20-56358

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTH BAY UNITED PENTECOSTAL CHURCH; et al.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of California

No. 3:20-cv-00865-BAS-AHG
The Honorable Cynthia A. Bashant, District Judge

STATE DEFENDANTS-APPELLEES' ANSWERING BRIEF AND OPPOSITION TO RENEWED MOTION FOR INJUNCTION PENDING APPEAL

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
PAUL STEIN
Supervising Deputy Attorney General
LISA J. PLANK
Deputy Attorney General

TODD GRABARSKY
Deputy Attorney General
State Bar No. 286999
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 269-6044
Fax: (916) 731-2124
E-mail: Todd.Grabarsky@doj.ca.gov
Attorneys for Defendants-Appellees Governor Gavin Newsom, Attorney General Xavier Becerra, and Public Health Officer Dr. Sonia Angell

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs appeal from an order denying preliminary injunctive relief against restrictions California has imposed on indoor worship services to combat the spread of COVID-19, and they request an injunction pending appeal. In just the last two weeks, this Court has denied two such requests, one of them in this case. *See S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, __ F.3d __, 2020 WL 7681858 (9th Cir. Dec. 24, 2020); *Gish v. Newsom*, Nos. 20-55445, 20-56324 (9th Cir. Dec. 23, 2020). Since then, California's harrowing surge in cases, hospitalizations, and deaths has only gotten worse. As the district court recognized, hospital emergency rooms are turning patients away, and it undoubtedly "serves the public interest to continue to protect the population as a whole, in this dire phase of the pandemic." Pls.' Excerpts of Record ("ER") 25-26.

Moreover, the record in this case could not be clearer. Although the Court remanded Plaintiffs' request for injunctive relief to the district court for consideration, Plaintiffs chose not to submit significant evidence in support of the request for relief, choosing instead to rely nearly exclusively on the Supreme Court's decision in *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020), and this Court's application of that decision in *Calvary Chapel Dayton Valley v. Sisolak*, __F.3d __, 2020 WL 7350247 (9th Cir. Dec. 15, 2020) ("*Dayton Valley*"). Thus, as the district court concluded, it is largely undisputed that the

restrictions on indoor worship services Plaintiffs challenge are based on neutral and generally applicable risk criteria and that the restrictions on secular and religious activities alike are proportional to the transmission risk of each activity.

Indeed, as the district court in this case and in a parallel one also on appeal found after careful analysis, California's restrictions on worship services likely satisfy strict scrutiny. The State has a plainly compelling interest in slowing the spread of COVID-19, and the restrictions it imposes on indoor worship services and other activities are tailored to the transmission risk posed and thus no broader than necessary to serve the State's interest. Indeed, the State allows alternatives not posing the same transmission risk such as online and drive-in services and, even more importantly, outdoor, in-person services without any attendance limit. In addition, the State tried less restrictive alternatives such as face coverings and physical distancing—and limits tied to building capacity—but found each insufficient when community spread increased. And Plaintiffs have failed to identify any other alternatives that would serve the State's interest.

Having failed to offer any real factual argument, Plaintiffs contend that *Roman Catholic Diocese* compels an injunction as a matter of law. Although both the Supreme Court and this Court previously declined to grant injunctive relief based on the mere fact that California imposes different restrictions on secular activities posing different transmission risk, Plaintiffs now ask this Court to hold

that "worship services must be treated the same as (or better than) all other indoor gatherings (the appropriate comparator) without regard to any alleged different 'transmission risk' of those activities," Opening Br. ("OB") 58, and "all arguments concerning the severity of the pandemic are irrelevant," OB 76.

Roman Catholic Diocese cannot be read so sweepingly. Far from overruling precedent applying strict scrutiny only when religious activities are treated worse than analogous secular conduct, *Roman Catholic Diocese* expressly *applied* it. In so doing, the Court concluded that New York's regulations violated the minimum requirement of neutrality by imposing harsh caps on worship services, while failing without any plausible justification to impose any capacity limits on certain secular businesses and other activities deemed "essential." *Roman Catholic Diocese*, as this Court observed in *Dayton Valley*, may have expanded Free Exercise Clause analysis, but it did not abandon the fundamental tenets of such analysis, much less require States to treat religious activity the same as all secular activity no matter how different. Moreover, while *Roman Catholic Diocese* faulted New York for not considering attendance limits based on building capacity, California has tried such limits and found them inadequate to deal with the present infection levels.

Injunctive relief also should be denied because of the dire situation California now faces. While Plaintiffs are undoubtedly suffering some injury from being

prevented from conducting services indoors, that injury is outweighed by the public interest in avoiding additional outbreaks now when the State's health care system is in danger of being overwhelmed. COVID-19 cases, hospitalizations, and deaths are skyrocketing and there are no longer any ICU beds in Southern California, where Plaintiffs' church is located. The Court should not pour gasoline on this fire by enjoining restrictions designed to reduce the risk of COVID-19 at precisely the moment when the health care system is least able to deal with more outbreaks.

The Court should affirm the district court's order and deny Plaintiffs' renewed request for an injunction pending appeal.

JURISDICTIONAL STATEMENT

Plaintiffs brought this action under 42 U.S.C. § 1983. ER 1112. The district court has subject matter jurisdiction over Plaintiffs' federal claims, 28 U.S.C. §§ 1331, 1343(a), but not over Plaintiffs' state law claims, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106, 124-125 (1984). This Court has jurisdiction to review the district court's denial of a preliminary injunction. 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

1. Whether Plaintiffs' Free Exercise Clause challenge is unlikely to succeed because California's restrictions on indoor worship services are rationally

designed to slow the spread of COVID-19 and based on neutral and generally applicable transmission-risk criteria that apply to all activities, religious as well as secular, and produce restrictions proportionate to the risk of each activity.

2. Alternatively, whether the district court correctly found that California's restrictions on indoor worship services are likely to satisfy strict scrutiny because (a) the State has compelling interest in slowing the spread of the COVID-19 pandemic and (b) the restrictions are narrowly tailored to further that interest they are based on and proportionate to the transmission risk posed by indoor worship services, expressly permits alternatives posing less risk, and were implemented only after trying less restrictive alternatives.

3. Whether the State's ban on group singing and chanting indoors is a rational, neutral and generally applicable regulation and Plaintiff's challenge to it is unlikely to succeed.

4. Whether the trial court correctly found that the public interest and balance of equities weigh against sweeping injunctive relief that would undermine the State's efforts to slow the spread of COVID-19 in the midst of a surge in which Californians are being infected, hospitalized, and killed at unprecedented rates.

STATEMENT OF THE CASE

I. THE COVID-19 PANDEMIC AND THE STATE'S RESPONSE

A. The Novel Coronavirus and the COVID-19 Disease

COVID-19 is now the world's deadliest infectious disease. To date, it has killed over 350,000 Americans, more than the number killed in combat in World War II, including more than 27,000 in California.[1] In addition, many of those infected COVID-19, now totaling over 2.3 million in California alone, suffer cardiac problems and other long-term health detriments. State Defs.' Supp. Excerpts of Record ("SER") 947. There is no known cure and only limited treatment options for the disease, and while several vaccines have been developed and approved, they are not yet widely available. SER 952-53.

COVID-19 is transmitted primarily by respiratory droplets containing SARS-CoV-2, the virus causing the disease, which are exhaled when individuals breathe, speak, sing, or chant. SER 687-88, 949-50. Many infected people have no symptoms, but may nonetheless transmit COVID-19 to others. SER 688-90; 949-50.[2] Thus, until a vaccine is widely distributed, restricting physical interactions in

[1] *See* https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days; https://covid19.ca.gov/state-dashboard/.

[2] Contrary to Plaintiffs' contention otherwise, OB 57-58 n.17, there is "broad consensus," based on multiple studies, concerning asymptomatic and pre-symptomatic transmission. SER 688-89, 949-50.

which COVID-19 is likely to spread is crucial to slow the spread of the disease. SER 686-87.

The risk that COVID-19 will be transmitted depends on several factors. One is the number of people gathered together: simply put, the greater the number of people, the greater the risk that one or more is infectious, and the more people that may be infected. SER 690-92. Indeed, absent precautions slowing the disease's spread, a single infectious person at a large gathering may unwittingly cause hundreds of infections, SER 692-93, as a study employing genetic tracing demonstrated in linking a single person attending a 200-person conference in Boston to 245,000 COVID-19 cases. SER 382.

A second risk factor is the nature of the activity. Epidemiologists have found that "[v]iral load"—the number of "viable viral particles" to which a person is exposed—determines whether the virus will "overcome the body's defenses and cause a COVID 19 infection." SER 950-51; *see also* SER 690-93. Accordingly, transmission risk increases when individuals are in close proximity for extended periods because during this time the respiratory droplets exhaled by an infected person may accumulate into doses large enough to overcome an uninfected person's immune system. SER 688, 949-50. Transmission risk also increases when an infected individual engages in activities such as speaking, singing, or shouting that increase their breathing and exhalations of infected droplets. SER

693-96, 964, 970-73. Conversely, transmission risk may be reduced—but not eliminated entirely—by precautions such as wearing face coverings and maintaining physical distance. SER 696-99, 964.

A third factor determining transmission risk is location. Transmission risk is substantially lower outside because respiratory droplets and aerosolized particles will dissipate into the atmosphere, especially if there is wind. SER 969-70. Indoors, the amount of ventilation indoors likewise affects the risk of transmission. *Id.*.

Indoor public gatherings create a heightened risk of transmission because they have attributes that increase all three risk factors. First, public gatherings may bring together large numbers of people from different households, increasing the risk that one or more people is unwittingly infected and exposing multiple others to infection. SER 690-93, 968-70. Second, at gatherings, individuals may remain in close proximity to each other for extended periods during which the respiratory droplets exhaled by infected individuals may accumulate into doses large enough to cause infection. *Id.* Third, when gatherings are held indoors, there is no wind to dissipate respiratory droplets, and ventilation may be limited. *Id.* Indeed, according to recent studies, public gatherings have caused as much as 80% of COVID-19's spread. SER 951-52.

Worship services, like other congregate activities, are an especially risky type

of public gatherings. SER 694-96, 973-75. Worship services are relatively lengthy, and participants tend to know and speak with one another, bringing them into even closer contact while simultaneously increasing exhalations. *Id.* Singing, chanting, and responsive reading also increase exhalations. *Id.* And many houses of worship have limited ventilation, allowing even more infected respiratory droplets to accumulate. *Id.* Thus, worship services unfortunately have become "super-spreader" events, causing dozens, hundreds, and even thousands of infections, SER 951-52, 973-75, and these outbreaks have continued despite adoption of precautions such as masking, hygiene, and distancing, SER 318-372.

