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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SOUTH BAY UNITED PENTECOSTAL
CHURCH, *et al.*,

Plaintiffs,

v.

GAVIN NEWSOM, in his official
capacity as Governor of California, *et al.*,

Defendants.

Case No. 20-cv-00865-BAS-AHG

ORDER

- 1. GRANTING DEFENDANTS’ REQUEST FOR JUDICIAL NOTICE (ECF No. 81-7);**
- 2. STRIKING EXHIBITS 4–7 TO THE DECLARATION OF TRISSEL AND DENYING AS MOOT DEFENDANTS’ OBJECTION (ECF No. 86); AND**
- 3. DENYING PLAINTIFFS’ RENEWED MOTION FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION (ECF No. 75).**

In this action brought by a San Diego church to challenge California’s COVID-19 regulation, the Court is asked to draw a difficult balance between religious liberty and public health. The applicant church seeks to enjoin the regulation in order to provide indoor worship for its congregation, and California seeks to preserve the regulation to curb the

1 community spread of the virus. The Southern California region is now witnessing the
2 pandemic at its peak: record number of new daily cases, skyrocketing deaths, and 0% of
3 ICU hospital beds left to spare. The stakes are high. Religion is all the more essential
4 when disease, desperation, and death surround us; at the same time, a unified effort to fight
5 the spread of the virus is desperately needed like never before.

6 In drawing this difficult balance between religious liberty and public health, the
7 Court must follow the higher courts’ precedents, when the precedents seem to change
8 course as quickly as the various pandemic restrictions. Admittedly, this has been a rapidly
9 evolving—and escalating—pandemic. And in this very case, the Supreme Court declined
10 to intervene after the Court refused to enjoin California’s prior regulation. Now, by all
11 measures, the pandemic is worse and more out of control in Southern California than when
12 that decision was made. Nevertheless, the Court is tasked with deciding whether Chief
13 Justice Roberts’ rationale for not intervening in this case has now “expired,” as Justice
14 Gorsuch’s recent concurrence in another case suggests. *See Roman Catholic Diocese of*
15 *Brooklyn v. Cuomo*, --- U.S. ---- (Nov. 25, 2020), 2020 WL 6948354, at *5 (Gorsuch, J.,
16 concurring).

17 This decision is the Court’s best attempt to interpret and harmonize the recent
18 decisions on the issue from the Supreme Court and the Ninth Circuit, in balancing the
19 essential interests in religious liberty and public health.

20
21 **I. BACKGROUND**

22 The Court incorporates the background section from the Court’s October 15, 2020
23 Order. (Order at 3:21–15:2, ECF No. 71.) In that Order, the Court denied Plaintiffs’
24 renewed motion to enjoin California’s restrictions in place at that time, in the form of a
25 capacity limit on indoor worship services and a ban on singing, chanting, or shouting
26 indoors. *Id.*

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1 **A. Rulings Above**

2 **1. The Supreme Court’s Prior Denial of Plaintiffs’ Application**

3 In May, Plaintiffs sought emergency relief from the Supreme Court.¹ After Justice
4 Kagan referred Plaintiffs’ application for injunctive relief to the Supreme Court, the Court
5 denied it. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) (mem.).
6 Chief Justice Roberts wrote an opinion concurring in the denial of the application. *Id.* at
7 1613–14. He reasoned:

8 Although California’s guidelines place restrictions on places of worship, those
9 restrictions appear consistent with the Free Exercise Clause of the First
10 Amendment. Similar or more severe restrictions apply to comparable secular
11 gatherings, including lectures, concerts, movie showings, spectator sports, and
12 theatrical performances, where large groups of people gather in close
13 proximity for extended periods of time. And the Order exempts or treats more
14 leniently only dissimilar activities, such as operating grocery stores, banks,
and laundromats, in which people neither congregate in large groups nor
remain in close proximity for extended periods.

15 *Id.* at 1613. The Chief Justice further explained:

16 The precise question of when restrictions on particular social activities should
17 be lifted during the pandemic is a dynamic and fact-intensive matter subject
18 to reasonable disagreement. Our Constitution principally entrusts “[t]he
19 safety and the health of the people” to the politically accountable officials of
20 the States “to guard and protect.” *Jacobson v. Massachusetts*, 197 U.S. 11,
21 38 (1905). When those officials “undertake[] to act in areas fraught with
22 medical and scientific uncertainties,” their latitude “must be especially
23 broad.” *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where
24 those broad limits are not exceeded, they should not be subject to second-
guessing by an “unelected federal judiciary,” which lacks the background,
competence, and expertise to assess public health and is not accountable to
the people. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469
U.S. 528, 545 (1985).

25 *Id.*

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¹ Appl. for Inj. Relief, *S. Bay United Pentecostal v. Newsom* (No. 19A1044).

1 **2. *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020)**

2 In late November, the Supreme Court granted Roman Catholic Diocese of Brooklyn’s
3 emergency application to enjoin New York’s COVID-19 restrictions on houses of worship,
4 which had limited in-person attendance to 10 persons in the red zone and 25 persons in the
5 orange zone. *Roman Catholic Diocese of Brooklyn v. Cuomo*, --- U.S. ----, 2020 WL
6 6948354 (Nov. 25, 2020) (per curiam). The Court held that the 10- and 25-person capacity
7 limits should be reviewed under strict scrutiny, finding that the challenged rules singled
8 out houses of worship for “especially harsh treatment,” which “effectively barr[ed] many
9 from attending religious services.” *Id.* at *1, 3. The Court opined that, although
10 “[s]temming the spread of COVID–19 is unquestionably a compelling interest,” New
11 York’s restrictions were not narrowly tailored to the state’s interest. *Id.* at *2.

12 A week after, the Supreme Court vacated a district court’s decision to not enjoin
13 California’s restriction on houses of worship as requested by the Harvest Rock Church in
14 Los Angeles County,² and remanded to the Ninth Circuit with instructions to remand to the
15 Central District of California for further consideration in light of the Court’s ruling in
16 *Roman Catholic Diocese. Harvest Rock Church v. Newsom*, --- S. Ct. ----, 2020 WL
17 7061630 (Dec. 3, 2020) (mem.).

