places of worship were "months" away from opening. 3ER325. Then, in early May he indicated that they would be able to open in early June. 9th Cir. Dkt. 20, at 2–3. But most recently, he announced that on Monday, May 25, California will release further expedited plans. 9th Cir. Dkt. 27, at 3–4. It is unclear whether places of worship will be able to immediately open on that day, or

[1] The three volumes of the Excerpts of Record are located at 9th Cir. Dkt. 3-1, 3-2, and 3-3.
[2] Page citations are to the ECF stamp at the top of the document.

soon thereafter. In any event, every day that passes Plaintiffs are irreparably harmed, and there is a risk that restrictions will be reimposed in the fall if the virus resurfaces.

California's original executive orders from March 2020 allowed "essential businesses" to continue operations subject to strict social distancing guidelines. For example, these orders permitted marijuana dispensaries, fast food restaurants, and liquor stores to remain open, presumably for the health and well-being of Californians. 3ER533–58. However, California also prioritized some economically essential businesses that were irrelevant to health and safety, including "the entertainment industries" and movie studios. 3ER558. The original orders prohibited religious leaders and churches like Plaintiffs from holding worship services and ceremonies. 3ER551.

Under the original orders, California insisted that all religious worship take place only at home, by live-streaming—apparently assuming that all Californians have access to high-speed internet, computer equipment, a desire to add intrusive, data-collecting apps to their computer devices, and the willingness to suspend a lifetime of worship practices at the command of the government. 3ER551. And in doing their part to curb their pandemic, Plaintiffs chose to abide by them.

But the Reopening Plan is beyond the pale. Communal worship and ministry are at the heart of Plaintiffs' religious beliefs and practices. 2ER308. But these new stay-at-home orders continue making it a crime for a congregant to even step foot inside a synagogue, while permitting manufacturing, warehousing, offices, and dine-

in restaurants to open. 3ER559–97.

California published the Reopening Plan online and described Stage 2 as "lower-risk workplaces" and Stage 3 as "higher risk workplaces." 3ER560–61. However, when asked at a press conference why schools are considered "lower-risk" and churches are considered "higher risk," Governor Newsom explained that the Reopening Plan balanced risk with reward—*i.e.*, it prioritized services considered more important to California. 3ER512. But Governor Newsom is not only prioritizing life-saving businesses, or even schools. He is prioritizing all manufacturing and warehousing—so long as they practice social distancing. In other words, Governor Newsom is criminalizing the exact same type of gatherings, but only if motivated by religious belief.

With each passing moment, Plaintiffs suffer irreparable harm of the worst caliber: a severe deprivation of religious liberty. Thus, Plaintiffs seek an injunction as follows:

> Defendants, their agents, employees, and successors in office, are restrained and enjoined from enforcing, trying to enforce, threatening to enforce, or otherwise requiring compliance with any prohibition on Plaintiffs' engagement in religious services, practices, or activities at which the County of San Diego's Social Distancing and Sanitation Protocol and Safe Reopening Plan is being followed.

Plaintiffs request this injunction by tomorrow, Sunday, May 24, 2020, so that they can resume worship services. However, in the alternative, Plaintiffs request this injunction by Pentecost Sunday—May 31, 2020.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. California's "Stay-at-Home" Orders.

This case arises from executive orders issued by the State of California and the County of San Diego to prevent the spread of the novel coronavirus. On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency as a result of the threat of COVID-19. 3ER332. Two weeks later, on March 19, 2020, the Governor issued Executive Order N-33-20, which ordered all individuals living in the State of California to stay home or at their place of residence. 3ER533.

Executive Order N-33-20 gave some Californians the right to leave their residence, including workers "needed to maintain continuity of operations of the federal critical infrastructure sectors" as well as industries Governor Newsom viewed as "critical to protect the health and well-being of all Californians," such as the Hollywood movie industry. 3ER536–558. Included on this list were "faith based services that are provided through streaming or other technology." 3ER551.

Seven weeks later the pandemic had, in the Governor's words, "stabilized." 3ER324–25; 2ER224–67, 314–20. As a result, on May 7, 2020, the Governor published his four stage "Resilience Roadmap"—the California Reopening Plan. 3ER560. The California Reopening Plan modified Executive Order N-33-20 by adding more Californians that had the right to leave their residence. 3ER560.

"Stage 1" of the plan began on March 16, and continued until May 7, 2020. "Stage 2" of the Reopening Plan began on May 8, and allowed all manufacturing and warehousing (not just critical or essential manufacturing) to immediately reopen, as

well as all retail, but for curbside pickup only (Stage 2a). This also began the stage where individual counties could certify to the State that they had met certain statistical benchmarks, and then could reopen offices, schools, and destination retail (*i.e.*, to visit and browse) (Stage 2b). 3ER325–27. San Diego county certified that it met these benchmarks on May 20, 2020. Ex. A, Dissent, at 13 n.7. As a result, presently the following can open in San Diego: "Destination retail, including shopping malls and swap meets;" "Personal services, limited to: car washes, pet grooming, tanning facilities, and landscape gardening;" "Office-based businesses;" "Dine-in restaurants;" "Schools and childcare facilities;" and "Outdoor museums and open gallery spaces." 3ER568; 2ER298.

Religious services are relegated to "Stage 3" along with movie theaters and hair and nail salons, which has yet to start. According to California's Public Health Officer, Stage 3 is for "things like getting your hair cut, uh getting your nails done, doing anything that has very close inherent relationships with other people, where the proximity is very close." "Stage 4" is the end of all COVID-19 related executive orders. 3ER325–27. In assigning types of businesses to different stages (distinguishing between schools and places of worship), Governor Newsom explicitly stated that California's Reopening Plan weighed the risk of a COVID-19 outbreak with the "reward" of the value of the business. 3ER512.

### B. Plaintiffs Bishop Hodges and South Bay Pentecostal Church.

Bishop Arthur Hodges III is Senior Pastor of South Bay Pentecostal Church, a diverse Christian community in Chula Vista, California. Every Sunday, the church

holds three to five worship services, where congregants "come together with one accord" to pray and worship. Along with worship services, the church ministers to the faithful by performing baptisms, funerals, weddings, and other religious ceremonies. The sanctuary of South Bay Pentecostal Church can seat up to 600 people, but is usually only a third-, or half-filled, with 200–300 congregants. 2ER305–13.

South Bay Pentecostal Church may be the largest food distributor to needy people in the South Bay region of San Diego County. Since the closure orders were placed, the Church has worked with the Chula Vista Police Department to develop a drive-through food distribution system so that hundreds of cars may drive into and around the Church parking lot. Volunteers are provided masks and gloves and deliver groceries, contact-free, directly into each driver's trunk or cargo area. During any given week, the Church distributes between three and twelve tons of food. 2ER305–13; 3ER506.

South Bay Pentecostal believes it can apply the lessons learned from proper social distancing as a food distributer to resume worship services. Due to Bishop Hodges' experience with the social distancing guidelines needed to be a large food distributor to the needy, he is prepared to carry on the South Bay Pentecostal Church's religious ministries consistent with federal, state, and county social distancing guidelines and other preventative measures. 2ER305–13; Ex. A, Dissent, at 15–16.

### C. Proceedings Below and Across the Country.

Almost as soon as various state governors began issuing executive orders

intended to curb the COVID-19 pandemic, various groups began filing suits alleging that the orders infringed upon constitutional rights. *See Planned Parenthood Ctr. for Choice v. Abbott*, No. A-20-CV-323-LY, 2020 WL 1502102 (W.D. Tex. Mar. 30, 2020). Then, beginning on April 6, courts began citing this Court's opinion in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), for the proposition that the pandemic can justify infringements on those constitutional rights. *See S. Wind Women's Ctr. LLC v. Stitt*, No. CIV-20-277-G, 2020 WL 1677094 (W.D. Okla. Apr. 6, 2020). Almost as soon as the various governors' executive orders were issued, the lower courts began splitting on whether the orders violated constitutional rights, both under this Court's regular jurisprudence and under *Jacobson*.

Plaintiffs here did not join in those lawsuits because they believed it was important to do their part in curbing the pandemic in March and April. However, on Friday, May 8, 2020, the day California entered into Stage 2 of its Reopening Plan, Plaintiffs filed suit in the Southern District of California. Plaintiffs contended that permitting various entities to open in Stage 2, but relegating places of worship to Stage 3, was an unconstitutional violation of their right to the Free Exercise of religion. That same day, Plaintiffs filed an application for a temporary restraining order. 3ER609–10; *South Bay Pentecostal Church v. Newsom*, No. 3:20-cv-00865-BAS-AHG (S.D. Cal. May 8, 2020). The next Monday, May 11, Plaintiffs filed a First Amended Complaint and an amended application for a temporary restraining order. ER268–605. Plaintiffs requested a briefing schedule permitting an injunction by that weekend so they could hold worship services.

On Friday, May 15, 2020, the District Court denied Plaintiffs' application for a temporary restraining order and denied Plaintiffs' request for an order to show cause re: preliminary injunction. Ex. B; Ex. C. That same day, Plaintiffs appealed to the Ninth Circuit, and the next day filed an urgent motion for an injunction pending appeal. 2ER43–47; 9th Cir. Dkt. 2; *South Bay Pentecostal Church v. Newsom*, No. 20-55533 (9th Cir. May 15, 2020). Again, Plaintiffs requested an injunction by the weekend so they could hold worship services on Sunday.

In the meantime, the splits in the district courts reached up to the circuit courts. The circuit courts split on whether certain executive orders limiting abortion rights were constitutional. *See In re Abbott*, 954 F.3d 772 (5th Cir. 2020) (constitutional); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020) (unconstitutional); *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020) (unconstitutional); *Robinson v. Attorney Gen.*, 957 F.3d 1171 (11th Cir. 2020) (unconstitutional). The circuit courts also split on whether executive orders discriminating against religious activity were constitutional. *Elim Romanian Pentecostal Church v. Pritzker*, --- F.3d ---, 2020 WL 2517094 (7th Cir. May 16, 2020) (likely constitutional); *Roberts v. Neace*, --- F.3d ---, 2020 WL 2316679 (6th Cir. May 9, 2020) (unconstitutional); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) (unconstitutional); *First Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi*, --- F.3d ---, Doc. 00515426773 (5th Cir. May 22, 2020) (enjoined and remanded).

On Friday, May 22, 2020, the Ninth Circuit panel issued its order on Plaintiffs' motion for an injunction pending appeal. Ex. A. The panel, Judges Silverman and

Nguyen, issued a three-page order holding that strict scrutiny was not required under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) ("*Lukumi*"). In so holding, the panel stated: "We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure. In the words of Justice Robert Jackson, if a '[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.'" Ex. A, Order, at 2 (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting)).

Judge Collins published an eighteen-page dissent in which he concluded that (1) *Jacobson* does not apply to Free Exercise claims, Ex. A, Dissent, at 5–9; (2) California's Reopening Plan is not "neutral" under *Lukumi*, *id.* at 11–14; (3) California's Reopening Plan is not "of general applicability" under *Lukumi*, *id.* at 14–15; (4) California's Reopening Plan does not satisfy strict scrutiny, *id.* at 15–16; and (5) the equities at issue when considering whether to grant injunctive relief favor granting it here, *id.* at 17–18.

### D. The Forthcoming Widespread Civil Unrest.

As stated above, the earliest litigation concerning executive orders infringing on constitutional rights began almost immediately after those orders were published in March. But orders granting injunctive relief on Free Exercise grounds did not begin being issued until April.

In the Christian faith, the Easter season proceeds for seven weeks, from Easter Sunday to Pentecost Sunday. The earliest temporary restraining orders against

unconstitutional orders like Governor Newsom's related to Easter Sunday—six weeks ago. *See On Fire Christian Ctr., Inc. v. Fischer*, --- F.3d ---, 2020 WL 1820249 (W.D. Ky. Apr. 11, 2020). Pentecost Sunday will occur in eight days, on May 31, 2020. While litigation is quickly moving in federal courts across the county, many places of worship are no longer willing to wait, and are intending to reopen for Pentecost in defiance of any executive orders. In Minnesota, the Catholic bishops (represented by Becket Law) sent a letter to the governor announcing that they will resume services on Pentecost regardless of his orders. 9th Cir. Dkt. 20, at 2–3, 11–19. And in California, three thousand churches have announced that they will reopen on Pentecost, again regardless of Governor Newsom's orders. 9th Cir. Dkt. 20, at 2–3.