B. The State's Early COVID-19 Directives

As the district court recognized earlier in this case, throughout the current pandemic, the State has "continued to fine tune its restrictions" in light of developing scientific knowledge and changing conditions in the State. *S. Bay United Pentecostal Church v. Newsom*, __ F.Supp.3d __, 2020 WL 6081733, at *13 (S.D. Cal. Oct. 15, 2020), *vacated on other grounds*, 981 F.3d 765 (9th Cir. 2020); *see also* ER 3 (incorporating background section of *South Bay*, 2020 WL 6081733).

On March 4, 2020, near the beginning of the pandemic, the Governor proclaimed a State of Emergency. ER 1114. Two weeks later, he issued Executive Order N-33-20, the Stay-at-Home Order, which required "all individuals living in

the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors." ER 1167 The Public Health Officer designated a list of "Essential Critical Infrastructure Workers," ER 1170, which exempted from the Stay-at-Home Order "[c]lergy for essential support and faith-based services that are provided through streaming or other technologies that support physical distancing and state public health guidelines." ER 1185. Although the Stay-at-Home Order prohibited in-person worship services, the inclusion of clergy on the list of critical infrastructure workers permitted places of worship to conduct services by online streaming or drive-ins. *See Cross Culture Christian Ctr. v. Newsom*, 2020 WL 2121111, at *3 n.2 (E.D. Cal. May 5, 2020).

In late April, in light of the Stay-at-Home Order's success in slowing the spread of COVID-19 and the State's marshaling of public health resources, the Governor announced a "Resilience Roadmap" for reopening of the State. ER 1194.

As part of this process, the State formulated guidelines for conducting various activities safely during the pandemic and with those guidelines in place allowed various activities to resume with those modifications. ER 404-35. These guidelines generally require places of employment to take precautions such as physical distancing, and they impose reporting as well as oversight requirements,

which make quarantining and contact tracing feasible, and mitigate the transmission risk. *Id.*; *see also* State Defs.' MJN Exs. 7-11. The industry-specific guidelines also require industries and sectors to take measures designed to deal with the specific risks created by them. For example, factories are required to screen workers, develop safety plans and, where individuals must work in close proximity, install engineering controls such as plexiglass barriers to protect those individuals. ER 20-21, 449; SER 408, 979-80. Similarly, personal care services are required to screen customers as well as workers, to observe special hygiene requirements, and either to limit the amount of time that may be spent within six feet of customers or use secondary barriers such as face shields. State Defs.' MJN Ex. 2; SER 978-89. Some industries, such as professional sports or music, film, and television production, have entered into binding labor agreements with particularly stringent requirements such as frequent, and sometimes daily, testing. *See, e.g.*, SER 456. These requirements have been incorporated into the relevant industry guidance. ER 422, 425-27.

On May 25, 2020, California issued the guidance for places of worship and providers of religious services. This guidance contains instructions and recommendations for physical distancing during services, cleaning and disinfection protocols, training, and monitoring. ER 1209. Additionally, in keeping with the CDC's recognition and recommendation that the size of worship services may be

limited in accordance with guidance from state and local authorities, the May 25 guidelines limited worship services to either 100 attendees or 25% of building capacity, whichever is less. ER 1211; *see also* ER 1227, 1251 (imposing the same restrictions on political protests). On June 12, in light of developing understanding concerning the significance of air flow in the transmission of COVID-19, the State updated the guidelines to remove numerical limit on outdoor worship services, where air flow and other factors reduce the risk of transmission. ER 1235; SER 692-93, 969-70.

In mid-June, in light of developing scientific evidence as well as increased spread of COVID-19, the State issued state-wide guidance requiring that face covering such as masks be worn in most public spaces, public settings, and workplaces. ER 389; SER 404, 963. Face coverings reduce (but do not eliminate) the risk that a person infected with COVID-19 will infect others. SER 697-99, 963-65. Physical distancing, which is required in the guidelines for worship services and other activities, similarly reduces (but does not eliminate) the risk that infected respiratory droplets will reach another person, particularly when exposure to an infected person is brief. SER 696.

The face-covering requirement and industry-specific guidelines, however, proved unable to prevent COVID-19 from spreading over the summer. Accordingly, in July, the State began tightening restrictions. Around the same

time, the State prohibited group singing and chanting, which increases vocalization and the volume of potentially infected viral droplets exhaled, indoors in worship services and other places where such activity is likely to occur. ER 389, 1259. Later, the State expanded this restriction to bar singing, chanting, cheering, and similar activities in all indoor gatherings. ER 389.

COVID-19, however, continued to spread. Accordingly, on July 13, the State tightened the restrictions on public gatherings even further. It closed both indoor and outdoor operations of bars and pubs throughout the state, as well as indoor operations of dine-in restaurants, movie theaters, family entrainment centers (e.g., arcades, bowling alleys, mini-golf, playgrounds), zoos, museums, and cardrooms. ER 1294. In addition, in counties with elevated transmission rates, hospitalization rates or hospital capacity utilization, the State closed indoor worship services as well as a number of activities, including fitness centers, offices for non-critical infrastructure, personal care services, hair salons, and shopping malls. ER 1281-82, 1294-98. Outdoor worship services, however, continued without any attendance limits or restrictions on singing and chanting throughout the State. *Id.*

C. The Blueprint for a Safer Economy

Conditions improved, and on August 28, 2020, the State implemented the Blueprint for a Safety Economy, which sets forth the State's currently operative COVID-19 regulatory framework. ER 352. This framework builds on both state-

wide regulations such as the masking requirement and the industry-specific guidelines.

The Blueprint seeks to allow activities to the maximum extent that safe under current conditions. Accordingly, it permits many activities so long as they are "with modifications"—that is, subject to statewide and industry-specific guidance. As noted above, however, public gatherings pose a heightened risk of transmission. For such activities, statewide and industry-specific guidelines are often "insufficient," especially in areas in areas where COVID-19 is widespread. SER 713; *see also* SER 690-91, 698-99, 703, 968-70, 974, 1666-67. The Blueprint accordingly bars these activities from operating indoors or limits the number of people that may participate in them.

The Blueprint determines the need for additional restrictions based on objective "risk-based criteria." ER 361-62. These criteria, which apply to *all* activities and sectors, are:

- Ability to accommodate face covering wearing at all times (*e.g.* eating and drinking would require removal of face covering)
- Ability to physically distance between individuals from different households
- Ability to limit the number of people per square foot
- Ability to limit duration of exposure
- Ability to limit amount of mixing of people from differing households and communities
- Ability to limit amount of physical interactions of visitors/patrons

- Ability to optimize ventilation (*e.g.* indoor vs outdoor, air exchange and filtration)
- Ability to limit activities that are known to cause increased spread (*e.g.* singing, shouting, heavy breathing; loud environs will cause people to raise voice)

ER 361-62; *see also* SER 706-07, 956-61.

The Blueprint also assigns counties to tiers, ranging from Tier 1 ("Widespread") to Tier 4 ("Minimal"), which are based on the extent of COVID-19 spread. ER 356-65, 379-84. As the transmission risk posed by an activity depends in part upon the extent of community spread, the restrictions imposed by the Blueprint generally increase or decrease as counties move up or down in the tiers.

For example, in Tier 1 counties where COVID is "widespread," worship services are permitted outdoors only. ER 381. In Tier 2 counties with "substantial" spread, worship services are permitted indoors subject a maximum 25% capacity or 100 people, whichever is less. *Id*. In Tier 3 counties with "moderate" spread, indoor worship services are permitted subject to a maximum 50% capacity or 200 persons, and in Tier 4 counties with "minimal" spread, indoor worship services are permitted at 50% capacity with no numerical cap. *Id*.

The Blueprint's restrictions on other activities reflect their relative transmission risks. Many activities such as hair salons, limited services (like laundromats and auto shops), personal care services, and hotels that do not involve

large gatherings, and thus pose less transmission risk, are permitted to open "with modifications" in all tiers. ER 379-91; SER 975-82. Other activities such as professional sports, which as mentioned above are subject to strenuous testing requirements, are likewise permitted to open "with modifications" in all tiers, and "critical infrastructure," which contains many activities that do not involve gatherings and others such as factories or film production that are subject to stringent industry-specific restrictions, are likewise permitted to operate with modifications in all tiers. ER 379, 404-35.

Activities posing a high transmission risk in spite of statewide and industry-specific guidance are subject to attendance limits and restrictions on operating indoors proportionate to that risk. For example, movie theaters, which like worship services bring many people into proximity in the same place for an extended period of time, are subject to exactly the same capacity limits as worship services: no indoor operation in Tier 1, indoors with the lesser of 25% capacity or 100 persons in Tier 2, 50% capacity or 200 persons in Tier 3, and 50% capacity in Tier 4. *See* ER 381. Restaurants, which for different reasons pose a similar transmission risk, are subject to those same capacity restrictions. ER 382. And the same capacity limits on worship services are applied to protests as well as college lectures.

Other activities involving public gatherings are subject to similar restrictions.

For example, museums and zoos, which bring together many people in the same place but for independent activities and not in proximity for extended periods, are subject to slightly less stringent restrictions than worship services: no indoor operations in Tier 1, 25% capacity in Tier 2, 50% capacity in Tier 3, and no limit in Tier 4. ER 381. Retail and shopping malls, where interactions are briefer and more transient are permitted to operate indoors at 25% capacity in Tier 1, 50% capacity in Tier 2, and no capacity limits in Tiers 3 and 4. ER 380.

Activities posing even greater transmission risks than worship services are subject to greater restrictions. For example, gyms and fitness centers, where exertion increases potentially infected exhalations, are not permitted to open indoors in Tier 1 and are restricted to 10% capacity in Tier 2 and 25% in Tier 3 (but 50% in Tier 4). ER 381. Other activities such as wineries, family entertainment centers, and cardrooms[3] are not permitted to operate indoors in either Tier 1 or Tier 2 and then subject to the same or lower capacity limits as worship services in the remaining tiers. ER 382-83; *see also id*. (closing offices in Tiers 1 and 2). Bars are only permitted to operate indoors in Tier 4, ER 382, amusement parks are closed outright in Tiers 1 and 2 and allowed to operate outdoors only in

[3] Casinos are permitted only on tribal lands, which are not subject to most state regulation, including the Blueprint. *See Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1426 (1999).

