
In the Supreme Court of the United States

SOUTH BAY UNITED PENTECOSTAL CHURCH, ET. AL.,
Applicants,

v.

GAVIN NEWSOM, ET AL.,
Respondents.

**OPPOSITION OF STATE RESPONDENTS TO
EMERGENCY APPLICATION FOR WRIT OF INJUNCTION**

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TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT.....	13
I. Because In-Person Worship Services Are Permitted, Plaintiffs Fail To Show An Irreparable Injury, Let Alone One That Outweighs The Public Interest In Combatting A Pandemic	14
II. There Is No Reasonable Probability That The Court Will Grant Review and Reverse	17
CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

<i>Abiding Place Ministries v. Wooten</i> No. 3:20-cv-00683-BAS-AHG (S.D. Cal. Apr. 10, 2020).....	23
<i>Antietam Battlefield KOA v. Hogan</i> 2020 WL 2556496 (D. Md. May 20, 2020).....	23
<i>Binford v. Sununu</i> No. 217-2020-CV-00152 (N.H. Superior Ct. March 25, 2020).....	23
<i>Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah</i> 508 U.S. 520 (1993).....	9, 18
<i>City of Los Angeles v. Lyons</i> 461 U.S. 95 (1983).....	14, 15
<i>City of Richmond v. J.A. Croson Co.</i> 488 U.S. 469 (1989).....	16
<i>Conforte v. C.I.R.</i> 459 U.S. 1309 (1983).....	14
<i>Cross Culture Christian Ctr. v. Newsom</i> 2020 WL 2121111 (E.D. Cal. May 5, 2020).....	23
<i>Elim Romanian Pentecostal Church v. Pritzker</i> 2020 WL 2517093 (7th Cir. May 16, 2020).....	18, 24
<i>Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons</i> 954 F.3d 118 (2d Cir. 2020).....	1
<i>First Pentecostal Church of Holly Springs v. City of Holly Springs</i> 2020 WL 2616687 (5th Cir. May 22, 2020).....	24
<i>Gish v. Newsom</i> 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020).....	23
<i>Jacobson v. Massachusetts</i> 197 U.S. 11 (1905).....	16
<i>Kingdomware Techs., Inc. v. United States</i> 136 S. Ct. 1969 (2016).....	15

TABLE OF AUTHORITIES

	Page
<i>Larson v. Valente</i> 456 U.S. 228 (1982)	22
<i>Lux v. Rodrigues</i> 561 U.S. 1306 (2010)	13, 17
<i>Medtronic, Inc. v. Lohr</i> 518 U.S. 470 (1996)	16
<i>Quern v. Mandley</i> 436 U.S. 725 (1978)	16
<i>Respect Maine PAC v. McKee</i> 562 U.S. 996 (2010)	13
<i>Roberts v. Neace</i> 2020 WL 2316679 (6th Cir. May 9, 2020)	21, 24
<i>Spell v. Edwards</i> 2020 WL 2509078 (M.D. La. May 15, 2020).....	23
<i>St. Paul Fire & Marine Ins. Co. v. Barry</i> 438 U.S. 531 (1978)	16
<i>Tolle v. Northam</i> No. 20-1419 (4th Cir. Apr. 28, 2020)	24
<i>Tory v. Cochran</i> 544 U.S. 734 (2005)	15
<i>Winter v. Nat. Res. Def. Council, Inc.</i> 555 U.S. 7 (2008)	13, 15, 16
<i>Yakus v. United States</i> 321 U.S. 414 (1944)	16
 STATUTES AND REGULATIONS	
28 U.S.C. § 1292(a)	9
Cal. Labor Code § 226(a)	22

TABLE OF AUTHORITIES

	Page
Cal. Labor Code § 6409.1(b)	22
2019 Cal. Building Code, pt. 2, ch. 10	
Table 1004.5	23
§ 1004.6.....	23
Cal. Code Regs., title 8, § 340	22
COURT RULES	
Sup. Ct. R. 23.3.....	14
GOVERNMENTAL ORDERS AND GUIDANCE	
California Department of Public Health, <i>Coronavirus Disease (COVID-19) and Guidance on Retail Food, Beverage, and Other Related Service Venues</i> (March 16, 2020), https://tinyurl.com/ycdtlhf	4, 19
California Department of Public Health, <i>COVID-19 Industry Guidance: Dine-In Restaurants</i> (May 12, 2020), https://tinyurl.com/y7r7o75j	19
California Department of Public Health, <i>COVID-19 Industry Guidance: Manufacturing</i> (May 12, 2020), https://tinyurl.com/y8owdgw3	6
California Department of Public Health, <i>COVID-19 Industry Guidance: Office Workplaces</i> (May 12, 2020), https://tinyurl.com/y9xrdjws ;	6
California Department of Public Health, <i>COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies</i> (May 25, 2020), https://tinyurl.com/y97vsvnv	<i>passim</i>
<i>California Department of Public Health, Symptoms and Risks</i> , https://tinyurl.com/ycsnarry	1

TABLE OF AUTHORITIES

	Page
California Department of Public Health, <i>Face Coverings Guidance</i> (April 1, 2020), https://tinyurl.com/smhvkua	4
California Department of Public Health, <i>Guidance for Pharmacies and Pharmacy Staff</i> (May 13, 2020), https://tinyurl.com/y7vlmzgd ;	19
California Department of Public Health, Press Release, <i>Counties Statewide Can Reopen Places of Worship for Religious Services and Retail Stores</i> (May 25, 2020), https://tinyurl.com/y7ke2ju4	6
<i>California Stay Home Q&A</i> , https://tinyurl.com/y7w4nqs8	3, 11, 21
Centers for Disease Control & Prevention, <i>Coronavirus Disease, Cases in the U.S.</i> , https://tinyurl.com/qqt3aq6	1
Centers for Disease Control & Prevention, <i>Interim Guidance for Communities of Faith</i> (May 22, 2020), https://tinyurl.com/y7v7a342	11, 12
Centers for Disease Control & Prevention, <i>Interim Guidance on Large Events & Mass Gatherings</i> (March 15, 2020), https://tinyurl.com/yx3l8kct ;	19
County of San Diego, Order of the Health Officer & Emergency Regulations (May 26, 2020), https://tinyurl.com/uhnq3gb	12
Department of Homeland Security, <i>Critical Infrastructure Sectors</i> , https://tinyurl.com/qlpwg6x	4
Executive Order N-25-20 (March 12, 2020)	3
Executive Order N-33-20 (March 19, 2020)	3, 4
Governor Gavin Newsom, Press Conference, Transcript (May 7, 2020), https://tinyurl.com/y9vm9wbe/	21, 22
Governor Gavin Newsom, Press Conference, Transcript (May 22, 2020), https://tinyurl.com/y7sgqefm	11