These places of worship felt inclined to reopen due to their intuited understanding that Governor Newsom's and other state governors' restrictions on their religious rights were unconstitutional. But recent action by the federal government has all but ensured that thousands of additional churches will begin defying the orders. On May 19, 2020, the Department of Justice sent a letter to Governor Newsom stating that his Reopening Plan is violating the civil rights of religious Californians. As stated by the DOJ,

> *South Bay United Pentecostal Church v. Newsom*, No. 3:20-cv-865 (S.D. Cal. May 15, 2020) . . . do[es] not justify California's actions. . . . *South Bay United Pentecostal* does not describe why worship services can be distinguished from schools, restaurants, factories or other places Stage 2 permits people to come together. Other decisions around the country have followed *Lukumi* to make clear that reopening plans cannot unfairly burden religious services as California has done. . . .

> We believe, for the reasons outlined above, that the Constitution calls for California to do more to accommodate religious worship, including in Stage 2 of the Reopening Plan.

The DOJ's letter was sent by Eric S. Dreiband, Assistant Attorney General for the Civil Rights Division, and California's four U.S. Attorneys: McGregor W. Scott, Nicola T. Hanna, David L. Anderson, and Robert S. Brewer. 9th Cir. Dkt. 14, at 6, 21–23.

In apparent response to these churches' intent to reopen, on May 20, 2020, "[t]he First Pentecostal Church of Holly Springs was burned to the ground." *First Pentecostal Church of Holly Springs*, Doc. 00515426773, at 3. "Graffiti spray-painted in the church parking lot sneered, 'Bet you Stay home Now YOU HYPOKRITS.'" *Id*. This action, however, appears to have only strengthened the resolve of places of worship to reopen.

Further, on May 22, 2020, President Donald Trump held a press briefing. During that press briefing, President Trump stated:

> Today I am identifying houses of worship: churches, synagogues, and mosques, as essential places that provide essential services. . . . These are places that hold our society together and keep our people united, the people are demanding to go to church, synagogue, go to their mosque, many millions of Americans embrace worship as an essential part of life. The ministers, pastors, rabbis, imams, and other faith leaders will make sure that their congregations are safe, as they gather and pray. I know them well, they love their congregations, they love their people, they don't want anything bad to happen to them or anybody else. The governors need to do the right thing and allow these very important essential places of faith to open right now, for this weekend. If they don't do it, I will override the governors.

9th Cir. Dkt. 25, at 3–4. Despite stating that governors need to immediately rescind their orders burdening the free exercise of religion, Governor Newsom stated that he will not respond in any way until Monday, May 25. 9th Cir. Dkt. 27, at 3–4. Other governors have responded similarly.

In light of the ongoing violations of Plaintiffs' Free Exercise rights, the deepening of the circuit split with the Seventh and Ninth Circuits splitting from the Fifth and Sixth Circuits, Judge Collins' vigorous dissent, and the potential for widespread civil unrest, Plaintiffs now seek emergency relief from this Court.

## REASONS FOR GRANTING THE APPLICATION

With respect to both a stay and an affirmative injunction, they may be issued by a Circuit Justice "[i]f there is a 'significant possibility' that the Court would" grant certiorari "and reverse, and if there is a likelihood that irreparable injury will result if relief is not granted." *Am. Trucking Associations, Inc. v. Gray*, 483 U.S. 1306, 1308 (1987). However, unlike the issuance of a stay of a lower court order, "[a] Circuit Justice's issuance of an injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C. J.) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J.)).

Generally, therefore, "[t]o obtain injunctive relief from a Circuit Justice, an applicant must demonstrate that 'the legal rights at issue are "indisputably clear."'" *Id*. at 1306 (quoting *Turner Broadcasting System, Inc. v. FCC*, 507 U.S. 1301, 1303

(1993) (Rehnquist, C. J.). However, the Court may also issue an injunction, "based on all the circumstances of the case," without having its order "construed as an expression of the Court's views on the merits." *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014). The Court may also consider "a traditional ground for certiorari," such as whether "[t]he Circuit Courts have divided on whether to enjoin the requirement." *Wheaton Coll. v. Burwell*, 573 U.S. 958 (2014).

### 1. There Is A "Significant Possibility" that this Court would Grant Certiorari and Reverse Because the Violation of Plaintiffs'—and all Americans' rights—is Indisputably Clear.

Although binding precedent from this Court should have mandated that the lower courts grant the injunction that Plaintiffs seek, there is currently a circuit split that requires immediate guidance from this Circuit Justice or this Court. The Seventh Circuit[3] and the Ninth Circuit[4] plainly agree with California. And the Fifth Circuit,[5] the Sixth Circuit,[6] the Wisconsin Supreme Court,[7] and France's Highest Court[8] agree with Plaintiffs. Due to these widespread inconsistencies on matters of fundamental constitutional importance, it is likely that four justices would be

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[3] *Elim Romanian Pentecostal Church v. Pritzker*, --- F.3d ---, 2020 WL 2517094 (7th Cir. May 16, 2020).
[4] Ex. A.
[5] *First Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi*, --- F.3d ---, Doc. 00515426773 (5th Cir. May 22, 2020).
[6] *Roberts v. Neace*, --- F.3d ---, 2020 WL 2316679 (6th Cir. May 9, 2020); *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020).
[7] *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 53 ("There is no pandemic exception . . . to the fundamental liberties the Constitution safeguards.").
[8] France's Highest Court held that the government's decree "constitute[d] a serious and manifestly unlawful interference with" the fundamental religious right "to participate collectively in ceremonies, in particular in places of worships." 9th Cir. Dkt. 14 at 5. This is undoubtedly one of those rare human rights cases where looking to foreign jurisdictions is helpful. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 576 (2003) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.").

interested in granting certiorari to provide guidance on how religious rights should be treated in an emergency.

The reality, however, is that this Court's jurisprudence in *Smith*, *Lukumi*, and *Trinity Lutheran*, provide the rule of decision. So it is also likely that five justices would vote to reverse the lower court's decisions. Indeed, a simple analysis of *Lukumi*, as undertaken by Dissenting Judge Collins in the Ninth Circuit, makes clear that Plaintiffs' religious rights are "indisputably" being violated.

Under the Free Exercise Clause, a law that "discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons" is subject to strict scrutiny. *Lukumi*, 508 U.S. at 532. To survive that "stringent standard," the government must prove that the law is narrowly tailored to further a compelling government interest. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017). As discussed below, the Reopening Plan cannot survive strict scrutiny.

In addition, "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'" *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990). Thus, a law that is "neutral" and "generally applicable" is not subject to strict scrutiny even if it has the incidental effect of burdening a religious belief or practice. *See id.* But this "rule comes with an exception." *Ward v. Polite*, 667 F.3d 727, 738 (6th Cir. 2012). When the policy "appears to be neutral and generally applicable on its face, but in practice is riddled with exemptions," it "must run the gauntlet of strict scrutiny." *Id.* at 740.

### 1.1. The Reopening Plan is not neutral because it imposes special burdens on Plaintiffs *because of* their religious practices.

Under the First Amendment's Free Exercise Clause, "[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532 (emphasis added); *see also Trinity Lutheran*, 137 S. Ct. at 2021 ("Nor may a law regulate or outlaw conduct because it is religiously motivated.") (emphasis added). Here, Judge Collins analyzed the issue as follows:

> Because the restrictions at issue here explicitly "reference . . . religious practice, conduct, belief, or motivation," they are not "facially neutral." *Stormans*, 794 F.3d at 1076. . . .
>
> As set forth by the State, the four-stage Reopening Plan assigns "retail (curbside only), manufacturing & logistics" to the initial portion of "Phase 2," and in-store retail, "child care, offices & limited hospitality, [and] personal services" to a later portion of Phase 2. (On May 20, 2020, San Diego County was given approval to begin this later portion of Phase 2; it aims to promptly reopen both dine-in restaurants and in-store retail businesses.) By contrast, "religious services" are *explicitly* assigned to a "Stage 3" that also includes "movie theaters" and other "personal & hospitality services." All reopenings under the Plan are subject to detailed, activity-by-activity State guidance that sets forth the specific actions that each activity (such as "manufacturing" or "warehousing facilities") must take (*e.g.*, use of face coverings, social distancing, sanitation, and employee training) in order to reopen, and to stay open.
>
> By *explicitly* and categorically assigning all in-person "religious services" to a future Phase 3—without any express regard to the number of attendees, the size of the space, or the safety protocols followed in such services—the State's Reopening Plan undeniably "discriminate[s] on its face" against "religious conduct." *Lukumi*, 508 U.S. at 533. Although the State insists that it has not acted out of

> antipathy towards religion, the "constitutional benchmark is 'government neutrality,' not 'government avoidance of bigotry.'" *Roberts*, 2020 WL 2316679, at *4 (quoting *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008)). Because the Reopening Plan, on its face, is not neutral, it is subject to strict scrutiny. *Lukumi*, 508 U.S. at 531–32.

Ex. A, Dissent, at 11–14 (footnotes omitted).

On this point, California and the lower courts essentially contended that California's Reopening Plan was neutral because it was categorizing like businesses alike, and not treating houses of worship any worse than similarly situated entities. This argument, however, is factually false.

On May 7, 2020, Governor Newsom held a press conference in which he stated that the Reopening Plan took into account not just the physical layout or conditions of the entity (risk), but the *benefit they provide to California as a whole* (reward).

> Q: Thank you Governor. Can you clarify why churches and salons are in Stage 3 and not Stage 2. Um, what makes them more high risk than schools, for example? Uh, **what factors are you weighing here** when you decide what goes into what phase?
>
> A: Yeah, we're, we're . . . looking at **low risk-high reward, low risk-low reward**. . . .

3ER328[9] (bolding added); *see also Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) ("[T]he States have offered evidence of numerous statements by the President about his intent. . . . It is well established that evidence of purpose beyond the face of the challenged law may be considered") (citing *Lukumi*, 508 U.S. at 534).

Thus, according to California, its residents may gather to manufacture

[9] https://www.facebook.com/CAgovernor/videos/260976601615609/, 50:36.

products, to teach children, but *not* to worship because worship is "low reward." Like Judge Collins, Plaintiffs do not accuse the Governor of personal bigotry or animus, but rather indifference to the religious rights of Californians. Because California thinks worship is only important for relaxation, but nothing more, *that* is why worship is placed in Stage 3 with salons and theaters: *low reward*.

Notably, the only *evidence* actually submitted below by California was the declaration of Dr. James Watt. 2ER123–28. But it merely established the undisputed fact that gathering can lead to COVID-19 outbreaks, and then provided examples of outbreaks connected to "religious services, choir practices, funerals, and parties." 2ER127. It did not state that *risk* was the only criterion being considered by California as part of its Reopening Plan, and actually implied the opposite: "*A main purpose* of the state's current health and safety rules and related orders is . . . to reduce the spread of th[e] virus." 2ER126–27 (emphasis added).

But this simply begs the question: "Why not ban all large gatherings?" Why not create an absolutely neutral rule, such as: "In any gathering involving more than 10 people, (a) the gathering may not exceed 25% occupancy of the room, (b) when seated, the people must be equally spaced out in the whole room (greater than six feet distance), and (c) when moving around, the people must maintain at least six-foot social distancing at all time."

The real answer is that such a neutral rule would ban activities California finds important. But this is unconstitutional religious targeting.

### 1.2. The Reopening Plan is not generally applicable because it is *riddled with exceptions.*

A law is not generally applicable if it targets a particular religious belief or practice for discriminatory treatment "through [its] design, construction, or enforcement." *Lukumi*, 508 U.S. at 557 (Scalia, J., concurring). Here, the Reopening Plan fails the generally applicable requirement because it is underinclusive, exempting "nonreligious conduct that endangers [the government's] interests in a similar or greater degree than [the prohibited religious conduct]." *Id.* at 543. For example, the Reopening Plan exempts a laundry list of industries and services purportedly "essential" to the government's various interests, including originally the entire entertainment industry, medical cannabis dispensaries and liquor stores, and now retail stores, manufacturing, offices, and restaurants.

But California cannot provide exemptions to secular facilities on the ground that they are "essential" while denying parallel exemptions to churches that practice the same or similar degree of preventative measures. That is because favoring non-religiously motivated activities over religiously motivated activities constitutes a forbidden governmental "value judgment." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999).

The Reopening Plan as applied also falls "well below the minimum standard" of general applicability because the scheme is substantially "underinclusive" and riddled with categorical and individualized exemptions. *Lukumi*, 508 U.S. at 543. This includes both the original Stage 1 "essential businesses" of the movie industry, liquor stores and cannabis dispensaries, and the new Stage 2 "essential businesses"

of retail, offices, manufacturing, and schools. "Neutrality and general applicability are interrelated," and "the failure to satisfy one requirement is a likely indication that the other has not been satisfied." *Lukumi*, 508 U.S. at 531.

