Docket No. 20-55533

In the

United States Court of Appeals

for the

Ninth Circuit

SOUTH BAY UNITED PENTECOSTAL CHURCH and
BISHOP ARTHUR HODGES III,
Plaintiffs-Appellants,

v.

GAVIN NEWSOM, in his official capacity as the Governor of California , *et al.*,
Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Southern District of California, Case No. 3:20-cv-865-BAS • Honorable Cynthia A. Bashant, District Judge

URGENT MOTION FOR AN INJUNCTION PENDING APPEAL
UNDER CIRCUIT RULE 27-3(b)
RELIEF REQUESTED BY SUNDAY, MAY 17, 2020

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant South Bay United Pentecostal Church is a nonprofit public benefit corporation organized under the laws of the State of California. It does not have any parent corporation, and no publicly held corporation owns ten percent or more of its stock.

CIRCUIT RULE 27-3 CERTIFICATE

The undersigned counsel certifies the following:

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(ii) Facts showing the existence and nature of the emergency:

This appeal follows the May 15, 2020, Order of the U.S. District Court, Southern District of California, which denied Plaintiffs-Appellants' *ex parte* motion for temporary and preliminary injunctive relief. 1ER1–33.

That *ex parte* motion concerned a series of "Stay-At-Home" Orders issued by the State and the County of San Diego, as most recently amended on May 7 and 10, 2020, as part of an effort to curb the coronavirus pandemic. It was not about whether the government has a compelling interest in curbing pandemics. It does. Nor was it about whether the government may limit some personal liberties. It can. Nor was it about the constitutionality of the prior executive orders issued in March that permitted "life-sustaining" businesses to stay open.

No, the underlying *ex parte* motion and this motion are about California's modifications to its Stay-At-Home order made by Governor Newsom's May 7, 2020,

"Resilience Roadmap," and the County of San Diego's May 10, 2020, order implementing it. (generally, the "Orders" or the "Reopening Plan"). 3ER559–97. 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). In a few weeks, offices, seated dining at restaurants, visiting retail, and schools will open (Stage 2b). And churches will open between a month or a few months after that, alongside movie theaters as well as hair and nail salons, and tattoo parlors (Stage 3).

The original 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, 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, Defendants 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. 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 and warehousing to open right now, and soon permitting offices and dine-in restaurants to open. 3ER559–97.

After presenting the Reopening Plan, the State published it online and described Stage 2 as "lower-risk workplaces" and Stage 3 as "higher risk workplaces." 3ER560–61. However, when asked 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 him. 3ER512. But Governor Newsom is not only prioritizing life-saving businesses, or even schools. He is prioritizing all manufacturing and warehousing—so long as the practice social distancing. In other words, Governor Newsom is criminalizing the exact same type of gatherings, but only if motivated by religious belief. This is unconstitutional.

With each passing moment, Plaintiffs-Appellants suffer irreparable harm of the worst caliber: a severe deprivation of religious liberty. Via their ex parte motion, Plaintiffs sought leave to hold worship services this Sunday, May 17, 2020. But that relief was denied. Plaintiffs now file this urgent motion seeking the same relief pending appeal. 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 until Plaintiffs' appeal to the Ninth Circuit is finally adjudicated.

This Court should immediately join the Sixth, Eighth, and Eleventh Circuits in adjudicating pandemic-related motions for injunctions pending appeal in favor of protecting the constitutional rights of Americans. *See, e.g.*, *Maryville Baptist Church, Inc. v. Beshear*, --- F.3d ---, 2020 WL 2111316 (6th Cir. 2020) (Free Exercise rights) *Adams & Boyle, P.C. v. Slatery*, 956 F.3d 913 (6th Cir. 2020) (Privacy rights); *In re Rutledge*, 956 F.3d 1018 (8th Cir. 2020); *Robinson v. Attorney Gen.*, --- F.3d ---, 2020 WL 1952370 (11th Cir. 2020) (Privacy rights).