18
19 **3. *Dayton Valley v. Sisolak* (9th Cir. 2020)**

20 On December 15, 2020, the Ninth Circuit issued a published decision reversing a
21 district court’s denial of a preliminary injunction barring enforcement of a Nevada directive
22 against houses of worship. *Dayton Valley v. Sisolak*, No. 20-16169, 2020 WL 7350247
23 (9th Cir. Dec. 15, 2020). The Ninth Circuit held that the *Roman Catholic Diocese* decision
24 compelled strict scrutiny review of Nevada’s directive, which imposed a fifty-person cap
25 on houses of worship but a 50% capacity cap on certain other businesses. *Dayton Valley*,
26 2020 WL 7350247, at *3. The panel held that *Roman Catholic Diocese* “arguably
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28 ² *Harvest Rock Church, Inc. v. Newsom*, No. LACV206414JGBKKX, 2020 WL 5265564 (C.D.
Cal. Sept. 2, 2020).

1 represented a seismic shift in Free Exercise law” and Nevada’s directive created “the same
2 ‘disparate treatment’ of religion,” thus triggering strict scrutiny review under *Roman*
3 *Catholic Diocese*. *Id.* The panel found that Nevada held a compelling interest in slowing
4 the spread of COVID-19 but concluded that the directive was not narrowly tailored to the
5 compelling interest “because, for example, ‘maximum attendance at a religious service
6 could be tied to the size of the [house of worship].’” *Id.* at *4 (citing *Roman Catholic*
7 *Diocese*, 2020 WL 6948354, at *2). Concluding that the plaintiff church has demonstrated
8 a success on the merits of its Free Exercise claim, and finding other preliminary injunction
9 factors to be in favor of an injunction, the Ninth Circuit reversed the district court with
10 instructions that the district court “employ strict scrutiny review to its analysis of the
11 Directive, and preliminarily enjoin the State from imposing attendance limitations on in-
12 person services in houses of worship that are less favorable than 25% of the fire-code
13 capacity.” *Id.* at *4.

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15 **B. Winter Outbreak in California and the State’s Response**

16 Meanwhile, COVID-19 rampaged through California, quickly bringing the State
17 into the worst phase of the pandemic since its inception in March. In just a month between
18 mid-November and mid-December, the number of new cases per day in California
19 increased from 8,743 a day to more than 35,000 a day.³ The number of hospitalizations
20 for COVID-19 in California grew from 777 on November 15 to 13,635 on December 14.⁴
21 In Southern California, ICU bed capacity is now 0%.⁵

22 In response to the unprecedented surge in the virus infections and patients needing
23 hospitalization, California’s public health officials reinforced its response to reduce
24 community spread of the virus, protect individuals at higher risk of severe illness or death,
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27 ³ Declaration of Dr. George Rutherford, MD (“Rutherford Decl.”) ¶ 66, ECF No. 81-4.

28 ⁴ *Id.*

⁵ Current tier assignments as of December 15, 2020, <https://covid19.ca.gov/state-dashboard/>.

1 and prevent the state’s health care delivery system from being overwhelmed.⁶ Community
2 spread occurs when residents become infected with the virus in community settings,
3 making it difficult to identify the source of exposure.⁷ California’s response targets three
4 factors that facilitate community spread of COVID-19: (1) prevalence of COVID-19 in the
5 community, measured by the proportion of individuals infected at a given time, (2) the
6 number of interactions between people during which the pathogen can be transmitted, and
7 (3) the average likelihood of transmission per interaction.⁸ Wearing masks, frequent
8 handwashing, and social distancing reduce the likelihood of transmission per interaction
9 (factor 3).⁹ Stay at home orders and limiting the capacity of indoor operations reduce the
10 number of interactions (factor 2).¹⁰

11 In devising its response to manage the second factor—reducing the number of
12 interpersonal interactions—the State applies neutral risk criteria to determine the
13 conditions in which a given activity may take place:

- 14 • ability to accommodate wearing masks at all times;
- 15 • ability to allow physical distancing;
- 16 • ability to limit duration of exposure;
- 17 • ability to limit amount of mixing of people from differing households and
18 communities;
- 19 • ability to limit amount of physical interactions of visitors/patrons;
- 20 • ability to optimize ventilation; and
- 21 • ability to limit activities that are known to cause increased spread.

22 (Declaration of Todd Grabarsky (“Grabarsky Decl.”) Ex. 6, ECF No. 81-1 at 74–75; *Id.*
23 Ex. 7, ECF No. 81-1 at 85–86.)

25 ⁶ Declaration of Dr. Michael A. Soto (“Soto Decl.”) ¶ 9, ECF No. 81-5; Declaration of Dr. James
26 Watt, MD, MPH (“Watt Decl.”) ¶ 90, ECF No. 81-3.

27 ⁷ Watt Decl. ¶ 34.

28 ⁸ Soto Decl. ¶ 10.

⁹ *Id.*

¹⁰ *Id.*

1 On December 3, 2020, California implemented a Regional Stay at Home Order
2 applicable to any Regions for which the adult ICU bed capacity falls below 15%.¹¹ The
3 Order mandates “[a]ll individuals living in the Region [to] stay home or at their place of
4 residence except as necessary to conduct activities associated with the operation,
5 maintenance, or usage of critical infrastructure.”¹² When operative in a Region, the Order
6 supersedes the State’s prior guidance including the Blueprint for a Safer Economy.¹³ For
7 example, restaurants in the Purple Tier could operate outdoors before, but under the new
8 Order, restaurants may only offer take-out or deliveries.¹⁴

9 The Regional Stay at Home Order allows Californians to engage in onsite operations
10 in the critical infrastructure sector and to gather outdoors for religious worship and political
11 expression.¹⁵ California designates as essential “[c]lergy for essential support and faith-
12 based services that are provided outdoors, or through streaming or other technologies that
13 support physical distancing and state public health guidelines,” along with other designated
14 essential workers in the critical infrastructure sector.¹⁶ The critical infrastructure sector
15 also includes certain operations in health care; emergency services; food and agriculture;
16 energy; water and wastewater; transportation and logistics; communications and
17 information technology; government operations and other community-based essential
18 functions; critical manufacturing; financial services; chemical and hazardous materials;
19 defense industrial base; and industrial, commercial, residential, and sheltering facilities and
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24 ¹¹ Grabarsky Decl., Ex. 13, ECF No. 81-1 at 152–55.

25 ¹² *Id.* at ¶ 2.a.

26 ¹³ *Id.* at ¶ 9.

27 ¹⁴ Compare California Health Officials Announce a Regional Stay at Home Order Triggered by
28 ICU Capacity (Dec. 3, 2020), <https://www.gov.ca.gov/2020/12/03/california-health-officials-announce-a-regional-stay-at-home-order-triggered-by-icu-capacity/> with Industry guidance to reduce risk—
Restaurants, wineries, and bars (Dec. 1, 2020) <https://covid19.ca.gov/industry-guidance/#restaurants>.