Of course, protecting both lives and the economy are commendable values, but the imposition of a value judgment at all is problematic and requires imposition of strict scrutiny. *Fraternal Order of Police*, 170 F.3d at 366 ("[T]he Department has made a value judgment that . . . medical[] motivations . . . are important enough . . . but that religious motivations are not."). Otherwise, which value judgments will be deemed sufficient? Already non-essential manufacturing is open, as well as visiting "bookstores, clothing stores, florists and sporting goods stores" to browse. 3ER327, 444.

Governor Newsom's interest in protecting the economy is commendable, but under *Lukumi* and its progeny, these exceptions require the application of strict scrutiny. This same conclusion was reached by Judge Collins:

> Under California's approach—in which an individual can leave the home only for the *enumerated* purposes specified by the State—these categories of authorized activities provide the operative rules that govern one's conduct. While the resulting highly reticulated patchwork of designated activities and accompanying guidelines may make sense from a public health standpoint, there is no denying that this amalgam of rules is the very antithesis of a "generally applicable" prohibition. The State is continually making judgments, at the margins, to decide what additional activities its residents may and may not engage in, and thus far, "religious services" have not made the cut. I am at a loss to understand how the State's current maze of regulations can be deemed "generally applicable." *See Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) ("At some point, an exception-ridden policy takes on

> the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy.").
>
> The State contends that its plan is generally applicable because it assertedly classifies activities neutrally, in accordance with the State's sense of their perceived risk. But that is not how the Reopening Plan works. Warehousing and manufacturing facilities are categorically permitted to open, so long as they follow specified guidelines. But in-person "religious services"—merely *because* they are "religious services"—are categorically *not* permitted to take place *even if they follow the same guidelines*. This is, by definition, *not* a generally applicable regulation of underlying physical conduct.

Ex. A, Dissent, at 14–15.

In sum, the record shows that the Government has not been, and is not, acting in a neutral manner, as required under the Free Exercise Clause. Thus, California must satisfy strict scrutiny.

### 1.3. The Reopening Plan *fails strict scrutiny* because it is not narrowly tailored to curbing the pandemic.

Given that the Reopening Plan violates Plaintiffs' free exercise of religion, it must withstand "the strictest scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2019. California "bears the burden of proving the constitutionality of its actions" and California does not get "the benefit of the doubt." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816, 818 (2000). California thus has the burden to prove that its laws further a compelling government interest and are narrowly tailored to achieve that end. Strict scrutiny is "the most demanding test known to constitutional law," and government action that imposes special burdens on religious beliefs and practices will survive it "only in rare cases." *City of Boerne v. Flores*, 521 U.S. 507,

534 (1997). This is not one of those cases.

To satisfy the first prong of strict scrutiny, the Reopening Plan must advance a compelling government interest "of the highest order." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). The compelling interest prong requires a "focused inquiry" that does not turn on whether the government has a compelling interest in enforcing the Reopening Plan in the abstract. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014). In other words, "then everybody will want an exception" is not a compelling interest. Instead, courts should "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). Thus, this Court must determine whether California has a compelling interest in not permitting South Bay Pentecostal Church to open.

Plaintiffs have never disputed that the government has a compelling interest in curbing the novel coronavirus. Nor have Plaintiffs ever disputed that the Reopening Plan furthers that interest. But the Reopening Plan fails strict scrutiny—and is therefore unconstitutional—because it is not narrowly tailored to achieve that end. Specifically, the Reopening Plan is overbroad and goes "far beyond what was reasonably required for the safety of the public." *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 28 (1905).

Here, any compelling interest California may have in violating Plaintiffs' free exercise rights is defeated by the Reopening Plan's under-inclusivity. California

stated that it "has a compelling interest in protecting the public from COVID-19's spread." 9th Cir. Dkt. 12, at 26. But the Reopening Plan is not narrowly tailored, and therefore does not satisfy strict scrutiny. California argued that it is tailored because "measures limiting physical contract [sic] are widely recognized as the 'only way' to slow the spread of the virus." *Id*. But a law cannot further a compelling interest when it "fail[s] to prohibit nonreligious conduct that endangers [its asserted] interests in a similar or greater degree" than the religious conduct. *Lukumi*, 508 U.S. at 543. Why is California not "limiting physical contact" by shuttering factories, schools, restaurants and airlines? California has never provided an answer.

Because the Reopening Plan allows broad exemptions to its stay-at-home mandate, California cannot claim that stopping the spread of COVID-19 is a compelling enough interest to shutter South Bay Pentecostal Church. California must instead identify a compelling interest actually consistent with its broader powers—exemptions and all. Unless it does so, California is left with discriminatory decrees that "leave[] appreciable damage to [its] supposedly vital interest unprohibited," which is fatal under the Free Exercise Clause. *Lukumi*, 508 U.S. at 547. But there is no compelling interest that requires the shuttering only of places of worship but not other facilities. Again, Judge Collins arrived at the same conclusion:

> The State's undeniably compelling interest in public health "could be achieved by narrower [regulations] that burdened religion to a far lesser degree." *Lukumi*, 508 U.S. at 546. As Plaintiffs have reiterated throughout these proceedings, they will "comply[] with every single guideline that other businesses are required to comply with." In their papers in the district court, Plaintiffs provided a list illustrating the range of measures they are ready and willing to implement

> on reopening, including spacing out the Church's seating, requiring congregants to wear face coverings, prohibiting the congregation from singing, and banning hugging, handshakes, and hand-holding. By regulating the specific underlying risk-creating *behaviors*, rather than banning the particular *religious setting* within which they occur, the State could achieve its ends in a manner that is the "least restrictive way of dealing with the problem at hand." *Roberts*, 2020 WL 2316679, at *5.[9]
>
> > [9] On this score, it is noteworthy that, earlier today, the CDC issued "Interim Guidance for Communities of Faith." *See* https://www.cdc.gov/coronavirus/2019-ncov/php/faith-based.html.
>
> The State's only response on the narrow-tailoring point is to insist that there is too much risk that congregants will not follow these rules. But as the Sixth Circuit recently explained in *Roberts*, the State's position on this score illogically assumes that the very same people who cannot be trusted to follow the rules at their place of worship can be trusted to do so at their workplace: the State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Roberts*, 2020 WL 2316679, at *3.

In this case, treating Plaintiffs equally and permitting them to hold worship services at South Bay Pentecostal Church would not jeopardize the public health. 2ER314–20. Bishop Hodges is committed to following the County of San Diego and the Center for Disease Control's public health guidelines, including strict social distancing measures. He is not asking for special treatment; he is only asking for equal treatment.

### 1.4. If *Jacobson* applies, it is only minimally relevant.

Over 150 years ago, this Court in *Ex Parte Milligan*, 71 U.S. 2 (1866), held that the Founding Fathers took into consideration the fact that emergency circumstances

would arise, where leaders would seek to deprive persons of their rights, and *because of that*, created the Bill of Rights: "Those great and good men [the Founding Fathers] foresaw that *troublous times would arise*, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, *unless established by irrepealable law*." *Id.* at 120 (emphasis added).

According to this Court in *Milligan* "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any provisions [of the Bill of Rights] can be suspended during any of the great exigencies of government." *Id.* "The history of the world had taught them [the Founding Fathers] that what was done in the past might be attempted in the future." *Id.*

"For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. *Not one of these safeguards can the President, or Congress, or the Judiciary disturb,* except the one concerning the writ of habeas corpus." *Id.* at 125 (emphasis added). "[T]hey limited the suspension to one great right [the right of habeas corpus], and *left the rest to remain forever inviolable*." *Id.* (emphasis added). "*The Constitution of the United States is a law for rulers and people*, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and *under all circumstances*." *Id.* at 121 (emphasis added).

This Court then aptly concluded that if "*the safety of the country*" demands a

violation of constitutional rights, "it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is *not worth the cost of preservation*." *Id.* at 126 (emphasis added).

Then, over a hundred years ago, this Court addressed whether the constitution protected an individual's right to refuse the smallpox vaccine in contravention of a local ordinance—essentially a substantive due process claim. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). *Jacobson* explained that governments can validly enact restrictions on substantive due process rights to stop the spread of diseases, but they cannot do so in "an arbitrary, unreasonable manner," or in a way that "go[es] so far beyond what was reasonably required for the safety of the public." *Id.* at 28. Thus, when evaluating challenges to laws "purporting to have been enacted to protect the public health, the public morals, or the public safety," courts must ask whether the law "has no real or *substantial* relation to those objects, *or* is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law." *Id.* (emphasis added). This is a fact-intensive inquiry looking at the "necessities of the case." *Id.*

Beginning on April 6 with the Western District of Oklahoma, courts have been citing *Jacobson* with respect to restrictions on *any* constitutional rights during the current pandemic. *Jacobson* was decided before most modern constitutional jurisprudence, and is therefore a bit of an outlier. But to date, the circuit courts have generally agreed to apply it with respect to some constitutional rights. To date, the Fifth, Sixth, Eighth, and Eleventh Circuits have analyzed *Jacobson* with relation to

restrictions on abortion rights during the pandemic.[10]

Notably, *Jacobson* was decided decades before the First Amendment was held to apply to the States by incorporation, and was not a case specifically about regulations of churches. So it is *not* plain that it should apply in this case at all. This is implied by the Sixth Circuit's opinions. The Sixth Circuit cited *Jacobson* in both its abortion and Free Exercise cases, but only analyzed it in the former. In the latter, it largely ignored it and concluded simply that "restrictions inexplicably applied to one group and exempted from another do little to further these goals and do much to burden religious freedom." *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020); *Roberts*, 2020 WL 2316679, at *4 (6th Cir. May 9, 2020). One district court reached this conclusion. *First Baptist Church v. Kelly*, --- F.Supp.3d ---, 2020 WL 1910021, at *6 (D. Kan. Apr. 18, 2020). Judge Collins reached this conclusion as well:

> The State's motion cites no authority that can justify its extraordinary claim that the current emergency gives the Governor the power to restrict any and all constitutional rights, as long as he has acted in "good faith" and has "some factual basis" for his edicts. Nothing in *Jacobson* supports the view that an emergency *displaces* normal constitutional standards. Rather, *Jacobson* provides that an emergency may justify temporary constraints *within* those standards. As the Second Circuit has recognized, *Jacobson* merely rejected what we would now call a "substantive due process" challenge to a compulsory vaccination requirement, holding that such a mandate "was within the State's police power." *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015); *see also Zucht v. King*, 260 U.S. 174, 176 (1922) (*Jacobson* "settled that it

[10] *In re Abbott*, 954 F.3d 772 (5th Cir. 2020); *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020); *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020); *Robinson v. Attorney Gen.*, 957 F.3d 1171 (11th Cir. 2020).

> is within the police power of a state to provide for compulsory vaccination"). *Jacobson*'s deferential standard of review is appropriate in that limited context. It might have been relevant here if Plaintiffs were asserting a comparable substantive due process claim, but they are not.

Ex. A, Dissent, at 6–7.

If the Court holds that *Jacobson* does apply, however, then as indicated above, there are two questions the Court must analyze. Under the first prong, "no real or substantial relation to th[e] objects [of public health]," the circuit courts have treated this as essentially akin to the heightened scrutiny required under this Court's much later developed analyses. *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 (6th Cir. 2020) ("[I]t is much harder to discern that relation here, given the paltry amount of PPE saved, and limited amount of in-person contact avoided, by halting procedural abortions"); *Robinson v. Attorney Gen.*, 957 F.3d 1171 (11th Cir. 2020) ("[T]he state did not present any evidence that applying the April 3 order to proscribe pre-viability abortions would in fact free up hospital space for COVID-19 patients or PPE for medical providers.").

Here, California has never explained why letting large numbers of people sit together indoors for eight hours at a factory or a school, but not for one hour worshipping, provides a "real or substantial" benefit to curbing the COVID-19 pandemic. That is the question. California has only ever asserted that the novel coronavirus is serious, and needs to be curbed. But that is undisputed, and it does not answer the question of "What is the factual or scientific basis for distinguishing manufacturing from churches?"—especially when there have been COVID-19

outbreaks at factories.

Under the second prong, "invasion of rights secured by the fundamental law," the circuit courts have generally found for practical purposes that the "fundamental law" is simply the constitutional law readily determinable from precedent. *See Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913, 926 (6th Cir. 2020) ("As of today, a woman's right to a pre-viability abortion is a part of 'the fundamental law.'"); *Robinson v. Attorney Gen.*, 957 F.3d 1171 (11th Cir. 2020) ("[T]o the extent that the April 3 order effectively operates as a *prohibition* on a woman's right to obtain an abortion before viability, the district court [reasonably] concluded that it is substantially likely to be unconstitutional as applied").

