No. 19A1044

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

Reply Brief in Support of Emergency Application for Writ of Injunction Relief Requested by Sunday, May 31, 2020

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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

The Government's oppositions to Plaintiffs' emergency application fail to address the significant constitutional issues at stake in this important case. Instead, as stated by Judge Collins, California is simply trying to convince this Court that its "highly reticulated patchwork of designated activities and accompanying guidelines [] make sense from a public health standpoint." Ex. A, Dissent, at 14. California also asserts — independent of any reference to the First Amendment— that Plaintiffs are no longer being harmed because the State is now permitting them to hold worship services with an arbitrary cap of 100 people.

The Government's primary argument is that their recent actions moot Plaintiffs' claims, and that the Court should not get involved at this stage. But this reveals the main problem with California's position—that the violation of Plaintiffs' constitutional rights is indisputably clear. The eleventh hour attempts by California and Illinois[1] to moot the applications to this Court do not impact the analysis. California is still violating Plaintiffs' fundamental constitutional rights, and millions of Americans across the county are still having their constitutional rights trampled upon. As stated by Judge Collins, there is "no authority that can justify [California's] extraordinary claim that the current emergency gives the Governor the power to

[1] Currently pending before Justice Kavanaugh is an emergency application for a writ of injunction similar to the present one, but against Illinois. *See Elim Romanian Pentecostal Church v. Pritzker*, No. 19A1046 (May 27, 2020). Plaintiffs here incorporate by reference the arguments made by the applicants there.

restrict any and all constitutional rights, as long as he has acted in 'good faith.'" Ex. A, Dissent, at 6.

In determining whether to take up this dispute at this time, the Court may consider "all the circumstances of the case." *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 571 U.S. 1171 (2014). Those circumstances, including civil unrest, a standoff between governors and the President, and arson attacks against churches, warrant immediate guidance from this Court.

ARGUMENT

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.

1.1. The Reopening Plan is neither generally applicable nor neutral.

California's argument with respect to general applicability under the Free Exercise clause relies, without any analysis, on *Elim Romanian Pentecostal Church v. Pritzker*, No. 20-1811, 2020 WL 2517093 (7th Cir. May 16, 2020). Indeed, the term "generally applicable" (or any variant thereof) does not appear at all in California's brief. Instead, relying on *Elim*, California asserts that its Reopening Plan is constitutional because it applies to all industries, and it has grouped like industries together. State Opp., 18–19, 21. In this respect, California's constitutional analysis is as light as the Ninth Circuit's, which appealed to the supposed constitutional principle that in interpreting the Bill of Rights, courts must "temper [their] doctrinaire logic with a little practical wisdom." Ex. A, Opn., at 3.

But as Judge Collins held in his dissent, there is a significant problem with the argument that a law is generally applicable so long as it regulates *every* industry by

name. A law is not generally applicable simply because it identifies every industry within its subdivisions. Ex. A, Dissent, at 14–15. It is wordplay to say that California's Reopening Plan is generally applicable because it applies to all industries—when it applies to different industries in different ways. *See id.*

Turning to neutrality, California spends a significant amount of time trying to convince the Court that its Reopening Plan is neutral because it has honestly and fairly treated like entities alike. State Opp., 21–22 & nn. 32–33. But this is a red herring. As Judge Collins held: "By *explicitly* and categorically assigning all in-person 'religious services' [various limitations]—without any express regard to . . . 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.'" Ex. A, Dissent, at 13 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

Judge Collins' logic is sound. From a broad perspective, there are easy and there are difficult ways to achieve California's interests. The easy way is to promulgate an overbroad ban on activity (*e.g.*, music festivals) that is somewhat related to the State's concern (preventing COVID-19 outbreaks). The difficult way is to promulgate a narrowly tailored ban that targets the State's actual concerns. The easy way may be fine for activity to which the constitution is indifferent (music festivals), but it is not fine for activity that the constitution protects (worship).