¹⁵ Grabarsky Decl., Ex. 13 at ¶ 2.b,c , ECF No. 81-1 at 153.

¹⁶ Essential Workforce at 8.16 (Dec. 3, 2020), <https://covid19.ca.gov/essential-workforce/>.

1 services.¹⁷ The essential workforce employed at the listed critical infrastructure is allowed
2 to report to work “if remote working is not practical.”¹⁸

3 The Regional Stay at Home Order became operative in San Diego after the ICU
4 capacity for the Southern California Region fell below 15%.¹⁹ Accordingly, in San Diego,
5 all gatherings at places of worship, weddings, and funerals, as well as for political
6 expression must be held outdoors.²⁰ Lectures and student gatherings at higher education
7 institutions must be held outdoors, except for some courses like labs.²¹ Gyms and dance
8 studios must operate outdoors, and indoor pools, hot tubs, saunas, and steam rooms must
9 close.²² Amusement parks, museums, zoos, aquariums, overnight campgrounds must
10 close, and so must convention centers, concert venues, movie theatres, family
11 entertainment centers, and live performances.²³ Entertainment production and professional
12 sports may not take place with live audiences.²⁴ Restaurants, wineries, bars, breweries,
13 and distilleries must close for dine-in or on-site consumption.²⁵ Tattoo shops, hair salons,
14 barbershops, nail salons, and body waxing studios must close.²⁶ Cardrooms and satellite
15 wagering businesses must close.²⁷ Hotels must not accept in-state reservations unless used
16 for listed exceptions such as mitigating COVID-19, and out-of-state reservations must be
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19 ¹⁷ Essential Workforce (Dec. 3, 2020), <https://covid19.ca.gov/essential-workforce/>.

20 ¹⁸ *Id.*

21 ¹⁹ Current tier assignments as of December 15, 2020 (Dec. 15, 2020), <https://covid19.ca.gov/stay-home-except-for-essential-needs>.

22 ²⁰ Grabarsky Decl., Ex. 13 at ¶ 2.c; Industry guidance to reduce risk—Places of worship and cultural ceremonies (Dec. 8, 2020 at 1:39 p.m.), <https://covid19.ca.gov/industry-guidance/#worship>.

23 ²¹ Industry guidance to reduce risk—Higher education (Oct. 1, 2020), <https://covid19.ca.gov/industry-guidance/#higher-education>.

24 ²² Industry guidance to reduce risk—Gyms and fitness centers (Dec. 3, 2020), <https://covid19.ca.gov/industry-guidance/#fitness-guidance>.

25 ²³ Find the status for activities in your county, <https://covid19.ca.gov/safer-economy/>.

26 ²⁴ *Id.*; California Health Officials Announce a Regional Stay at Home Order Triggered by ICU Capacity (Dec. 3, 2020), <https://www.gov.ca.gov/2020/12/03/california-health-officials-announce-a-regional-stay-at-home-order-triggered-by-icu-capacity/>.

27 ²⁵ Find the status for activities in your county, <https://covid19.ca.gov/safer-economy/>.

28 ²⁶ *Id.*

²⁷ *Id.*

1 at least the minimum time period required for quarantine.²⁸ Schools may not reopen fully
2 for in-person instruction with some exceptions.²⁹

3 Grocery stores can operate at 35% of capacity.³⁰ Clothing stores, convenience
4 stores, home and furnishing stores, and other retail stores, in addition to libraries, can
5 operate at 20% of capacity.³¹ Laundromats and limited service providers that do not
6 require close contact may remain open with modifications.³² Essential workers in public
7 transit,³³ manufacturing plants,³⁴ logistics and warehousing facilities,³⁵ and non-urgent
8 medical and dental care offices³⁶ may conduct on-site operations with mandatory
9 precautions.

10 The following table summarizes the restrictions in place in the San Diego County,
11 where Plaintiffs' church is located:

	Regional Stay at Home Order Capacity Restrictions
Places of worship	Outdoor only.
Political expression	Outdoor only.
Weddings and Funerals	Outdoor only.
Cultural ceremonies	Outdoor only.
Outdoor Recreational Facilities	Allow outdoor operation only without any food, drink or alcohol sales. Additionally, overnight stays at campgrounds will not be permitted.
Entertainment production and professional sports	No live audience.
Amusement parks	Closed.
Museums, zoos, and aquariums	Closed.

20 ²⁸ *Id.*

21 ²⁹ *Id.* (“Local school and health officials may decide to open elementary schools, and school
22 officials may decide to conduct in-person instruction for a limited set of students in small cohorts.”)

23 ³⁰ *Id.*; CDPH, Supplement to Regional Stay at Home Order (Dec. 6, 2020), <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/supplement-regional-stay-at-home-order.aspx>.

24 ³¹ Find the status for activities in your county, <https://covid19.ca.gov/safer-economy/>.

25 ³² *Id.*; Industry guidance to reduce risk—Limited services, <https://covid19.ca.gov/industry-guidance/#limited-services>.

26 ³³ Industry guidance to reduce risk—Public transit and intercity passenger rail (Oct. 20, 2020), <https://covid19.ca.gov/industry-guidance/#public-transit>.

27 ³⁴ Industry guidance to reduce risk—Manufacturing, <https://covid19.ca.gov/industry-guidance/#manufacturing>.

28 ³⁵ Industry guidance to reduce risk—Logistics and warehousing facilities, <https://covid19.ca.gov/industry-guidance/#logistics>.

³⁶ Find the status for activities in your county, <https://covid19.ca.gov/safer-economy/>.