Here, there is a "palpable invasion" of Plaintiffs' Free Exercise rights. Under *Lukumi* and *Fraternal Order of Police*, churches have a right to be treated equally to secular interests. If other exemptions that undermine the interest is granted, then religious exemptions must be granted too. But California has never provided an explanation as to why an exemption can be granted to a factory but not a church.

More basically, banning worship in church is banning the single most important exercise of religious rights. Arguments that people of faith can engage in activity *not* required by their faith, while banning the activity that *is* required, does not help the State. *Compare* 9th Cir. Dkt. 12, at 14 (California arguing that "Congregants are permitted to gather over the phone"); *with* 2ER308 (Bishop Hodges citing scripture for the necessity of physical gathering). Indeed, disputes over how people may worship is what led to the founding of this great country.

### 2. The Balance of Equities Strongly Favor Granting an Injunction.

#### 2.1. Plaintiffs Face Irreparable Harm without Injunctive Relief.

This Court has made clear that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, in the First Amendment context, a plaintiff establishes irreparable injury "by demonstrating the existence of a colorable First Amendment claim." *Canyon Ridge Baptist Church, Inc. v. City of San Diego*, No. 05CV2313 R (CAB), 2006 WL 8455354, at *9 (S.D. Cal. June 15, 2006) (quoting *Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002)). Both the District Court and Judge Collins recognized (and California has not disputed) that Plaintiffs face irreparable harm. 1ER8; Ex A, Dissent, at 17. And Judge Collins made a further point: Plaintiffs include South Bay *Pentecostal* Church, and Pentecost falls on May 31, 2020. "The injury here is particularly poignant, given that Pentecost—which the eponymously named Church greatly desires to celebrate—falls on May 31." Ex. A, Dissent, at 17.

#### 2.2. The Balance of Hardships Tips Sharply in Plaintiffs' Favor.

The balance of hardships also tips overwhelming in favor of Plaintiffs. Here, the threatened injury to Plaintiffs is weighty—the loss of constitutional rights and the inability to practice their faith. Plaintiffs have shown that leaving the Reopening Plan in place for even a brief period "would substantially chill the exercise of fragile and constitutionally fundamental rights," and thereby constitute an intolerable hardship to Plaintiffs. *Coll. Republicans at San Francisco State Univ. v. Reed*, 523 F.

Supp. 2d 1005, 1012 (N.D. Cal. 2007).

By contrast, the cost of an injunction to California is negligible. In fact, California has the authority to adopt, at least on an interim basis, a more narrowly crafted set of equally applied provisions that enable the government to achieve any legitimate ends without unjustifiably invading First Amendment freedoms. In addition, California will suffer no legitimate harm by accommodating Plaintiffs' exercise of fundamental rights in the same manner that California is accommodating millions of others engaged in secular activities. The Constitution demands no less.

### 2.3. An Injunction is in the Public Interest

An injunction is in the public interest. As the Ninth Circuit has "consistently recognized," there is a "significant public interest in upholding First Amendment principles." *Doe v. Harris*, 772 F.3d 563, 683 (9th Cir. 2014). As discussed above, Plaintiffs' core constitutional right to the free exercise of religion will remain in jeopardy so long as California remains free to enforce its Reopening Plan. Thus, the public interest favors an injunction. *See, e.g., Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. 2020) ("As for the public interest, treatment of similarly situated entities in comparable ways serves public health interests at the same time it preserves bedrock free-exercise guarantees.").

California's only argument in response was an eight-item string citation to examples of COVID-19 outbreaks connected to religious services. 9th Cir. Dkt. 12, at 27–30. But this anecdotal evidence provided no meaningful evidence. There was no comparison with factories and schools, and there was no comparison between these

*eight* examples and the *hundreds of thousands* of church services being conducted in the rest of America. The most recent estimate is that there are 384,000 places of worship in America. 9th Cir. Dkt. 14, at 17. If all eight examples happened in the same week, this would mean that only 0.002% of worship services led to an outbreak. This cannot outweigh the public interest in preserving fundamental constitutional rights.

## CONCLUSION

For the reasons stated in this application, Plaintiffs meet all of the requirements for an injunction in this case, and the public interest is best served by this Court granting Plaintiffs' application.

Respectfully submitted,

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EXHIBIT A

FILED

MAY 22 2020

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

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| SOUTH BAY UNITED PENTECOSTAL CHURCH, a California nonprofit corporation; BISHOP ARTHUR HODGES III, an individual,<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>GAVIN NEWSOM, in his official capacity as the Governor of California; XAVIER BECERRA, in his official capacity as the Attorney General of California; SONIA ANGELL, in her official capacity as California Public Health Officer; WILMA J. WOOTEN, in her official capacity as Public Health Officer, County of San Diego; HELEN ROBBINS-MEYER, in her official capacity as Director of Emergency Services; WILIAM D, GORE, in his official capacity as Sheriff of the County of San Diego,<br><br>Defendants-Appellees. | No. 20-55533<br><br>D.C. No. 3:20-cv-00865-BAS-AHG<br>Southern District of California, San Diego<br><br>ORDER |

Before: SILVERMAN, NGUYEN, and COLLINS, Circuit Judges.

This appeal challenges the district court's denial of appellants' motion for a temporary restraining order and order to show cause why a preliminary injunction should not issue in appellants' challenge to the application of the State of California and County of San Diego's stay-at-home orders to in-person religious

services. Appellants have filed an emergency motion seeking injunctive relief permitting them to hold in-person religious services during the pendency of this appeal.

We have jurisdiction to review the denial of a temporary restraining order where, as here, "the circumstances render the denial 'tantamount to the denial of a preliminary injunction.'" *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (internal citation omitted); *see also* 28 U.S.C. § 1292(a)(1). Accordingly, the motion to dismiss for lack of jurisdiction (Docket Entry No. 24) is denied.

The request to take judicial notice (Docket Entry No. 25) is granted.

In evaluating a motion for an injunction pending appeal, we consider whether the moving party has demonstrated that they are likely to succeed on the merits, that they are likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Feldman v. Ariz. Sec'y of State's Office*, 843 F.3d 366, 367 (9th Cir. 2016) ("The standard for evaluating an injunction pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction.").

We conclude that appellants have not demonstrated a sufficient likelihood of success on appeal. Where state action does not "infringe upon or restrict practices because of their religious motivation" and does not "in a selective manner impose burdens only on conduct motivated by religious belief," it does not violate the First Amendment. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 543 (1993). We're dealing here with a highly contagious and often fatal disease for which there presently is no known cure. In the words of Justice Robert Jackson, if a "[c]ourt does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

The remaining factors do not counsel in favor of injunctive relief. *See Winter*, 555 U.S. at 20. We therefore deny the emergency motion for injunctive relief pending appeal (Docket Entry No. 2).[1]

[1] Judge Collins would grant the motion and has filed a dissent.

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MAY 22 2020

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

*South Bay United Pentecostal Church v. Newsom*, No. 20-55533

COLLINS, Circuit Judge, dissenting:

Plaintiffs-Appellants South Bay United Pentecostal Church (the "Church") and its Bishop, Arthur Hodges III (collectively, "Plaintiffs"), move for a preliminary injunction pending appeal that would allow them to conduct in-person church services. The State of California's refusal to allow them to hold such services likely violates the Free Exercise Clause of the First Amendment, and so I would grant the requested injunction. Because the majority concludes otherwise, I respectfully dissent.

**I**

The Church is a Christian congregation in Chula Vista, California. Until the recent COVID-19 pandemic, the Church held between three and five Sunday services every week, which would attract 200–300 congregants each. Its sanctuary seats 600.

On March 19, 2020, Governor Gavin Newsom issued Executive Order N-33-20. The order generally required "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." The federal list of critical sectors did not include churches. The State public health officer subsequently designated a comprehensive set of "Essential Critical Infrastructure

Workers." That list designated clergy as essential, but only if they were holding services "through streaming or other technologies that support physical distancing and state public health guidelines."

On April 28, the Governor announced a four-stage "Reopening Plan" or "Resilience Roadmap," under which the State would initially relax the stay-at-home order for some organizations but not others. At Stage 1, only "critical infrastructure" was exempted. At Stage 2, curbside retail and additional factories making previously non-essential "things like toys, clothing, . . . [and] furniture" would be permitted to reopen. Stage 2 entities also included ones that would reopen at a later date within that stage, such as schools (in an adapted form), childcare, dine-in restaurants, outdoor museums, "destination retail, including shopping malls and swap meets," and office-based businesses where telework is not possible. At Stage 3, "higher risk workplaces" like churches could reopen, along with bars, movie theaters, hair salons, and "more personal & hospitality services." And at Stage 4, concerts, conventions, and spectator sports could reopen. The Governor predicted that while Phase 2 would begin in "weeks, not months," Phase 3 would begin in "months, not weeks."

On May 4, the Governor announced that Stage 2 would commence within a week. On May 8, Plaintiffs sued the Governor and several other state officers (collectively, "the State") as well as various local officials, claiming that the

Reopening Plan's decision to place churches within Stage 3 instead of Stage 2 violated the Free Exercise Clause of the First Amendment. The County of San Diego implemented the Reopening Plan in an order dated May 9, 2020. Plaintiffs filed an amended complaint on May 11.

On May 15, 2020, the district court denied Plaintiffs' motion for both a temporary restraining order ("TRO") and an order to show cause ("OSC") why a preliminary injunction allowing the Church to hold in-person services should not issue. Plaintiffs appealed and concurrently moved for a preliminary injunction in this court.

**II**

We have jurisdiction over this appeal under our controlling decision in *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306 (9th Cir. 1989).[1] Both in *Religious Tech. Ctr.* and in this case, the plaintiffs filed a motion for a TRO and for an OSC why a preliminary injunction should not issue; the district court denied the motion "for a TRO and an OSC following a hearing at which all parties were represented"; and the specific grounds on which the district court denied the motion "foreclosed any interlocutory relief." *Id*. at 1308–09. As to the latter point, the district court below agreed with the State that the Reopening

[1] The State questioned our jurisdiction in its initial opposition to Plaintiffs' motion in this court, but it did not renew that objection in its subsequent formal opposition. Nonetheless, we have an obligation to consider the issue *sua sponte*.

Plan is a "neutral law of general application" that is therefore subject only to rational basis review under *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Given that this threshold legal conclusion is indisputably fatal to Plaintiffs' Free Exercise claim, "[t]he futility of any further hearing was thus patent; there was nothing left to talk about." *Id*. at 1309. The order was thus "tantamount to a denial of a preliminary injunction," *id*. at 1308, and we therefore have jurisdiction under 28 U.S.C. § 1292(a)(1).

**III**

Plaintiffs seek a preliminary injunction pending appeal, and the standards for such relief are well-settled. "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "Under our 'sliding scale' approach, 'the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another.'" *Hernandez v. Sessions*, 872 F.3d 976, 998 (9th Cir. 2017) (quoting *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012)). Here, all of these factors favor the Plaintiffs.

**A**

In seeking injunctive relief pending appeal, Plaintiffs principally rely on their claim under the First Amendment's Free Exercise Clause, which provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*." U.S. CONST. amend. I (emphasis added). This restriction is fully applicable to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). I conclude that Plaintiffs have established a very strong likelihood of success on the merits of their Free Exercise claim.

**1**

As a threshold matter, the State contends that, in light of the ongoing pandemic, the constitutional standards that would normally govern our review of a Free Exercise claim should *not* be applied. "Although the Constitution is not suspended during a state of emergency," the State tells us, "constitutional rights may be reasonably restricted 'as the safety of the general public may demand'" (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905)). According to the State, the current emergency conditions preclude us from applying *Lukumi*'s familiar framework for evaluating Free Exercise claims and require us instead to apply *Jacobson*'s "highly deferential" standard of review, under which we are supposedly limited "'to a determination of whether the [Governor's] actions were

taken in good faith and whether there is some factual basis for [the] decision'" (quoting *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971)). As the State sees it, there is no "reason why *Jacobson* would not extend *to the First Amendment and other constitutional provisions*" (emphasis added). I am unable to agree with this argument, which seems to me to be fundamentally inconsistent with our constitutional order. *Cf. Sterling v. Constantin*, 287 U.S. 378, 397–98 (1932) ("If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases[.]").

The State's motion cites no authority that can justify its extraordinary claim that the current emergency gives the Governor the power to restrict any and all constitutional rights, as long as he has acted in "good faith" and has "some factual basis" for his edicts. Nothing in *Jacobson* supports the view that an emergency *displaces* normal constitutional standards. Rather, *Jacobson* provides that an emergency may justify temporary constraints *within* those standards. As the Second Circuit has recognized, *Jacobson* merely rejected what we would now call a "substantive due process" challenge to a compulsory vaccination requirement, holding that such a mandate "was within the State's police power." *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015); *see also Zucht v. King*, 260 U.S.