Tier 3, ER 383-84. Indoor spectator sports, concerts, and other performances are prohibited in all tiers. *Id.*

D. The Current Surge and the Regional Stay-at-Home Order

After the Blueprint was instituted infections initially fell, but, as in the rest of the country, infection rates began to increase in late October, and recently California has been experiencing a search. Indeed, cases have skyrocketed, quadrupling in the last month to reach a 14-day daily average of more than 37,000 a day.[4] *See also* ER 3, 25. The increase in daily cases has been accompanied by skyrocketing hospitalizations and deaths, the latter of which has also quadrupled to a 14-day daily average of 291 and setting a record of 585 deaths in a single day on New Year's Eve.[5] Ominously, the increased hospitalization rates have shrunk ICU availability to the disturbingly low level of less than 1% statewide and 0% in Southern California, where Plaintiffs' church is located.[6] As a consequence, the State is losing the ability to treat those who fall seriously ill from COVID-19—as well as those who suffer from serious non-COVID-related illness and injuries—and the CDC director has warned the next few months may be "the most difficult in the public health history of this nation." SER 398.

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[4] *See* https://covid19.ca.gov/state-dashboard (last accessed Jan. 6, 2021).
[5] *Id.*
[6] *See* https://covid19.ca.gov/safer-economy/ (last accessed Jan. 6, 2021).

In response, on December 3, 2020, the State implemented a Regional Stay-at-Home Order in regions where ICU availability drops below 15%. ER 440. In those regions, all private gatherings are prohibited, and individuals are required to stay home unless their conduct is expressly permitted by the order or related to critical infrastructure. ER 8-11, 440.[7] Worship services, political protests, and college lectures are permitted to continue outdoors; retail is permitted indoors at 20% capacity; and grocery stores are permitted at 35% capacity. *Id*. Most other activities such as dine-in restaurants, hair salons and barbershops, personal care services, and limited services as well as bars, cardrooms, gyms, museums, family entertainment centers, and campgrounds are closed or (in some cases) permitted only outdoors. *Id*..

II. PROCEDURAL HISTORY

A. The Initial Request for Emergency Relief

Shortly after filing suit in early May, Plaintiffs moved for a temporary retaining order against the initial Stay-at-Home Order and Resilience Roadmap. On May 15, the district court denied the motion finding Plaintiffs unlikely to succeed on their Free Exercise Clause claims both because the Order was a neutral and generally applicable regulation subject only to rational basis review, which it

[7] *See also* https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional-stay-home-order ("What does the Regional Stay Home Order do?").

easily satisfies, and because it satisfied strict scrutiny as well. *S. Bay United Pentecostal Church v. Newsom*, 2020 WL 7263235 (S.D. Cal. May 15, 2020). Plaintiffs appealed and moved this Court for an injunction pending appeal, which this Court denied. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020). Plaintiffs then sought an emergency writ of injunction from the Supreme Court, which was also denied. *S. Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020).

B. The July Renewed TRO Motion

In July, Plaintiffs requested a remand to present further evidence, which the Court granted. Asserting that "the worst of the pandemic is absolutely over" and the State no longer had a compelling interest in combatting COVID-19, Plaintiffs filed a renewed motion for a temporary restraining order supported by a declaration from Dr. George Delgado—a medical doctor with no purported training, credentials, or experience in public health and epidemiology—and declarations from four others concerning the state of the pandemic. ER 1991

In response, the State submitted declarations from three experts: Dr. James Watt, the Chief of the Division of Communicable Disease Control at the California Department of Public Health (CDPH), ER 1991; Dr. George Rutherford, the head of the Division of Infectious Disease and Global Epidemiology at the University of California, San Francisco School of Medicine, SER 1849; and Peter Imrey, Ph.D.,

a biostatistician from the Cleveland Clinic, SER 2296. Prior to the State's submission, the Blueprint for a Safer Economy was adopted, which Plaintiffs addressed in their reply.

The district court denied Plaintiffs' renewed motion on October 15, finding Plaintiffs unlikely to succeed on their Free Exercise claim or on the related discriminatory enforcement claim that they added in light of the George Floyd protests in the summer. *S. Bay United Pentecostal Church v. Newsom*, __ F. Supp. 3d __, 2020 WL 6081733 (S.D. Cal. Oct. 15, 2020).[8] In making the former ruling, the court found that the Blueprint is neutral and generally applicable regulation that treats worship services as or more favorably than comparable secular activities. *Id.* at *12-*14. Relying on the Watt and Rutherford declarations, the court found that "the evidence shows that the State's restrictions are based on the elevated risk of transmission of the novel coronavirus in indoor settings, particularly congregate activities and those involving singing and chanting." *Id.* at *13 (citing *id.* at *2-*3, *7-*9). Notably, the court assigned no weight to Dr. Delgado's opinion concerning comparative risk because he lacked significant experience in epidemiology and because his comparative risk assessment was so lacking in any scientific basis that it was likely inadmissible

[8] Though Plaintiffs allude to Floyd protests, OB 22-23, 51, they do not contend that they are likely to succeed on in showing discriminatory enforcement. *See also South Bay*, 2020 WL 6081733, at *14-*15; *see also* SER 1836-40, 2319.

under *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311 (9th Cir. 1995).[9] *Id.* at *13-*14.

C. The First December Motion

On December 3, in light of the Supreme Court's decision in *Roman Catholic Diocese*, 141 S.Ct. 63, Plaintiffs requested another injunction pending appeal. On December 8, the Court denied the request, but vacated the district court's October 15 order and remanded for further consideration. *S. Bay United Pentecostal Church v. Newsom*, 981 F.3d 765 (9th Cir. 2020).

D. The Ruling Presently on Appeal

On remand, Plaintiffs again moved for preliminary injunctive relief. ER 610. Plaintiffs provided no additional supporting evidence except for a short declaration from Dr. Delgado purporting to compare California with outdated COVID-related statistics from New York.[10] ER 606. The State, by contrast, submitted expanded

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[9] Contrary to Plaintiffs' assertion, the State did not "ridicule[]" Dr. Delgado's attempt at a comparative risk assessment. OB 70 n.18. Rather, the State and its experts showed that Dr. Delgado lacked qualifications and used a flawed methodology. SER 1829-31, 1872-75, 2301-13, 2324. Tellingly, Plaintiffs have abandoned Dr. Delgado's attempted comparative risk analysis, omitting it from their latest renewed motion before the district court as well as the excerpts of record in this appeal.

[10] Plaintiffs improperly submitted to the district court several other declarations from another litigation with their reply brief, but when the State Defendants objected that they had been deprived of any opportunity to respond to those declarations as they pertain to the present matter, SER 12, Plaintiffs voluntarily withdrew them, ER 30, and the district court accordingly struck them

(continued…)

declarations from Drs. Watt and Rutherford, SER 680, 941, as well as declarations from two new experts, Michael A. Stoto, Ph.D., a professor of public health at Georgetown University, SER 1647, and Dr. Yvonne Maldonado, Chief of the Division of Pediatric Infectious Diseases and Senior Associate Dean at Stanford University School of Medicine. SER 1727.

On December 21, after conducting oral argument, the district court denied Plaintiffs' renewed motion for preliminary injunctive relief. ER 2, 27. Although the court rejected Plaintiffs' assertion that the Regional Stay-at-Home Order was targeted at religion, it found that it was bound by this Court's decision in *Dayton Valley v. Sisolak*, 2020 WL 7350247, to apply strict scrutiny to the State's restrictions. ER 15-16. After an extensive analysis of the Order and the evidence in the record, the court concluded the Order likely satisfied strict scrutiny. ER 16-24.

First, rejecting Plaintiffs' contention that the State lacked even a rational interest in reducing community spread, the court found that "'[s]temming the spread of COVID–19 is unquestionably a compelling interest.'" ER 16-17 (quoting *Roman Catholic Diocese*, 141 S.Ct. at 67).

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from the record. ER 13, 81. In asserting that the district court abused its discretion by striking the declarations, Plaintiffs neglected to mention that they were voluntarily withdrawn. OB 55 n.16.

Second, the court found that the Regional Stay-at-Home Order is narrowly tailored to furthering that compelling interest. ER 17-24. The court noted that California's restrictions are based on the "risk profile" of the restricted activities assessed in light of seven risk-based criteria. ER 17-18. Applying these criteria, the court observed, California treats worship services at least as well as other activities that involve gatherings of groups for prolonged period. ER 17-19.

In so doing, the court rejected Plaintiffs' assertion that the State's restrictions are underinclusive because they treat other secular activities posing the same risk of transmission more favorably. ER 18-22. For example, while grocery stores and other retail services, limited services such as laundromats, and the transportation sector are subject to more lenient restrictions, the court found that "these activities have a lower risk profile because interactions between patrons in those places are typically asocial, distanced, and short in time." ER 18-19. The court likewise found that worksites in critical infrastructure sectors "present a lower risk profile than in non-employment situations" because of either industry-specific guidelines applicable to them or binding labor agreements in those industries. ER 20-21; *see also* ER 422, 425-27 (incorporating such agreements into industry-specific guidelines). Among other reasons, the court explained, "the State has greater control over enforcing specific industry guidelines applicable to each industry," "employers are also subject to various health and safety requirements enforced by

State labor authorities," and "an employer is better positioned to control its employees' behavior affecting the risk factors." ER 20-21 & n.48. The court also found that, while COVID-19 outbreaks have been tied to religious gatherings in San Diego County and Southern California, ER 19, 24, there was no evidence in the record of any such outbreaks tied to critical infrastructure jobsites, grocery shopping, other retail, laundromats, or the transportation sector, ER 20-21.

Accordingly, the district court concluded that "California assigns different risk profiles to different sectors based on a neutral, seven-factor risk analysis, which explains the different restrictions that apply to various exempt sectors." ER 21. The court then ruled that, because "California has designed the different exemptions to match its goal of reducing community spread," it has done "exactly what the narrow tailoring requirement mandates." ER 22.

The district court also distinguished the restrictions considered by the Supreme Court in *Roman Catholic Diocese*. ER 22. While the 10- and 25-person caps at issue there created "an effective ban on all religious activities in the applicable zones," California allows outdoor religious gatherings in unlimited numbers. ER 22-23. Similarly, unlike the restrictions considered by this Court in *Dayton Valley,* California's restrictions "place each activity on a risk spectrum and impose[] no more restriction on houses of worship than necessary." ER 23.