Stated differently, with respect to worship, the constitution *mandates* that California take the difficult route. To be neutral, California must start with the hard

work of promulgating a regime that prohibits gatherings in a similar manner across all industries without singling out "worship." If California does single out worship, then it must satisfy strict scrutiny, and end with the hard work, by showing that it was impossible to design a regime that prohibited gatherings in a similar manner across all industries. What the constitution does not permit, is for California to both infringe constitutional rights and skip the hard work. In that case, California's actions will—by definition—ban more constitutionally protected activity than necessary.[2]

Because California has regulated houses of worship *because* they are houses of worship, "the Reopening Plan, on its face, is not neutral, [and] it is subject to strict scrutiny." Ex. A, Dissent, at 14 (quoting *Lukumi*, 508 U.S. at 531–32). Otherwise, it is simply too easy for the government to get away with "the sort of 'subtle departures from neutrality' that the Free Exercise Clause is designed to prevent." *Berean Baptist Church v. Cooper*, --- F.Supp.3d ---, 2020 WL 2514313, at *6 (E.D.N.C. May 16, 2020).[3]

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[2] For example, if California promulgated neutral rules on gatherings that applied across all industries, then creative Californians would figure out how to optimize worship activities within those neutral requirements. But by imposing arbitrary limitations solely on worship qua worship, California unconstitutionally limits activity that it has no need to. As stated by Judge Collins, "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.'" Ex. A, Dissent, at 16 (quoting *Roberts v. Neace*, 958 F.3d 409, 416 (6th Cir. 2020)).

[3] Indeed, if California's argument were the rule, a state could simply assert that the classification of industries was based on "risk," with no citation except to a press release stating as much, not address why the Hollywood movie industry was prioritized above all other industries, and simply hope that this glaring favoritism was overlooked. *Compare* State Opp., at 6–7 (stating classification was based on risk); *with* 3ER558 (inexplicably classifying the Hollywood movie industry as Stage 1 essential, as important as hospitals).

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

Judge Collins rightly concluded that "[t]he State's undeniably compelling interest in public health 'could be achieved by narrower [regulations] that burdened religion to a far lesser degree.'" Ex. A, Dissent, at 15 (quoting *Lukumi*, 508 U.S. at 546.) California's arguments against this do not logically follow.[4]

First, California states that "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.'" State Opp., at 17. To support this, California merely cites to the Public Health Department's guidance on houses of worship. *Id*. In other words, according to California, strict scrutiny is satisfied because it has asserted that what it is doing must be done. This is not "bear[ing] the burden of proving the constitutionality of its actions"—especially when California does not get "the benefit of the doubt." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816, 818 (2000). The question that Plaintiffs have repeatedly asked: "Why not 'limit attendance to 25% of building capacity or a maximum of 100 attendees' *for all industries*?"—has never been straightforwardly answered.

[4] Throughout its brief, California cites outside the record to provide this Court with articles relevant to a strict scrutiny analysis. These outside-the-record citations should be ignored. The entirety of the District Court briefing is available in the Excerpts of Record filed with the Ninth Circuit. California believed *that* record was sufficient for an outright ban on all worship activities. If it truly was sufficient, there is no need for California to now cite outside the record to justify its lesser rule, which simply places an arbitrary cap on attendance at worship, but not other, gatherings.

In partial response, California states that every industry—including houses of worship—are required to "limit 'the number of [people] in enclosed areas.'" State Opp., at 6, 19. California also argues that the CDC recommends "limit[ing] the size of gatherings." *Id*. at 11. But again, only one industry has a 25% capacity or 100-person cap—houses of worship. If California's interest in limiting gatherings is not important enough to be enforced against other industries, it is not important enough to be enforced against churches. *Lukumi*, 508 U.S. at 547.[5]

Then California states that gatherings are actually only permitted at houses of worship, and all "other large gatherings remain barred." State Opp., at 11 n. 23. But, in this context, "gathering" is a defined term of art meaning "a shared or group experience." *See id.* California does not mean that 101 people cannot come together in a factory or a grocery store—and indeed, they do all the time.[6]

Finally, California argues that there are meaningful (generalized) differences between houses of worship and other industries. California argues that "[l]abor in

[5] California states that the Sixth Circuit endorsed "cap[ping] the number of congregants." State Opp., at 24 (citing *Roberts*, 958 F.3d at 415). But this is misleading. In context, the Sixth Circuit discussed a cap as a neutral rule that could be applied across the board. It did not endorse capping the number of attendees *only* at worship services, or even when responsible social distancing could be practiced without caps.