174, 176 (1922) (*Jacobson* "settled that it is within the police power of a state to provide for compulsory vaccination"). *Jacobson*'s deferential standard of review is appropriate in that limited context. It might have been relevant here if Plaintiffs were asserting a comparable substantive due process claim, but they are not.

Instead, Plaintiffs assert a claim under the Free Exercise Clause, whose standards are well-established and which applies to the States under the Fourteenth Amendment. *Cantwell*, 310 U.S. at 303. *Jacobson* had no occasion to address a Free Exercise claim, because none was presented there. (That is unsurprising, because the Free Exercise Clause had not yet been held to apply to the States when *Jacobson* was decided in 1905. *See Phillips*, 775 F.3d at 543.) Consequently, *Jacobson* says nothing about what standards would apply to a claim that an emergency measure violates some other, *enumerated* constitutional right; on the contrary, *Jacobson* explicitly states that other constitutional limitations may continue to constrain government conduct. *See* 197 U.S. at 25 (emergency public health powers of the State remain subject "to the condition that no rule . . . shall contravene the Constitution of the United States, nor infringe any right granted or secured by that instrument"). The State suggests that the Second Circuit's decision in *Phillips* applied *Jacobson* to bar a First Amendment challenge, but *Phillips* actually confirms my narrower reading of *Jacobson*. After applying *Jacobson* to reject the plaintiffs' *substantive due process* challenge to New York's vaccination

requirement, the court then addressed (and rejected) the plaintiffs' Free Exercise challenge by applying not *Jacobson*, but the familiar *Lukumi* framework that governs all Free Exercise claims. *See Phillips*, 775 F.3d at 543.

The Fourth Circuit's decision in *Chalk* likewise provides no support for the State's position. In *Chalk*, the defendants were pulled over for driving at 11:00 PM in violation of Asheville, North Carolina's four-night curfew, and a search of their car revealed dynamite caps and other "materials from which an incendiary bomb could be readily produced." *See* 441 F.2d at 1278–79. On appeal from the defendants' subsequent convictions, the Fourth Circuit rejected the defendants' challenge to the traffic stop, which was "focused on the curfew imposed by the mayor as a restriction on *their right to travel*." *Id*. at 1283 (emphasis added). Applying a deferential standard of review, the court held that the temporary travel restrictions imposed by the short-lived curfew were justified in light of the significant civil unrest in Asheville that had led to the curfew order. *Id*. at 1282–83. Given that the defendants were not engaged in any expressive (or religious) activity while driving, the First Amendment was not directly implicated by the traffic stop in *Chalk*, and so the decision has little relevance here. If anything, *Chalk*'s discussion of the First Amendment undercuts the State's argument. The Fourth Circuit stated in dicta that any incidental impact on First Amendment rights from the curfew would be governed by the intermediate scrutiny standard of

*United States v. O'Brien*, 391 U.S. 367 (1968), and the court likened the brief restriction on travel to a time, place, and manner restriction. *See* 441 F.2d at 1280–81, 1283. The fact that *Chalk* attempted to fit its comments within such existing First Amendment categories refutes the State's notion that the existence of an emergency results in a wholesale displacement of conventional constitutional standards.

Moreover, the State overlooks that we have expressly rejected a comparably broad reading of *Chalk* in addressing a First Amendment challenge to "an emergency order prohibiting access to portions of downtown Seattle, Washington, during the 1999 World Trade Organization (WTO) conference." *Menotti v. City of Seattle*, 409 F.3d 1113, 1117, 1142 n.55 (9th Cir. 2005). Instead of applying a broad "'emergency exception'" based on *Chalk*, we analyzed the emergency order *within* the rubric of established First Amendment time, place, and manner principles, which we held provided ample room to "take[] into account a balance of the competing considerations of expression and order." *Id*. at 1142 & n.55.

Accordingly, I conclude that Plaintiffs' challenge must be evaluated under the traditional *Lukumi* framework that governs Free Exercise claims.[2]

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[2] Notably, the State does not cite or rely upon the circuit court decision that most directly supports its reading of *Jacobson*, which is *In re Abbott*, 954 F.3d 772 (5th Cir. 2020). For the reasons stated, I am unable to agree with the Fifth Circuit's conclusion that "*Jacobson* instructs that *all* constitutional rights may be reasonably restricted to combat a public health emergency." *Id*. at 786 (emphasis in original);

**2**

In addressing a Free Exercise claim under *Lukumi*, the first question is whether the challenged restriction is one "that is neutral and of general applicability." 508 U.S. at 531. If the answer is yes, then "we review [it] for a rational basis." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1084 (9th Cir. 2015). If the answer is no, then the restriction is subject to strict scrutiny—that is, it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531–32. In denying the requested relief, the district court held that the State's Reopening Plan is a "neutral law of general application" and that it "is rationally based on protecting safety and stopping the virus spread." Alternatively, the district court held that the Reopening Plan is narrowly tailored to promote the State's compelling interest in public health.[3] In my view, Plaintiffs have a high likelihood of success in their appeal of these rulings.

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*see also In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (generally endorsing the Fifth Circuit's description of emergency powers under *Jacobson*). Beyond that limited observation, I express no view on the very different substantive constitutional questions presented in those cases.

[3] The district court actually reached this alternative conclusion in the context of addressing Plaintiffs' likelihood of success on their Free Exercise claim under the *California* Constitution. Reliance on the California Constitution, however, would be inappropriate here. *See Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

**a**

As the Supreme Court explained in *Lukumi*, "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. Accordingly, where a regulation's operative language restricts conduct by *explicit* reference to the conduct's religious character, it is not facially neutral. *Id*. (citing the law at issue in *McDaniel v. Paty*, 435 U.S. 618 (1978), which applied specifically to members of the clergy, as an example of a law that on its face "imposed special disabilities on the basis of religious status") (cleaned up). Because the restrictions at issue here explicitly "reference . . . religious practice, conduct, belief, or motivation," they are not "facially neutral." *Stormans*, 794 F.3d at 1076.

In framing its restrictions in response to the pandemic, California did not purport simply to proscribe specific forms of underlying physical conduct that it identified as dangerous, such as failing to maintain social distancing or having an excessive number of persons within an enclosed space. Instead, Executive Order N-33-20 presumptively prohibited California residents from leaving their homes for any reason, except to the extent that an *exception* to that order granted *back* the freedom to conduct particular activities or to travel back and forth to such activities. *See* Cal. Exec. Order N-33-20 (Mar. 19, 2020)[4] (ordering "all

[4] *See* https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf.

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," except as the State "may designate additional sectors as critical").[5] In announcing its Reopening Plan, the State has adopted a phased approach that will progressively add more and more exceptions to the baseline stay-at-home prohibition by designating additional specific categories of activities that, in the State's judgment, do not present an undue risk to public health. *See* Order of the Cal. Pub. Health Officer (May 7, 2020)[6] ("I will progressively designate sectors, businesses, establishments, or activities that may reopen with certain modifications, based on public health and safety needs, and I will add additional sectors, businesses, establishments, or activities at a pace designed to protect public health and safety.").

As set forth by the State, the four-stage Reopening Plan assigns "retail (curbside only), manufacturing & logistics" to the initial portion of "Phase 2," and in-store retail, "child care, offices & limited hospitality, [and] personal services" to

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[5] Even the most ardent proponent of a broad reading of *Jacobson* must pause at the astonishing breadth of this assertion of government power over the citizenry, which in terms of its scope, intrusiveness, and duration is without parallel in our constitutional tradition. But since Plaintiffs do not directly challenge the validity of the original Order here, I do not address the point further.

[6] *See* https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/SHO%20Order%205-7-2020.pdf.

a later portion of Phase 2. (On May 20, 2020, San Diego County was given approval to begin this later portion of Phase 2; it aims to promptly reopen both dine-in restaurants and in-store retail businesses.[7]) By contrast, "religious services" are *explicitly* assigned to a "Stage 3" that also includes "movie theaters" and other "personal & hospitality services." All reopenings under the Plan are subject to detailed, activity-by-activity State guidance that sets forth the specific actions that each activity (such as "manufacturing" or "warehousing facilities") must take (*e.g.*, use of face coverings, social distancing, sanitation, and employee training) in order to reopen, and to stay open.

By *explicitly* and categorically assigning all in-person "religious services" to a future Phase 3—without any express regard to the number of attendees, the size of the space, or the safety protocols followed in such services[8]—the State's Reopening Plan undeniably "discriminate[s] on its face" against "religious conduct." *Lukumi*, 508 U.S. at 533. Although the State insists that it has not acted out of antipathy towards religion, the "constitutional benchmark is 'government

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[7] *See* Lori Weisberg, *San Diego County gets the OK from state to resume dining-in at restaurants*, SAN DIEGO UNION-TRIBUNE (May 20, 2020), https://www.sandiegouniontribune.com/business/story/2020-05-20/san-diego-county-gets-the-ok-from-state-to-resume-dining-in-at-restaurants.

[8] In this respect, this case differs from *Roberts v. Neace*, __ F.3d __, 2020 WL 2316679 (6th Cir. May 9, 2020), in which the challenged order prohibited "[a]ll mass gatherings," and "faith-based" events were merely listed as one *example* of such "mass gatherings." *Id*. at *1, 3.

*neutrality*,' not 'government avoidance of bigotry.'" *Roberts*, 2020 WL 2316679, at *4 (quoting *Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008)). Because the Reopening Plan, on its face, is not neutral, it is subject to strict scrutiny. *Lukumi*, 508 U.S. at 531–32.

**b**

Even if the Reopening Plan were not facially discriminatory, it would still fail *Lukumi*'s additional requirement that the restrictions be "of general applicability." 508 U.S. at 531.

Under California's approach—in which an individual can leave the home only for the *enumerated* purposes specified by the State—these categories of authorized activities provide the operative rules that govern one's conduct. While the resulting highly reticulated patchwork of designated activities and accompanying guidelines may make sense from a public health standpoint, there is no denying that this amalgam of rules is the very antithesis of a "generally applicable" prohibition. The State is continually making judgments, at the margins, to decide what additional activities its residents may and may not engage in, and thus far, "religious services" have not made the cut. I am at a loss to understand how the State's current maze of regulations can be deemed "generally applicable." *See Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) ("At some point, an exception-ridden policy takes on the appearance and reality of a system

of individualized exemptions, the antithesis of a neutral and generally applicable policy.”).

The State contends that its plan is generally applicable because it assertedly classifies activities neutrally, in accordance with the State’s sense of their perceived risk. But that is not how the Reopening Plan works. Warehousing and manufacturing facilities are categorically permitted to open, so long as they follow specified guidelines. But in-person “religious services”—merely *because* they are “religious services”—are categorically *not* permitted to take place *even if they follow the same guidelines*. This is, by definition, *not* a generally applicable regulation of underlying physical conduct.

**3**

The only remaining question is whether the Reopening Plan’s treatment of religious services satisfies strict scrutiny. The district court concluded that it did, but that is plainly wrong.

The State’s undeniably compelling interest in public health “could be achieved by narrower [regulations] that burdened religion to a far lesser degree.” *Lukumi*, 508 U.S. at 546. As Plaintiffs have reiterated throughout these proceedings, they will “comply[] with every single guideline that other businesses are required to comply with.” In their papers in the district court, Plaintiffs provided a list illustrating the range of measures they are ready and willing to

implement on reopening, including spacing out the Church's seating, requiring congregants to wear face coverings, prohibiting the congregation from singing, and banning hugging, handshakes, and hand-holding. By regulating the specific underlying risk-creating *behaviors*, rather than banning the particular *religious setting* within which they occur, the State could achieve its ends in a manner that is the "least restrictive way of dealing with the problem at hand." *Roberts*, 2020 WL 2316679, at *5.[9]

The State's only response on the narrow-tailoring point is to insist that there is too much risk that congregants will not follow these rules. But as the Sixth Circuit recently explained in *Roberts*, the State's position on this score illogically assumes that the very same people who cannot be trusted to follow the rules at their place of worship *can* be trusted to do so at their workplace: the State cannot "assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings." *Roberts*, 2020 WL 2316679, at *3.

* * *

Therefore, I conclude that Plaintiffs are highly likely to succeed on the merits of their Free Exercise Clause claim.

[9] On this score, it is noteworthy that, earlier today, the CDC issued "Interim Guidance for Communities of Faith." *See* https://www.cdc.gov/coronavirus/2019-ncov/php/faith-based.html.