1	Restaurants	Take-out only.
2	Wineries	Closed for on-site consumption.
3	Bars, Breweries, Distilleries	Closed for on-site consumption.
4	Higher education	Outdoor only (closed for indoor lectures and student gatherings).
5	Convention Centers	Closed.
6	Concert venues	Closed.
7	Movies	Closed.
8	Family Entertainment Centers	Closed.
9	Musical, theatrical, and artistic performances	Closed.
10	Cardrooms and satellite wagering	Closed.
11	Tattoo shops	Closed.
12	Hair salons and barbershops	Closed.
13	Nail salons	Closed.
14	Body waxing studios	Closed.
15	Dance studios	Outdoor only.
16	Gyms	Outdoor only.
17	Indoor pools, hot tubs, saunas	Closed.
18	Hotels	Closed for in-state reservations unless used for listed exceptions. Open for non-essential, out-of-state reservations so long as reservation is at least the minimum time period required for quarantine.
19	Music, film, and TV production	May resume subject to approval by county public health officers.
20	Public Transit	Open with safety precautions.
21	Office workspaces	Allow remote only except for critical infrastructure sectors where remote working is not possible.
22	Libraries	20% of capacity.
23	Retail stores / Shopping malls	20% of capacity.
24	Grocery stores	35% of capacity.
25	Laundromats	Open with modifications.
26	Critical infrastructure	Essential workers may work on site, if remote work not practicable.
27	Non-urgent medical and dental	Open with safety precautions.
28	Schools	Schools may not reopen fully for in-person instruction until the county has been in the Substantial (Red) Tier for two weeks. Local school and health officials may decide to open elementary schools, and school officials may decide to conduct in-person instruction for a limited set of students in small cohorts.
	Child care	Open with safety precautions.
	Day camps	Open with modifications.

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1 **C. The Present Motion**

2 Plaintiffs filed the present renewed motion for a temporary restraining order and
3 application for an injunction pending appeal on December 3, 2020. (ECF No. 75.)
4 Plaintiffs concurrently filed a parallel application with the Ninth Circuit. (Emergency
5 Mot., *S. Bay United Pentecostal Church v. Newsom*, No. 20-55533 (9th Cir. Dec. 3, 2020),
6 ECF No. 96.) The Ninth Circuit vacated this Court’s October 15, 2020 Order, remanded
7 the case for further consideration, and denied without prejudice Plaintiffs’ emergency
8 motion for an injunction pending appeal. (Mandate and Order, ECF No. 84.)

9 Plaintiffs filed a supplemental brief. (ECF No. 80.) California Defendants filed an
10 Opposition (ECF No. 81), and San Diego Defendants filed a Joinder and Opposition (ECF
11 Nos. 82, 83). Plaintiffs filed a Reply. (ECF No. 85.) The Court held a hearing on
12 December 18, 2020. The Motion is now ripe for decision.

13
14 **II. PRELIMINARY MATTERS**

15 Because the case has been remanded, the Court construes Plaintiffs’ application for
16 a stay pending appeal (ECF No. 75) as a renewed motion for a temporary restraining order
17 or preliminary injunction.

18 California Defendants’ request for judicial notice (ECF No. 81-7), to which
19 Plaintiffs have not objected, is granted.³⁷

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23 ³⁷ To the extent that any exhibit does not satisfy the requirements of summary judgment or trial
24 evidence, “a preliminary injunction is customarily granted on the basis of procedures that are less formal
25 and evidence that is less complete than in a trial on the merits.” *Univ. of Texas v. Camenisch*, 451 U.S.
26 390, 395 (1981). This flexibility exists because “[t]he urgency of obtaining a preliminary injunction
27 necessitates a prompt determination.” *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).
28 A district court therefore “may give even inadmissible evidence some weight, when to do so serves the
purpose of preventing irreparable harm.” *Id.* District courts have exercised this discretion to consider a
variety of evidence at the preliminary injunction stage that may otherwise be inadmissible. *See, e.g., Flynt
Distrib. Co.*, 734 F.2d at 1394 (holding that it was within the district court’s discretion to rely on hearsay
statements); *Moose Creek, Inc. v. Abercrombie & Fitch Co.*, 331 F. Supp. 2d 1214, 1225 n.4 (C.D. Cal.
2004) (considering internet materials that were not individually authenticated).

1 At the hearing, Plaintiffs withdrew exhibits 4 through 7 accompanying Plaintiffs’
2 counsel’s declaration, which consist of evidence submitted to the Kern County Superior
3 Court in a separate action. (Exs. 4–7 to the Declaration of Jeffrey M. Trissell, ECF No.
4 85-2 at 76–222.) The withdrawn exhibits are stricken from the record, and California
5 Defendants’ objection (ECF No. 86) is denied as moot.

6
7 **III. LEGAL STANDARD**

8 The standard for a temporary restraining order and preliminary injunction are
9 “substantially identical.” *Stuhlbarg Int’l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832,
10 839 n.7 (9th Cir. 2001). “A plaintiff seeking a preliminary injunction must establish that
11 [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the
12 absence of preliminary relief, that the balance of equities tips in [its] favor, and that an
13 injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20
14 (2008). The party seeking the injunction bears the burden of proving these elements. *Klein*
15 *v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). “A preliminary injunction
16 is ‘an extraordinary and drastic remedy, one that should not be granted unless the
17 movant, *by a clear showing*, carries the burden of persuasion.’” *Lopez v. Brewer*, 680 F.3d
18 1068, 1072 (9th Cir. 2012) (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

19
20 **IV. ANALYSIS**

21 **A. Irreparable Harm**

22 The Supreme Court has made clear that capacity restrictions at houses of worship
23 will cause irreparable harm without temporary or preliminary relief. *See Roman Catholic*
24 *Diocese*, 2020 WL 6948354, at *3. The Court finds that Plaintiffs have shown irreparable
25 harm.

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1 **B. Likelihood of Success on the Merits**

2 The issue is whether Plaintiffs’ Free Exercise Clause claim as applied to the current
3 restrictions in place is likely to succeed on the merits at a final hearing. Ordinarily, a party
4 seeking preliminary injunction must establish that it will prevail on the merits with a
5 “reasonable certainty.” *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970), *aff’d sub*
6 *nom. Sierra Club v. Morton*, 405 U.S. 727 (1972). In this circuit, the burden is lessened to
7 a fair chance of success on the merits in cases in which the harm that may occur to the
8 plaintiff is sufficiently serious. *William Inglis & Sons Baking Co. v. ITT Continental*
9 *Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1975).

10 The Court limits its analysis to Plaintiffs’ Free Exercise Clause claim because the
11 Ninth Circuit has remanded the present action “[i]n light of the Supreme Court’s orders in
12 *Harvest Rock Church, Inc. v. Newsom*, No. 20A94, 592 U.S. ____ (Dec. 3, 2020) and *Roman*
13 *Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87, 592 U.S. ____ (Nov. 25, 2020).”

14
15 **1. Applicable Tier of Scrutiny**

16 The Free Exercise Clause of the First Amendment disallows a State from enacting a
17 law that prohibits the free exercise of religion. *Church of the Lukumi Babalu Aye, Inc. v.*
18 *City of Hialeah* (“*Lukumi*”), 508 U.S. 520, 531 (1993). Any “law burdening religious
19 practice that is not neutral or not of general application must undergo the most rigorous of
20 scrutiny.” *Id.* at 546.