[6] California also states that, "the State prohibits workplace activities that resemble in-person religious services," and cites to the Q&A page on its pandemic website. State Opp., at 21. The cited source, however, merely discusses "mass gatherings" in the abstract—not as specifically applied to workplaces. Further, the definition of "mass gatherings" on that Q&A page is simply (1) multiple people; (2) single space; and (3) shared experience. In other words, that definition bans all office meetings with two or more people (even at the Stage 1 essential businesses such as hospitals and the movie industry). It also does not apply to shopping, since everyone present is there for their own purposes—not a shared experience—and so the Rose Bowl Flea Market, which brings in 20,000 people when it opens for one day a month, would be allowed to operate at 50% capacity, only 10,000. The citation does not support California's argument at all.

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." State Opp., at 21. Further, "[v]ocal activity such as 'loud speech' 'can emit thousands of oral droplets per second,' 'confirming that there is a substantial probability that normal speaking causes airborne virus transmission in confined environments.'" *Id.* at 2 (quoting scientific study from outside the record) (brackets omitted); *see also id.* at 8 (same argument). And in manufacturing, the owners "know each employee's identity, and often maintain records of which employees are present and when." *Id.* at 22.

But this begs the question, why not ban "loud speech" across the board? Why not ban "singing" across the board? Why not require churches to track which of their registered parishioners are attending? What is the compelling interest in generalizing industries, and banning whole industries based on generalizations? Here, Judge Collins provides the answer:

> 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."

Ex. A, Dissent, at 16 (quoting *Roberts v. Neace*, 958 F.3d 409, 414 (6th Cir. 2020)).

A further problem with generalizations is that, by definition, they are not precise. Under California's Reopening Plan, all manufacturing and retail can reopen so long as

they follow neutral social distancing guidelines (and 50% building occupancy for retail). But where is the real science indicating that attending church is more dangerous than visiting a grocery store—especially when it is the same people visiting a grocery store on Saturday and church on Sunday? It is not in the record. *Contrast* 2ER314–20 (Plaintiffs' expert discussing how visiting a grocery store is riskier).

Due to California's reliance on generalizations, its Reopening Plan necessarily pulls in certain manufacturing plants that are similar to houses of worship. For example, a quintessential California manufacturing industry is clothing. Below is an image Plaintiffs submitted with the district court of a California clothing factory in the Los Angeles area (2ER38):

Under California's Reopening Plan, the above factory may reopen, even though it operates similar to how a house of worship ordinarily would—people sitting fairly

close together for certain periods of time, presumably talking at some points. California has not satisfied its burden under strict scrutiny.[7]

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

California's argument on the equities is primarily an argument that the equities do not warrant this Court's emergency intervention *at this time*. These arguments all fail.

First, California rejects Plaintiffs' assertion of a Circuit split, arguing that no other Circuit has split from the Ninth Circuit in adjudicating whether "California's past or current restrictions [are] unconstitutional on free exercise grounds." State Opp., at 23. But this makes little sense—California is in the Ninth Circuit; no other Circuit will be adjudicating the constitutionality of its pandemic related executive orders.