(iii) Whether the motion could have been filed earlier.

This motion could not have been filed earlier. On May 15, 2020, at 10:30 a.m.,

the District Court held a hearing, at the end of which, the District Court stated that it was denying Plaintiffs' motion for a temporary restraining order and order to show cause re: preliminary injunction. The District Court then issued a minute order stating that the motion was denied "[f]or the reasons stated in the hearing." 1ER1. Plaintiffs were not able to obtain a transcript of that hearing until May 16, 2020, at 11:39 a.m. This motion was prepared then immediately prepared. At 3:15 p.m., counsel called the Ninth Circuit emergency line seeking instructions on how to file. This motion was filed as soon as a case no. was assigned.

(iv) When and how counsel was notified:

Counsel for Defendants-Appellees received notice by ECF on May 15, 2020, of Plaintiffs-Appellants' Notice of Appeal. On May 16, 2020, counsel for Defendants-Appellees further notified Defendants-Appellees' counsel and this Court (both via voicemail and email) of Appellants' intent to file this Emergency Motion seeking interim injunctive relief. Based on prior communications, Defendants have made clear that they cannot agree at any stage to the injunctive relief sought.

(v) Whether relief was first sought in the District Court

On May 15, 2020, Plaintiffs filed a similar motion seeking the same relief in the District Court. 2ER34–42. However, under the District Court's Chambers

Rules, the Defendants have two court days, until Tuesday, May 19, 2020, to oppose it. Therefore, it will not be decided until after this Sunday, when Plaintiffs seek to resume worship services.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes & Rules:

INTRODUCTION

Over 150 years ago, the Supreme Court announced that "[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, 76 (1866). Yet relying on the present pandemic, California has decided that it can prioritize reopening the economy by opening all factories—even "non-essential" ones—but not churches. This is despite the commonly known danger of opening all factories.[1] This is because, in Governor Newsom's view, places of worship provide a "low reward" to the people of California. This unconstitutional denigration of people of faith cannot continue. Plaintiffs must be allowed to gather for worship along the same lines as any other permissible gathering in California.

JURISDICTIONAL STATEMENT

This appeal challenges an order denying a motion for an order to show cause re: preliminary injunction filed by Plaintiffs. The District Court exercised federal-question jurisdiction over Plaintiffs' claims under the U.S. Constitution pursuant to 28 U.S.C. §§ 1331 and 1343. The District Court exercised supplemental jurisdiction

[1] *See* Jessica Lussenhop, *Coronavirus at Smithfield pork plant: The untold story of America's biggest outbreak*, BBC NEWS (Apr. 17, 2020), https://www.bbc.com/news/world-us-canada-52311877.

over Plaintiffs' claims under the California Constitution pursuant to 28 U.S.C. § 1367(a).

On May 15, 2020, the District Court denied Plaintiffs' motion for a temporary restraining order and order to show cause re: preliminary injunction. 1ER1–34. By denying Plaintiffs' request for an order to show cause re: preliminary injunction following full briefing on the request, the District Court made its order appealable. *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989). On May 15, 2020, Appellants filed a notice of appeal. Fed. R. App. P. 4(a)(1)(A). 2ER43–51.

FACTUAL BACKGROUND

A. The Government "Stay-at-Home" Orders

This case arises from executive orders issued by the State 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. On May 7, 2020, the Governor published his Resilience Roadmap which modified the prior order with respect to certain businesses. 3ER560. For all other entities, Governor Newsom's

directives remain in effect, prohibiting all religious leaders from conducting in-person and out-of-home religious services.

Governor Newsom's stay-at-home orders have had exceptions, initially both 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 movie industry. 3ER536–558. Included on this list are "faith based services that are provided through streaming or other technology." 3ER551.