21 California argues that the Regional Stay at Home Order is a neutral law of general
22 applicability, thus triggering only a rational basis review. Plaintiffs argue that the Regional
23 Stay at Home Order’s goal is “to infringe upon or restrict practices because of their
24 religious motivation,” as evidenced by the California governor’s statements and by the fact
25 that the Regional Stay at Home Order treats religious institutions differently from certain
26 other non-religious entities. *Lukumi*, 508 U.S. at 533. Plaintiffs point to the following
27 statement by the Governor of California:
28

1 Q: Thank you Governor. Can you clarify why churches and salons are in Stage
2 3 and not Stage 2. Um, what makes them more high risk than schools, for
3 example? Uh, what factors are you weighing here when you decide what goes
4 into what phase?

5 A: Yeah, we're, we're looking at the science, epidemiology, looking again at
6 frequency, duration, time, uh, and looking at low risk-high reward, low risk-
7 low reward, looking at a series of conditions and criteria, as well as best
8 practices uh from other states and nations.

9 (Pls.' Br. at 19:8–16 (citing ECF No. 47 at 13–14).)

10 The Court cannot draw a reasonable inference from this exchange that the Governor
11 implied that religion is a “low reward” activity, as Plaintiffs suggest.³⁸ The Court would
12 have to make multiple assumptions and leaps in logic to so interpret the statement. A more
13 plausible interpretation of the statement is that the State considered a cost-benefit analysis
14 in addition to “science, epidemiology, frequency, duration, [and] time” in formulating its
15 COVID-19 restrictions. Plaintiffs also fail to mention that, in the same exchange, the
16 Governor stated that the State was “very sensitive to those that want to get back into
17 church” and that the State was going to “see what [it] can do to accommodate that.”³⁹ The
18 Court finds no evidence of statements made in connection with the challenged rule that can
19 be viewed as targeting Plaintiffs’ faith or singling out any other religion. In this regard,
20 Plaintiffs have not shown that California’s Regional Stay at Home Order harbors “an
21 official purpose to disapprove of a particular religion or of religion in general.” *See*
22 *Lukumi*, 508 U.S. at 532.

23 The Court is nonetheless bound by precedent in this circuit to conclude that the
24 Regional Stay at Home Order is subject to strict scrutiny review. *See Hart v. Massanari*,
25 266 F.3d 1155, 1171 (9th Cir. 2001) (holding that all courts within a circuit are bound by

26
27 ³⁸ The Court also notes that this statement is from May 2020, before the current Regional Stay at
28 Home Order was implemented.

³⁹ Press Conference Tr. 50:58-51:23, 53:25-54:20 (May 7, 2020), <https://www.rev.com/blog/transcripts/gov-gavin-newsom-california-covid-19-briefing-transcript-may-7>.

1 vertical *stare decisis* authority of a circuit panel’s precedential opinion). A Ninth Circuit
2 panel, in a published opinion, has held that *Roman Catholic Diocese* mandates strict
3 scrutiny review when a state imposes different capacity restrictions on religious worship
4 services as compared to non-religious activities and entities, like retail stores, in response
5 to the pandemic. *Dayton Valley*, 2020 WL 7350247, at *4. There, the panel found that
6 strict scrutiny review was triggered because a Nevada directive imposed a fifty-person cap
7 on houses of worship, and only a 50% cap on other activities and entities including casinos,
8 bowling alleys, and restaurants. *Id.* Although California’s Regional Stay at Home Order
9 does not allow casinos, bowling alleys, and restaurants to open at a greater capacity than
10 religious services, it does allow retail establishments to do so. Thus, the Court is bound to
11 analyze the Order under strict scrutiny.

12 13 **2. Strict Scrutiny Analysis**

14 Strict scrutiny review requires that the challenged restriction “be ‘narrowly tailored’
15 to serve a ‘compelling’ state interest.” *Dayton Valley*, 2020 WL 7350247, at *4 (citing
16 *Roman Catholic Diocese*, 2020 WL 6948354, at *2). Although strict scrutiny imposes a
17 high bar, courts have “upheld laws—even under strict scrutiny.” *See Williams-Yulee v.*
18 *Fla. Bar*, 575 U.S. 433, 449 (2015) (collecting cases); *cf.* Adam Winkler, *Fatal in Theory*
19 *and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 Vand.
20 L. Rev. 793, 809 (2006) (explaining that the Supreme Court, applying strict scrutiny
21 review, has frequently upheld free exercise challenges to religious exemptions from
22 generally applicable laws).

23 24 **i. Compelling Interest**

25 Plaintiffs argue that California’s goal of reducing community spread of COVID-19
26 is “not even a *rational*” interest, much less a compelling one. (Pls.’ Reply at 7:14–24, ECF
27 No. 85.) Contrary to Plaintiffs’ position, the Supreme Court has clarified that “[s]temming
28 the spread of COVID–19 is unquestionably a compelling interest.” *Roman Catholic*

1 *Diocese*, 2020 WL 6948354, at *2. Although Plaintiffs urge this Court to find that focusing
2 on community spread would not serve the ultimate promotion of public health and safety,
3 courts lack both the expertise and the authority to make such determination. *See id.* at *8
4 (Kavanaugh, J., concurring) (“The Constitution ‘principally entrusts the safety and the
5 health of the people to the politically accountable officials of the States.’”); *cf. Williams-*
6 *Yulee*, 575 U.S. at 449 (“[P]olicymakers may focus on their most pressing concerns.”).

7 Following the precedents, the Court concludes that California has a compelling
8 interest in reducing the community spread of COVID-19. *See Roman Catholic Diocese*,
9 2020 WL 6948354, at *2; *Dayton Valley*, 2020 WL 7350247, at *4 (“[S]lowing the spread
10 of COVID-19 is a compelling interest.”).