TABLE OF AUTHORITIES

	Page
Governor Gavin Newsom, Press Release, <i>Governor Newsom Provides Update on California’s Progress Toward Stage 2 Reopening</i> (May 4, 2020), https://tinyurl.com/y9ru2sam	6
Order of the California State Public Health Officer (May 7, 2020), https://tinyurl.com/ybn45nux	7
<i>Report Card: Criteria for Moving to Stage 2 on the Resilience Roadmap</i> (May 4, 2020), https://tinyurl.com/ycgkec6g	7
<i>Statewide Industry Guidance to Reduce Risk: Office Workplaces & Limited Services</i> , https://tinyurl.com/y8xtowt6	18
<i>Update on California’s Pandemic Roadmap</i> , https://tinyurl.com/yaamk84m	<i>passim</i>
 OTHER AUTHORITIES	
<i>California Advises Against Even Small Social Gatherings</i> , Associated Press (March 12, 2020), https://tinyurl.com/yahxkqqt	3
<i>Coronavirus Map & Case Count: California</i> , N.Y. Times, https://tinyurl.com/u6r2cf2	5
<i>Coronavirus Map & Case Count: New York</i> , N.Y. Times, https://tinyurl.com/yczhbv4w	5
Ercolano, Johns Hopkins University Hub, <i>A Coronavirus Vaccine Is In The Works—But It Won’t Emerge Overnight</i> , April 16, 2020, https://tinyurl.com/y8sypwke	1
Galiatsatos, Johns Hopkins Medicine, <i>What Coronavirus Does to the Lungs</i> (April 13, 2020), https://tinyurl.com/ycfk6s57	2
Harvard Health Publishing, Harvard Medical School, <i>Coronavirus Resource Center</i> , https://tinyurl.com/wmdmeym	3
Ledford, <i>How Does COVID-19 Kill? Uncertainty Is Hampering Doctors’ Ability To Choose Treatments</i> , Nature, April 9, 2020, https://tinyurl.com/v8z9b6b	2

TABLE OF AUTHORITIES

	Page
Marks & Pour, <i>What We Still Don't Know About the Coronavirus</i> , <i>The New Yorker</i> , April 29, 2020.....	2
National Governors Association, <i>COVID-19 State and Territory Actions Tracker: Statewide Limits on Gatherings</i> , https://tinyurl.com/ybwoo8l8	20
Shapiro et. al., <i>Supreme Court Practice</i> (11th ed. 2019).....	13, 18
Stadnytskyi et al., <i>The Airborne Lifetime of Small Speech Droplets and their Potential Importance in SARS-CoV-2 Transmission</i> , <i>Proceedings of the National Academy of Sciences</i> (May 4, 2020), https://tinyurl.com/y8d6jmk8	2
Thompson, et al., <i>California Advises Against Even Small Social Gatherings</i> , <i>Associated Press</i> (March 12, 2020), https://tinyurl.com/yahxkqqt	3
<i>Tracking Coronavirus in California</i> , <i>L.A. Times</i> , https://tinyurl.com/qu79hu7	5
Weitz, et al., <i>Online COVID-19 Dashboard Calculates How Risky Reopenings and Gatherings Can Be</i> , <i>Scientific American</i> , May 21, 2020, https://tinyurl.com/yd3sl5qx	20

STATEMENT

1. The novel coronavirus disease (COVID-19) has infected nearly 1.7 million people in the United States.¹ To date, over 100,000 Americans have died.² There is not yet a cure or a vaccine, and likely will not be for many months.³ In response to this pandemic, governments, private organizations, and individuals have taken unprecedented steps to protect their communities. The country has witnessed “a rapid reorientation of workplace practices and social life in support of public health.” *Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 135 (2d Cir. 2020).

While there remain many areas of uncertainty about this new disease and the virus that causes it, medical and public-health experts now have a basic understanding of who is most vulnerable to severe infection and how the virus spreads. People over 65 years of age and individuals with chronic health conditions, such as diabetes or heart disease, are most likely to develop severe symptoms.⁴ In such cases, the virus causes parts of the lungs to collapse or fill with fluid, thereby inhibiting breathing and preventing sufficient oxygen from

¹ Centers for Disease Control & Prevention, Coronavirus Disease, *Cases in the U.S.*, <https://tinyurl.com/qqt3aq6> (last visited May 28, 2020).

² *Id.*

³ See, e.g., Ercolano, Johns Hopkins University Hub, *A Coronavirus Vaccine Is In The Works—But It Won’t Emerge Overnight*, April 16, 2020, <https://tinyurl.com/y8sypwke>.