The district court also found that Plaintiffs failed to offer any less restrictive alternative that would achieve California's compelling interest in curbing COVID's spread. ER 23-24. Citing the State's expert testimony, the court found that face covering, physical distancing and sanitization were insufficient because they only reduced one aspect of the transmission risk posed by worship services. ER 23-24. Indeed, the court observed, California already had tried less restrictive alternatives like capacity limitations, but those alternatives "proved insufficient to prevent outbreaks at houses of worship in San Diego County and the Southern California Region." ER 23-24.

Finally, the district court held that the balance of harms and public interest weigh against an injunction. "In San Diego," the court observed, "emergency rooms are having to turn patients away, and the hospitals are being quickly overwhelmed," and enjoining the restrictions would likely exacerbate an already dire situation. ER 25-26; *see also* ER 3 ("The Southern California region is now witnessing the pandemic at its peak: record number of new daily cases, skyrocketing deaths, and 0% of hospital beds left to spare."). Thus, while acknowledging the burden imposed by not being able to hold services indoors, the court concluded that "it serves the public interest to continue to protect the population as a whole, in this dire phase of the pandemic." ER 25-26.

Plaintiffs appealed, ER 1979, and moved this Court for another injunction pending appeal, which the Court denied in a published order. *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2020 WL 7681858 (9th Cir. Dec. 24, 2020).

STANDARD OF REVIEW

This Court reviews an appeal from the denial of preliminary injunctive relief for abuse of discretion. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). The denial of such relief should be reversed only if the district court "abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1103 (9th Cir. 2016).

In seeking a preliminary injunction, Plaintiffs bear the heavy burden to demonstrate a strong likelihood of success on the merits, irreparable injury, a balance of hardships in their favor, and advancement of the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20-22 (2008).

ARGUMENT

This Court has refused repeatedly to enjoin the restrictions that California has imposed on worship services to combat the spread of COVID-19, including twice

since *Roman Catholic Diocese*.[11] The evidence presented by the State on remand, confirmed that these restrictions are based on neutral and generally applicable criteria assessing transmission risk, which are subject to rational basis review, and also that the restrictions are narrowly tailored to further the State's compelling interest in slowing the spread of COVID-19, and thus satisfy even strict scrutiny. Plaintiffs did not even try to rebut this evidence. Instead, they assert that the Supreme Court's decision in *Roman Catholic Diocese* and this Court's in *Dayton Valley* compel the application of strict scrutiny and preclude consideration of the scientific evidence in the record. That is wrong. While *Roman Catholic Diocese* and *Dayton Valley* broadened Free Exercise analysis, they did not overrule prior decisions holding neutral and generally applicable standards subject to rational basis review, and they certainty did not preclude consideration of the unrebutted scientific evidence on strict scrutiny.

[11] *South Bay*, 2020 WL 7681858; *Gish v. Newsom*, Nos. 20-55445, 20-56324, 2020 WL 7752732 (9th Cir. Dec. 23, 2020); *Harvest Rock Church v. Newsom*, 977 F.3d 728 (2020), *vacated*, 2020 WL 7061630; *South Bay*, 959 F.3d 938; *Gish v. Newsom*, No. 20-55445 (9th Cir. May 7, 2020). In the face of this authority, Plaintiffs point to a Kern County Superior Court, which stated that it would issue a preliminary injunction based on the California Constitution's free exercise provision. *Burfitt v. Newsom*, No. BCV-20-102267 (Dec. 10, 2020). The court, however, has not actually done so yet, and once it does, the State plans to appeal because the ruling in *Burfitt* is based on multiple errors. In any event the Eleventh Amendment bars Plaintiffs from invoking state law against the State Defendants. *Pennhurst*, 465 U.S. at 124-25.

I. PLAINTIFFS' FREE EXERCISE CLAUSE CLAIM IS UNLIKELY TO SUCCEED.

A. Unrebutted Expert Testimony Submitted on Remand Shows that California's Restrictions on Worship Services Are Rational and Based on Neutral and Generally Applicable Criteria.

The First Amendment's Free Exercise Clause prohibits any law that "discriminates against some or all religious beliefs or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 533, 543 (1993); *see also Employment Div. v. Smith*, 494 U.S. 872, 881 (1990). A law does not discriminate against religion, and thus is "neutral and of general applicability," if it treats religious activity at least as favorably as "*analogous* non-religious conduct." *Lukumi*, 508 U.S. at 531-32, 546 (emphasis added); *see also Stormans v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (examining "*comparable* secular conduct") (emphasis added). Such neutral and generally applicable laws need only satisfy rational basis review. *Lukumi*, 508 U.S. at 531-32. California satisfies this test. Restricting personal interactions is a plainly rational way to combat the spread of an infectious disease that spreads through such interactions. Moreover, as demonstrated below, the restrictions at issue are based on neutral and generally applicable risk criteria that apply to religious and secular activities alike and create restraints proportional the risk.

The restrictions on indoor worship services in the Blueprint and the Regional Stay-at-Home Order are part of a layered approach to limiting the spread of

COVID-19. SER 706-08, 1651-58. To reduce transmission risk, California has implemented statewide precautions such as face coverings and physical distancing as well as industry-specific guidelines requiring modifications reducing the risk of specific activities. SER 696-99, 956-57, 963-65. While these measures adequately reduce transmission risk for some activities, they do not do so for all, SER 690-91, 703, 963-65, 974, and additional restrictions are needed for public gatherings and other high risk activities, particularly in areas where transmission rates are high. Accordingly, the Blueprint and the Regional Stay-at-Home Order either bar these activities indoors or impose attendance limits on them. SER 696-99, 703-07, 956.

These additional restrictions are based on neutral and generally applicable criteria. The risk profile of each activity is assessed based objective criteria relating to the manner in which COVID-19 is transmitted, such as the number of people involved in the activity, its duration, the amount of physical exertion or vocalization, the ability to take precautions such as masking and distancing, and ventilation. ER 361-62. These criteria apply to all activities, secular as well as religious. ER 361-62. Based on this objective analysis of transmission risk, California imposes additional capacity restrictions on indoor operations proportional to the risk.

Capacity limits are not needed for many activities because the transmission risk is low. For example, "limited services" such as laundromats (which are closed

to the public indoors under the Regional Stay-at-Home Order) do not create a great transmission risk because they do not gather together many people at a time or require close contacts between them. ER 10, 19-20; SER 977-78. Other activities such as hair salons and "personal care services" such as acupuncture (which are also closed indoors under the Regional Stay-at-Home Order) may bring a few people into close contact, but industry-specific guidance requiring secondary barriers such as face shields or safety goggles and the closing of waiting areas mitigate the risk. SER 960, 978-79. Even more stringent mitigating restrictions such as screening, safety plans, and engineering controls are imposed on places such as factories, plants, and warehouses where large numbers of people are brought to a single location, though not necessarily in close proximity. ER 20-21; SER 970-80.

Under the State's risk-based criteria, capacity restrictions and even the closing of indoor operations are needed for other activities. For example, retail shopping, which brings together many people but involves only fleeting interactions that are much less likely to transfer the virus, are permitted to operate indoors but still subject to capacity limits in counties with widespread or substantial transmission rates. ER 19-20; SER 707, 975-78. Capacity limits are also imposed on grocery shopping, but they are slightly higher than those for retail because transmission

risk in grocery stores is further reduced by high-functioning air conditioning systems. *Id.*

Higher risk activities are subject to more restrictive capacity limits. Congregate activities such as worship services in which large numbers of people gather in close proximity for extended periods of time for a shared communal experience create an even greater risk of transmission and are therefore prohibited from operating indoors in counties where COVID-19 is widespread and subject to capacity restrictions in other counties. ER 19-22; SER 691-96, 969-70, 973-75. Other congregate activities posing similar risks such as movies, protests, and college lectures are subject to the same capacity limits, ER 361; SER 707, 960-61, as are restaurants which pose similar risks albeit for different reasons. ER 362. Activities posing even greater transmission risks such as gyms (where exertion increases the volume of potentially infected droplets exhaled), bars, wineries, family entertainment centers, cardrooms, and amusement parks, are subject to even more stringent restrictions on indoor operations and attendance. ER 9-11, 362-64. Thus, California imposes restrictions on indoor operations and capacity proportional to the specific transmission risk of all activities.

Plaintiffs assert that risk criteria in the Blueprint "do not apply to businesses deemed 'critical infrastructure,'" and that those businesses operate under both the Blueprint and the Regional Order regardless of transmission risk." OB 58-59.

That is wrong. The Blueprint *includes* critical infrastructure, and like several other activities, critical infrastructure may operate only "with modification"—that is, subject to the industry-specific guidance designed to reduce transmission risk by the particular sector or activity. ER 379. In addition, the State Defendants submitted unrebutted evidence explaining the treatment of every critical infrastructure activity that Plaintiffs identified. SER 975-82; *see also* ER 19-21 (discussing transportation and critical infrastructure worksites). For example, schools and daycares must divide children, who are less suspectable to COVID-19, into small, "bubble"-like cohorts that reduce mixing and make isolation and tracing easier, State Defs.' MJN Exs. 6; and in factories and manufacturing plants industry guidance reduces transmission risk by, among other things, requiring are required to install engineering controls such as plexiglass separators whenever employees must work in close proximity, ER 20-21.[12] Moreover, "critical infrastructure" jobsites and workplaces are closed systems with stable workforces that subject to "health and safety requirements enforced by State labor authorities" and "binding labor agreements"—which makes contact-tracing, quarantining, and exposure mitigation strategies possible and makes an "employer better positioned to control its employees' behavior affecting the risk factors." ER 19-20 & n.48; *see also*

[12] Thus, Plaintiffs' conjecture about "meatpacking plants filled with workers laboring shoulder-to-shoulder" would not be permitted. OB 59.

State Defs.' MJN Exs. 7-11; *Harvest Rock Church v. Newsom*, 2020 WL 7639584, at *9 (C.D. Cal. Dec. 21, 2020).

Similarly, there is no "Hollywood exemption." OB 64. While Plaintiffs assert that the film industry is allowed "to entirely self-regulate," *id*., in fact the industry has entered into binding labor agreements that impose onerous restrictions that go far beyond anything that Plaintiffs have ever offered to observe, including, among other things, enhanced distancing and regular COVID testing several times per week and daily for some employees. SER 448, 456, 979-80; *see also Harvest Rock*, 2020 WL 7639584, at *9. Moreover, far from being voluntary as Plaintiffs try to suggest, these restrictions have been incorporated into the relevant industry-specific guidance. ER 422. Thus, Plaintiffs' suggestion of a "simulated indoor worship service, complete with singing, for a movie or TV show" (OB 26), would in actuality be far different from an actual worship service because the cast and crew would be regularly tested for the disease and subjected to a strict screening, reporting, and tracing regime.