**B**

All of the remaining considerations strongly favor the entry of an injunction pending appeal. The Bishop's inability to hold in-person worship services, and the Church members' inability to attend them, are certainly irreparable injuries. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1008 (10th Cir. 2004) (en banc) (Seymour, J., concurring in relevant part for a majority of the court) ("[T]he violation of one's right to the free exercise of religion necessarily constitutes irreparable harm."), *aff'd sub nom. Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal*, 546 U.S. 418 (2006). The injury here is particularly poignant, given that Pentecost—which the eponymously named Church greatly desires to celebrate—falls on May 31. Indeed, the State explicitly "does not question the sincerity of Plaintiffs' belief that it is essential to gather in person for worship services."

I do not doubt the importance of the public health objectives that the State puts forth, but the State can accomplish those objectives without resorting to its current inflexible and overbroad ban on religious services. The balance of equities, and the public interest, strongly favor requiring the State to honor its constitutional

duty to accommodate a critical element of the free exercise of religion—public worship.

For these reasons, I would grant Plaintiffs' request for a preliminary injunction. I respectfully dissent.

EXHIBIT B

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**Southern District of California**

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The following transaction was entered on 5/15/2020 at 11:48 AM PDT and filed on 5/15/2020

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| **Case Name:** | South Bay United Pentecostal Church et al v. Newsom et al |
| **Case Number:** | 3:20-cv-00865-BAS-AHG |
| **Filer:** | |
| **Document Number:** | 32(No document attached) |

**Docket Text:**
**Minute Order for proceedings held before Judge Cynthia Bashant: Motion Hearing (telephonic) held on 5/15/2020. For the reasons stated in the hearing, the Court grants [29] Ex Parte MOTION for Leave to File Supplemental Authority in Support of Plaintiffs Application for a Temporary Restraining Order filed by South Bay United Pentecostal Church, Bishop Arthur Hodges III; denies [12] Ex Parte MOTION for Temporary Restraining Order and Order to Show Cause re: Preliminary Injunction filed by South Bay United Pentecostal Church, Bishop Arthur Hodges III; and denies [21] Ex Parte MOTION for Leave to File Application for Leave To File Request for Judicial Notice Pursuant to Federal Rule of Evidence 201 filed by South Bay United Pentecostal Church, Bishop Arthur Hodges III (Court Reporter/ECR Dana Peabody). (Plaintiff Attorney Paul Jona, Charles LiMandri, Jeffrey Trissell, and Mark Meuser).(Defendant Attorney Todd Grabarsky, Lisa Plank, and Timothy White). (no document attached) (sxm)**

**3:20-cv-00865-BAS-AHG Notice has been electronically mailed to:**

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**3:20-cv-00865-BAS-AHG Notice has been delivered by other means to:**

**EXHIBIT C**

1 United States District Court

2 for the Southern District of California

3

4 SOUTH BAY UNITED PENTECOSTAL )
CHURCH, etc., et al., ) No. 20cv0865-BAS
5 )
Plaintiffs, ) May 15, 2020
6 )
v. ) San Diego, California
7 )
GAVIN NEWSOM, etc., et al., )
8 )
Defendants. )

9

10

TRANSCRIPT OF MOTION HEARING
11 BEFORE THE HONORABLE CYNTHIA BASHANT
United States District Judge

12

APPEARANCES:

13

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1 San Diego, California, May 15, 2020
2 * * *
3 THE CLERK: Thank you, Counsel, and everybody for
4 being on the line so promptly.
5 This is Stephanie, Judge Bashant's clerk. I just wanted to
6 give a quick admonishment before we get started and I call the
7 case.
8 The same courtroom decorum applies as though we were
9 actually in the courtroom versus telephonic. The members of
10 the public and media, if you could please mute your phones and
11 make sure they stay muted. Counsel is the only one permitted
12 to provide argument. There are also no recordings of any type.
13 We have our Official Court Reporter, Dana Peabody, on the
14 phone, and she is the one who will provide the official court
15 transcript, and you may request it through her.
16 And with that, I believe I will go ahead and call the case.
17 Calling Matter Number 1, 20cv0865, South Bay United
18 Pentecostal Church versus Newsom, et al., on calendar for a
19 motion hearing telephonically.
20 THE COURT: Counsel, state your appearances for the
21 record, please.
22 MR. JONNA: Good morning, Your Honor. Paul Jonna on
23 behalf of plaintiff South Bay United Pentecostal Church and
24 Bishop Arthur Hodges III, and I'm joined by my colleague,
25 Jeffrey Trissell.

1 THE COURT: Good morning.
2 MR. MEUSER: Mark Meuser, also here on behalf of the
3 plaintiff, with the Dhillon Law Group.
4 MR. LiMANDRI: Charles LiMandri with my partner,
5 Mr. Jonna, who will be arguing the case this morning.
6 THE COURT: Good morning.
7 MR. WHITE: Good morning, Your Honor. This is County
8 of San Diego for the -- County Counsel's office for the County
9 of San Diego, defendant.
10 THE COURT: And I missed the name.
11 MR. WHITE: Timothy White.
12 THE COURT: Thank you.
13 MR. GRABARSKY: And good morning, Your Honor. This is
14 Deputy Attorney General Todd Grabarsky on behalf of the state
15 defendants, Governor Gavin Newsom, Attorney General Xavier
16 Becerra, and Public Health Officer Dr. Sonia Angell.
17 THE COURT: Okay. Good morning, everyone, and thank
18 you all for agreeing to appear telephonically. I know it's not
19 easy. We're kind of talking on top of each other. I'll try to
20 make sure that I give you each a chance to be heard.
21 If anyone has any difficulty hearing anything, don't
22 hesitate to let me know, and I'll make sure that it gets
23 repeated. Sometimes when people come on the phone last minute,
24 there's a beep, and it blocks out whatever anyone is saying, so
25 feel free to let me know if you're having any difficulty

1 hearing what anyone has said.
2 First of all, I want to let everyone know I've reviewed
3 plaintiffs' amended complaint, I reviewed all the attached
4 rules promulgated by the State of California that were attached
5 to the complaint, I reviewed plaintiffs' motion for a TRO with
6 the various requests for judicial notice, the state and the
7 county's office, I reviewed plaintiffs' objections to
8 defendants' responses as untimely. That will be denied.
9 I also reviewed plaintiffs' leave to file supplemental
10 authorities, which will be granted. I have reviewed those
11 authorities.
12 My understanding is the plaintiffs are not objecting to the
13 initial closure order or the initial decision classifying some
14 businesses as essential and others as not, and, therefore, this
15 is not challenging the same order as the one I already
16 addressed in the Abiding Ministry case.
17 Instead, plaintiffs have filed this amended complaint
18 objecting to the state's plans for reopening, specifically the
19 classification of churches and religious services as Stage 3
20 out of four stages of reopening.
21 Plaintiffs ask that religious services be classified as
22 Stage 2 and that they be allowed to begin services immediately.
23 As a preliminary matter, there are numerous requests for
24 judicial notice, most of which I think should be denied as moot
25 or unnecessary.

1 First of all, with respect -- with respect to the request
2 that has to do with the number of deaths, I think that the
3 actual request for judicial notice talks about deaths and
4 population and types of death in the State of California,
5 although I think the numbers actually reflect those that are
6 for San Diego County, not for the State of California, but
7 regardless, I think that the numbers in San Diego County are
8 largely irrelevant.
9 Plaintiffs seem to concur that the coronavirus is real,
10 that the Government has a compelling interest in curbing the
11 virus, that the stay-at-home orders further that interest, and
12 simply focusing on one county in a state that is as mobile as
13 California is too limiting.
14 Ultimately I don't find that the number of deaths in
15 San Diego County are particularly helpful in my analysis of the
16 stages of reopening.
17 I also don't think I need to take judicial notice of the
18 governor's orders. They're attached to the complaint already,
19 but to the extent it is necessary, I'll take judicial notice of
20 the orders, particularly those that outline the plan for
21 reopening because ultimately that's what plaintiffs are
22 challenging in this case.
23 And finally, I don't think I need to take judicial notice
24 of opinions from other courts. I can actually look at them and
25 consider them without taking judicial notice of them. The ones

1 from other district courts are not binding, but certainly the
2 analysis of other courts can be helpful.
3 So let me talk about the actual restraining order request.
4 First of all, I'm prepared to find that irreparable harm will
5 occur to the plaintiffs if I don't grant the TRO. Plaintiffs
6 don't have to address that prong.
7 But I do have concern about all the other prongs, and
8 here's sort of my preliminary thoughts, and then I'll be
9 interested in hearing from each of you:
10 First of all, it appears to me that the stages in
11 California's reopening plan are carefully focused on the risk
12 each workplace poses. In other words, we have Stage 2, which
13 is a lower-risk workplace; initially curbside only and then
14 types of facilities where one moves through quickly without
15 long periods of time together. Entering these workplaces in
16 the Stage 2 are -- they're places that are by their nature
17 transitory. You're just going in for the purpose of picking
18 something up, and then you're leaving.
19 Stage 3 are higher-risk workplaces, those which by their
20 nature involve people gathering in close proximity with one
21 another for extended periods.
22 And then we've got Stage 4, which is the highest risk, so
23 very large groups, like rock concerts, conventions, events held
24 at sporting venues.
25 None of this seems to me to be targeted or focused on

1 limiting religion. If your religion involves walking into a
2 church, a few people at a time, keeping six feet apart, picking
3 something up from the church, and going home with you, then it
4 seems to me that would be a Stage 2 workplace.
5 But unfortunately, religious services generally involve
6 sitting together as a group. I note that in plaintiffs' case,
7 plaintiffs are proposing services involving groups of 200 to
8 300 congregants per service, and beginning with Bible classes
9 of ten to 100 people, and that they describe practices -- or
10 Bishop Hodges describes practices consisting of having people
11 with special needs or sickness come stand around an alter where
12 hands are laid on them and they are anointed, challenging
13 congregants to all approach the alter at once to come
14 believing, come praying, and practicing baptism by full
15 immersion in the water on a weekly or daily basis.
16 This seems to me to be a higher-risk environment than one
17 where you just pick something up either at curbside or walk
18 through a store, pick something up, pay for it, and walk out.
19 It's not a value judgment. It's not a judgment about what's
20 more important or what's more valuable than the other. It's
21 simply a determination of what activity poses the higher risk
22 for infecting others.
23 So I just don't see how strict scrutiny applies, but I'll
24 certainly be interested in hearing what you have to say.
25 So let me start with the plaintiff. I believe it's

1 Mr. Jonna who is going to be speaking. Those are my
2 preliminary thoughts.
3 MR. JONNA: Yes, Your Honor. This is Paul Jonna.
4 Thank you for those thoughts, and thank you for reviewing
5 the voluminous materials in such a short amount of time.
6 Your Honor, the problem with these orders in the reopening
7 plan is that there's arbitrary exceptions and unequal treatment
8 of churches.
9 So the government can't explain, for example, why factories
10 and schools, which don't involve transitory -- you know,
11 transitory measures -- why those places can open in Stage 2 but
12 not churches.
13 So what they've tried to argue without support is that
14 places of worship are sidelined for scientific reasons, but
15 we -- large gatherings at factories and schools where people
16 gather indoors for hours are able to reopen.
17 So under Lukumi, the state has the burden to explain why
18 they're making the distinction in order to meet strict
19 scrutiny, and they have not.
20 The answer can't be that factories and schools are just
21 more important. The right to practice your faith, you know, is
22 a first right in the First Amendment. The government has to
23 treat it equally. It can't be viewed as less important, and
24 that's why most other states, Your Honor, took steps to protect
25 the constitutional rights of churches and religious believers.