Second, California argues that "it would surely be premature to assess whether a hypothetical future pandemic response would be constitutionally justified without knowing the circumstances that prompted its adoption." State Opp., at 24–25. But Plaintiffs are not asking this Court to assess a "future pandemic response"—but merely to provide guidance to the lower courts on what legal standards to apply, as there is widespread confusion. There are very clear splits in the Circuits, on how to apply *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) and *Church*

[7] The factory image was taken from a news article dated January 30, 2020—before the pandemic. The use of facemasks appears to be due to the presence of fabric particles in the factory. Plaintiffs do not mean to imply that this is an image of a factory operating under California's current regulations; it is simply the type of factory that can reopen if it follows California's neutral guidelines.

of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), to a situation giving rise to very similar responses by state governors. If the pandemic resurfaces as a result of America's reopening, or if it resurfaces in the Fall, the lower courts need to know what standards to apply.

Third, California states that "the record [here] . . . provide[s] a poor basis on which to judge the [State's] new guidance" because it "was developed with respect to the State's prior reopening policy." State Opp., at 24. But this does not logically follow. If the record were actually sufficient to justify singling out religious worship for an outright ban, it would be sufficient to justify singling out worship for an arbitrary 100-person cap. The issue is, and always has been, how California justifies singling out churches for discriminatory treatment.

Finally, 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), and there is a "significant public interest in upholding First Amendment principles." *Doe v. Harris*, 772 F.3d 563, 683 (9th Cir. 2014). But California's brief makes clear that millions of Californians will continue losing those First Amendment freedoms until it decides otherwise.

In this respect, California states that "100 persons" should simply be good enough. State Opp., at 15. This is a repeat of its early argument that live-stream services or drive-in services should simply be good enough.[8] Before May 28, 2020,

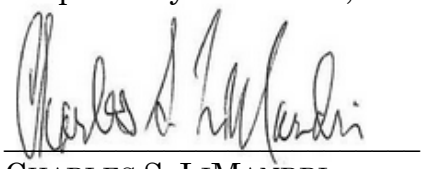
[8] With respect to its prior restrictions, California states that it "also allowed churches to host drive-in services so long as attendees remained in their vehicles, sufficiently far apart from one another." State Opp., at 5. This statement is misleading. In the first lawsuit in the Southern District of California, the district court denied a requested temporary restraining order against a drive-in ban. *See Abiding Place*

Governor Pritzker from Illinois argued that "10 persons" should simply be good enough—that 10 should be enough to satisfy the Christian requirement of gathering together. But where is the line? Is 20 good enough? Is 90 good enough? In light of the First Amendment, it is not for any governor—or even any court—to answer this question.

CONCLUSION

For the reasons stated above, in their supplemental brief, and in their initial application, Plaintiffs respectfully request that this Court grant their requested emergency writ for an injunction.

Respectfully submitted,



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Ministries v. Wooten, No. 3:20-cv-00683-BAS-AHG, Dkt. No. 10 (S.D. Cal. Apr. 10, 2020). At the time, San Diego's Public Health Officer Wilma Wooten declared that California's drive-in ban was necessary because "[a]llowing people to leave their homes and drive to a religious service puts everyone's health in San Diego County at risk. . . . While driving to [church], the congregants may stop to put gasoline in their car, purchase food or use the restroom." *See id.* at Dkt. No. 6-2. Only following a second round of litigation did California capitulate and agree to permit drive-in worship. *Cross Culture Christian Ctr. v. Newsom*, No. 2:20-cv-00832-JAM-CKD, 2020 WL 2121111, at *3 n.2 (E.D. Cal. May 5, 2020).

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CERTIFICATE OF SERVICE

I, Charles S. LiMandri, counsel of record for Applicants South Bay United Pentecostal Church and Bishop Arthur Hodges III, hereby certify that on this 30th day of May, 2020, I caused 2 packages containing 1 copy of the REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR WRIT OF INJUNCTION RELIEF REQUESTED BY SUNDAY, MAY 31, 2020 in the above entitled case to be served by via electronic mail on the following counsel:

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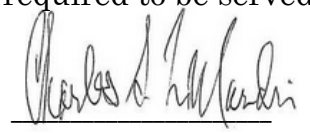
I further certify that all parties required to be served have been served.



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