Plaintiffs' assertion, raised for the first time on appeal, that there is an exemption for professional sports (OB 50, 63) is similarly unfounded. Like the film industry, professional sports are subject to labor agreements incorporated into the State's mandatory guidance that impose stringent regulations requiring, among

other things, routine testing.[13] Moreover, professional sports are subject to industry-specific guidance requiring, among other things, approval by county public health authorities, ER 425-27, which has been withheld in some high-profile instances.[14]

Moreover, jobsites and workplaces deemed "critical infrastructure" are closed systems in which employers determine who is permitted "in the bubble" and subject to a host of "health and safety requirements enforced by State labor authorities," "binding labor agreements," and "[w]ork shifts [that] may be grouped to control personnel to whom the employees are regularly exposed"—all of which makes contact-tracing, quarantining, and exposure mitigation strategies much easier and makes an "employer better positioned to control its employees' behavior affecting the risk factors." ER 19-20 & n.48; *see also* State Defs.' MJN Exs. 7-11; *Harvest Rock*, 2020 WL 7639584, at *9. Houses of worship are not subject to any of those regulations, nor do Plaintiffs suggest that the onerous COVID-specific mitigating restrictions specifically tailored to particular industries or sectors should be imposed on worship services.

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[13] *See e.g.*, NFL-NFLPA COVID-19 Protocols For 2020 Season, https://static.www.nfl.com/image/upload/v1604923568/league/qj8bnhpzrnjevze2pmc9.pdf at p. 61.

[14] *See, e.g.*, Eric Branch, *49ers Cannot Play at Levi's Stadium Under Santa Clara County's Coronavirus Restrictions*, S.F. Chronicle (Nov. 28, 2020), https://www.sfchronicle.com/49ers/article/49ers-cannot-play-at-Levi-s-Stadium-under-Santa-15760248.php.

Plaintiffs also deride the State's "risk factors" as "pseudo-scientific" and lacking any scientific basis. OB 59, 61. In fact, the State's risk criteria reflect current scientific understanding of how COVID-19 is transmitted, which is primarily though emission of aerosolized droplets, and recognized public health measures for reducing the spread of airborne infectious diseases. SER 687-90, 949-51. Thus, as another court recently observed, the State's risk criteria are based on "the specific mechanism" of COVID-19 transmission. *Harvest Rock*, 2020 WL 7639584, at *7. Moreover, Plaintiffs are unable to point to any ways in which those factors are inconsistent with established scientific principles or understandings or provide any evidence supporting this notion. That is in sharp contrast to the State's detailing of the numerous errors in Dr. Delgado's risk analysis that Plaintiffs' proffered earlier in this litigation, but have now abandoned after the trial court rejected it. *South Bay*, 2020 WL 6081733, at *13-*14.[15]

In any event, Plaintiffs cannot establish a likelihood of success by seconding guessing the State's risk assessments. As Chief Justice Roberts explained, courts

[15] Relying on the dissenting opinion in another case, Plaintiffs also assert that the analysis of worship services in the State's experts' declarations are "of no value" because they are not qualified to opine on what takes place in worship services. OB 65-66 & n.20 (citing *Harvest Rock*, 977 F.3d at 734 n.4 (O'Scannlain, J., dissenting)). The majority in that case, however, *relied* on the declaration of Dr. Watt, the State's only declarant at that time. *See Harvest Rock*, 977 F.3d at 730-31. Moreover, Plaintiffs have not challenged Dr. Rutherford's testimony that his analysis is based on "knowledge from attending and studying religious worship services as well as [] study of relevant publications." SER 973.

should defer to the judgment of public health officials on uncertain medical and scientific issues:

> When [politically accountable] officials "undertake[] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." *Marshall v. United States*, 414 U.S. 417, 427 (1974). Where 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 Met. Trans. Auth.*, 469 U.S. 528, 545 (1985).

South Bay United Pentecostal Church v. Newsom, 140 S.Ct. 1613, 1613-14 (2020) (Roberts, C.J., concurring) (citations altered). Indeed, for over a century, the Supreme Court has applied that deference in the face of scientific uncertainty even where individual rights and liberties are at issue and even in non-emergency contexts. *See, e.g.*, *Andino v. Middleton*, 141 S.Ct. 9, 10 (2020) (Kavanaugh, J., concurring); *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007); *Kansas v. Hendricks*, 521 U.S. 346, 360 & n.3 (1997); *Jones v. United States*, 463 U.S. 354, 364-65 & n.13, 370 (1983); *Lambert v. Yellowley*, 272 U.S. 581, 597 (1926); *Collins v. Texas*, 223 U.S. 288, 297-98 (1912). Nothing in *Roman Catholic Diocese* suggests an intent to depart from this well-established principle. Indeed, a majority of the Supreme Court expressly reaffirmed it.[16] And this deference is especially

[16] *See Roman Catholic Diocese*, 141 S.Ct. at 74 (Kavanaugh, J., concurring) ("Federal courts [] must afford substantial deference to state and local authorities about how best to balance competing policy considerations during the pandemic."); (continued…)

warranted here as Plaintiffs present no evidence challenging the comparative risk analysis underlying California's COVID regulatory framework.

Thus, Plaintiffs have failed to show any likelihood of rebutting the State's demonstration that California's restrictions on indoor worship services are based on neutral and generally applicable risk criteria.

B. *Roman Catholic Diocese* Did Not Overrule Prior Supreme Court Decisions Applying Rational Basis Review to Neutral and Generally Applicable Regulations.

Rather than challenge the State's demonstration that the restrictions at issue are based on neutral and generally applicable criteria, Plaintiffs argue that California's restrictions are subject to strict scrutiny as a matter of law under the Supreme Court's recent decision in *Roman Catholic Diocese*. But *Roman Catholic Diocese* did not overrule the Supreme Court's decisions in *Lukumi* and *Smith* holding that that neutral and generally applicable laws are subject to rational basis review under the Free Exercise Clause. To the contrary, the Supreme Court expressly applied *Lukumi* in finding that the restrictions at issue in *Roman Catholic Diocese* were subject to strict scrutiny because they likely "violate 'the minimum requirement of neutrality' to religion." *Roman Catholic Diocese*, 141 S.Ct. at 66 (quoting *Lukumi*, 508 U.S. at 533). Moreover, the factors that led the Supreme

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id. at 75-76 (Roberts, C.J., dissenting); *id*. at 78 (Breyer, J., dissenting); *id*. at 79 (Sotomayor, J., dissenting); *see also Commonwealth v. Beshear*, 981 F.3d 505, 511 (6th Cir. 2020).

Court to find the minimum requirement of neutrality to religion violated are absent here.

In *Roman Catholic Diocese*, the Supreme Court considered an executive Order issued by the Governor of New York which authorized state officials to identify COVID-19 "hot spots" and create zones of heightened restrictions around them that, among other things, imposed a 10-person cap on religious services, whether inside or outside, in the center zone and a 25-person cap in the next zone. *See Roman Catholic Dioceses v. Cuomo*, 2020 WL 6120167, at *2 (E.D.N.Y. Oct. 16, 2020); *Harvest Rock*, 2020 WL 7639584, at *5. In ruling that the Plaintiffs were likely to show these restrictions to be discriminatory, the Court first observed, "statements made in connection with the challenged rules can be viewed as targeting the ultra-Orthodox Jewish community." 141 S.Ct. at 66 (internal quotation marks omitted). Next, setting aside those statements, the Court held that New York's regulations likely were not neutral "because they single out houses of worship for especially harsh treatment." *Id.*

In particular, the Court noted that in the New York's red zones, "while a synagogue may not admit more than 10 persons, businesses categorized as 'essential' may admit as many people as they wish." *Id.*; *see also id.* (noting that the list of "essential" businesses is "not limited to those [services] that can be regarded as essential"). "The disparate treatment," for which no evidentiary

justification was even offered, is "even more striking in an orange zone" because there houses of worship are limited to 25 persons but "even non-essential businesses may decide for themselves how many people to admit." *Id*.

Plaintiffs contend that *Roman Catholic Diocese* subjects California's restrictions on worship services to strict scrutiny because they are more severe than the numerical caps considered in that decision. *E.g.*, OB 65. That is by no means clear because California offers something that the New York order at issue in *Roman Catholic Diocese* did not: "the ability to legally congregate in unlimited numbers for worship—so long as that worship occurs outside." *Harvest Rock*, 2020 WL 7639584, at *4. Even more importantly, there is nothing in *Roman Catholic Diocese* suggesting that strict scrutiny is triggered simply because a State imposes harsh restrictions on worship services, and certainly nothing suggesting that strict scrutiny must be applied "without regard to any alleged different 'transmission risk.'" OB 68. Rather, the Supreme Court applied strict scrutiny to New York's restrictions because "they *single* out houses of worship for *especially harsh* treatment." 141 S. Ct. at 66 (emphasis added). In other words, following *Lukumi*, the Supreme Court applied strict scrutiny because New York's restrictions treated religious conduct less favorably than "analogous non-religious conduct." *Lukumi*, 508 U.S. at 531-32, 546.

Indeed, shortly after *Roman Catholic Diocese*, a different California church asked the Supreme Court to enjoin California's restrictions on the ground that they were harsher than the New York restrictions, but the Supreme Court declined to do so. *Harvest Rock*, 2020 WL 7061630. Instead, the Supreme Court remanded the case to this Court with instructions "to remand to the *District Court* for further consideration in light of *Roman Catholic Diocese*." *Id.* (emphasis added). Moreover, this Court denied Plaintiffs' earlier request to enjoin California's restrictions based solely on *Roman Catholic Diocese* and remanded for further consideration. *South Bay*, 981 F.3d 765.

It is true that *Roman Catholic Diocese* may have broadened the inquiry into discriminatory treatment of religious conduct, but even under such an inquiry, this case is distinguishable.