⁴ California Department of Public Health, *Symptoms and Risks*, <https://tinyurl.com/ycesnarry> (updated May 15, 2020).

reaching the bloodstream.⁵ Doctors are also finding that the virus can “push kidneys into failure, send the body’s immune system into catastrophic overdrive, and cause blood clots that impede circulation to the lungs, heart, or brain.”⁶ For patients who survive, medical experts believe it may take upwards of a year for the organ damage to heal.⁷

Coronavirus spreads easily. The virus “is thought to spread mainly from person to person . . . through respiratory droplets,” which often “land in the mouths or noses of people who are nearby.” E.R. 125 (Declaration of James Watt, M.D., M.P.H.).⁸ Vocal activity such as “loud speech” “can emit thousands of oral fluid droplets per second,” “confirm[ing] that there is a substantial probability that normal speaking causes airborne virus transmission in confined environments.”⁹ And the virus “can be transmitted by a person who is asymptomatic.” E.R. 125. Indeed, “[e]merging research suggests that people may actually be most likely to spread the virus to others during the 48 hours

⁵ Galiatsatos, Johns Hopkins Medicine, *What Coronavirus Does to the Lungs* (April 13, 2020), <https://tinyurl.com/ycfk6s57>.

⁶ Marks & Pour, *What We Still Don’t Know About the Coronavirus*, *The New Yorker*, April 29, 2020, <https://tinyurl.com/y7svnhrr>; see also Ledford, *How Does COVID-19 Kill? Uncertainty Is Hampering Doctors’ Ability To Choose Treatments*, *Nature*, April 9, 2020, <https://tinyurl.com/v8z9b6b>.

⁷ Galiatsatos, *supra*, *What Coronavirus Does to the Lungs*.

⁸ “E.R.” refers to the Excerpts of Record in the court of appeals.

⁹ Stadnytskyi et al., *The Airborne Lifetime of Small Speech Droplets and their Potential Importance in SARS-CoV-2 Transmission*, *Proceedings of the National Academy of Sciences* (May 4, 2020), <https://tinyurl.com/y8d6jmk8>.

before they start to experience symptoms.”¹⁰ That “makes it difficult to prevent spread,” E.R. 125, because people may engage in certain risky activities, such as attending events in close proximity to others, that they would avoid if they were experiencing symptoms.

2. In the absence of a vaccine or cure, many jurisdictions, including California, have adopted emergency measures to slow the virus’s spread. On March 4, 2020, California Governor Gavin Newsom declared a state of emergency and, not long afterward, issued executive orders directing most Californians to stay home and “to heed any orders and guidance” issued by the California Public Health Officer. Executive Order N-25-20 (March 12, 2020), <https://tinyurl.com/uuq893k>; see E.R. 156-157 (Executive Order N-33-20 (March 19, 2020) (stay-at-home order)). While exceptions to the stay-at-home order were made for certain activities like grocery shopping and some types of outdoor physical fitness, the State has urged people to respect physical-distancing protocols at all times, remaining at least six feet apart from those who are not from the same household.¹¹ The State has also advised people to wear masks or other face coverings in public, while cautioning that face

¹⁰ Harvard Health Publishing, Harvard Medical School, *Coronavirus Resource Center*, <https://tinyurl.com/wmdmeym> (last updated May 22, 2020).

¹¹ *California Stay Home Q&A*, <https://tinyurl.com/y7w4nqs8> (last visited May 28, 2020); see also, e.g., Thompson et al., *California Advises Against Even Small Social Gatherings*, Associated Press (March 12, 2020), <https://tinyurl.com/yahxkqqt>.

coverings should not substitute for other “strong defenses, such as physical distancing and frequent hand washing.”¹²

At the same time, California recognized the importance of balancing these extraordinary measures against the need to maintain “Californians’ health and well-being.” E.R. 156-157 (Executive Order N-33-20). The State’s health care directives thus provided exemptions for those working in “critical infrastructure sectors” as designated by the federal Department of Homeland Security and supplemented by the California Public Health Officer. *See id.* at 156; *id.* at 162 (Supplemental Guidance on Critical Infrastructure Workers).¹³ For example, because members of the community depend upon continued access to food and medicine, grocery stores and pharmacies were permitted to remain open—but only with safeguards in place to protect store workers and members of the community from undue risks of exposure. *See* E.R. 163-164, 167-168. Likewise, because many people rely on restaurants as a source of food, restaurants were allowed to continue operating, but were limited to providing take-out and delivery options. *See id.* at 167-168.¹⁴

¹² California Department of Public Health, *Face Coverings Guidance* (April 1, 2020), <https://tinyurl.com/smhvkuu>.

¹³ *See also* Department of Homeland Security, *Critical Infrastructure Sectors*, <https://tinyurl.com/qlpwg6x>.

¹⁴ California Department of Public Health, *Coronavirus Disease (COVID-19) and Guidance on Retail Food, Beverage, and Other Related Service Venues* (March 16, 2020), <https://tinyurl.com/ycdlthf>.

Religious organizations were also deemed essential in California. The State recognized that members of the clergy provide “support and faith-based services” critical to the spiritual needs of many Californians. E.R. 177. While the risk of viral spread from large in-person gatherings was too substantial to permit in-person religious services in the initial weeks of the crisis, California authorized clergy to travel to church facilities and offices to record, broadcast, or stream services that their congregations could view at home. *See id.* The State also allowed churches to host drive-in services, so long as attendees remained in their vehicles, sufficiently far apart from one another.¹⁵

3. As a result of its early steps to combat the spread of COVID-19, California has not seen infection or death rates climb as high as in other parts of the country. As of May 27, 2020, the State has reported about 99,000 cases and approximately 3,800 deaths, or about 250 cases and 10 deaths per 100,000 people (compared, for example, to about 1,900 cases and 150 deaths per 100,000 people in New York).¹⁶ Infections continue to increase, but the rate of new cases appears to have slowed.¹⁷

¹⁵ California Department of Public Health, *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* 9 (May 25, 2020), <https://tinyurl.com/y97vsvnv>.

¹⁶ *See* <https://covid19.ca.gov> (last visited May 27, 2020); *Coronavirus Map & Case Count: California*, N.Y. Times, <https://tinyurl.com/u6r2cf2> (last visited May 27, 2020); *Coronavirus Map & Case Count: New York*, N.Y. Times, <https://tinyurl.com/yczhbv4w> (last visited May 27, 2020).

