Docket No. 20-56358

In the

United States Court of Appeals

for the

Ninth Circuit

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

v.

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

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

CORRECTED APPELLANTS' OPENING BRIEF AND RENEWED MOTION FOR AN INJUNCTION PENDING APPEAL

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It is time—past time—to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

Roman Catholic Diocese of Brooklyn v. Cuomo, 141 S. Ct. 63, 72 (2020) (Gorsuch, J., concurring)

INTRODUCTION

In *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) ("*Brooklyn Diocese I*"), the United States Supreme Court issued an extraordinary writ enjoining enforcement of New York Governor Andrew Cuomo's draconian 10- and 25-person occupancy caps on houses of worship under the "Red" and "Orange" zones, respectively, of his COVID-19-related "Cluster Action Initiative," encompassing most of Brooklyn and immediately surrounding areas at that time.

The Supreme Court found these restrictions neither neutral nor narrowly tailored under the strict scrutiny mandated by the Free Exercise Clause, given that numerous secular businesses were not so restricted. *Id.* at 66–67. The gist of the Court's seminal decision is that "even in a pandemic, the Constitution cannot be put away and forgotten. The restrictions at issue here, by effectively barring many from attending

religious services, strike at the very heart of the First Amendment's guarantee of religious liberty." *Id.* at 68. The Supreme Court has thus admonished the lower courts that it is *especially* during a pandemic—not *despite* a pandemic—that courts should stand strong in protecting constitutional rights. For as the Court noted in the aftermath of the Civil War, "it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation." *Ex Parte Milligan*, 71 U.S. 2, 126 (1866).

The decision in *Brooklyn Diocese I* also marks the end of the unaccountable rise of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) as a "towering authority that overshadows the Constitution during a pandemic," when in fact it was only a "modest decision" not involving an enumerated constitutional right or the modern tier analysis applicable to State action impinging on the free exercise of religion. *Brooklyn Diocese I*, 141 S. Ct. at 71 (Gorsuch, J., concurring). *Jacobson* does not rate even a mention in the majority opinion. Quite simply, "*Jacobson* deference" is no longer the standard in these cases and never should have been.

Eight days after its decision in *Brooklyn Diocese I*, the Supreme Court issued an order in *Harvest Rock Church v. Newsom*, 592 U.S. ___, 2020 WL 7061630 (2020) ("*Harvest Rock II*"), granting certiorari on three questions challenging the *entire scheme* of California's even more draconian restrictions on worship, vacating the district court's denial of an injunction prohibiting the scheme's enforcement, and instructing the district court to reconsider its decision in light of *Brooklyn Diocese I*.

In applying *Brooklyn Diocese I* to other challenges to COVID-19 pandemic restrictions on religion that have come before it, the Supreme Court has been very consistent: *every application* for injunctive relief is resulting in the vacatur of lower court opinions denying injunctive relief. *See, e.g.*, *Harvest Rock II*, 2020 WL 7061630 (9th Circuit/California); *Robinson v. Murphy*, 592 U.S. ___, 2020 WL 7346601 (2020) (3d Circuit/ New Jersey); *High Plains Harvest Church v. Polis*, 592 U.S. ___, 2020 WL 7345850 (2020) (10th Circuit/Colorado).

Responding to the Supreme Court's loud and clear signal, on December 8 this Court vacated the District Court's denial of a preliminary injunction to appellants South Bay United Pentecostal Church and Bishop Arthur Hodges III's (collectively "South Bay") and

instructed it to reconsider its denial in light of *Brooklyn Diocese I. S. Bay United Pentecostal Church v. Newsom*, 981 F.3d 765 (9th Cir. 2020) ("*S. Bay IV*").

Another panel of this Court has since found that *Brooklyn Diocese I* "arguably represented a seismic shift in Free Exercise law, and *compels the result* in this case." *Calvary Chapel Dayton Valley v. Sisolak*, __ F.3d __, 2020 WL 7350247, *3 (9th Cir. Dec. 15, 2020) ("*Calvary Chapel II*") (emphasis added). Accordingly, that panel preliminarily enjoined enforcement of Nevada's 50-person occupancy cap on churches because it was "less favorable" than the capacity limit afforded to numerous secular businesses not subjected to any hard cap on the number of customers or clients. *Id.* at *1, 4; *see also Calvary Chapel Lone Mountain v. Sisolak*, __ Fed. Appx.__, 2020 WL 7364797 (9th Cir. Dec. 15, 2020).

Likewise adhering to *Brooklyn Diocese I*, a California Superior Court held that California's "restrictions are arguably harsher than any other set of restrictions considered by the courts in all of the cases cited by the parties in this action," and enjoined them as applied to a Catholic priest and the five churches he oversees in four different counties,

including Los Angeles County. *Burfitt v. Newsom*, No. BCV-20-102267, *2 (Cal. Super. Dec. 10, 2020) (2ER115–18).

Following suit, Los Angeles County itself modified its health order to "align with recent Supreme Court rulings for places of worship"—thus allowing churches to hold services indoors with no numerical or percentage caps, only social distancing between the members of separate households. 2ER87–104.

Only days ago, the Second Circuit also recognized the "seismic shift." Following the Supreme Court's writ of injunction pending appeal and remand for reconsideration of challenges to Governor Cuomo's COVID-19 regime by the Diocese of Brooklyn and Agudath Israel in *Brooklyn Diocese I*, the Second Circuit decided the pending appeal on the merits, reversed the district court's denial of a preliminary injunction, directed the district court to issue a preliminary injunction prohibiting enforcement of the 10- and 25-person caps on houses of worship, and remanded for reconsideration of Agudath Israel's additional challenge to the 25% and 33% capacity limits under the "Cluster Action Initiative." *Agudath Israel of Am. v. Cuomo,* __ F.3d __, 2020 WL 7691715, at *11 (2d Cir. Dec. 28, 2020) ("*Brooklyn Diocese II*").

In *Brooklyn Diocese II*, the Second Circuit definitely dispelled any vestige of "*Jacobson* deference": "But we grant *no special deference* to the executive when the exercise of emergency powers infringes on constitutional rights. That is precisely what the three-tiered framework for analyzing constitutional violations is for, and courts may not defer to the Governor simply because he is addressing a matter involving science or public health." *Id.* at *10 (emphasis added).