Since Governor Newsom's Executive Order was first signed on March 16, 2020, the COVID-19 pandemic has flattened considerably and, in the Governor's words, "stabilized." 3ER324–25; 2ER224–67, 314–20. As a result, on April 28, 2020, Governor Newsom held a press conference in which he announced California's current four-stage Reopening Plan. 3ER325–27

"Stage 1" of the plan began on March 16, and continued until May 7, 2020. "Stage 2" of the Reopening Plan began on Friday, 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). Religious services are relegated to "Stage 3" along with movie theaters and hair and nail salons. According to Defendant Angell, 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. Governor Newsom explicitly stated that the Reopening Plan was based on a balancing of Risk v. Reward. 3ER512.[2]

On May 8, 2020, California's Reopening Plan became effective, and was published online. It included sanitation and safety protocols for warehouses and manufacturing. 3ER559–87. Below are images form the internet of a cosmetics factory and a garment factory in the Los Angeles metropolitan area—the type of non-essential factories that presumably were allowed to reopen as of May 8:

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

2ER37–38.

On May 10, 2020, the County of San Diego issued an order that incorporated Governor Newsom's executive orders and further established a "Social Distancing and Sanitation Protocol" for "essential businesses" operating in San Diego County. The order also established a "Safe Reopening Plan" Protocol for "reopening businesses" that will be resuming business. 3ER588–605. Going further than Governor Newsom's order, the County also banned all gatherings of "more than one person" except as permitted by Governor Newsom's order. 3ER589, 594.

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 hold up to 600 people, but is usually only a third-, or half-filled, with 200-300 congregants. 2ER305–13. Below is an image of the sanctuary.

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. Below is an image of that food distribution in action (3ER506):

South Bay Pentecostal Church simply seeks to apply the lessons learned from proper social distancing as a food distributer to resumed worship services. Bishop Hodges 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, just like the above shown factories. For example:

- South Bay Pentecostal Church is large enough to ensure the six feet of separation between congregants.
- The Church can provide or allow masks, gloves, and other screening mechanisms to protect congregants and inhibit the spread of COVID-19 during services and ceremonies.
- The Church will require any congregant who is sick or is displaying symptoms to stay at home. 2ER305–13.

LEGAL STANDARD

The standards for issuing a temporary restraining order and a preliminary injunction are the same. *See, e.g.*, *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking a temporary restraining order must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm without injunctive relief, (3) that the balance of harm tips in his favor, and (4) that a temporary restraining order is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.2011). In this Circuit, courts evaluate these factors through a "sliding scale approach." *Id*. at 1131. So, for example, "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Id*.

The grant or denial of a preliminary injunction by a lower court is typically reviewed for abuse of discretion, but where, as here, constitutional rights are at stake, the Supreme Court requires reviewing courts to "make an independent examination of the whole record so as to assure [them]selves that the judgment does not constitute a forbidden intrusion on" constitutional rights. *Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 (1982); *Hurley v. Irish American GLIB*, 515 U.S. 557, 567-68 (1995).

De novo review further extends to "constitutional facts" underlying restrictions on constitutional rights. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 286 (1964); *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 304 n.5 (2007); *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 621 (2003). This duty of *de novo* review, even of findings of fact, in fundamental rights cases specifically applies in the preliminary injunction context. *See, e.g., Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996); *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996).

ARGUMENT

1. Plaintiffs Will Likely Succeed on the Merits: The Reopening Plan violates Plaintiffs' Free Exercise Rights because it imposes a penalty on their sincerely held religious practices.

Under the federal 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. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). 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.

"[T]he 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 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 and manufacturing related to retail stores. And the Reopening Plan will soon reopen offices and restaurants.

By contrast, the Reopening Plan, "in a selective manner[,] impose[s] burdens only on conduct [because it is] motivated by religious belief." *Lukumi*, 508 U.S. at 543. That religiously motivated conduct is Plaintiffs' holding communal worship services and faith-based ceremonies, both of which the Reopening Plan prohibits.