¹⁷ *See Tracking Coronavirus in California*, L.A. Times,

In light of that progress, Governor Newsom and the California Public Health Officer announced on April 28, 2020 that California would begin to implement a reopening plan called the Pandemic Resilience Roadmap. See *Update on California's Pandemic Roadmap*, <https://tinyurl.com/yaamk84m> (Roadmap).¹⁸ The plan calls for gradually moving through four stages: Stage One, the strict, initial response to the pandemic, including the stay-at-home order; Stage Two, reopening “lower risk sectors”; Stage Three, reopening certain “higher risk sectors”; and finally, Stage Four, at which point all restrictions will be lifted. Roadmap at 5. Public health officials classified workplaces as “lower risk” if they can safely reopen with adaptations to allow for physical distancing. For example, retail stores, manufacturing operations, and offices may reopen, but only with measures in place to limit “the number of [people] in enclosed areas,” where feasible, and additional measures to ensure “at least six feet of separation to limit transmission of the virus.”¹⁹ Stages Three and Four were reserved for workplaces, events, and other

<https://tinyurl.com/qu79hu7> (last visited May 28, 2020).

¹⁸ See also Governor Gavin Newsom, Press Release, *Governor Newsom Provides Update on California's Progress Toward Stage 2 Reopening* (May 4, 2020), <https://tinyurl.com/y9ru2sam>.

¹⁹ California Department of Public Health, *COVID-19 Industry Guidance: Manufacturing* 7 (May 12, 2020), <https://tinyurl.com/y8owdgw3>; see also California Department of Public Health, *COVID-19 Industry Guidance: Office Workplaces* 6 (May 12, 2020), <https://tinyurl.com/y9xrdjws>; California Department of Public Health, Press Release, *Counties Statewide Can Reopen Places of Worship for Religious Services and Retail Stores* (May 25, 2020), <https://tinyurl.com/y7ke2ju4>.

settings in which people gather in close proximity for extended periods of time—for example, in-person religious services, movie theaters, and nail salons, Roadmap at 12 (Stage Three), as well as larger gatherings, such as concerts and athletic events with live audiences, *id.* (Stage Four).

Decisions to move from one stage to the next are based upon several risk-based indicators, including the rate of hospitalizations, available levels of testing, and progress in implementing “contact tracing,” which allows officials to identify and warn those who have been in close proximity to an infected individual. *See* Roadmap at 2.²⁰ On May 7, 2020, the California Public Health Officer announced that there had been sufficient progress on a statewide level to move to Stage Two. *See* Order of the California State Public Health Officer (May 7, 2020), <https://tinyurl.com/ybn45nux>. In doing so, she indicated that the State would continue to reevaluate the Roadmap in light of evolving conditions, “progressively designat[ing] sectors, businesses, establishments, or activities that may reopen.” *Id.* at 2.

4. South Bay United Pentecostal Church is a religious community located near San Diego, California. Bishop Arthur Hodges III is the Church’s senior presiding pastor. On May 11, 2020, the Church and Bishop Hodges sought a temporary restraining order, asking the U.S. District Court for the Southern District of California to order state and county officials to “mov[e]”

²⁰ *See also State Report Card: Criteria for Moving to Stage 2 on the Resilience Roadmap* (May 4, 2020), <https://tinyurl.com/ycgkec6g>.

in-person worship services “from Stage 3 of the Reopening Plan to Stage 2.” E.R. 280. According to plaintiffs, so long as they agreed to abide by certain physical-distancing measures, it would violate the Free Exercise Clause, Equal Protection Clause, and Due Process Clause to forbid the Church from hosting “[c]ommunal worship and ministry.” *Id.* Plaintiffs agreed that the State has a “compelling interest in curbing pandemics.” *Id.* at 279. But they argued that California had inadequately justified its decision to slate in-person worship services for reopening in Stage Three of the Roadmap, while permitting “manufacturing and retail” to reopen during Stage Two. *Id.* at 279-280.

The defendants opposed the requested restraining order, explaining that the State had consistently assigned “all large public gatherings, including religious services” to Stage Three. E.R. 87. In the view of state public-health officials, large public gatherings pose a heightened risk of spread because attendees are “stationary in close quarters for extended periods of time.” *Id.* Moreover, at religious services, “congregants are often speaking aloud and singing, which increases the danger that infected individuals will project respiratory droplets that contain the virus,” “thereby infect[ing] others.” *Id.*; *see supra* at 2. As James Watt, M.D., M.P.H., an epidemiologist with the California Department of Health, explained in a declaration submitted to the district court, there “have been multiple reports of sizable to large gatherings such as religious services, choir practices, funerals, and parties resulting in significant spread of COVID-19.” E.R. 127. Defendants pointed, for example,

to a worship service in Sacramento tied to 71 COVID-19 cases; a choir practice in Seattle linked to 32 cases; a Kentucky church revival tied to 28 cases; and a religious service in South Korea where over 5,000 cases were traced back to a single infected individual in attendance. *Id.* at 87-88 (collecting citations).

On May 15, 2020, the district court denied the requested restraining order, reasoning that the plaintiffs were unlikely to succeed on the merits and that the balance of equities weighed against relief because the “virus poses a serious health risk” and the “only way currently known to curb the disease is to limit personal exposure.” E.R. 32.