Nevertheless, on the post-*Brooklyn Diocese I* remand by this Court, the District Court failed to detect even a tremor from above affecting its prior errant decision denying South Bay injunctive relief from California's *total ban* on worship in churches in the "Purple Tier" of Governor Newsom's "Blueprint for a Safer Economy" (Blueprint) and a separate total ban under the State's "Regional Stay Home Order" (Regional Order). 1ER2–26; *S. Bay United Pentecostal Church v. Newsom*, No. 20-CV-00865-BAS-AHG, 2020 WL 7488974 (S.D. Cal. Dec. 21, 2020) ("*S. Bay V*").

Under the Blueprint, divine worship in a church is now totally banned for 99.6% of the population of the State of California, now in the Purple Zone, and for 98.3% of the population under the Regional Order.

Yet the District Court has defied the controlling decision in *Brooklyn Diocese I* and rendered vain this Court's directive to reconsider its erroneous decision, instead audaciously reissuing essentially the same decision. Worse, making a mockery of the strict scrutiny it finally admits is required, the District Court found to be "narrowly tailored" a total ban on indoor worship throughout the State of California. This despite the fact that innumerable secular businesses are allowed to operate at 100% capacity or other substantial capacities under both the Blueprint—which the District Court's decision strangely ignores—and the Regional Order.

Despite *Brooklyn Diocese I,* the District Court failed to see anything amiss with the utterly unprecedented spectacle of a statewide ban on worship in church on Christmas Day, following a Supreme Court decision holding that even a 10- or 25-person cap on houses of worship *in a limited region of New York State* was intolerable under the Free Exercise clause.

As the District Court has refused to recognize the "seismic shift" another panel of this Court has already noted, it should be compelled to do so by this Court. Therefore, South Bay respectfully requests that this Court reverse the District Court and direct it to enter an injunction

preventing California and San Diego from enforcing, trying to enforce, threatening to enforce, or otherwise requiring compliance with:

1. any industry-specific standards for Places of Worship that do not apply with equal or greater force to other industries, including specifically:
    a. no hard occupancy cap of 100 or 200 people (red and orange tiers respectively),
    b. no percentage cap of 25% or 50% of occupancy (red tier, and orange and yellow tiers),
    c. permitting only neutral requirements such as regular disinfecting, mask-wearing, and six-foot social distancing per household, as recommended by CDC guidelines;
2. any outright prohibition on indoor worship services because worshipping inside the sanctuary with the use of the altar and baptistery is a necessary part of Pentecostal worship services and restricting it is not narrowly tailored; and
3. any outright prohibition on singing or chanting during indoor worship services because singing is at the heart of Pentecostal

worship services and, in light of the church's intention to take measures to safely sing, restricting it is not narrowly tailored.

Cf. Brooklyn Diocese II, 2020 WL 7691715, at *11.

JURISDICTIONAL STATEMENT

This appeal challenges the denial of a renewed motion for a temporary restraining order or preliminary injunction filed by South Bay. The District Court exercised federal-question jurisdiction over South Bay's claims under the federal Constitution and supplemental jurisdiction over South Bay's claims under the California Constitution. 28 U.S.C. §§ 1331, 1343, 1367(a). On December 21, 2020, the District Court denied South Bay's motion for a preliminary injunction. 1ER2–26. On that same day, South Bay filed its notice of appeal. 8ER1979–80.

FACTUAL & PROCEDURAL BACKGROUND

A. California's and San Diego's Original "Stay-at-Home" Orders

On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency as a result of the threat of COVID-19. 5ER1114. Two weeks later, on March 19, 2020, Governor Newsom issued Executive Order N-33-20, which ordered all Californians "to immediately heed the

current State public health directives" by staying home or at their place of residence. 5ER1116–17, 1167–68.

Executive Order N-33-20 gave some Californians the right to leave their residence as "needed to maintain continuity of operations of the federal critical infrastructure sectors." 5ER1116–17, 1167–92. The Executive Order, which quoted a Statewide Public Health Officer Order, did not designate certain industries as essential based on the transmission risk of COVID-19 in those industries. Rather, it "identified 16 critical infrastructure sectors" that are "so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, economic security, public health or safety, or any combination thereof." 5ER1167–68. In other words, "[t]he supply chain must continue, and Californians must have access to such necessities as food, prescriptions, and health care." 5ER1168.

"Critical infrastructure" included the following:

- Gas stations
- Liquor stores / Marijuana dispensaries
- "Essential" retailers such as Best Buy, Target, Home Depot, and Walmart
- Pharmacies
- Grocery stores / Farmer's markets
- Essential offices such as Banks, investment firms, government functions
- Essential manufacturing and warehousing
- Laundromats

- Transit for essential purposes
- Childcare,
- The entertainment industries, including film studios, and
- Worship services ***via live-streaming.*** 5ER1170–92.

Thus, from the beginning California's COVID-19 pandemic regulations have targeted indoor worship for suppression, regardless of the measures taken to reduce or eliminate the risk of viral spread. Meanwhile, coffee baristas, fast-food workers, laundromat technicians, and the Hollywood movie industry have been deemed so essential to the functioning of society that their indoor operations must continue. *See* 5ER1170–92.

The inclusion of Hollywood on the "critical infrastructure" winners' list made this whole scheme constitutionally suspect from the outset because it revealed that California was not categorizing businesses solely on the basis of whether they were needed to protect health and safety. Nevertheless, South Bay decided to do its part by voluntarily adhering to these requirements—until it became obvious that there was no prospect of relief from their burden in the foreseeable future, as the current open-ended draconian restrictions on houses of worship confirm.

The County of San Diego issued orders alongside California, sometimes more restrictive than Executive Order N-33-20, but never less

so. *See* 5ER1117, 6ER1310–40. For example, San Diego even banned the drive-in worship services that California permitted—a ban the District Court here enforced. *See* 4ER821:17–22:12 (Transcript, *Abiding Place Ministries v. Wooten*, No. 3:20-cv-683-BAS (S.D. Cal. Apr. 10, 2020) (Bashant, J.)).

B. The Resilience Roadmap

By late April 2020, the coronavirus "curve" had flattened. As Governor Newsom admitted on April 27 we "have not only bent the curve in the State of California, but stabilized it." 5ER1117. Californians began anticipating the day when their constitutional liberties would be restored. Instead, on April 28, 2020, Governor Newsom announced the "Resilience Roadmap" (Roadmap). 5ER1118. The Roadmap introduced a new scheme of secular value judgments categorizing businesses by their "transmission risk" and societal "reward," permitting "low risk-high reward" industries to open. 5ER1194–1206.