11 12 **ii. Narrow Tailoring**

13 Having found that California has a compelling interest in reducing community
14 spread of COVID-19, the Court turns to determining whether California’s Regional Stay
15 at Home Order is narrowly tailored to the compelling interest. Narrow tailoring requires
16 that the law restrict no more than is necessary to advance the government’s compelling
17 interest. *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718
18 (1981) (“The state may justify an inroad on religious liberty by showing that it is the least
19 restrictive means of achieving some compelling state interest.”). California explains that
20 the Regional Stay at Home Order narrowly tailors the restrictions to its objective of slowing
21 the community spread, by assessing the risk profile of an activity based on seven-factor
22 risk criteria, which consider: an activity’s (1) ability to accommodate wearing masks at all
23 times; (2) ability to allow physical distancing; (3) ability to limit the duration of exposure;
24 (4) ability to limit the amount of mixing of people from differing households and
25 communities; (5) ability to limit the amount of physical interactions of visitors/patrons;
26 (6) ability to optimize ventilation; and (7) ability to limit activities that are known to cause
27 increased spread. (Grabarsky Decl. Ex. 7, ECF No. 81-1 at 85–86.)
28

1 Applying these factors, California assigns a similar risk profile for religious
2 gatherings, as it does for weddings, funerals, college lectures, and political expression.
3 California requires those activities to take place outdoors. Dance studios and gyms must
4 also only operate outdoors. The Regional Stay at Home Order does not grant an exemption
5 for other activities that similarly may involve gathering in groups for a prolonged period.
6 All operations at amusement parks, museums, zoos, aquariums, campgrounds must stop,
7 and so must convention centers, concert venues, movie theatres, family entertainment
8 centers, live performances, and live audience participation in professional sports.⁴⁰
9 Restaurants may not open for dine-in.⁴¹ Plaintiffs do not dispute that California treats a
10 church more favorably than those non-exempted activities with respect to gathering
11 outdoors. Plaintiffs direct the Court’s focus on other exempted activities that can proceed
12 indoors.

13 A law’s underinclusiveness—its failure to reach all activities that implicate the
14 interest—can constitute evidence that “raise[s] doubts about whether the government is in
15 fact pursuing the interest it invokes, rather than disfavoring a particular speaker or
16 viewpoint.” *See Williams-Yulee*, 575 U.S. at 448 (citing *Brown v. Entm’t Merchants Ass’n*,
17 564 U.S. 786, 802 (2011)). For example, in *Lukumi*, “[i]n a textbook illustration of that
18 principle, [the Court] invalidated a city’s ban on ritual animal sacrifices because the city
19 failed to regulate vast swaths of conduct that similarly diminished its asserted interests in
20 public health and animal welfare.” *Id.* (citing *Lukumi*, at 543–47). “Underinclusiveness
21 can also reveal that a law does not actually advance a compelling interest.” *Id.* at 449. For
22 this reason, the Supreme Court deemed unconstitutional a restriction that “prohibit[ed]
23 newspapers, but not electronic media, from releasing the names of juvenile defendants.”
24 *Id.* (citing *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 104–05 (1979)).

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28 ⁴⁰ [Find the status for activities in your county](https://covid19.ca.gov/safer-economy/), <https://covid19.ca.gov/safer-economy/>.

⁴¹ *Id.*

1 The court turns to analyze each exemption to determine whether the Regional Stay
2 at Home Order disfavors religious entities or fails to advance California's goal to reduce
3 community spread.

4 **a. Religious Gatherings**

5 California explains that religious gatherings, weddings, funerals, college lectures,
6 and political expression involve features that raise the risks associated with the second
7 through fifth factors in California's risk criteria: many people gathering at one time and
8 socializing with each other; people from different households gathering nearby each other
9 for a prolonged time; and vocalizing, conversing, or singing in groups. (Watt Decl. ¶¶ 39–
10 43, 45–46; Rutherford Decl. ¶¶ 90–92, 101–10.) California explains that these risks can
11 be mitigated when the gatherings take place outdoors because aerosolized transmission is
12 slowed in open air. (Rutherford Decl. ¶ 93.)

13 As to the seventh factor, California has shown that there have been known COVID-
14 19 outbreaks tied to religious gatherings in the San Diego County⁴² and in the Southern
15 California Region.⁴³ Both outbreaks occurred when religious gatherings could take place
16 indoors at limited capacity.⁴⁴ Plaintiffs do not deny the existence of these outbreaks.
17 California's health experts also considered reports and studies of known outbreaks tied to
18 religious gatherings in other states. (Watt Decl. ¶¶ 46.i (Washington), 46.ii (Arkansas);
19 Rutherford Decl. ¶ 108 (West Virginia).)

20
21 **b. Retail, Limited Services, and Transportation**

22 Grocery stores and retail shops can operate indoors at fixed capacity.⁴⁵ Limited
23 services, including laundromats, that do not require close contact may remain open with
24

25 ⁴² Grabarsky Decl. Ex. 17, ECF No. 81-1 at 174 (County of San Diego's letter to Awaken Church,
COVID-19 Outbreak Notification).

26 ⁴³ Grabarsky Decl. Ex. 21, ECF No. 81-1 at 187–91 (Grace Community Church outbreak in Los
27 Angeles).

28 ⁴⁴ The outbreak in San Diego County occurred on or around November 23, 2020, and the outbreak
in Los Angeles County occurred on or around October 22, 2020. *See supra* n.43 and 44.

⁴⁵ Find the status for activities in your county, <https://covid19.ca.gov/safer-economy/>.

1 modifications.⁴⁶ The transportation sector, such as airports and train stations, may also
 2 remain open with modifications.⁴⁷ California explains that these activities have a lower
 3 risk profile because interactions between patrons in these places are typically asocial,
 4 distanced, and short in time—with patrons generally seeking to leave the store as soon as
 5 possible. (Rutherford Decl. ¶¶ 62, 117, 126.) Singing, recitation, or speaking in unison,
 6 such as reciting a prayer together, is not common in retail, limited services, or
 7 transportation settings. (*Id.* ¶¶ 119, 127.) These assumptions lower the third through fifth
 8 risk factors. The record before the Court does not include known cases of an outbreak tied
 9 to retail, grocery shopping, laundromats, or transportation hubs.