First, unlike *Roman Catholic Diocese*, in this case there is no animus or targeting. As the district court found, there is "no evidence of statements made in connection with the challenged rule that can be viewed as targeting Plaintiffs' faith or singling out any other religion." ER 15. Plaintiffs continue to accuse Governor Newsom of treating worship as a "low reward" activity based on his answer to a question in a press conference. OB 12-13, 50-51 (citing ER 1121.) As the district court explained, however, this accusation is based on a vague reference to "low risk-low reward" conduct, and it takes "multiple assumptions and leaps in logic" to

interpret this statement as referencing worship services. ER 15. Moreover, as the district court observed, Plaintiffs failed below—and continue on appeal to fail—to mention that in the same exchange the Governor stated that "the State was 'very sensitive to those that want to get back into church'" and would "'see what [it] can do to accommodate that.'" *Id.*

Second, California's restrictions do not single out religious activity for especially harsh treatment. As noted above, unlike New York, California permits religious congregants to gather in unlimited numbers for outdoor services throughout the State. Moreover, the restrictions on indoor services produced from California's objective analysis of transmission risk are proportional to the risk posed by worship services. In other words, California's Blueprint places worship services in a continuum of restrictions: It applies less stringent restrictions only on activities that pose less transmission risk, similar restrictions on activities posing similar risk and greater restrictions on activities posing greater transmission risks. ER 21-22. Thus, in sharp contrast to New York, California does not single out worship services and it does not impose especially harsh restrictions on them.

C. *Calvary Chapel Dayton Valley* Applied Strict Scrutiny Because Nevada Imposed Less Stringent Restrictions on Numerous Secular Activities that Posed Greater Transmission Risks.

Although the district court did not find that that California's restrictions target religious activity or single them out for especially harsh treatment, it nonetheless

concluded that it was bound by this Court's decision in *Dayton Valley* to apply strict scrutiny because California imposes more greater capacity limits on retail establishments than on worship services. ER 15-16. Although *Dayton Valley* observed that *Roman Catholic Diocese* "arguably represented a seismic shift in Free Exercise law," *Dayton Valley*, 2020 WL 7350247, at *3, it did not hold that strict scrutiny is triggered anytime a State treats worship services more harshly than secular conduct without regard to whether the transmission risk of that conduct. Indeed, it could not have done so because under both *Lukumi* and this Court's own precedent (*e.g.*, *Stormans*) strict scrutiny is triggered only by disparate treatment of *analogous* conduct.

In *Dayton Valley*, this Court considered a Nevada Directive that set a 50-person cap on both indoor and outdoor worship services, but imposed a 50% capacity limitation a wide range of secular activities including casinos, bowling alleys, restaurants, arcades, gyms, fitness facilities, non-retail outdoor venues, breweries, distilleries, and wineries as well as retail stores. *Dayton Valley*, 2020 WL 7350247, at *1-*2, *4. This Directive permitted thousands of people to congregate for hours around gaming tables and slot machines imbibing inebriants in casinos, but allowed only 50 people to gather for a worship service. *Id.* Noting that "the Directive treats numerous secular activities and entities significantly better than religious worship services," this Court held that the Directive's

restrictions "create the same 'disparate treatment' of religion" as the New York restrictions in *Roman Catholic Diocese*, and therefore they trigger strict scrutiny. *Id.* at *4 (emphasis added).

The district court felt obliged to apply strict scrutiny here because one of the "numerous secular activities" that *Dayton Valley* noted were treated better than worship services in Nevada's Directive was "retail businesses." *Dayton Valley*, 2020 WL 7350247, at *4 (cited in ER 16). The *Dayton Valley* Court, however, listed several other secular entities in addition to "retail businesses" that Nevada also treated better than worship services—"[c]asinos, bowling alleys . . . restaurants, [and] arcades," *id.*, as well as "non-retail outdoor venues, gyms, fitness facilities, restaurants, breweries, distilleries [and] wineries," *id.* at *1—all of which California treats the same or more stringently because they pose the same or greater transmission risk than do worship services. *See* ER 379-84. Moreover, nothing in *Dayton Valley* suggests that the Court applied strict scrutiny based on Nevada's lesser restriction for retail alone, which, as explained above, poses less transmission risk than worship services, and is subject to a host of regulations not feasible or applicable to houses of worship. Indeed, this Court could not have done so because under the Supreme Court's decision in *Lukumi* and this Court's decision in *Stormans*, strict scrutiny may be applied to a regulation of religious conduct only due to more favorable treatment of "analogous" or "comparable"

secular conduct. *Lukumi*, 508 U.S. at 531-32, 546; *Stormans*, 794 F.3d at 1079. As this Court has no authority to overrule circuit precedent, much less Supreme Court precedent, its decision in *Dayton Valley* should not be interpreted as imposing strict scrutiny on conduct that is *not* comparable in relevant terms, especially in the absence of any clear statement to that effect by the panel.

II. IN ANY EVENT, THE DISTRICT COURT CORRECTLY FOUND THAT CALIFORNIA'S CAREFULLY CALIBRATED RESTRICTIONS ON INDOOR WORSHIP SERVICES LIKELY SATISFY STRICT SCRUTINY.

Even if the Blueprint and Regional Stay-at-Home orders are subject to strict scrutiny, Plaintiffs are still unlikely to succeed because, as the district court correctly found, the State's restrictions on worship services are narrowly tailored to serve its compelling interest in combatting the spread of COVID-19.

A. California Has a Compelling Interest in Curbing Community Spread of COVID-19.

As the district court found, California's restrictions on worship services serve a compelling interest. ER 16-17. The restrictions seek to reduce community spread of COVID-19 in order to "decrease death and disability in our community, especially among those vulnerable populations . . . , and ensure that critical infrastructure, particularly health care facilities, are not overwhelmed." SER 700. As the Supreme Court noted, "[s]temming the spread of COVID–19 is unquestionably a compelling interest." *Roman Catholic Diocese*, 2020 WL 6948354, at *2.

Although Plaintiffs abandon their contention below that the State lacks any rational interest in reducing community spread, they offer up a new objection: that the State lacks a compelling interest in slowing the spread of COVID-19 because of the "radically underinclusive" web of exemptions for secular businesses. OB 53-54. California, however, does not "exempt[]" any activity or sector posing a risk of spreading COVID-19. To the contrary it imposes statewide requirements such as face coverings and physical distancing that apply to all activities, and the Blueprint allows indoor activities only "with modifications"—that is, subject to the industry-specific guidance designed to reduce transmission risk. ER 379-84. It is true that the Blueprint allows many activities to operate indoors without any capacity limitations, but Plaintiffs are unable to point to any evidence in the record suggesting that capacity limitations are needed in addition to statewide requirements and industry-specific guidance to reduce the transmission risk of these activities to an adequate level. Thus, they have plainly failed to show any likelihood of succeeding on their underinclusiveness argument.[17]

[17] Plaintiffs also assert that the 25,000 California deaths somehow undermine any claim of a compelling interest in curbing COVID's spread. OB 54. This is empty—and somewhat ghoulish—rhetoric. It also contradicts Plaintiffs' attempts to downplay the risks of COVID-19 and acknowledgment that California has 11th lowest fatality rate in the nation. OB 42-43. Indeed, preventing California from imposing COVID-19 restrictions that have been working would be "like throwing away your umbrella in a rainstorm because you are not getting wet." *Shelby County v. Holder*, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting) (cited in *South Bay*, 2020 WL 6081733, at *1).

Citing an unpublished state trial court order, Plaintiffs also assert that California lacks a compelling interest in curbing the spread of COVID-19 because it has not "engaged in a meaningful cost-benefit analysis" required under state law. OB 54-55. In fact, as the Court of Appeal recognized in staying that order, *see* SER 2-11, there is no such requirement. Further, even if state law imposed a duty to conduct such an analysis, the Eleventh Amendment would bar Plaintiffs from enforcing that duty against the State in federal court. *See Pennhurst*, 465 U.S. at 125-25. Nor is there any reason such a state-law duty would affect application of federal constitutional law. And Plaintiffs have presented no evidence that the costs of measures curbing the spread of the world's deadliest infectious disease outweigh the benefits, especially in light of the unprecedented surge in infections, hospitalizations, and deaths. *See generally* ER 1647.[18]

[18] In asserting that the costs of curbing the COVID-19 epidemic outweigh its benefits, Plaintiffs appear to be advocating the "Focused Protection" advocated in the declarations they withdrew. Plaintiffs, however, deny advocating this approach, *see* OB 28 n.4— no doubt because the evidence in the record shows it is "'NOT based in science,' 'ignores sound public health expertise,' and 'preys on a frustrated populace.'" SER 1666-68; *see also* SER 965-68, 984-86, 1727.

B. The State's COVID-19 Restrictions Are Narrowly Tailored to Its Interest in Curbing the Spread of the Disease.

1. California's Restrictions on Worship Services Are Carefully Calibrated to the Transmission Risk They Pose, Permit Alternatives That Pose Less Risk, and Were Adopted After Trying Less Restrictive Alternatives.

As the district court recognized, ER 17, narrow tailoring requires that a law restrict no more than necessary to advance the government's compelling interest, and that the government "seriously undertook to address the problem with the least intrusive tools readily available to it." *McCullen v. Coakley*, 573 U.S. 464, 4949 (2014); *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981). Although this is a demanding standard, it is not impossible to satisfy, *see Williams-Yulee v. Fla. Bar.*, 575 U.S. 433, 449 (2015), and the district court correctly found the standard satisfied because "California has carefully designed the different [restrictions] it imposes" to match its goal of reducing community spread." ER 22.

As explained above, the restrictions imposed by California's Blueprint are based on the transmission risk posed by the activities in question, assessed using several objective criteria. ER 361-62. These criteria, and by extension the Blueprint, focus on the "specific mechanism of COVID-19 transmission: viral droplets which travel through the air from person to person." *Harvest Rock*, 2020 WL 7639584, at *7; *see also* SER 706-07, 958-61. Moreover, the resulting

restrictions are proportional to the risk. Activities with lower risk profiles such as retail are permitted to operate indoors subject to the limitations imposed by statewide requirement and industry-wide guidance. ER 21-22. High risk activities such as worship services, protests, and college lectures are not permitted to operate indoors in Tier 1 counties where COVID-19 is widespread, but they are allowed to do so subject to capacity limitations and caps in other tiers. *Id*; ER 381. Still other activities with even higher risk profiles such as wineries, family entertainment centers, cardrooms, and concerts are not permitted indoors until Tier 3 or not all. ER 21-22; ER 382-84. Thus, as the district court in another case observed, the Blueprint's restrictions are "based on the specific mechanism of Covid-19 infection with sliding levels of restriction based on scientific likelihood of viral spread in any given scenario." *Harvest Rock*, 2020 WL 7639584, at *9.