Houses of worship did not make the revised winners' list of "low-risk-high reward" businesses allowed to operate under Stage 1 of the Roadmap. When asked why reopening of houses of worship had been deferred to the hazy future of Stage 3, Governor Newsom admitted that

a secular risk-reward value judgment was at work: "Yeah, we're, we're looking at the science, epidemiology, looking again at frequency, duration, time, and *looking at low risk-high reward, low risk-low reward*, looking at a series of conditions and criteria, as well as best practices from other states and nations." 5ER1121 (citing bit.ly/375aC99, at 50:36).

In other words, according to Governor Newsom, places of worship offer only a "low reward" for the risk involved. That invidiously discriminatory value judgment against religion—a dead letter after *Brooklyn Diocese I*—has been the mainspring of California's COVID-19 pandemic regulatory regime in all its variations.

On May 7, 2020, Governor Newsom also published his Roadmap online. That webpage identified the industries that could open immediately (*i.e.*, Stage 2a), those that could open in a few weeks (*i.e.*, Stage 2b), and those that could not open for several months, until Stage 3 was announced. 4ER918–21, 5ER1121, 1194–1203. For each industry that was allowed to open in Stage 2, the Roadmap also linked to industry-specific guidance with which the industry was required to comply. 5ER1121, 1205–06; *see* 3ER392–433, 449–84, 4ER757–803, 839–84 (industry guidance for manufacturing, warehousing, schools, transit,

malls, etc.). Once again, houses of worship failed to make Newsom's winners' list.

Between May 8–21, 2020, the County of San Diego issued a series of Orders of the County Health Officer. 5ER1121–22, 6ER1346–95. These promulgated the County's own "Safe Reopening Plan" for all businesses reopening in Stage 2. 5ER1121–22, 6ER1397–99.. The Order continued California's ban on all gatherings of "more than one person" except as otherwise permitted. 6ER1318. Here too houses of worship failed to make the cut.

C. Plaintiffs Bishop Hodges and South Bay Pentecostal Church

South Bay Pentecostal Church, a member of the United Pentecostal Church International, is a reflection of the Chula Vista community in San Diego County. The majority of its members are Hispanic, with the balance consisting of Filipino, Caucasian, African-American, and other ethnic groups representing a cross-section of society, from rich to poor, and people of all ages. 7ER1740, 8ER1852, 1855.

In addition to his capacities in the United Pentecostal Church International, Bishop Hodges has served as Senior Pastor and Bishop of South Bay for thirty-five years. 7ER1740, 8ER1852. South Bay's model is

the New Testament church described in the Acts of the Apostles: "And when the day of Pentecost was fully come, they were all with one accord in one place." Acts 2:1. South Bay believes that "all" being gathered in "one place" is fundamental to fulfillment of Christ's divine commission to His church. Acts 1:8. The Book of Acts, which chronicles the founding of the Church, uses the word "together" thirty-one times. This experience of worshipping together occurs *both* "*in the temple*, and breaking bread from house to house." Acts 2:46–47 (emphasis added). 8ER1854.

Accordingly, South Bay holds between three and five services each Sunday. Pre-pandemic, the average attendance at these services was between two-hundred and three-hundred congregants. South Bay's sanctuary can hold up to six-hundred people. Thus, it is normally only a third-filled or half-filled. 8ER1854.

South Bay's services begin with Bible classes spread across different ages and groups. Each class may have between ten and one-hundred participants. When these classes conclude, congregants gather together with one accord for praise and worship. Those with special needs or sickness come forward and stand around the altar, where hands are laid upon them and they are then anointed. This sacrament observes the

Scriptural charge to "let them pray over him, anointing him with oil in the name of the LORD." James 5:14. South Bay's services conclude with preaching followed by a challenge to physical action, where the congregation is challenged to approach the altar to "come believing, come praying." 8ER1854–55

South Bay's services also include baptisms. South Bay believes Scripture exhorts people to "[r]epent, and be baptized every one of you in the name of Jesus Christ for the remission of sins, and ye shall receive the gift of the Holy Ghost." Acts 2:38. South Bay believes this sacrament of "new birth" cannot be performed on one's own or at home but only by immersion in water in the house of worship whenever a candidate for baptism requests it. Because baptism is a necessary for salvation, there can be no justifiable reason for postponing it. 8ER1855.

Since California's orders prohibiting indoor religious assembly were put in place in early March, South Bay's ability to carry out its ministry has been dramatically curtailed. "Zoom Meetings" and other tele-conferencing applications are inadequate substitutes as they prohibit meeting "in the temple," and curtail a minister's ability to lay hands upon a congregant or perform a baptism. They also curtail the congregation's

ability to respond to the "altar call" that is central to their experience of faith. 8ER1855–56.

D. South Bay's Prior Litigation under the Roadmap

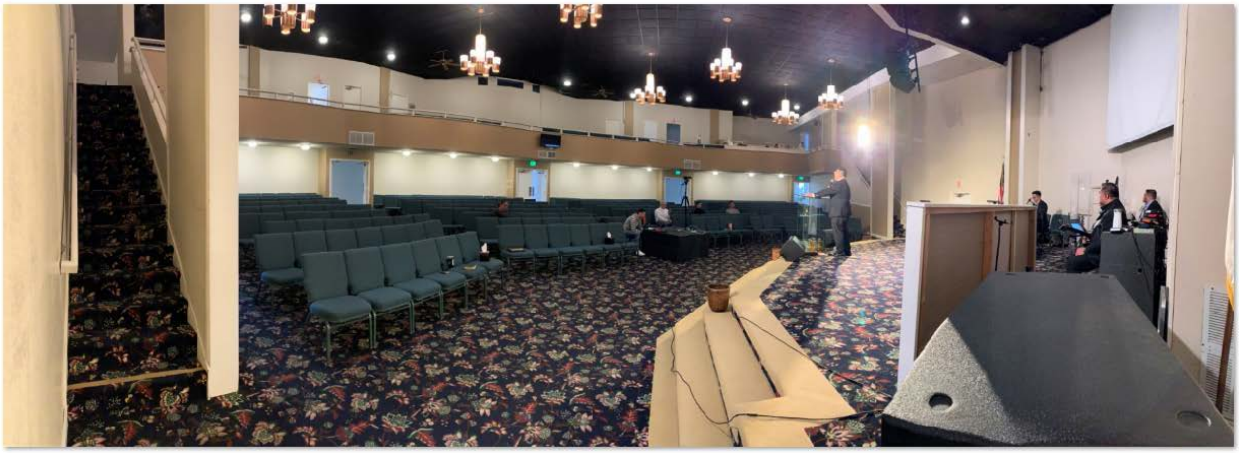
Almost as soon as various state governors began issuing executive orders intended to curb the COVID-19 pandemic, various groups began challenging them. And, just as fast, courts split on whether the orders violated constitutional rights, both under regular Free Exercise analysis and deferential *Jacobson* analysis. *Compare Abiding Place Ministries v. Wooten*, No. 3:20-cv-683-BAS (S.D. Cal. Apr. 10, 2020) (4ER819:14–23:4) (applying *Jacobson* and therefore concluding that the orders are constitutional); *with On Fire Christian Ctr., Inc. v. Fischer*, 453 F. Supp. 3d 901, 912–13 (W.D. Ky. Apr. 11, 2020) (concluding that *Jacobson* does not apply to the Free Exercise clause, and therefore orders are unconstitutional); *First Baptist Church v. Kelly*, 455 F.Supp.3d 1078, 1087 (D. Kan. Apr. 18, 2020) (same).