11 c. Worksites in Critical Infrastructure Sectors

12 The Regional Stay at Home Order allows employers in the critical infrastructure to
 13 designate essential workers to perform on-site tasks that cannot be done remotely—subject
 14 to specific industry guidelines. (Grabarsky Decl. Ex. 13 at ¶ 2.d, ECF No. 81-1 at 153.)
 15 California explains that job sites present a lower risk profile than in non-employment
 16 situations because the State has greater control over enforcing specific industry guidelines
 17 applicable to each industry: factories must screen workers, develop safety plans, and install
 18 engineering controls such as plexiglass barriers, to protect individuals who work near each
 19 other. (*Id.* Ex. 30, ECF No. 81-1 at 264–73.) The employers are also subject to various
 20 health and safety requirements enforced by State labor authorities. (Rutherford Decl.
 21 ¶ 121, ECF No. 81-4.) Binding labor agreements in certain industries impose other
 22 mandatory measures such as routine testing of on-site staff. (Grabarsky Decl. Ex. 33 at
 23 ¶ 4, ECF No. 81-2 at 5 (describing testing requirements in work protocols implemented by
 24 Screen Actors Guild); *Id.* Ex. 34 at ¶¶ 6–7 (describing testing requirements of “COVID-19

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 27 ⁴⁶ *Id.*; Industry guidance to reduce risk—Limited services, <https://covid19.ca.gov/industry-guidance/#limited-services>.

28 ⁴⁷ Industry guidance to reduce risk—Public transit and intercity passenger rail (Oct. 20, 2020) <https://covid19.ca.gov/industry-guidance/#public-transit>.

1 Return-to-Work Agreement” binding the movie studios and unions)). Work shifts may be
2 grouped to control personnel to whom the employees are regularly exposed, thus diluting
3 the risk presented by likelihood of strangers from different bubbles randomly mixing at
4 each gathering. (Rutherford Decl. Ex. 19 (CDC guidance for employers), ECF No. 81-4
5 at 549.) Besides, an employer is better positioned to control its employees’ behavior
6 affecting the risk factors. (Watt Decl. ¶¶ 87, 104.)⁴⁸ The record lacks evidence of known
7 outbreaks associated with jobsites in Southern California.

8 In sum, California assigns different risk profiles to different sectors based on a
9 neutral, seven-factor risk analysis, which explains the different restrictions that apply to
10 various exempt sectors. While some courts may disagree with the local public health
11 officials’ assessment of what constitutes comparable activities based on the seven risk
12 factors, the Court finds that such risk assessment—which necessarily reflects the local
13 climate, infrastructure, and public health outcomes of prior policies—is a question of
14 policy-making better deferred to the local public health officials. California applied a
15 neutral seven-factor risk criteria and concluded that the risk profile of religious gatherings,
16 college lectures, political expression, weddings and funerals, cultural ceremonies, dance
17 studios, and gyms, called for outdoor restriction but not an entire closure order. California
18 applied the same risk factors and concluded that activities with a higher risk profile,
19

20
21 ⁴⁸ Our legal system already recognizes that “[c]ontrol or right of control by the employer . . .
22 characterizes the relation of the employer and employee.” *See Metcalf & Eddy v. Mitchell*, 269 U.S. 514,
23 521 (1926)). And our legal system imposes certain obligations on employers that are not imposed on other
24 entities. For example, strict liability is only imposed on employers in workers compensation law. *See*
25 Lawrence M. Friedman & Jack Ladinsky, Social Change and the Law of Industrial Accidents, 67 Colum.
26 L. Rev. 50, 71 (1967) (explaining the development of a workers compensation system that “fix[es] liability
27 upon the employer regardless of fault” in industrial accidents). In torts, the strict-liability principle of
28 *respondeat superior* may hold an employer liable for a negligent act of its employee committed during
the course of performing the job. *See generally* David Jacks Achtenberg, Taking History Seriously:
Municipal Liability Under 42 U.S.C. S 1983 and the Debate over Respondeat Superior, 73 Fordham L.
Rev. 2183, 2204 (2005) (explaining that the *respondeat superior* doctrine is traditionally explained by (1)
an employer’s power to control the direct tortfeasor, (2) the legal unity between the tortfeasor and his
employer, (3) the master’s implied warranty of the servant’s fitness, or (4) the need for reciprocity between
benefits and responsibility). There is no equivalent legal doctrine recognizing a house of worship’s control
over its congregation.

1 including amusement parks, museums, zoos, aquariums, dine-in restaurants, on-site
2 consumption at wineries, convention centers, concert venues, movies, family entertainment
3 centers, live performances, cardrooms, tattoo shops, hair salons, barbershops, nail salons,
4 body waxing studios, indoor pools, hot tubs, saunas, and hotels (for in-state reservations or
5 out-of-state reservations not exceeding the minimum quarantine period) should be closed.
6 Based on the same risk factors, California concluded that retail, transportation, and limited
7 services activities—with better ability to limit duration of exposure, amount of mixing of
8 people from differing households, amount of physical interactions of visitors, and limit
9 activities that are known to cause increased spread—could proceed indoors with specific
10 limitations.

11 The Court concludes that California did exactly what the narrow tailoring
12 requirement mandates—that is, California has carefully designed the different exemptions
13 to match its goal of reducing community spread, based on a neutral, seven-factor risk
14 analysis. The Court does not find that California’s Regional Stay at Home Order is
15 underinclusive as to exceed the boundaries drawn by the First Amendment. Therefore,
16 based on the record before the Court, Plaintiffs are not likely to show that the Regional
17 Stay at Home Order restricts more than is necessary to advance the California’s compelling
18 interest in reducing community spread.

19 20 **3. Consistency with Precedents**

21 The Court’s strict scrutiny analysis does not conflict with the recent decisions issued
22 by the higher courts. In *Roman Catholic Diocese*, the Supreme Court found that the 10- or
23 25-person ban instituted by New York was an effective ban on all religious activities in the
24 applicable zones. *See* 2020 WL 6948354, at *3 (“The restrictions at issue here, by
25 effectively barring many from attending religious services, strike at the very heart of the
26 First Amendment’s guarantee of religious liberty.”). The same cannot be said about the
27 Regional Stay at Home Order’s exemption allowing outdoor religious gatherings, given
28 that the climate in Southern California Region is warm year-round. The record does not

1 contain evidence that various entities that had been limited to operate outdoors in the past
2 versions of California’s COVID-19 response, such as gyms and restaurants, have not been
3 able to follow the outdoor mandate. Further, no capacity limit is placed on outdoor
4 worship. Based on the above, the Court does not find that the Regional Stay at Home
5 Order, as applied to San Diego County and the Southern California Region, places an
6 effective ban on religious services. *But see Burfitt v. Newsom*, BCV-20-102267 (Cal. Sup.
7 Ct. Dec. 10, 2020).