But the government 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, and soon destination retail—visiting "bookstores, clothing stores, florists and sporting goods stores" to browse—will be allowed to open.

Governor Newsom's interest in protecting the economy is commendable, but under *Lukumi* and its progeny, these exceptions require the application of strict scrutiny. As one court recently noted in enjoining an executive order similar to the one at issue here, "If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection." *Tabernacle Baptist Church, Inc. of Nicholasville, Kentucky v. Beshear*, No. 3:20-CV-00033-GFVT, 2020 WL 2305307, at *5 (E.D. Ky. May 8, 2020).

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

required. At least four federal courts have held as much, determining that executive orders distinguishing between "essential" and "non-essential" businesses must satisfy the strict scrutiny analysis set forth in *Lukumi*. *See, e.g.*, *Maryville Baptist Church*, 2020 WL 2111316, at *3; *On Fire Christian Ctr., Inc. v. Fischer*, --- F. Supp. 3d ---, 2020 WL 1820249, at *6 (W.D. Ky. 2020); *First Baptist Church v. Kelly*, --- F. Supp. 3d ---, 2020 WL 1910021, at *6 (D. Kan. 2020); *Tabernacle Baptist Church*, 2020 WL 2305307, at *5.

And this is the position of the Department of Justice, reflected in multiple memoranda published by Attorney General Barr, as well as briefs filed by the DOJ in cases across the country. *See* 3ER446–87 (Statement of Attorney General William P. Barr on Religious Practice and Social Distancing (Apr. 14, 2020); Memorandum for the Assistant Attorney General for Civil Rights and All United States Attorneys (Apr. 27, 2020); U.S. DOJ Statement of Interest, *Temple Baptist Church v. City of Greenville*, No. 4:20-cv-64-DMB-JMV, ECF No. 6 (N.D. Miss. Apr. 14, 2020); U.S. DOJ Statement of Interest, *Lighthouse Fellowship Church v. Northam*, No. 2:20-cv-00204-AWA-RJK, ECF No. 19 (E.D. Va. May 3, 2020)).

1.2. The Orders are not also neutral because they impose special burdens on Plaintiffs *because of* their religious practices.

Under the First Amendment's Free Exercise Clause, the government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit[]

conduct *because* it is undertaken for religious reasons." *Lukumi*, 508 U.S. at 532 (emphasis added). Nor may the government "target the religious for special disabilities based on their religious status." *Id.* at 533 (quoting *Smith*, 494 U.S. at 877). And it may not punish an organization's "religiously motivated" conduct. *Trinity Lutheran*, 137 S. Ct. at 2021. Here, the Reopening Plan is not neutral because it puts Plaintiffs to a choice: They must suppress their sincerely held religious beliefs and practices or face fines and criminal penalties. That discrimination impermissibly "imposes a penalty on the free exercise of religion" that either invalidates the orders or, at the very least, "triggers the most exacting scrutiny." *Id.*

The Orders are also not neutral because "the interpretation given to [them] by [the government]" favors secular conduct over comparable religious activities. *Lukumi*, 508 U.S. at 537. For example, gatherings of large groups of people in factories are permitted, but not in churches. Since these gatherings may be permitted, Plaintiffs must be permitted to engage in equivalent religious activities and services, as long as Plaintiffs also adhere to the same public health measures.

Yet that is not so. The District Court rejected this argument on the basis that "it seems to me that a religious service falls within Stage 3 not because it's a religious service, but because the services involve people sitting together in a closed environment for long periods of time." 1ER28. But this is simply not reflected by the

record. If all gatherings "involve[ing] people sitting together in a closed environment for long periods of time" were currently prohibited, this argument would fail—but they are not.

In this context, the Sixth Circuit is correct:

> How are in-person [office] meetings with social distancing any different from . . . church services with social distancing? . . . Why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister? . . . While the law may take periodic naps during a pandemic, we will not let it sleep through one.