While South Bay did not join in these early lawsuits, by late April, when Governor Newsom announced the Roadmap, South Bay determined that there was no reason it should be relegated to Stage 3,

while Stage 2 permitted numerous indoor business activities to continue or reopen.

South Bay had previously demonstrated its ability to adopt and enforce suitable safety precautions as the largest food distributor to needy people in the South Bay region of San Diego County. Every week, South Bay distributed between three and twelve tons of food. 7ER1744, 8ER1858. South Bay believed that since it was capable of adopting and enforcing proper safety precautions for the purposes of food distribution, it was clearly capable of adopting and enforcing similar protocols for Scripturally mandated indoor worship. 8ER1858.

South Bay is able to integrate masks, gloves, screens, veils, temperature checks, and other mechanisms to inhibit the spread of COVID-19 during services. And South Bay would also require anyone who was sick or had symptoms to stay at home. In other words, South Bay can abide by any necessary COVID-19 health guidelines as readily as the many secular businesses on California's and the County's winners' lists. 8ER1857–58. South Bay's sanctuary is also large enough to accommodate the six feet of social distancing:



7ER1741, 8ER1857.

Moreover, California has already made clear that there is an implicit exception to social distancing requirements for religious sacraments that require laying on of hands and personal contact, such as baptism by immersion.[1] Further, South Bay's full immersion baptismal font uses a virus-killing ultraviolet water filtration system combined with chlorine at a level comparable to public swimming pools. 8ER1858.

Given these facts, on May 8, 2020, the day California entered into Stage 2 of the Roadmap, South Bay filed suit in the U.S. District Court for the Southern District of California. South Bay contended that permitting various industries to open in Stage 2, but relegating churches to Stage 3, was an unconstitutional violation of its right to the Free Exercise of religion. Dkt.1.[2] South Bay moved for a temporary restraining order, Dkt.3, 12, and in its motion sought to have the Southern District of California join the various other federal courts giving churches relief in May. *See, e.g., Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610 (6th Cir. May 2, 2020); *Tabernacle Baptist Church, Inc. of Nicholasville*

[1] For example, for the reception of communion in the worship services of certain Christian groups.

[2] "Dkt." citations refer to the District Court docket and only concern procedural history. *See* Adv. Comm. Note to 9th Cir. Rule 30-1.1

v. Beshear, 459 F.Supp.3d 847 (E.D. Ky. May 8, 2020); *Roberts v. Neace*, 958 F.3d 409 (6th Cir. May 9, 2020); *Berean Baptist Church v. Cooper*, 460 F.Supp.3d 651 (E.D.N.C. May 20, 2020); *First Pentecostal Church of Holly Springs v. City of Holly Springs, Mississippi*, 959 F.3d 669 (5th Cir. May 22, 2020).

On Friday, May 15, 2020, the District Court denied South Bay's motion for a TRO without a written opinion, 8ER1818–19, but only an oral opinion from the bench. 8ER1820–50. That same day, South Bay appealed to this Court, Dkt.35, and the next day filed an urgent motion for an injunction pending appeal (IPA).

On Friday, May 22, 2020, this Court's May motions panel issued its order on South Bay's motion for an IPA. *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020) ("*S. Bay I*"). In a three-page opinion, the panel majority, Circuit Judges Silverman and Nguyen, held that strict scrutiny was not required and denied the motion. *Id.*

Anticipating what is now the state of the law post-*Brooklyn Diocese I*, Circuit Judge Collins published an eighteen-page dissent in which he concluded that Governor Newsom's Roadmap was neither neutral nor

generally applicable, that it failed strict scrutiny, and that the balance of equities favored a grant of injunctive relief. *Id.* at 944–47.

On May 23, 2020, South Bay submitted an emergency application for a writ of injunction pending appellate review to Justice Elena Kagan. Apparently in response, on Monday, May 25, 2020, Governor Newsom announced changes to the Roadmap permitting individual counties to apply for 21-day licenses during which worship and political protests would be permitted so long as the gathering did not exceed 25% of "building capacity" or "the relevant area's maximum occupancy," but with a hard cap of no more than 100 persons, provided the county satisfied certain statistical benchmarks. 5ER1124–25, 6ER1209–31. Two days later, San Diego received its first 21-day license, and issued a series of orders granting permission to worship. 5ER1124, 6ER1401–45.

Subsequently, following the death of George Floyd at the hands of a police officer on May 25, 2020, mass protests erupted in cities across the country, including Los Angeles. 5ER1140, 7ER1512–26. These protests plainly violated Governor Newsom's ban on political protests exceeding 100 persons, yet neither he nor any local authority took any

action to punish them or to discourage them as they continued with ever larger numbers. 5ER1140, 7ER1528–78.