Moreover, to avoid restricting worship services more than is needed to combat the spread of COVID-19, California has made sure to leave open alternatives that do not pose the same, heightened transmission risk of entirely unrestricted indoor worship services. Thus, since the beginning of the pandemic, California has treated clergy as critical infrastructure workers and allowed them to conduct worship services through on-line streaming and drive-in services, which do not involve any physical interaction and thus pose little or no transmission risk. *See Cross Culture*, 445 F. Supp. 3d at 766 n.2. Additionally, in June, based on

evidence that transmission risk is substantially lower outside, the State permitted outdoor worship services to be conducted without any limit on the number of persons attending. SER 703.

In addition, the State has continuously fine-tuned its restrictions on indoor worship services in light of changing circumstances and tried to employ less restrictive alternatives. For example, in May, the State issued guidance for conducting worship services and permitted services indoors, subject to that statewide guidance such as distancing and masking, under an attendance limitation of the lesser of 25 percent capacity or 100 persons total. SER 703. When infections resurged in July, the State tightened restrictions in some areas, prohibiting indoor worship services in counties with elevated infection rates. SER 703-06. In late August, as infections receded, the State relaxed these restrictions by adopting the Blueprint, which takes a more nuanced and lenient approach, barring indoor worship services in Tier 1 counties, but permitting indoor worship in in Tiers 2 through 4 subject to decreasing attendance limits. ER 381. Thus, as the district court found, California has not only considered less restrictive alternatives, it has already tried them and only abandoned them because they proved "insufficient to prevent outbreaks at houses of worship in San Diego County and the Southern California Region." ER 24; *see also* SER 712-13, 968-75, 1659-68 (testimony of Drs. Watt, Rutherford, and Stoto). Moreover, "Plaintiffs

have not shown that a lesser restriction—for example, allowing indoor worship relying only on mask wearing, social distancing, and sanitization measures—would have achieved California's compelling interest in curbing the community spread of the virus." ER 23-24; *see also* SER 690-96, 712-13, 969, 973-74 (explaining they would not).

Plaintiffs largely ignore the district court's analysis and make no attempt to point to any less restrictive alternative that California has not tried or considered. Instead, they dismiss the district court's finding as "absurd on its face," OB 56, and point to a December 19, 2020 order from Los Angeles County supposedly lifting its restrictions on indoor worship service, OB 57; ER 87-104. However, Plaintiffs neglect to inform the Court that on December 29—two days before they filed their Opening Brief—Los Angeles County issued a revised order clarifying that its directives align with and do not supersede the State's, including the restrictions on worship services. State Defs.' MJN Ex. 1. In any event, nothing in LA County's December 19 order purported to make a public health-based determination that indoor worship is safe so long as physical distancing, mask-wearing, and other precautions are taken. Rather, the December 19 order made clear that it was solely based solely on the County's conclusion—which, as shown above, is mistaken—that *Roman Catholic Diocese* and other authorities required it to allow indoor worship services. Thus, nothing in the LA County Order or Plaintiffs' brief

undermines the district court's conclusion that California carefully designed its restrictions to match its goal of reducing community spread and considered less restrictive alternatives but was forced by the spread of COVID-19 to reject them as inadequate.

2. California's Restrictions Are Not Underinclusive.

Recycling one of their compelling interest arguments, Plaintiffs contend that the State's COVID-19 restrictions are not narrowly tailored because they "leave unprohibited a vast amount of damage" permitted by "exemptions" for various secular activities. OB 63. As shown above, there are in fact no exemptions, and while Plaintiffs note a number of activities which are permitted to operate subject to statewide requirements and industry-specific requirements without additional restrictions, they ignore the State's unrebutted expert testimony concerning the relatively low transmission risk of each of the examples raised below. *See* SER 975-78 (retail); SER 978-79 (personal care services); SER 979-80 (factories, warehouses, and film production); SER 981 (transportation);[19] SER 982 (homeless shelters and drop-in centers); SER 980-82 (other of Plaintiffs' proposed comparators).[20] Thus, the State does not permit any secular activity threating to

[19] The federal government has claimed ultimate authority to COVID-related restrictions on airports. State Defs.' MJN Exs. 12-14.

[20] Protests and "office-based businesses," OB 63, are subject to the same or greater restrictions as worship services, ER 383, 1227, 1251.

spread COVID-19 to a "similar or greater degree" as worship services. *See Lukumi*, 508 U.S. at 543 (defining "underinclusive" restrictions as those that "fail to prohibit nonreligious conduct that endangers [the State's interest] in a similar or greater degree than [religious conduct] does.").

Plaintiffs also assert that "there have been COVID-19 outbreaks tied for to virtually every industry," OB 70, but they do not dispute the district court's finding that on remand they failed to present any evidence of "known outbreaks associated with jobsites" or "an outbreak tied to retail, grocery shopping, laundromats, or transportation hubs." ER 20, 21. Moreover, the only evidence that they cite in support of their assertion that there have been outbreaks in virtually every industry in California is one outbreak at a factory that had violated COVID-19 protocols, ER 1138 n.32, and a photograph of a clothing factory taken from before the pandemic, ER 1138. Plaintiff also cite to a Los Angeles Superior Court order, OB 70, but neglected to inform this Court that that ruling was stayed on appeal. *County of Los Angeles v. Superior Court*, 2020 WL 4876658 (Cal. Ct. App. Aug. 15, 2020).

3. Plaintiffs' Purported Safety Record Does Not Immunize Them from Restrictions Supported by Outbreaks in Other Churches in the Region.

Plaintiffs assert that any restrictions on indoor worship services at their church are "*per se* overinclusive" because, they claim, it has a "perfect record"

with respect to COVID-19. OB 57. That claim is difficult if not impossible to verify, especially in light of the virus's asymptomatic spread, because Plaintiffs do not conduct routine testing, unlike, say, a film production set or profession football team, which is required to. But even if credited, the assertion does not help Plaintiffs because they claim to have been following the current restriction and their success up to this point has no bearing on whether they will be able to hold services safely without doing so. Even more fundamentally, they do not dispute that the precautions that they plan to take have "proved insufficient to prevent outbreaks at houses or worship in the San Diego County and the Southern California regions," ER 24; *see also* SER 318-372 (documenting instances of outbreaks including in churches nearby Plaintiffs' church). And as the district court recognized the State is not required to wait until an outbreak occurs in every house of worship before imposing restrictions designed to reduce the risk of spreading a deadly infectious disease like COVID-19, ER 24, especially as only a small number of outbreaks are needed to spark a massive increase in transmissions, SER 690-96, 951-52.

4. *Roman Catholic Diocese* Does Not Save Plaintiffs' Strict Scrutiny Arguments.

Unable to dispute the district court's analysis or reconcile its objections with the record created in part by its failure to present any significant evidence on remand, Plaintiffs are forced once again to fall back on *Roman Catholic Diocese*,

asserting that because the Supreme Court rejected the scientific arguments offered by New York in that case, the evidence presented by California in this case must be disregarded. OB 59-60. Plaintiffs, however, are unable to point to anything in in *Roman Catholic Diocese* transforming the strict scrutiny analysis into such a rigid legal rule.

Indeed, the issue of strict scrutiny was not litigated in *Roman Catholic Diocese*. New York did not present any evidence demonstrating that its restrictions satisfied strict scrutiny nor did it even argue that they did so. In fact, New York's briefs before the Supreme Court did not mention either "narrow tailoring" or "less restrictive alternative," let alone point to any evidence demonstrating those standards were met.[21] Thus, when the Supreme Court found that New York could have adopted "many other less restrictive rules . . . to minimize the risk to those attending religious services," *Roman Catholic Diocese*, 141 S.Ct. at 67, it was doing so on a record without any evidence concerning these issues.[22]

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[21] *See* Opp'n to App. for Writ of Inj., *Roman Catholic Diocese*, https://www.supremecourt.gov/DocketPDF/20/20A87/161095/20201118134346148_20A87%20NY%20Opposition%20to%20Application%20for%20Injunction.pdf; *Agudath Israel*, https://www.supremecourt.gov/DocketPDF/20/20A90/161415/20201120135238857_20A90%20Respondent%20NY%20Br%20in%20Opposition.pdf.

[22] This Court in *Calvary Chapel Dayton Valley*, likewise, also did not have any scientific evidence before it demonstrating that Nevada's restrictions were

(continued…)

This case could not be more different. Here, California *has* presented copious evidence demonstrating that its restrictions are narrowly tailored and that it has considered and, indeed, tried less restrictive alternatives that have proven inadequate to curb the virus's spread, *see supra* pp. 50-51 The State's experts testified unequivocally that in areas where the virus is "widespread" (Tier 1 counties) or in regions with ICU availability less than 15% (regions under the Regional Stay-at-Home Order), indoor worship services—even with masks, distancing, and other precautions, and regardless of building size—still pose too great a risk of community spread:

- Dr. Watt described measures such as masks, distancing, screening for symptoms, and increased sanitization as "insufficient" to quell the spread in indoor gatherings such as worship services. SER 712-13; *see also* SER 690-91, 698-99, 703.

- Dr. Rutherford testified that the increased risk of community spread posed by worship services is not sufficiently mitigated by less restrictive measures such as face-coverings, distancing, or prohibiting singing and chanting. SER 968-75.

- Dr. Stoto opined that California's restrictions, including the ban on

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narrowly tailored or the least restrictive alterative. *See* 9th Cir. Dkts. 20-16169, 20-16274

indoor worship services in Tier 1 of the Blueprint and the Regional Stay-at-Home Order are "no more restrictive than required to achieve their purpose," SER 1665-68, and "proportionate to its goals" of curbing community spread of COVID-19, SER 1659-65.

- And Drs. Stoto, Rutherford, and Maldonado testified that the so-called "Focused Protection" strategy circulating on the fringes of the scientific community (indeed, one which Plaintiffs have disavowed) would not curb COVID's spread and would lead to needless death and suffering. SER 965-68, 1667-69, 1727.

No such evidence was before the Supreme Court in *Roman Catholic Diocese*, and none of it has been rebutted by Plaintiffs here.

This case is also different from *Roman Catholic Diocese* because, while the Supreme Court found—again, in the *absence* of any evidence to the contrary—it "hard to see how" the highly restrictive 10-person and 25-person caps in that case "can be regarded as 'narrowly tailored,'" 114 S.Ct. at 67, here California has shown exactly how. As demonstrated above, California has shown that the restrictions are based on an assessment of transmission risk and "carefully designed . . . to match its goal of reducing community spread." ER 22. California also has shown that it permits alternatives such as on-line and drive-in services that do not present a transmission risk. And, most importantly of all, it has shown that

it tried less restrictive alternatives, including the one suggested by the Court—tying attendance limits to the size of a church or synagogue (*Roman Catholic Diocese*, 114 S.Ct. at 67)—but found those alternatives insufficient when COVID-19 is widespread in the community or, as now, the disease is surging. SER 712-13, 968-75, 1659-68. Thus, *Roman Catholic Diocese* did not face anything remotely resembling the evidence here, and it should not be interpreted to foreclose the district court's finding of narrow tailoring, which was based on that evidence.