Maryville Baptist Church, 2020 WL 2111316, at *4.

In sum, the Supreme Court has held that a "law targeting religious belief as such is never permissible." *Trinity Lutheran*, 137 S. Ct. at 2024 n.4. Any attempt to "punish the expression of religious doctrines" or "impose special disabilities on the basis of religious views" is categorically forbidden. *Smith*, 494 U.S. at 877 (citations omitted). That is what the Government is doing here, and for that reason, the Reopening Plan is not neutral toward religion.

1.3. The California Constitution mandates strict scrutiny.

Even if the Reopening Plan were generally applicable, the California Constitution—which essentially acts as a state RFRA—already mandates application of strict scrutiny. Under the California Constitution, "the religion

clauses of the California Constitution are read more broadly than their counterparts in the federal Constitution." *Carpenter v. City and County of San Francisco*, 93 F.3d 627, 629 (9th Cir. 1996). Courts automatically "therefore review [a] challenge . . . under the free exercise clause of the California Constitution in the same way [they] might have reviewed a similar challenge under the federal Constitution after *Sherbert*, and before *Smith*. In other words, we apply strict scrutiny." *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004).

1.4. The Orders *fail strict scrutiny* because they are 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. The Government 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). Governor Newsom's Reopening Plan 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). Plaintiffs do not dispute that the government has a compelling

interest in curbing the novel coronavirus. Nor do Plaintiffs dispute 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 the Government's objectives. 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).

The compelling interest prong requires a "focused inquiry" that does not turn on whether the government has a compelling interest in enforcing the Orders 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 should determine whether the Government has a compelling interest in not permitting South Bay Pentecostal Church to open.

Here, any compelling interest the Government may have in violating Plaintiffs' free exercise rights are defeated by the Orders' under-inclusivity. As noted above, 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. *See Lukumi*, 508 U.S. at 543.

Because the Reopening Plan allows broad exemptions to its stay-at-home mandate, the Government cannot claim that stopping the spread of COVID-19 is a compelling enough interest to shutter South Bay Pentecostal Church. The Government must instead identify a compelling interest actually consistent with its broader powers—exemptions and all. Unless it does so, the Government 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 shutting only of churches but not other facilities.

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. Defendants have "no good reason so far for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same." *Maryville Baptist*

Church, 2020 WL 2111316, at *4.

1.5. If *Jacobson* applies, it is only minimally relevant.

Over 150 years ago, the Supreme Court in *Ex Parte Milligan*, 71 U.S. 2 (1866) held that the Founding Fathers took into consideration the fact that emergency circumstance 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.*" *Ex Parte Milligan*, 71 U.S. 2, 76 (1866) (emphasis added).

According to the Supreme Court in *Milligan* "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any [constitutional] provisions 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 79 (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 76 (emphasis added).

The Supreme Court concluded with the wise announcement 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 79 (emphasis added).

Then, over a hundred years ago, the Supreme Court addressed whether the constitution protected an individual's right to refuse the smallpox vaccine in contravention of a local ordinance. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). *Jacobson* explained that governments can validly enact liberty infringing restrictions 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 abortion rights during the current pandemic. *Jacobson* was decided before most modern constitutional jurisprudence, and is therefore a bit of an outlier. But because it deals with bodily integrity, autonomy, and medicine, it is a decent fit in the context of abortion rights. To date, the Fifth, Sixth, Eighth, and Eleventh have analyzed *Jacobson* with relation to restrictions on abortion rights during the pandemic.[3]

However, *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 only circuit to yet address a Free Exercise challenge to pandemic restrictions. The Sixth Circuit cited *Jacobson* in both its abortion and Free Exercise cases, but only analyzed it in the former. In the latter,

[3] *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.*, --- F.3d ---, 2020 WL 1952370 (11th Cir. 2020).

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*, 2020 WL 2111316, at *4; *see also First Baptist Church*, 2020 WL 1910021, at *6 (concluding that *Lukumi*, not *Jacobson*, controlled).