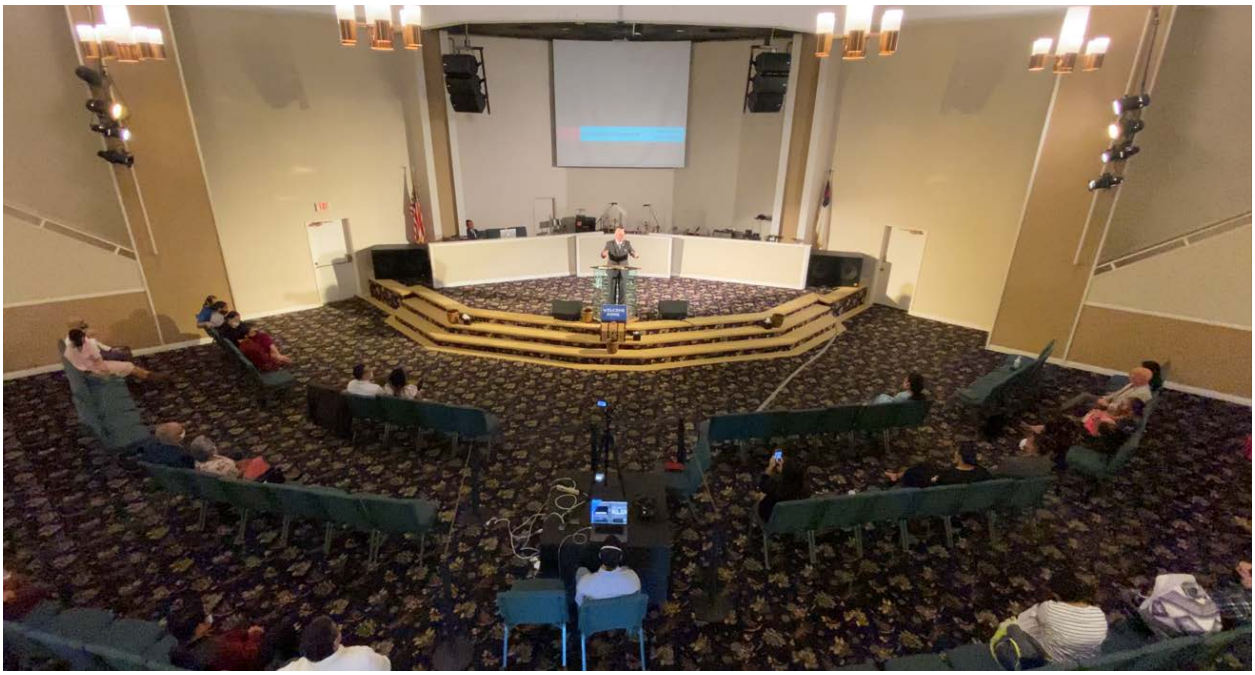
On Tuesday, May 26, 2020, Governor Newsom announced that even hair salons and barbershops could reopen (in a departure from the four-stage Roadmap). 5ER1124. Yet, on May 29, 2020, the Supreme Court, by a vote of 5-to-4, denied South Bay's emergency application for a writ of injunction. *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) ("*S. Bay II*").

Justice Roberts wrote a concurrence joined by no other Justice, in which he held that California's restrictions on worship were constitutional in light of the deference which should be given to the government in emergencies. *Id.* at 1613. Justice Kavanaugh wrote a dissenting opinion joined by Justices Thomas and Gorsuch. In another anticipation of what would become the majority opinion in *Brooklyn Diocese I*, the three Justices concluded that "California's latest safety guidelines discriminate against places of worship" because "comparable secular businesses are not subject to a 25% occupancy cap, including factories, offices, supermarkets, restaurants, retail stores, pharmacies, shopping malls, pet grooming shops, bookstores, florists, hair salons, and

cannabis dispensaries." *Id.* at 1614. "California," said the Justices, had failed to justify "distinguishing between (i) religious worship services and (ii) the litany of other secular businesses that are not subject to an occupancy cap." *Id.* at 1615.

The next day, Saturday, May 30, 2020, the George Floyd protests reached San Diego County. That day, a group of 1,000 protestors blocked the I-8 highway. This protest also violated Governor Newsom's and San Diego's 100-person cap on political protest. Illegal protests in San Diego occurred daily for at least ten days, until June 8. 7ER1528–78.

On Sunday, May 31, 2020—Pentecost Sunday—South Bay held worship services that complied with Governor Newsom's newest orders, *i.e.*, a 100-person cap. As is clear from the following images, there is ample room (especially with the balcony) for more than 100 congregants:



7ER1742. To ensure social distancing, South Bay removed every other church pew. South Bay also had to turn away congregants who wished to attend after the arbitrary cap was reached. 7ER1743.

On June 12, 2020, California modified its uniform treatment of "protests" and "worship." Under the June 12 regulations, there are no restrictions on either protest or worship, so long as they occur outdoors. 5ER1125, 6ER1233–55, 1447–68. But this did not help South Bay, which has no adequate outdoor venue and is in any event theologically bound to worship in the temple with its altar, altar calls and baptismal font. The Church's altar and baptistery are accordingly indoors. 7ER1744.

On June 12, 2020, California allowed gyms, bars, museums, hotels, and schools to reopen in San Diego, along with most Stage 3 industries, excepting nail salons, tattoo parlors, and venues such as movie theaters and concert halls. 5ER1125. Also around this date, Hollywood began taking advantage of the exceptions granted back in March. *See* 3ER497, 5ER1117.

Yet, on July 1, 2020, California only further tightened its restrictions on indoor worship with a ban on "indoor singing and chanting activities" at churches. 6ER1259.[3] The indoor singing ban does not apply to music and film production, however. Thus, Hollywood can film a simulated indoor worship service, complete with singing, for a movie or TV show, but South Bay cannot conduct a real service. Of course, this is not "science" but discriminatory absurdity.

Singing is at the very heart of Pentecostal worship services, and banning it essentially acts as a ban on those services at South Bay. 4ER906–07, 7ER1744. Singing comprises 25–50% of a typical Pentecostal worship gathering at South Bay. 4ER906. In a Pentecostal worship

[3] The document in the record is dated July 6. But the restriction was first published on July 1. *See* https://web.archive.org/web/20200702061350/https://files.covid19.ca.gov/pdf/guidance-places-of-worship.pdf.

service, everyone is instructed and expected to sing praise to God, just as everyone is instructed and expected to pray to God. In South Bay's worship services, praying, singing, and praising God is not for spectators, it is for participants. South Bay's Music & Praise teams are instructed to lead the Congregation in Singing, Praise, Worship. 4ER907.

In light of these developments, on July 10, 2020, South Bay moved this Court to order limited remand to the District Court. South Bay argued that the District Court should determine in the first instance whether California's preferential treatment of political protestors, as well as the singing ban, were constitutional. On July 29, 2020, this Court granted limited remand. Dkt.49.