III. PLAINTIFFS' CHALLENGE TO THE INDOOR SINGING AND CHANTING BAN IS UNLIKELY TO SUCCEED ON THE MERITS.

The State's restriction on indoor singing and chanting applies across-the-board and is plainly neutral and generally applicable because it applies across-the-board: "Singing, chanting, shouting, cheering, playing of wind instruments and similar activities are not permitted in indoor gatherings." ER 389. It is also rational because singing increases exhalations, which may include droplets containing the COVID-19 virus and thus increases the risk of spreading the disease. SER 693-96, 970-73. Pointing to one study, Plaintiffs deny that a restriction is necessary. OB 71. The State's expert, however, cites *eight* studies and concludes that there is a "consensus among public health officials . . . that singing, chanting, shouting and similar vocalization substantially increases the risk of both droplet and aerosol transmission" of the COVID-19 virus. SER 964, 970-72. Moreover, it is certainly rational to follow this expert testimony rather than

Plaintiffs' interpretation of a single study, as many courts have already done. *See, e.g, Harvest Rock*, 2020 WL 7639584, at *6; *County of L.A.*, 2020 WL 4876658, at *2; *Elim Romanian Pentecostal Church v. Pritzker*, 962 F.3d 341, 346 (7th Cir. 2020).

Plaintiffs also assert that the indoor singing and chanting is not neutral because an individual may speak loudly or shout on a television studio set or in the locker room of a professional sports team. OB 49-50. There is, however, an obvious difference between one or several individuals shouting and a group of people at a gathering singing and chanting in unison, which undisputed evidence showed is not happening in the entertainment industry, SER 449-50, 457-58, which in any event, like professional sports, is subject to extensive testing. ER 422-26; SER 448.

Nothing in *Roman Catholic Diocese* suggests otherwise. Indeed, as Justice Gorsuch appeared to acknowledge in his concurring opinion, the Constitution allows a State to require churches to take reasonable precautions, including "forgoing singing." *Roman Catholic Diocese*, 141 S.Ct. at 69 (Gorsuch, J., concurring).

IV. IN LIGHT OF THE DIRE CRISIS CAUSED BY THE CURRENT SURGE, THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH DECISIVELY AGAINST AN INJUNCTION.

The Court should affirm the district court's ruling for a reason separate and independent from the merits: the public interest and, in turn, the balance of equities weigh strongly against the injunction sought. The State agrees that Plaintiffs are harmed by being prevented from participating in indoor worship services, *Roman Catholic Diocese*, 2020 WL 6948354, at *3, but "the right to practice religion does not include liberty to expose the community . . . to communicable disease," *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944). Thus, they are not entitled to equitable relief disrupting the State's efforts to combat COVID-19 especially as "emergency rooms are having to turn patients away, and the hospitals are being quickly overwhelmed with the most recent surge of patients infected with COVID-19." ER 25.

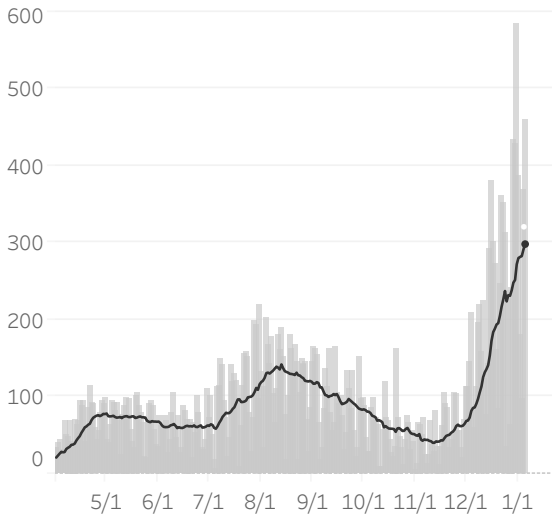
The State is at a critical moment. As the chart below highlights, daily cases are skyrocketing and in the last month have quadrupled to a 14-day daily average of more than 37,000:[23]

[23] These charts are taken from https://covid19.ca.gov/state-dashboard (Jan. 6, 2021).

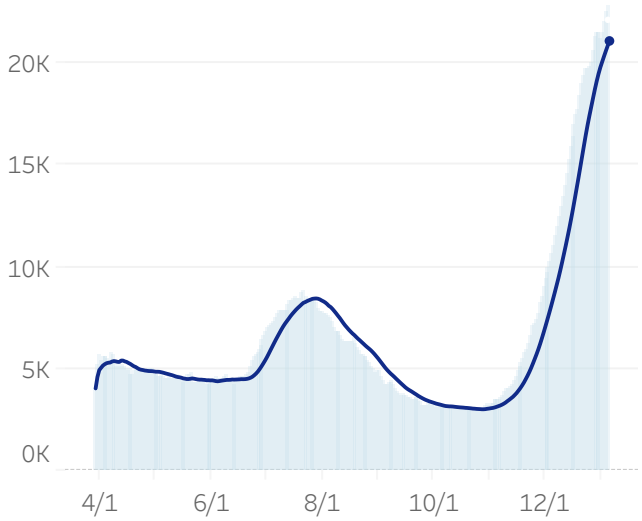
Daily New COVID-19 Cases

This increase been accompanied by skyrocketing hospitalizations and deaths, which also have quadrupled in the last month and set a grim record of 585 deaths in a single day on New Year's Eve:

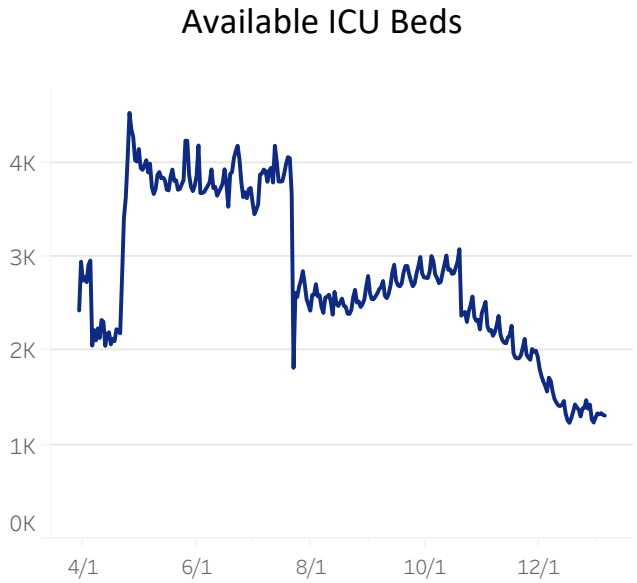
Daily COVID-19 Deaths



COVID-19 Hospitalized Patients



At the same time, ICU availability has shrunk to less than 1% statewide and 0% in Southern California, where Plaintiffs' church is located:[24]



Consequently, the State is losing the ability to treat those who fall seriously ill from COVID—as well as other serious injuries or illnesses—and the already record-breaking deaths may increase even further.

The Court should not exacerbate these dire circumstances by enjoining restrictions combatting the spread of COVID-19, especially in the sweeping manner Plaintiffs request, which would permit indoor worship services to commence immediately in *unlimited* numbers with singing and chanting. *See* OB 7-9, 66. Plaintiffs do not dispute that congregate activities such as worship services pose an especially great transmission risk, ER 19; SER 693-96, 973-75, or

[24] *See* https://covid19.ca.gov/safer-economy/ (last accessed Jan. 6, 2021).

that worship services can and have become "super-spreader" events resulting in hundreds of infections including in churches nearby to Plaintiffs', ER 19; SER 318-372, 951-52, 974-75. Nor do they challenge the district court's finding that the injunction they seek would greatly increase the risk of "super-spreader" events, further fueling the already accelerating spread of COVID-19, and overwhelming the State's public health system at the moment it is most taxed. ER 25-26; *see also Harvest Rock*, 2020 WL 7639584, at *11 ("If Plaintiffs were to immediately resume numerically uncapped indoor worship, it is likely that this indoor worship—like any indoor activity involving members of multiple households—would contribute to the spread of Covid-19, straining already-stressed public health infrastructure and filling already-packed ICUs.").

Instead, Plaintiffs dismiss arguments about the severity of the pandemic as "irrelevant" under *Roman Catholic Diocese*. ER 76. That is wrong: the Supreme Court imposed an injunction in that case because New York had "not shown that public health would be imperiled." 141 S. Ct. at 68. Here, California has, and Plaintiffs do not dispute that it has. As this Court previously observed, the Bill of Rights is not "a suicide pact," and in a public health crisis a court must temper its "doctrinaire logic with a little practical wisdom." *South Bay*, 959 F.3d at 939.

CONCLUSION

The Court should affirm the district court's order and deny the request for an injunction pending appeal.

Dated: January 7, 2021

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
PAUL STEIN
Supervising Deputy Attorney General
LISA J. PLANK
Deputy Attorney General

s/ Todd Grabarsky
TODD GRABARSKY
Deputy Attorney General
Attorneys for Defendants-Appellees Governor Gavin Newsom, Attorney General Xavier Becerra, and Public Health Officer Dr. Sonia Angell

SA2020301266

STATEMENT OF RELATED CASES

The following cases pending before this Court are related to the present matter because they also involve challenges to the State's COVID-19-related guidelines for religious worship services: *Gish v. Newsom*, 9th Cir. Nos. 20-55445, 20-56324; *Harvest Rock Church v. Newsom*, 9th Cir. Nos. 20-56357, 20-55907.

Dated: January 7, 2021

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
PAUL STEIN
Supervising Deputy Attorney General
LISA J. PLANK
Deputy Attorney General

s/ Todd Grabarsky
TODD GRABARSKY
Deputy Attorney General
Attorneys for Defendants-Appellees Governor Gavin Newsom, Attorney General Xavier Becerra, and Public Health Officer Dr. Sonia Angell

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,986 words excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Federal Rules of Appellate Procedure 32(a)(5) and (6).

Dated: January 7, 2021

/s/ Todd Grabarsky
TODD GRABARSKY

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 7, 2021 *<u>/s/ Todd Grabarsky</u>*
TODD GRABARSKY