Plaintiffs appealed, moving for expedited briefing and an emergency injunction pending appeal. On May 22, 2020, the Ninth Circuit agreed to consider the appeal on an expedited basis but denied immediate injunctive relief. Appl. Ex. A at 2; C.A. Dkt. No. 28.²¹ The court concluded that plaintiffs had not demonstrated a likelihood of success on the merits because, “[w]here 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.” Appl. Ex. A at 3 (quoting *Church of the Lukumi Babalu Aye, Inc.*

²¹ The Ninth Circuit denied the defendants’ motion to dismiss the appeal for lack of jurisdiction. While acknowledging that the court generally lacks appellate jurisdiction to review the denial of a temporary restraining order, the court concluded that the denial here was “tantamount to the denial of a preliminary injunction” for purposes of 28 U.S.C. § 1292(a). Appl. Ex. A at 2 (internal quotation marks omitted).

v. City of Hiialeah, 508 U.S. 520, 533, 543 (1993)). The court also stressed that “we’re dealing here with a highly contagious and often fatal disease for which there presently is no known cure.” *Id.* Judge Collins dissented, agreeing with plaintiffs that the State had failed to provide a sufficient justification for assigning in-person worship services to Stage Three of the reopening plan. Appl. Ex. A, Dissent at 15-16. Plaintiffs’ appeal remains pending; the opening brief is due on June 5, 2020. C.A. Dkt. No. 28.

5. On May 23, 2020, plaintiffs filed an emergency application for injunctive relief with Justice Kagan. Plaintiffs sought the ability to “resume worship services” by May 24, or “in the alternative,” “by Pentecost Sunday—May 31, 2020.” Appl. 5; *see id.* at 11-12. They explained that “this application is about California’s modifications to its Stay-At-Home order made by California Governor Newsom’s May 7, 2020, ‘Resilience Roadmap.’” *Id.* at 3. Plaintiffs argued that injunctive relief is appropriate because, following completion of the pending appeal before the Ninth Circuit, this Court is likely to grant certiorari on the question whether “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[s] the Free Exercise Clause.” Appl. i; *see id.* at 14-15. Plaintiffs noted, however, that the Governor had “announced that on Monday, May 25” the State would “release further expedited plans” for in-person religious services. *Id.* at 3.

6. In the statement referenced by plaintiffs, made on May 22, Governor Gavin Newsom had announced that the State was “working with the faith community . . . to put out guidelines, processes, and procedures,” allowing “churches [to] reopen[] in a safe and responsible manner.”²² The State issued those guidelines on May 25, 2020. The Department of Public Health concluded that places of worship could hold in-person services during Stage Two of the reopening so long as they adhered to certain restrictions, including “limit[ing] attendance to 25% of building capacity or a maximum of 100 attendees” and implementing “measures to ensure physical distancing.” California Department of Public Health, *COVID-19 Industry Guidance: Places of Worship and Providers of Religious Services and Cultural Ceremonies* 3, 9 (May 25, 2020), <https://tinyurl.com/y97vsvnv> (Guidance on In-Person Worship). This policy tracked recent guidance issued by the federal Centers for Disease Control and Prevention on in-person religious services, including the CDC’s recommendation for churches “to limit the size of gatherings in accordance with the guidance and directives of state and local authorities.” Centers for Disease Control & Prevention, *Interim Guidance for Communities of Faith* (May 22, 2020), <https://tinyurl.com/y7v7a342>.²³

²² Governor Gavin Newsom, Press Conference, Transcript (May 22, 2020), <https://tinyurl.com/y7sgqefm>.

²³ The State’s new guidance, including the 100-person or 25% capacity cap, applies to both in-person religious gatherings and political protests. But other large gatherings remain barred. See *California Stay Home Q&A: Are*

California’s new guidance cautioned that, even with distancing measures in place, “convening in a congregational setting of multiple different households” still “carries a relatively higher risk for widespread transmission of the COVID-19 virus, and may result in increased rates of infection, hospitalization, and death, especially among more vulnerable populations.” Guidance on In-Person Worship at 3. So, while the State allowed the new guidance to take effect immediately (subject to approval by county public-health departments), it committed to monitoring the issue closely over the coming 21 days to “review and assess the impact of [the new guidance] on public health.” *Id.* On May 26, 2020, the San Diego County Department of Public Health issued an order allowing churches within the county—including South Bay United Pentecostal—to hold in-person services pursuant to the guidance issued by the State.²⁴

7. On May 26, 2020, plaintiffs filed a supplemental brief with Justice Kagan asking the Court to issue “an injunction permitting them to hold worship services this Pentecost Sunday” without adhering to the newly issued guidance—in particular, the “25% or 100-person cap.” Supp. Br. 2. Plaintiffs

Gatherings Permitted?, <https://tinyurl.com/y7w4nqs8> (last visited May 28, 2020) (defining prohibited gatherings as “meetings or other events that bring together persons from multiple households at the same time for a shared or group experience in a single room, space, or place such as an auditorium, stadium, arena, large conference room, meeting hall, or other indoor or outdoor space”).

²⁴ County of San Diego, Order of the Health Officer & Emergency Regulations ¶ 14 (May 26, 2020), <https://tinyurl.com/uhnq3gb>.

argue that they will be injured absent injunctive relief because their “sanctuary seats 600 persons, and each service normally brings in between 200 and 300 congregants.” *Id.*

ARGUMENT

As plaintiffs acknowledge (Appl. 14), a request for injunctive relief from this Court in the first instance “demands a significantly higher justification’ than a request for a stay, because unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.” *Respect Maine PAC v. McKee*, 562 U.S. 996 (2010). The “legal rights at issue” must be “indisputably clear.” *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers). Plaintiffs must also show that they are “likely to suffer irreparable harm in the absence of preliminary relief,” “that the balance of equities tips in [their] favor,” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008), and that the Court is likely to grant certiorari and reverse after the completion of lower-court proceedings, Shapiro et. al., *Supreme Court Practice* § 17.13(b), p. 17-38 (11th ed. 2019). Plaintiffs fail to satisfy these standards because, among other things, California’s updated guidance allows them to do what their emergency application requests—“resume worship services.” Appl. 5.