E. The Second Round of Litigation Under the "Blueprint for a Safer Economy"

On August 10, 2020, having filed a Verified Second Amended Complaint, 5ER1108–65, South Bay renewed its motion for a preliminary injunction. Dkt.53. The motion included declarations from esteemed experts, including new declarations from George Delgado, M.D., of COVID Planning Tools, 3ER606–09, 4ER672–87, 5ER975–89, and declarations from Jayanta Bhattacharya, M.D., Ph.D., a Stanford University medicine professor and author of the Great Barrington

Declaration,[4] 4ER657–71, 890–904, Sean Kaufman, CPH, an infectious disease specialist formerly of the CDC, 5ER1054–61, James Lyons-Weiler, Ph.D., a Bioinformatics research scientist, 5ER1062–74, and Charles Cicchetti, Ph.D., a former economics professor, 5ER990–98.

Three weeks later, on September 1, 2020, both California and San Diego filed their respective opposition briefs, Dkt.57, 58, and California submitted expert declarations to respond to South Bay's experts. Dkt.57-2,57-3,57-4.

On September 9, 2020, South Bay submitted its reply briefs. Dkt.61. South Bay also submitted rebuttal declarations from two of its

[4] The Great Barrington Declaration is a statement authored by Stanford Professor Jayanta Bhattacharya, Harvard Professor Dr. Martin Kulldorff, and Oxford Professor Dr. Sunetra Gupta in Great Barrington, Massachusetts. The Declaration offers an alternative approach called Focused Protection, which contends that the most compassionate approach to the COVID-19 pandemic is one that spends resources to protect the most vulnerable while eschewing lockdowns that harm less vulnerable populations more than the risk of COVID-19 infection. Since writing the Declaration, Professors Bhattacharya, Kulldorff, and Gupta, have been joined by 40+ esteemed colleagues who co-signed the Declaration in early October. The Declaration has also been co-signed by 10,000+ medical and public health scientists, and 30,000+ medical practitioners. 2ER264–65, 279–87, 4ER657–68. South Bay does not contend that "Focused Protection" is necessarily the way to go, just that the theory shows that Governor Newsom's restrictions are not narrowly tailored.

experts, 4ER669–87, as well as Bishop Hodges. 4ER688–89. In its opposition brief, California—having failed to produce any evidence of viral spread at South Bay—resorted to citing a YouTube recording of a sermon at South Bay asking for prayers for two individuals infected with COVID-19. As Bishop Hodges attested in his rebuttal declaration, neither person contracted the virus at his church. One contracted it in a hospital and had not been back to worship services since February, while the other was only the relative of a congregant and not a congregant himself. 4ER689.

Bishop Hodges concluded his declaration with a statement California has never challenged: "To date, we are unaware of any instance of a coronavirus infection tied to our worship services. We have a perfect record and we are committed to acting safely in order to maintain that perfect record." 4ER689.

In the middle of this briefing, on August 28, 2020, an entirely new bureaucratic scheme: the "Blueprint for a Safer Economy," superseded the Resilience Roadmap. 2ER352–65, 3ER367–84. The Blueprint assigns counties to four color-coded "tiers" of "risk"—Purple, Red, Orange, and Yellow—depending merely on the positive rate of COVID-19 testing, now

characterized as "cases" of the virus even in the absence of any clinical illness. 2ER356–65.

	Higher Risk ⟶ Lower Risk of Community Disease Transmission***			
	Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Measure				
Adjusted Case Rate for Tier Assignment** (Rate per 100,000 population* excluding prison cases^, 7 day average with 7 day lag)	>7	4-7	1-3.9	<1
Testing Positivity^ (Excluding prison cases^, 7 day average with 7 day lag)	>8%	5-8%	2-4.9%	<2%

2ER358.

In each tier, California has imposed a labyrinthine set of regulations concerning which businesses may open, and under what conditions, conveniently placed into a color-coded chart. 3ER379–84.

SECTORS	Widespread Tier 1	Substantial Tier 2
Critical Infrastructure	Open with modifications	Open with modifications
Gatherings*	Outdoor gatherings only with modifications • Max 3 households	Indoor gatherings strongly discouraged, allowed with modifications • Max 3 households
Limited Services	Open with modifications	Open with modifications
**Outdoor Playgrounds & Outdoor Recreational Facilities ** **	Open with modifications	Open with modifications
Hair Salons & Barbershops	Open Indoors with modifications	Open indoors with modifications

3ER379.

The Blueprint does not meaningfully apply to the essential businesses originally designated by Governor Newsom as "critical infrastructure," and later as Stage 1 of the Roadmap. Under the Blueprint, they are simply "open with modifications." 3ER379. But with every other industry, the Blueprint is even more clearly an arbitrary list of winners versus losers based on secular value judgments than the Roadmap was.

Thus, in the Purple Tier, in addition to "critical infrastructure," salons and barbershops can open, as well as personal care services (tattoo, massage, etc.), hotels (even for non-essential travel), and retail at 25% capacity. In the Red Tier, numerous activities are allowed to open indoors with capacity caps, such as private gatherings (three households), retail (50%), museums / zoos, (25%), theaters / restaurants (25% / 100 people), gyms (10%). In the Orange Tier, the above industries' capacity caps are doubled and retail loses its cap entirely, while entertainment (bowling alleys, cardrooms) can open at 25%. Finally, in the Yellow Tier, capacity caps are again increased for theaters, gyms, restaurants, and entertainment centers—and bars can finally reopen. 3ER379–84.

In stark contrast, the "Industry Guidance" for churches provides the following strict limitations, depending on what tier a county is in:

Widespread Tier 1	Substantial Tier 2	Moderate Tier 3	Minimal Tier 4
Outdoor Only with modifications	Open indoors with modifications • Max 25% capacity or 100 people, whichever is fewer	Open indoors with modifications • Max 50% capacity or 200 people, whichever is fewer	Open indoors with modifications • Max 50% capacity

3ER381. Under the Blueprint, *houses of worship never regain their full capacity*, not even in the yellow tier.

The number of "cases" for purposes of the Blueprint data is assessed each Tuesday and compiled into a Blueprint Data Chart. Further, the number of "cases" per 100,000 is "adjusted" upward if the county falls below the statewide median testing volume—a "metric" known only to the state before it is announced weekly. 2ER356–65.