1 California was one of only nine states that didn't, and as the
2 Court knows, there's four federal courts that have held that
3 these types of orders are not generally applicable and that
4 they must satisfy strict scrutiny. And we have a Sixth Circuit
5 case, we have the On Fire Christian case, which said, "No
6 place, not even the unknown, is worse than any place the state
7 forbids the exercise of your sincerely held religious beliefs."
8 And we have the First Baptist case in the District of Kansas,
9 which involves in-person services. And the Tabernacle Baptist
10 case, which is very similar to our case, where the Court said,
11 "If social distancing is good enough for Home Depot and Kroger,
12 it's good enough for in-person religious services, which,
13 unlike the foregoing, benefit from constitutional protection."
14 So we believe strict scrutiny applies because gathering for
15 worship is prohibited, but not other gatherings.
16 And, Your Honor, we're not dealing with neutral laws of
17 general applicability. The orders are riddled with exceptions.
18 For example, Governor Newsom just last week said that churches
19 fall under the category of, quote, low-reward activity. Those
20 were his words. He didn't just say high risk, but he said "low
21 reward." He initially determined that marijuana dispensaries,
22 liquor stores, the entire entertainment industry, and now
23 factories and museum, those are higher-reward activities, so
24 those are the kinds of arbitrary assessments, Your Honor, that
25 are unconstitutional. Going to a factory or a museum is not

1 constitutionally protected, but freely exercising --
2 THE COURT: Let me just -- I'm going to interrupt you
3 for a minute because when I read through the order, I didn't
4 see that museums -- I have to hear from the state about exactly
5 what is, but I don't believe that some of the things you're
6 saying should be opened under Stage 2 or were listed as being
7 opened under Stage 2.
8 MR. JONNA: Sure, Your Honor. The fact -- certain
9 manufacturing factories were allowed to be opened from the
10 beginning, and certain ones -- the rest of them are allowed to
11 reopen in Phase 2, and if I'm misstating that, I'm sure the
12 state will correct me.
13 As far as museums, what the governor said is outdoor
14 museums can start opening in Stage 2, but an outdoor museum is,
15 you know -- I'm not sure why they're making the distinction
16 with a museum versus an outdoor church service, for example.
17 Again, freely exercising your religion is the very first right
18 in the First Amendment. And for the millions of faithful in
19 California, religion is needed in these times more than ever.
20 It might be hard for government officials to understand that,
21 especially if they're hostile to religion or don't see its
22 relevance or they think it's low reward, but to Bishop Hodges
23 and millions of Californians, free exercise of religion is
24 eternally important. To them, it's the most essential of
25 activities. It's the reason why many people came to this great

1 country to begin with, including the Pilgrims, who were
2 religious refugees.
3 So basically, Your Honor, the government officials
4 shouldn't be able to tell millions of people of faith that
5 their religious worship is low reward and nonessential. That's
6 hostility toward religion, and this Court has an incredible
7 opportunity to correct these constitutional violations.
8 And as Your Honor knows, the Department of Justice, the
9 U.S. Department of Justice, shares these concerns. They've
10 issued statements and intervened in multiple similar federal
11 actions, and, Your Honor, the facts have changed considerably
12 since Your Honor ruled in the Abiding Place Ministries case.
13 Mr. White, who's on the phone, who also argued that matter, he
14 said on April 10th that the next few weeks were critical and
15 necessary to flatten the curve. And that's now happened. The
16 curve has flattened, and the healthcare system has not been
17 overwhelmed. In fact, they've had to lay off workers. The
18 governor acknowledged these facts, and they're supported by
19 Dr. Delgado's declaration.
20 And, Your Honor, we had -- and I know you said in your
21 initial remarks that you weren't focused so much on San Diego,
22 but I do think it's significant that we've had less than 200
23 deaths in a county with a population of 3.3 million. I mean,
24 every human life is precious, and we all wish there were zero
25 deaths, but the data has to matter, Your Honor. And it's that

1 data the government is relying on to say that you can now
2 gather at factories and schools.
3 So even if the numbers go up again in the fall, the
4 solution can't be to close the churches again. There has to be
5 a balance where the Constitution is followed and people can
6 still practice their faith without the government dictating
7 that it has to be done in the confines of their home.
8 And I read statements in both the defendants' briefs that
9 are simply not true, and Your Honor repeated some of them, I
10 assume, because they were stated in the defendants' briefs, but
11 let me just clarify. My clients do not want to resume normal
12 worship services. That's just not true. We made it clear many
13 times that they should only be allowed to open in Stage 2
14 provided that they follow all of the government public health
15 measures and social distancing guidelines, and that's exactly
16 what the court said in the recent Tabernacle Baptist case,
17 which is very instructive and similar to our case.
18 In that case the Court granted the plaintiffs' TRO and
19 found that the church should be allowed to hold in-person
20 services, not drive-in, since the church was committed to
21 following the CDC's guidelines on large gatherings, practicing
22 social distancing, and --
23 THE COURT: I'm confused. Let me interrupt you a
24 minute because -- and I can see why the state might have been
25 confused as well because Bishop Hodges talks about how

1 important it is to resume the religious activities, including
2 the laying on of hands and approaching the alter. Is he not
3 requesting to do that by this TRO?
4 MR. JONNA: Your Honor, no. I mean -- essentially, I
5 think in these papers he described what they do -- what's
6 important to their faith, but he made it abundantly clear
7 multiple times, and he will certainly reaffirm it if it's
8 necessary, that he will only resume services by complying with
9 every single guideline that other businesses are required to
10 comply with.
11 So if, for example, that means that certain things that are
12 done normally have to be suspended because of these guidelines,
13 these social distancing guidelines, that will be done.
14 And then the Delgado declaration, Your Honor, had a long
15 list of things that churches could and should do to responsibly
16 resume services, and it included not singing, for example, it
17 included not having booklets or hymnals that would be reused,
18 it included single-file lines, it included, you know, not
19 having Holy water in the church. All sorts of things can be
20 done, and people of faith are willing to do them, and
21 Bishop Hodges is certainly willing to do them, so it's
22 absolutely not the case that he just wants to get 300 people in
23 there this Sunday. I mean, he wants to meticulously follow
24 these guidelines, and he can.
25 He's proven he can, Your Honor, by virtue of the fact that

1 they feed thousands of people. They're one of the most
2 charitable organizations in the South Bay region. They're
3 using masks and gloves. They're distributing food to thousands
4 of people. We included a photo. They've done it safely, and,
5 you know, the county and the government are happy to have the
6 church, you know, serve in that way, and they're willing to
7 resume services in a responsible way, and they've shown they
8 can, and other churches across the country have shown they can,
9 and so -- and, Your Honor, again, I would say the Delgado
10 declaration has a great summary of how this can be done, how it
11 should be done, how it has to be done.
12 And I'm not going to address irreparable harm because
13 Your Honor correctly pointed out that that's easily shown, and
14 I do have some thoughts on Jacobson, but I won't get into that
15 since Your Honor didn't mention it.
16 I do also have some thoughts on other cases, but that's --
17 those are my main points, and I'm happy to address the state or
18 the county's argument on rebuttal.
19 THE COURT: Okay. Let me hear from the state then
20 first.
21 MR. GRABARSKY: Good morning, Your Honor. This is
22 Deputy Attorney General Todd Grabarsky on behalf of the state
23 defendants.
24 We're dealing with an emergency situation involving a
25 highly technical public health issue where, really, the stakes

1 couldn't be higher, and those stakes being a significant risk
2 of severe illness and death on a massive scale. It is
3 these -- the situation that warrants judicial deference to the
4 governor's good-faith order.
5 And Your Honor has already stated in Your Honor's opening
6 remarks that this order furthers a compelling government
7 interest. Jacobson acknowledged this over a hundred years ago,
8 that it is no part of the function of the Court to determine
9 which one of two modes is likely to be the most effective for
10 the protection of the public against disease.
11 And in the Abiding Place ruling, Your Honor recognized this
12 important principle briefly quoting, "It's important that this
13 Court not usurp the state's authority to craft emergency health
14 measures. The Court shouldn't be second-guessing the wisdom or
15 efficacy of these measures as long as they have some basis in
16 reality and they aren't pretextual."
17 And that's exactly what plaintiffs are asking the Court to
18 do in this case; not only to second-guess the well-reasoned
19 decisions of the governor and the public health officer that's
20 based on science, data, facts, and experts in infectious
21 disease and epidemiology and public health, but more so,
22 they're asking the Court to disrupt the state's careful and
23 well-reasoned measures to combat this extraordinary
24 once-in-a-century public health emergency.
25 I'll note that -- and the reopening road map is really a

1 crucial part of those measures, and I'll note that the road map
2 is -- it's a work in progress. It's going to change based on
3 the data and how conditions on the ground change, and once we
4 gather the data based on how the virus responds to some
5 reopenings, the state and the public health officer will make
6 adjustments based on that data and those responses.
7 The reopening road map calls for careful and gradual
8 measures to see how the virus and the contagion responds to a
9 step-by-step staggered reopening. The state will look at that
10 data, whether infection or death rates change, and adapt the
11 reopening measures accordingly.
12 THE COURT: What about the argument of plaintiff that
13 there's so many arbitrary exceptions that it's, they feel,
14 singling out religion?
15 MR. GRABARSKY: I'll underscore Your Honor's remarks
16 this morning that the exceptions are based on the risk factors.
17 They're not arbitrary based on the content of what's going on
18 at the different activities. They're based on the risk
19 factors. And I'll note that contrary to what plaintiffs'
20 counsel is saying, schools, as of yet, are not open. The
21 reopening road map suggested in the future that schools might
22 reopen, but at present, schools are not permitted -- they're
23 still operating remotely, and they're not permitted to be -- to
24 hold in-person classes or instruction.
25 With regard to factories, again, that's based on the risk

1 factors. As Your Honor pointed out, these are leaving
2 transitions. These aren't mass groups of people gathered
3 together for a communal experience.
4 What plaintiffs are seeking to do, and I understand perhaps
5 the confusion behind this, given that the temporary restraining
6 order they've requested is a bit vague and abstract, but it
7 appears that what they're asking to do is gather indoors with
8 groups of hundreds of people together for the same purpose.
9 And I'll also note that from the onset, the state has
10 recognized the fundamental rights of religious exercise. Since
11 the beginning of the executive order, faith-based services have
12 been deemed as essential services that would allow plaintiff to
13 leave their home to provide congregants with worship
14 opportunities through various technology and free -- the free
15 online streaming or teleconferencing platform or through
16 drive-in services provided that congregants remain in their
17 cars, observe distancing, and refrain from physical contact.
18 This notion that the state has been hostile to religion
19 just simply isn't supported by the facts and how the executive
20 order has treated religion and faith-based groups from the
21 onset.
22 In other words, there's no complete or total prohibition on
23 the ability to worship. This argument was addressed by these
24 other district courts in California, the Gish case and the
25 Cross Culture case -- the Gish case from the Central District

1 and the Cross Culture case from the Eastern District.
2 With regard to plaintiffs' counsel citing to the Sixth
3 Circuit case, I think it's important to note that the Sixth
4 Circuit didn't go so far as to enjoin Kentucky's prohibition on
5 any person gathering for worship. The Sixth Circuit injunction
6 only applied to the prohibition on drive-in services, and that
7 was true with the On Fire district court Kentucky case. With
8 regard to the reference to the Tabernacle, the Tabernacle case,
9 also from Kentucky, that seems to go against the Sixth
10 Circuit's, I guess, refusal to enjoin the in-person ban
11 on -- the ban on in-person gatherings.
12 I'll also note that plaintiffs' counsel has suggested that
13 the United States Department of Justice had intervened in other
14 cases. That doesn't seem to be supported by the facts.
15 I think in two cases, U.S. DOJ had issued letters. There
16 was no motion to intervene in those cases at all.
17 And yeah, and finally just to touch on the notion
18 that there have been arbitrary exceptions, again, the
19 exceptions are not arbitrary. They're based on what are
20 gatherings, what are groups of people gathered together for
21 communal experience, and plaintiffs simply haven't shown that
22 comparable analogous gatherings to the hundreds of people in an
23 enclosed space that they're seeking have been permitted.
24 And I'm happy to address any other questions that the Court
25 has or that plaintiffs may raise.