8 In *Dayton Valley*, the Ninth Circuit considered the State of Nevada’s regulatory
9 scheme and concluded that Nevada’s restrictions were not narrowly tailored to the State’s
10 proffered interest. Nevada “ha[d] not explained why a 50% occupancy cap is good enough
11 for secular businesses where people congregate in large groups or remain in close
12 proximity for extended periods—such as at restaurants, bars, casinos, and gyms—but is
13 not good enough for places of worship.” *See Calvary Chapel Dayton Valley v. Sisolak*,
14 140 S. Ct. 2603, 2613 (2020) (Mem.) (Kavanaugh, J., dissenting). Here, California places
15 similar or greater limits on restaurants, bars, card rooms, gyms, and other activities that
16 share a similar risk profile with religious entities. *See supra* Part I.B. Many other activities
17 with heightened risk profiles are entirely closed. Retail stores, manufacturing plants, and
18 certain other activities are allowed to operate indoors with additional limitations and
19 industry-specific measures to reduce the risks, but California explains that those activities
20 have dissimilar risk profiles compared to houses of worship. Because California has shown
21 that it applied a neutral, multi-factor risk analysis to place each activity on a risk spectrum
22 and imposed no more restriction on houses of worship than necessary, the Court finds that
23 *Dayton Valley* is factually distinguishable.

24 Plaintiffs have not shown that a lesser restriction—for example, allowing indoor
25 worship relying only on mask wearing, social distancing, and sanitization measures—
26 would have achieved California’s compelling interest in curbing the community spread of
27 the virus. Mask wearing, social distancing, and sanitization reduces the likelihood of
28 transmission per interaction, whereas stay-at-home orders and capacity regulations reduce

1 the number of interactions of people from different households. (Soto Decl. ¶ 9, ECF No.
2 81-5.) To the extent that Plaintiffs seek to hold indoor worship services at 20% of the
3 church’s maximum capacity,⁴⁹ the Court notes that California has already tried a similar
4 measure, which allowed indoor worship at 25% capacity. That restriction proved
5 insufficient to prevent outbreaks at houses of worship in the San Diego County⁵⁰ and the
6 Southern California Region.⁵¹ If the dire trend of COVID-19 in Southern California—
7 which has left the Region’s ICU capacity at 0%⁵²—proves anything, it is that the State’s
8 efforts to implement curfews and less restrictive restrictions were not enough.

9 Plaintiffs do not dispute the existence of these outbreaks or the unavailability of
10 hospital beds in the Southern California Region. Plaintiffs merely proffer that they are not
11 aware of any confirmed COVID-19 cases tied to Plaintiffs’ church. In general, a local
12 government is not required to prove that a particular individual has contributed to a known
13 social harm, before implementing a law that seeks to prevent the harm. Just as a restaurant
14 with no known COVID-19 cases tied to it is bound by a valid public health regulation, so
15 must a house of worship that has no known COVID-19 cases tied to it. This is especially
16 so when the social harm sought to be mitigated is community spread of a deadly virus,
17 whose exact path of contagion is hard to trace.

18 The Court concludes that Plaintiffs are not likely to succeed on their Free Exercise
19 Clause claim at a final hearing.

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21 //
22 //

24 ⁴⁹ At the hearing held on December 18, 2020, Plaintiffs requested that the Court match the
25 restrictions in place for the retail sector, which is currently capped at 20% of maximum capacity under the
26 Regional Stay at Home Order. *See* Find the status for activities in your county, <https://covid19.ca.gov/safer-economy/>.

27 ⁵⁰ Grabarsky Decl. Ex. 17, ECF No. 81-1 at 174 (County of San Diego’s letter to Awaken Church,
28 COVID-19 Outbreak Notification).

⁵¹ *Id.* Ex. 21, ECF No. 81-1 at 187–91 (Grace Community Church outbreak in Los Angeles).

⁵² Current tier assignments as of December 15, 2020, <https://covid19.ca.gov/state-dashboard/>.

1 **C. Balance of Equities and Public Interest**

2 COVID-19 poses a significant health risk to everyone in Southern California, the
3 nation, and in fact, the world. In San Diego, emergency rooms are having to turn patients
4 away, and the hospitals are being quickly overwhelmed with the most recent surge of
5 patients infected with COVID-19.

6 The Court is mindful that a San Diego Superior Court judge recently enjoined
7 enforcement of the Regional Stay at Home Order, as applied to strip clubs and restaurants,
8 based in part on the finding that the plaintiff strip clubs “have done nothing to contribute
9 to the spread of COVID.” *See Midway Venture LLC v Co. of San Diego*, No. 37-2020-
10 00038194-CU-CR-CTL (Cal. Sup. Ct. Dec. 16, 2020). The injunction is now stayed,⁵³ but
11 it is worth highlighting the dichotomy between that ruling and this one as an example of
12 the dangers of having individual judges make public health policy. *See Roman Catholic*
13 *Diocese*, 2020 WL 6948354, at *3 (holding that, although the Court needs to conduct
14 “serious examination” of restrictions placed on religion, “[m]embers of this Court are not
15 public health experts, and we should respect the judgment of those with special expertise
16 and responsibility in this area”); *Id.* at *8 (Kavanaugh, J., concurring) (recognizing that
17 “[f]ederal courts . . . must afford substantial deference to state and local authorities about
18 how best to balance competing policy considerations during the pandemic” while not
19 abdicating the courts’ responsibility to assess the constitutionality of a challenged law); *S.*
20 *Bay United Pentecostal Church*, 140 S. Ct. at 1613 (Roberts, C. J., concurring in the denial
21 of application for injunctive relief) (“Our Constitution principally entrusts ‘[t]he safety and
22 the health of the people’ to the politically accountable officials of the States ‘to guard and
23 protect.’”). It is for that reason that this Court gives “substantial deference” to the
24 California public health officials’ attempt to protect the safety of its people.

25 The Court does not doubt that not being able to congregate indoors imposes a burden
26 on Plaintiffs’ religion. Nevertheless, the Court also recognizes that the burden is a
27

28

⁵³ *Midway Venture LLC v Newsom*, No. D078375 (Cal. Ct. App. Dec. 18, 2020).


1 temporary one, with widespread vaccination in close sight. The Court concludes that it
2 serves the public interest to continue to protect the population as a whole, in this dire phase
3 of the pandemic.

4
5 **V. CONCLUSION**

6 Plaintiffs have not shown that they are entitled to injunctive relief before a trial on
7 the merits. Consequently, the Court **DENIES** Plaintiffs' renewed motion for a temporary
8 restraining order or preliminary injunction (ECF No. 75).

9
10 **IT IS SO ORDERED.**

11
12 **DATED: December 21, 2020**


Hon. Cynthia Bashant
United States District Judge