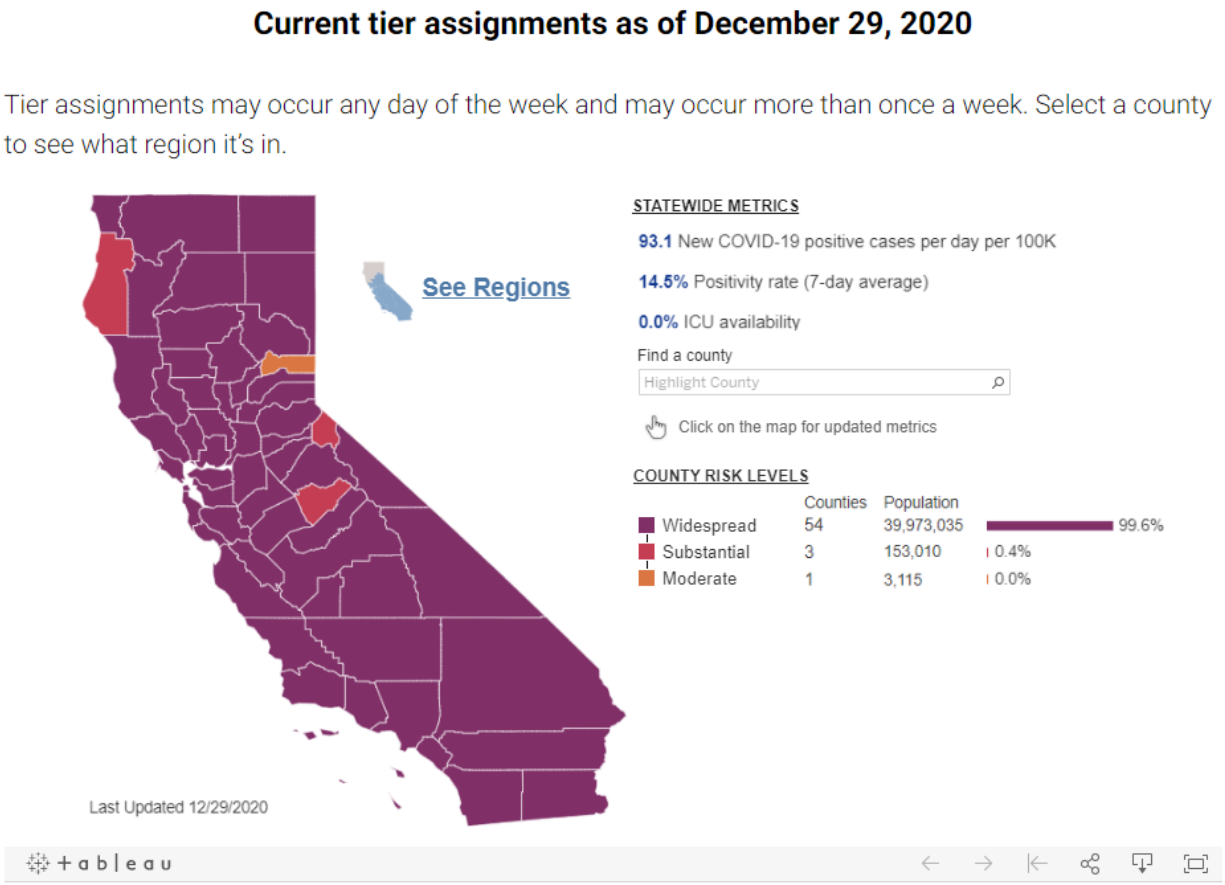
The Blueprint has no provision for a return to normal life in California. Even the Yellow Tier, in which less than one "case" per day can be found per 100,000 people, permits only 50% capacity for churches. There is no "green" tier in the Blueprint because, as Governor Newsom explained, "we don't believe that there's a green light that says just go back to the way things were or back to the pre-pandemic mindset." 2ER267, 3ER618.

During the limited remand, another church, Harvest Rock, appealed to this Court over the denial of its motion for a preliminary injunction, and a panel majority denied an injunction pending appeal. *Harvest Rock Church, Inc. v. Newsom*, 977 F.3d 728 (9th Cir. Oct. 1, 2020) ("*Harvest Rock I*"). In yet another anticipation of the "seismic shift" in *Brooklyn Diocese I*, Judge O'Scannlain dissented and found that the

Blueprint was not neutral, generally applicable or narrowly tailored. *Id.* at 731–37.

On October 15, 2020, the District Court in this case denied South Bay's renewed motion for a preliminary injunction. 3ER621–46; *S. Bay United Pentecostal Church v. Newsom*, No. 20-CV-00865-BAS-AHG, 2020 WL 6081733 (S.D. Cal. Oct. 15, 2020) ("*S. Bay III*"). The parties informed this Court of the District Court's order, and this Court ordered supplemental briefing from the parties, completed on November 13.

Meanwhile, on November 10, San Diego County announced that it had been pushed from the Red Tier into the Purple Tier of the Blueprint—meaning churches were required to close. 3ER618. Then, on November 16, Governor Newsom exercised the Blueprint's "emergency brake," which allows him to override the Blueprint and take whatever action he desires in his unfettered discretion. Governor Newsom pushed "94.1 percent of California's population" into the Purple Tier. 3ER618–19. That percentage has since grown to more than 99%. Under the Blueprint, California now looks like this:



3ER373[5]

On November 25, 2020, the Supreme Court handed down its decision in *Brooklyn Diocese I*, 141 S. Ct. 63, making it clear once and for all that strict scrutiny applies to COVID-19 pandemic regulations disparately burdening religion in comparison to favored secular businesses and activities.

[5] *See* https://covid19.ca.gov/safer-economy/.

As already noted, on December 3, the Supreme Court granted certiorari on Harvest Rock Church's challenge to the entire Blueprint scheme regulating churches, vacated the lower court orders, and remanded with instructions to reconsider their opinions. *Harvest Rock II*, 2020 WL 7061630. That same day, South Bay filed simultaneous motions for an injunction pending appeal with the District Court and this Court. Dkt.75.

On December 8, 2020, this Court denied South Bay's motion without prejudice, but also vacated the District Court's refusal of a preliminary injunction in *S. Bay III*, and remanded with instructions to reconsider that decision in light of *Brooklyn Diocese I. S. Bay IV*, 981 F.3d 765.