I. BECAUSE IN-PERSON WORSHIP SERVICES ARE PERMITTED, PLAINTIFFS FAIL TO SHOW AN IRREPARABLE INJURY, LET ALONE ONE THAT OUTWEIGHS THE PUBLIC INTEREST IN COMBATING A PANDEMIC

1. Plaintiffs cannot demonstrate “the basic requisite[] of the issuance of equitable relief”: “the likelihood of substantial and immediate irreparable injury.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (internal quotation marks omitted). Under California’s newly issued guidance, plaintiffs are no longer “[r]equir[ed] . . . to abstain from religious gatherings.” E.R. 516. They may now “resume in-person activity,” Guidance on In-Person Worship at 3—including on this coming Sunday, May 31, 2020, the Christian holy day of Pentecost, *see* Appl. 1. The harm that plaintiffs have alleged throughout this litigation has thus been redressed. *E.g.*, Appl. 30-31; E.R. 300, 516.

Although plaintiffs’ supplemental brief contends that they continue to face irreparable harm from the new guidance, they acknowledge that the guidance was “not included in the record below.” Supp. Br. 1-2. Because an order enjoining the new guidance was not “first sought in the appropriate court or courts below,” the Court should not entertain plaintiffs’ request to address the new guidance in the first instance. Sup. Ct. R. 23.3; *cf. Conforte v. C.I.R.*, 459 U.S. 1309, 1312 n.2 (1983) (Rehnquist, J., in chambers) (“Applicant’s failure to seek a stay in the Court of Appeals provides an alternative ground for denial of the stay.”).

In any event, plaintiffs fail to explain how they are injured by the new guidance. The Church typically holds three to five Sunday services, with each

“normally bring[ing] in between 200 and 300 congregants.” Supp. Br. 2; *see* Appl. 8. While the updated guidance limits attendance at each service to 100 persons or 25% of building capacity, plaintiffs point to nothing preventing them from “offering additional meeting times” if necessary to accommodate all congregants—just as the new guidance encourages and plaintiffs’ own expert has recommended. Guidance on In-Person Worship at 9; *see* E.R. 319. Indeed, plaintiffs might have to increase the number of services anyway to fulfill their stated intent of keeping every other row of seats empty and maintaining six feet of separation between family groups. E.R. 319-320; *see id.* at 294, 505. And in pledging to “encourage” congregants to “stay home” if they feel “uncomfortable with gathering during the pandemic,” plaintiffs have suggested that congregant attendance may be lower than normal. *Id.* at 505.

Plaintiffs also argue that the case is not moot. Supp. Br. 3. But whether or not that is so, plaintiffs are not excused from satisfying the requirements for injunctive relief, including the need to show that they are “likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. “[N]o court can enjoin” conduct that has ceased and thus no longer threatens irreparable injury. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *see Lyons*, 461 U.S. at 101, 111-112; *cf. Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., dissenting) (“[w]hether or not” a changed

circumstance “moots this case, it certainly renders the case an inappropriate vehicle for resolving the question presented”).²⁵

2. Even if plaintiffs could articulate an injury that is not redressed by the recent guidance, the “overall public interest” in enforcement of that guidance would “tip strongly in favor of” the State as it continues to work to protect the public health during this pandemic. *Winter*, 555 U.S. at 26. “Plaintiffs have never disputed that the government has a compelling interest in curbing the novel coronavirus.” Appl. 23. A “community has the right to protect itself against an epidemic of disease which threatens the safety of its members.” *Jacobson v. Massachusetts*, 197 U.S. 11, 27 (1905). And the public interest in enforcement of the law is substantial when the government acts as “guardian of the public” during a crisis. *Yakus v. United States*, 321 U.S. 414, 441-442 (1944) (citing, e.g., *Jacobson*, 197 U.S. at 11); see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment) (referring to extraordinary governmental power during “a social emergency rising to the level of imminent danger to life and limb”); cf. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasizing “the historic primacy of state regulation of matters of health and safety”).

²⁵ If the case is subject to the “capable of repetition, yet evading review” exception, as plaintiffs suggest, Supp. Br. 3, the appropriate remedy would be to seek declaratory relief. See *Quern v. Mandley*, 436 U.S. 725, 733 n.7 (1978); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538 n.7 (1978). While plaintiffs may continue pressing a claim for declaratory relief in the ongoing lower-court proceedings, see E.R. 520; *supra* at 7-10, the only request now pending before this Court is an application for an injunction.

Here, the California Department of Public Health has concluded that places of worship must “limit attendance to 25% of building capacity or a maximum of 100 attendees” to diminish the serious risk of “widespread transmission of the COVID-19 virus” in a setting where many people gather indoors for an extended period of time. Guidance on In-Person Worship at 3; *see* E.R. 126-127 (Declaration of James Watt, M.D., M.P.H.). Consistent with the State’s risk-based approach to combatting the virus, *supra* at 7, 12, California will continue to “review and assess the impact” of this policy in the coming weeks, Guidance on In-Person Worship at 3. When the attendance restriction proves unnecessary, the State will lift it or loosen it. In light of the tremendous uncertainty continuing to surround this new and deadly virus, however, it would be rash to do so today, before public-health officials have had the opportunity to evaluate evidence of the policy’s effectiveness in practice.

II. THERE IS NO REASONABLE PROBABILITY THAT THE COURT WILL GRANT REVIEW AND REVERSE

Far from demonstrating that “the legal rights at issue are “indisputably clear,” *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers), plaintiffs fail to show that it is likely that any court will conclude that the current policy, which allows them to hold in-person religious services subject to reasonable safety restrictions, violates their constitutional rights. For that reason, and because California’s new guidance makes this a poor vehicle for considering the constitutionality of broader restrictions on religious worship that may continue to exist in other States (Appl. 2), there is no “reasonable probability” that this

Court would grant certiorari and reverse following the completion of proceedings before the Ninth Circuit. Shapiro et. al., *Supreme Court Practice* § 17.13, p. 17-32 (11th ed. 2019).