1 THE COURT: Okay. Does the county have anything to
2 add?
3 MR. WHITE: Just briefly, Your Honor.
4 I think the state has done a great job explaining their
5 orders because they are state orders, and the county has
6 adopted them by incorporation or reference.
7 I would just point out that the state had the second
8 highest number of deaths since this pandemic started just the
9 week ending on Mother's Day, so this is not over by a long
10 shot. This still is a public health danger that the state and
11 the county officials, the public health officials, are
12 responding to and trying to protect the community as best as
13 they can while also protecting everybody's constitutional
14 rights.
15 There have been churches, as we've mentioned in our briefs,
16 that have been found, church settings to be what they call
17 superspreader events, and there seems to be something about
18 indoor congregation, for extended periods of time especially,
19 that are dangerous with this virus.
20 Everything's still being learned in real time, but that
21 seems to be a real concern, a real threat, especially when you
22 have people singing and standing close together, and I think
23 that's why in Stage 3, you'll see that movie theaters,
24 concerts, other events that may be similar that are not
25 religious are also in Stage 3, and so I don't think there

1 really can be an argument that the state or the county are
2 targeting religion or religious practices. That's just not
3 borne out by the facts or the order.
4 I think it would be a mistake to constitutionalize on a
5 church-by-church basis, for example, these public health issues
6 that are -- that public health experts need flexibility.
7 Things are changing rapidly. New data are coming in all the
8 time and new studies are being released and analyzed. And the
9 public health officials have scarce resources, so they set up
10 these stages to really protect the community on a general level
11 based on the science and the data at that time. To have to
12 have them analyzed on a church-by-church basis based on whether
13 this church is going to have 50 people in a room, what size the
14 room is, what square feet, or versus 200, it's not something I
15 think that is reasonable in the middle of a public health
16 crisis, in the pandemic, when they're trying to protect an
17 entire county or an entire state.
18 I think under Jacobson, this is just the type of situation
19 that Jacobson applies to, and I think that's why all three
20 courts that have reviewed the state stay-at-home order in
21 California of the churches so far have upheld it and found that
22 it is not discriminatory, that it is not arbitrary, and if
23 Jacobson would not apply, then certainly Smith applies.
24 Under Lukumi, we need to show, either by express actions or
25 implication, some desire or intent on public officials to

1 target or discriminate against a religious practice from
2 animus. That's certainly not shown here.
3 These are orders that apply to religious and secular
4 practices. Thank you.
5 THE COURT: Okay. Mr. Jonna, any rebuttal or any
6 response?
7 MR. JONNA: Yes, Your Honor. Thank you.
8 As far as Jacobson, I know the Court is familiar with the
9 case which involves vaccination and didn't deal with the
10 constitutional right to free exercise of religion, and it's not
11 clear that Jacobson applies to free exercise.
12 The Court in First Baptist church refused to apply it. And
13 under the case, an emergency rule is, as the Court knows,
14 invalid if it has no real or substantial relation to those
15 objects of protecting public health or if it's beyond all
16 question a plain, palpable invasion of rights secured by the
17 fundamental law. And the state or -- neither the state nor the
18 county have really explained why letting large numbers of
19 people sit together indoors in a factory is okay, but not
20 getting together for an hour of worship following the
21 government guidelines.
22 And that's really the issue. You know, the county focuses
23 on the fact that the coronavirus is serious and needs to be
24 curbed, and we're not disputing that, but it doesn't answer the
25 question of what the factual or scientific basis for

1 distinguishing manufacturing from churches, and there is a
2 palpable invasion of free exercise of rights. Under Lukumi and
3 Fraternal Order of Police, churches have a right to be treated
4 equally to secular interests, and if one exception that
5 undermines that interest is granted, then religious exemptions
6 must be granted too.
7 And it's also clear from the governor's statements that
8 they -- that the state views religion as a low-reward activity
9 despite the fact that it's constitutionally protected activity.
10 And as far as, Your Honor, the evidence that shows that
11 schools, factories, and museums are all part of Phase 2, I
12 would point the Court to Exhibit 1-3 attached to our first
13 amended complaint. It's not really -- I think the state was
14 careful in how they phrased it. They said they're not yet open
15 in Phase 2, but they are definitely unquestionably part of the
16 Stage 2 reopening whereas churches are not.
17 As far as, you know, I think the state or someone mentioned
18 indoors -- I mean, I'm sure many churches will be willing and
19 glad to have services outdoors if that was an option.
20 And as far as, you know, just telling all the people of
21 faith in California that they have to -- that drive-in services
22 and live-stream services are going to have to suffice for your
23 constitutionally protected exercise of religion, that's going
24 to have to suffice until we say so, without looking at the
25 data, without looking at the numbers, that's just not

1 acceptable to people of faith, and it's not consistent with our
2 Constitution.
3 As far as the cases, Your Honor, there are cases, and that
4 I cited, the First Baptist case and the Tabernacle Baptist
5 case, which both deal with in-person services, not drive-in
6 services.
7 And as far as the superspreading that the state mentioned,
8 that church activities, there's no evidence before this Court
9 that any of those services were following the government
10 guidelines that my client and all the other churches are
11 willing to responsibly follow to resume responsible worship
12 services like millions of other faithful are doing across this
13 country.
14 So I think there's just -- there is no evidence that
15 allowing -- you know, making an exception for churches similar
16 to the ones they're making for factories and schools is going
17 to really make this -- make the epidemic any worse than it
18 already is. In fact, I think the evidence is to the contrary.
19 THE COURT: Okay. Thank you, all.
20 Go ahead.
21 MR. GRABARSKY: This is Todd Grabarsky for the state
22 defendants. May I just respond to one point very briefly?
23 THE COURT: Sure.
24 MR. GRABARSKY: To plaintiff counsel's contention that
25 just because there's a secular exception means that there has

1 to be an exception for religious practices, that's just simply
2 not supported by the case law. This Court in Whitlow
3 acknowledged that, quote, nowhere has the supreme court stated
4 that if the government provides secular exception, it must also
5 provide a religious exception. Indeed, a majority of circuit
6 courts have refused to interpret Employment Division versus
7 Smith as standing for the proposition that a secular exemption
8 automatically creates a claim for a religious exemption, and
9 this principle has been acknowledged in over -- I think over
10 15 -- or over a dozen cases dealing -- across the country
11 dealing with religious challenges to stay-home orders across
12 the country that plaintiffs, in this argument or in their
13 briefings, have not addressed. They've only touched on a few
14 cases from Kentucky, and again, those cases go against the
15 Sixth Circuit ruling, which did not enjoin in-person religious
16 services.
17 THE COURT: Thank you, all.
18 MR. JONNA: There was one last thing -- this is
19 Paul Jonna -- I wanted to say, and I'm sorry, Your Honor. It's
20 the last thing.
21 To the extent the Court is willing to reconsider the
22 tentative, I just respectfully ask the Court to take a quick
23 look at the ex parte Milligan, U.S. Supreme Court case, because
24 it makes clear that the reason the Bill of Rights was added was
25 out of a concern that rulers would use the fear of an emergency

1 to seize power and take away constitutional rights, and I
2 really think that -- it's an old case, but it's a very
3 interesting and on-point case that I think is worth
4 consideration.
5 Thank you, Your Honor.
6 THE COURT: Okay. Thank you.
7 And by the way, I have read Milligan. I've worked my way
8 through it this morning. But, you know, I don't really find
9 Milligan -- you know, it has some wonderful phrasing, but I
10 don't really find it that applicable given the fact that it has
11 to do with suspending the writ of habeas corpus during a time
12 of war when there was a trial by jury available. There were a
13 lot of things about it that were distinguishing, but I did
14 review it.
15 So, first of all, I will deny the motion for a temporary
16 restraining order. I do not find that plaintiff has shown a
17 likelihood of success on the merits of any of its four causes
18 of action.
19 First of all, with respect to the Free Exercise Clause
20 causes of action from the U.S. Constitution, as I said in the
21 Abiding Place Ministries case, the state may limit an
22 individual's right to freely exercise his religious beliefs
23 when faced with a serious health crisis such as the one we're
24 facing now with covid-19, and I don't think plaintiffs really
25 disagree with that.

1 The right to practice religion freely does not include the
2 liberty to expose the community to communicable disease or to
3 ill health or death.
4 And despite plaintiffs' objections, I find that Jacobson is
5 still good law and still applicable to this case.
6 California's reopening plan seems to me to be a neutral law
7 of general application that happens to have the incidental
8 effect of burdening a particular religious practice.
9 Under The Church of Lukumi, L-U-K-U-M-I for our court
10 reporter, Babalu Aye, B-A-B-A-L-U A-Y-E, versus city Hialeah,
11 H-I-A-L-E-A-H, and that's at 508 U.S. 520 -- under that case,
12 it talks about what a law of neutrality and general
13 applicability is and if it does not aim to, quote, infringe
14 upon or restrict practices because of their religious
15 motivation, closed quote, and if it does not, quote, in a
16 selective manner impose burdens only on conduct motivated by
17 religious belief, closed quote.
18 And it seems to me that a religious service falls within
19 Stage 3 not because it's a religious service, but because the
20 services involve people sitting together in a closed
21 environment for long periods of time. Thus, any burden placed
22 by classifying church services as Stage 3 are not because of a
23 religious motivation, but because of the manner in which the
24 service is held, which happens to pose a greater risk of
25 exposure to the virus. And I note, there's lots of other

1 things: The SATs; the California Bar exam; lots of other
2 events that involve people sitting together in a closed
3 environment for long periods of time that are also not being
4 allowed to go forward.
5 Plaintiffs have not demonstrated arbitrary exceptions to
6 this classification, and the fact that there may be a secular
7 exemption, as the state points out, does not automatically give
8 a religious exemption, and again, as the state did, I refer to
9 the *Whitlow* case. I don't find that strict scrutiny applies,
10 and I do find that the reopening order is rationally based on
11 protecting safety and stopping the virus spread.
12 Turning to the California Constitution claim, again, that
13 reopening violates the California Free Exercise Clause, first,
14 I'd note that although plaintiff cites the *Catholic Charities*
15 case to argue that strict scrutiny should be applied to any
16 California Constitution claim, I think the *Catholic Charities*
17 case doesn't find that strict scrutiny applies. Instead, the
18 Court in that case found that they didn't need to determine the
19 appropriate test because even under a strict scrutiny analysis,
20 the claims pass muster, and I find the same in this case.
21 To satisfy strict scrutiny, the state must demonstrate that
22 the order is narrowly tailored to further compelling government
23 interests.
24 First, of course, there's a compelling government interest
25 in safety and health. I don't think plaintiffs dispute this,

1 and I do find that the order is narrowly tailored to this
2 purpose as well. The order allows congregants to gather
3 remotely, to gather over the phone, or via video conference, in
4 person with members of the same household, it allows clergy to
5 travel to churches to set up services for congregants to
6 experience remotely, the county now has opened to allow
7 congregations to gather by car in drive-in style services as
8 long as the physical distancing guidelines are followed and as
9 long as people don't touch each other. Individuals can
10 practice religion in whatever way they wish as long as they're
11 not sitting with each other in large groups inside.
12 Thus, I find that the reopening plan has been narrowly
13 tailored to further a compelling government interest, and it
14 does pass the strict scrutiny analysis.
15 Therefore, I find that plaintiff has not established that
16 they are likely to succeed on their California Constitution
17 claim.
18 Turning to the equal protection claim, the Equal Protection
19 Clause does not forbid classification. It simply keeps
20 governmental decision-makers from treating differently persons
21 who are in all relevant aspects of life, and that's a quote
22 from Nordlinger, N-O-R-D-L-I-N-G-E-R, versus Hahn, H-A-H-N, 505
23 U.S. 1 at 10.
24 Here the state's distinguishing between businesses where
25 people are more at risk and businesses where people are less at

1 risk, and the classification between these stages is based on
2 the type of activity that occurs within the business and the
3 risk of contracting the virus while participating in that
4 activity; therefore, the government is not treating differently
5 businesses that are alike. Religious services are treated
6 similar to other activities where large groups come together
7 for a period of time, like movies, concerts, theater, or dance
8 performances.
9 Because plaintiff has no evidence that similarly situated
10 persons or businesses are treated differently, they failed to
11 show a likelihood of success on their equal protection claim.
12 And then finally, plaintiffs claim that the reopening plan
13 violates the 14th Amendment, Due Process Clause. Substantive
14 due process, quote, forbids the government from depriving a
15 person of life, liberty, or property in such a way that shocks
16 the conscience or interferes with rights implicit in the
17 concept of ordered liberty. And that's a quote from Nunez
18 versus City of Los Angeles, 147 F.3d 867. It's a Ninth Circuit
19 case, and that's at 871. Any shock-the-conscience analysis
20 necessarily requires consideration of the justification the
21 government offers, if any, for the alleged infringement, and
22 that's referring to Reno versus Flores, 507 U.S. 292 at 301 and
23 302.
24 I find that given the circumstances and the state's
25 justification for the stay-at-home orders as well as the

1 planned reopening of the state in stages, plaintiffs have not
2 established that the state order shocks the conscience.
3 Furthermore, I don't find that either the balance of
4 equities or the public interest supports issuing a TRO. This
5 virus poses a serious health risk to everyone in the state; in
6 fact, everyone in the world. I don't think anyone here is
7 arguing with that. The only way currently known to curb the
8 disease is to limit personal exposure. California seems to be
9 doing a pretty good job of controlling the spread, but they
10 have to continue to monitor how each stage of reopening with
11 the increasing risk of each one affects the overall number of
12 infections.
13 I understand it's difficult for everyone involved, but it
14 is in the public interest to continue to protect the population
15 as a whole.
16 Therefore, the motion for the temporary restraining order
17 is denied.
18 Okay. Thank you, all, for your patience and working
19 through this together. I appreciate it.
20 MR. JONNA: Thank you, Your Honor.
21 MR. WHITE: Thank you, Your Honor.
22 MR. GRABARSKY: Thank you.
23 THE COURT: Okay. Thank you.
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C-E-R-T-I-F-I-C-A-T-I-O-N

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated May 16, 2020, at San Diego, California.

/Dana Peabody/
Dana Peabody,
Registered Diplomate Reporter
Certified Realtime Reporter