If the Court holds that *Jacobson* does apply, and not *Milligan*, then as indicated above, there are two questions the Court must analyze. Under the second prong, "invasion of rights secured by the fundamental law," the courts have generally found for practical purposes that the "fundamental law" is simply the constitutional law readily determinable from precedent. *See, e.g.*, *Adams & Boyle*, 2020 WL 1982210, at *9 (following *Milligan*, and noting that, "As of today, a woman's right to a pre-viability abortion is a part of 'the fundamental law.'"); *Robinson*, 2020 WL 1952370, at *6 ("[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 one exemption that undermines the interest is granted, then religious exemptions must be granted too. But Defendants do not provide any

explanation as to why an exemption can be granted to a factory but not a church.

Under the first prong, "no real or substantial relation to th[e] objects [of public health]," the courts have again practically treated this as essentially akin to the heightened scrutiny required under the Supreme Court's much later developed analyses. *See, e.g.*, *Adams & Boyle*, 2020 WL 1982210, at *9 ("[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*, 2020 WL 1952370, at *8 ("[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, neither the State nor the County explains why there letting large numbers of people sit together indoors for eight hours making clothes, but not for one hour worshipping, provides a "real or substantial" benefit to curbing the Coronavirus. That is the question. Defendants merely assert that the Coronavirus is deadly, and needs to be curbed. That is undisputed, and it doesn't answer the question of "What is the factual or scientific basis for distinguishing manufacturing from churches?"—especially when there have been Coronavirus outbreaks at factories.

In other words, *Jacobson* is not separate from Plaintiffs' constitutional claims,

but is shot through them. This finally track's the lessons of *Milligan*, and *Jacobson's* own emphasis that it should not be relied upon by the courts as a basis to unnecessarily refuse to act: "[I]t might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond that was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons." *Jacobson*, 197 U.S. at 28. Thus, this Court should engage the constitutional arguments in their regular course.

2. Plaintiffs Face Irreparable Harm Absent Immediate Injunctive Relief.

The Supreme 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). 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)).

As acknowledged by the District Court, without an injunction preventing Defendants from further enforcing the Orders, Plaintiffs will suffer irreparable harm

to their fundamental constitutional rights. 1ER8.

3. The Balance of Hardships Tips Sharply in Plaintiffs' Favor.

The balance of hardships 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 a temporary restraining order to the Government is negligible. In fact, Defendants have 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 and Fourteenth Amendment freedoms. In addition, Defendants will suffer no legitimate harm by accommodating Plaintiffs' exercise of fundamental rights in the same manner Defendants are accommodating millions of others engaged in secular activities. The Constitution demands no less.

4. A Temporary Restraining Order is in the Public Interest

A temporary restraining order 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 rights to free exercise of religion, equal protection, and due process will remain in jeopardy so long as Defendants remain free to enforce their Orders. Thus, the public interest favors an injunction. *See, e.g., Maryville Baptist Church*, 2020 WL 2111316, at *4 ("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."); *First Baptist Church*, 2020 WL 1910021, at *8 ("The public interest is furthered by preventing the violation of a party's constitutional rights."); *Tabernacle Baptist Church*, 2020 WL 2305307, at *5 ("[T]he public interest favors the enjoinment of a constitutional violation").

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court grant their urgent motion for injunctive relief pending their appeal.

Respectfully submitted,

Dated: May 16, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of Fed. R. App. P. 27(d) and 9th Cir. Rules 27-1(1)(d) and 32-3. The Motion was prepared in 14-point font and, other than the certificates, contains 5,563 words, as counted by Microsoft Word 2016.

May 16, 2020

/s/ Charles S. LiMandri
Charles S. LiMandri

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. The foregoing, along with the excerpts of record, will also be separately emailed to opposing counsel.

/s/ Charles S. LiMandri
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