1. Plaintiffs’ free exercise claim is unlikely to succeed. Whatever the merit of their prior contention that the State had failed to justify slating in-person religious services for “Stage Three” of the reopening plan, *supra* at 7-10, plaintiffs’ supplemental brief does not demonstrate that the revised guidance is unconstitutional. Indeed, while in-person religious services are now permitted, many other activities that are “most comparable” in terms of COVID-transmission risk factors—“concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods”—continue to be barred. *Elim Romanian Pentecostal Church v. Pritzker*, 2020 WL 2517093, at *1 (7th Cir. May 16, 2020); *see supra* at 11-12 & n.23. Plaintiffs are thus incorrect that the State has engaged in “unconstitutional religious targeting.” Appl. 19; *see id.* at 17-19 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)).²⁶ And while it is not at all clear that ordinary constitutional analysis would be

²⁶ Moreover, the exceptions from the stay-at-home order that plaintiffs refer to—for “retail, offices, manufacturing, and schools,” among others, Appl. 20-21—are entirely neutral towards religion: church-run retail and offices, manufacturers of religious items, sellers of sacramental wine, producers of religious movies, and religiously affiliated schools and counseling services are treated the same as their secular counterparts. *See, e.g., Statewide Industry Guidance to Reduce Risk: Office Workplaces & Limited Services*, <https://tinyurl.com/y8xtowt6> (last visited May 27, 2020).

appropriate in today’s “emergency circumstances,” Appl. 25, California’s revised guidance is constitutional under any applicable standard of scrutiny.

California public-health officials have employed a variety of tools to combat the unprecedented threat of COVID-19. One is requiring physical distancing, ensuring that people remain at least six feet apart when it is necessary for them to be in one another’s presence. *See e.g., supra* at 3-4, 6. Another is following the CDC’s recommendation to limit overall group size so that fewer people have to be around one another in the first place.²⁷ For example, California has directed grocery stores and pharmacies to limit the total number of customers “at any given time as necessary to reduce outdoor/indoor crowding.”²⁸ And as the State begins to allow the reopening of restaurants for in-person dining, it has required restaurants to “[a]djust maximum occupancy rules . . . to limit the number of people inside.”²⁹

The newly issued guidance on in-person religious services follows the same approach. Attendance is limited “to 25% of building capacity or a

²⁷ *See, e.g.,* Centers for Disease Control & Prevention, *Interim Guidance on Large Events & Mass Gatherings* (March 15, 2020), <https://tinyurl.com/yx3l8kct>.

²⁸ California Department of Public Health, *Guidance on Retail Food, Beverage, and Other Related Service Venues* (March 16, 2020), <https://tinyurl.com/ycdltlhf>; California Department of Public Health, *Guidance for Pharmacies and Pharmacy Staff* (May 13, 2020), <https://tinyurl.com/y7vlmzgd>; *see also* Supp. Br. 2 (noting that California has established a cap on retail-store capacity).

²⁹ California Department of Public Health, *COVID-19 Industry Guidance: Dine-In Restaurants* 10 (May 12, 2020), <https://tinyurl.com/y7r7o75j>.

maximum of 100 attendees.” Guidance on In-Person Worship at 3. This approach is informed by the practical recognition that, “in gatherings of large numbers of people, it may be very hard to maintain physical distancing” and that “measures that depend on individual behavior . . . are difficult to sustain.” E.R. 127 (Declaration of James Watt, M.D., M.P.H.). It is also based on evidence that the risk of infection increases rapidly with group size: in a larger group, there is not only a greater chance that one or more people will be infected, but also a larger number of people present and potentially exposed to the virus. See Guidance on In-Person Worship at 3.³⁰ Numerous States have thus adopted limits on the size of gatherings.³¹ And the few courts that have struck down bans on in-person worship have done so precisely on the assumption that it is permissible to “cap the number of congregants coming

³⁰ If, for example, “there are 50,000 new cases in a state of 10 million, the per-person probability is 0.5 percent.” Weitz, et al., *Online COVID-19 Dashboard Calculates How Risky Reopenings and Gatherings Can Be*, Scientific American, May 21, 2020, <https://tinyurl.com/yd3sl5qx> (describing analysis by “interdisciplinary researchers from Georgia Tech, Stanford University, and the Applied Bioinformatics Laboratory”). Although that probability may “seem[] quite small,” “the probability that at least one individual is infected with COVID-19 goes up rapidly with group size.” *Id.* “In this example, there’s a 4.9 percent chance that one or more people in a dinner party for 10 would be infected, a 22 percent chance that one or more people in a restaurant with 50 would be infected, a 71 percent chance that that one or more people in a dance club for 250 would be infected, and over a 99 percent chance that one or more people in a concert or sports event for 1,000 would be infected.” *Id.* “In other words: small risks for individuals rapidly become large risks when viewed collectively.” *Id.*

³¹ See National Governors Association, *COVID-19 State and Territory Actions Tracker: Statewide Limits on Gatherings*, <https://tinyurl.com/ybwoo8l8> (last visited May 27, 2020).

together at one time.” *E.g., Roberts v. Neace*, 2020 WL 2316679, at *4 (6th Cir. May 9, 2020).

Plaintiffs nonetheless contend that California’s attendance cap is “arbitrary” because “there is no percentage limitation for manufacturing and warehousing facilities.” Supp. Br. 2. But these workplaces are not comparable to in-person religious services. Labor in manufacturing facilities, warehouses, and offices does not typically involve large numbers of people singing or reading aloud together in the same place, in close proximity to one another, for an extended duration. And the State prohibits workplace activities that resemble in-person religious services—for example, meetings of numerous workers in an “auditorium,” “large conference room,” or “meeting hall.” *California Stay Home Q&A: Are Gatherings Permitted?*, <https://tinyurl.com/y7w4nqs8> (last visited May 28, 2020). While the State’s new guidance lifted restrictions on in-person worship services and political protests to accommodate core First Amendment-protected activity, the general ban on large gatherings remains in place. *See id.; supra* at 11-12 & n.23.³²

³² According to plaintiffs, California’s governor stated on May 7, 2020 that manufacturing and other sectors slated for Stage Two reopening provide a greater “reward” than religious services. Appl. 5. That is inaccurate. The governor stated that “low risk” activities were favored for opening regardless of perceived “reward.” *See* Governor Gavin Newsom, Press Conference, Transcript (May 7, 2020), <https://tinyurl.com/y9vm9wbe/> (“we’re looking at the science, epidemiology looking again at frequency, duration, time and looking at low risk, high reward, low risk, low reward, looking at a series of conditions and criteria as well as best practices from other States and nations”). “As it relates to churches,” the governor continued, “[o]ur fear is simply this,

Manufacturing facilities, warehouses, and offices are also subject to a number of regulations that diminish the risk to public health when people go to work there. They are, for example, subject to occupational safety regulations and inspections; they must notify workers of how to report dangerous practices; and they must immediately notify authorities when on-site COVID contraction is suspected. *See* Cal. Labor Code § 6409.1(b) (reporting requirement); 8 Cal. Code Regs. § 340 (required notice to workers of right to report dangerous conditions and request inspection). They also know each employee’s identity, and often maintain records of which employees are present and when. *See* Cal. Labor Code § 226(a) (requiring wage statements to include employee’s name and partial social security number, and “total hours worked”). The State does not regulate religious services in the same way, for good reason. *Cf. Larson v. Valente*, 456 U.S. 228, 255 (1982) (“[S]tate inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.”) (internal quotation marks omitted).³³

congregations of people mixing from far and wide, coming together proximate in an enclosed space at large scales, is a point of obvious concern and anxiety.” *Id.* Presaging the new guidance released this week, the governor also noted his sensitivity to “those that want to get back into church,” and his desire to “see what we can do to accommodate that.” *Id.*

³³ Another reason that “there is no percentage limitation for manufacturing and warehousing facilities,” Supp. Br. 2, and that there is a higher percentage limitation for “retail” operations, *id.*, is that ordinary occupancy limits for those establishments already ensure that crowd size will

2. Finally, there is no significant likelihood of the Court granting certiorari for plenary review following the Ninth Circuit’s resolution of the pending appeal. While conflicting authority could eventually develop in the lower courts on questions like those raised here, no conflict currently exists. No state or federal court has declared California’s past or current restrictions unconstitutional on free exercise grounds.³⁴ Across the country, trial courts have overwhelmingly rejected challenges to the various restrictions of other States.³⁵ And the courts of appeal have largely rejected requests for

be limited. With respect to manufacturing facilities, for example, the California Building Code bases the “design occupant load” (which is used to determine the number of required exits and similar rules for safe egress) on the premise that each occupant will have, on average, 100-150 square feet of space. 2019 Cal. Building Code, pt. 2, ch. 10, table 1004.5, <https://tinyurl.com/ybtvbr9a> (addressing “concentrated business use” and “industrial” space); *see also id.* (60 square feet per occupant for mercantile use). By contrast, occupant-load allowances for places of assembly, such as auditoriums and churches, are premised on an expectation of far denser occupancy. *See id.* (seven square-feet per occupant for assembly areas without fixed seats); *id.* § 1004.6 (basing limits for assembly areas with fixed seats on the total number of seats). Thus, to achieve low-density occupancy in places where occupancy would otherwise be dense requires a significant deviation from preexisting limits.

³⁴ *See Abiding Place Ministries v. Wooten*, No. 3:20-cv-00683-BAS-AHG (S.D. Cal. Apr. 10, 2020); *Cross Culture Christian Ctr. v. Newsom*, 2020 WL 2121111 (E.D. Cal. May 5, 2020); *Gish v. Newsom*, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020), emergency motion for injunction pending appeal denied, No. 20-55445 (9th Cir. May 7, 2020) (Dkt. No. 21).

³⁵ *See, e.g., Antietam Battlefield KOA v. Hogan*, 2020 WL 2556496 (D. Md. May 20, 2020); *Spell v. Edwards*, 2020 WL 2509078 (M.D. La. May 15, 2020); *Binford v. Sununu*, No. 217-2020-CV-00152 (N.H. Superior Ct. March 25, 2020).

injunctions pending appeals of those orders. *See Elim Romanian Pentecostal Church*, 2020 WL 2517093 at *1; *Tolle v. Northam*, No. 20-1419, Dkt. No. 14 (4th Cir. Apr. 28, 2020), pet. for cert. pending, No. 19-1283. Even the primary appellate authority relied upon by plaintiffs (App. 15; Supp. Br. 4-5), the Sixth Circuit’s decision in *Roberts v. Neace*, 2020 WL 2316679, at *5, recognized that it would be constitutional for a State to “cap the number of congregants,” as California’s new guidance does.³⁶

Indeed, California’s new guidance makes this case especially unfit for plenary review. Plaintiffs have failed to demonstrate any substantial, impending injury. *Supra* at 14-15. And the record, which was developed with respect to the State’s prior reopening policy, would provide a poor basis on which to judge the new guidance. If infections continue to decline, then California’s policies could be further loosened, *supra* at 7, 12, 17, making any determination by this Court here largely advisory. Plaintiffs argue that review is nevertheless warranted, because state policy could also move in the opposite direction if infection rates increase. Supp. Br. 3. But it would surely be premature to assess whether a hypothetical future pandemic response would be constitutionally justified without knowing the circumstances that prompted

³⁶ As plaintiffs acknowledge, the Fifth Circuit’s ruling in *First Pentecostal Church of Holly Springs v. City of Holly Springs*, 2020 WL 2616687, is “not entirely clear.” Supp. Br. 4. It does not explain whether that court’s grant of an injunction pending proceedings on remand was based on an assessment of the merits of constitutional or non-constitutional claims. *See Mot. for Injunction. Pending Appeal, Case No. 20-60399*, at 8-15 (May 16, 2020) (arguing that local restrictions violate a state statute and executive order).

its adoption. Issues of coronavirus precautions and the Free Exercise Clause may eventually require decision from this Court; this case does not.

CONCLUSION

The Court should deny the application for writ of injunction.

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