F. The Third Round of Litigation Under the "Regional Stay Home Order"

Following the remand in *S. Bay IV*, the parties and the District Court treated South Bay's motion for an injunction pending appeal as briefing on a renewed motion for a preliminary injunction. On December 3, however, Governor Newsom announced yet another scheme that suppresses indoor worship: the "Regional Stay Home Order" (Regional Order) which overlays the Blueprint. When triggered, the Regional Order

essentially pushes the affected region back into Stage 1 of the former Roadmap, with only "critical infrastructure" allowed to remain open. When the Regional Order expires due to better COVID-19 statistics, a county is reassigned to a tier in the Blueprint. 3ER440–43. Thus, even after the Regional Order expires, counties in the region are simply returned to the church-suppressing regime of the Blueprint.

In addition, in a departure from the "critical infrastructure" restrictions, schools are allowed to remain open, as well as non-essential retail at 20%, and grocery stores at 35%, but churches have the same Purple Tier restrictions. That order went into effect in the "Southern California Region" encompassing San Diego County on Monday, December 7, 2020. 1ER8–10, 3ER440–43. Currently, the Regional Order covers four of the State's five regions and 93.1% of its population:

[6]

On December 11, 2020, a California Superior Court granted a Catholic priest's motion for a preliminary injunction against church closures under both the Blueprint and the Regional Order, holding that *Brooklyn Diocese I* compelled it to rule in the priest's favor. *Burfitt*, No. BCV-20-102267, *3.

On December 18, 2020, after further submissions of briefs and expert declarations, the District Court heard oral argument on South

[6] *See* https://covid19.ca.gov/safer-economy/.

Bay's renewed motion for a preliminary injunction. 2ER109–10. At the hearing, the District Court declined to consider South Bay's rebuttal declarations on the grounds that they were "were filed late," when in fact they were filed timely with the reply brief. 1ER30:25–31:9. The District Court struck both South Bay's rebuttal declarations and California's surrebuttal declarations. 1ER13:1–5.

Over that weekend, Los Angeles County revised its health order to come into compliance with *Brooklyn Diocese I*, lifting all capacity and numerical caps on churches (requiring only social distancing between members of separate households). 2ER87–104.

Nevertheless, on Monday, December 21, 2020, the District Court denied South Bay's renewed motion for a preliminary injunction. 1ER2–26; *S. Bay V*, 2020 WL 7488974. Instead of following *Brooklyn Diocese I* and *Calvary Chapel II*, *as even Los Angeles County has just done*, the District Court distinguished them, holding that because "the climate in Southern California is warm year-round," California's closure of churches is not "an effective ban on religious services" and thus does not "strike at the very heart of the First Amendment's guarantee of religious liberty."

1ER22:21–23:7.[7] Further, the District Court limited its analysis to the Regional Order, ignoring the Blueprint entirely, and also failed to address San Diego County's order closing churches. *Cf.* 2ER336–44, 2ER87–104.

On the same day that the District Court issued its order denying injunctive relief, South Bay appealed to this Court, 8ER1979–80, and the next day, December 22, filed an urgent motion for an injunction pending appeal, seeking relief by Christmas.

On December 23, this Court set an expedited briefing schedule on South Bay's appeal. *S. Bay United Pentecostal Church v. Newsom*, __ F.3d __, 2020 WL 7641799 (9th Cir. Dec. 23, 2020) ("*S. Bay VI*"). That same day, the panel in Harvest Rock's new appeal issued a briefing schedule on Harvest Rock's motion for an injunction pending appeal. Judge O'Scannlain's concurrence lamented that the panel could not act faster, stating, "[a]t this point—and as we are already familiar with many of the issues presented in this case—Harvest Rock Church's claims against

[7] This conclusion is very similar to the District Court's earlier one, finding that no "fundamental rights" were being infringed upon because "[i]ndividuals can practice religion in whatever way they wish as long as they're not sitting with each other in large groups inside." 8ER1836:9–17, 1847:9–11.

California's restrictions appear strong." *Harvest Rock Church v. Newsom*, __ F.3d __, 2020 WL 7647556 (9th Cir. Dec. 23, 2020) ("*Harvest Rock III*") (O'Scannlain, J., concurring in part and dissenting in part).

The day after that, Christmas Eve, this Court denied South Bay's motion for an injunction pending appeal, stating that it was doing so "without prejudice to [South Bay] renewing the request for injunctive relief in conjunction with the merits appeal." *S. Bay United Pentecostal Church v. Newsom*, __ F.3d __, 2020 WL 7681858 (9th Cir. Dec. 24, 2020) ("*S. Bay VII*").

G. The Current State of the Pandemic in in the State and San Diego County

As stated in South Bay's complaint, updated to the most recent data, according to the Centers for Disease Control and Prevention, since February 1 there have been 2,913,144 deaths in America, with at worst 308,823 deaths "involving" COVID-19. 7ER1634–38.[8]

[8] As explained by South Bay's experts, there is a serious problem with the reliability of reported COVID-19 death tolls, primarily due to failing to distinguish "dying with" and "dying from," which are conflated in CDC's first column of published data on "All deaths *involving* COVID-19." 5ER1062–74. The fifth column of the CDC table, "Deaths involving COVID-19 and Pneumonia, excluding Influenza," listing 134,143 fatalities, probably is a more accurate representation of COVID-19 as the

California, to date, has reported a total of 24,958 deaths from COVID-19. 7ER1645–52.[9] With a population of 39,512,223 persons, 5ER1142, the probability of dying of COVID-19 in California is 63.1 out of 100,000, whereas the probability of dying of heart disease for Californians is 139.7 out of 100,000 and 135 out of 100,000 for cancer. 5ER1142.

California's COVID-19 fatality rate is only the 40th highest among the 50 states. New York is currently the second highest: 188 out of 100,000. 5ER1143.[10] Yet when all 50 states and the District of Columbia are ranked by severity of COVID-19 restrictions, California is ranked the second worst in severity—with only Hawaii having more severe

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proximate cause of death as viral pneumonia accounts for most COVID fatalities. *See* https://www.cdc.gov/nchs/nvss/vsrr/covid19/index.htm. Pneumonia caused by other pathogens annually kills approximately 100,000 Americans. Julio A. Ramirez, et al., *Adults Hospitalized With Pneumonia in the United States: Incidence, Epidemiology, and Mortality*, CLINICAL INFECTIOUS DISEASES (July 2017), https://bit.ly/2KQBPW3.

[9] *See* https://covid19.ca.gov/state-dashboard/.

[10] *See* https://www.statista.com/statistics/1109011/coronavirus-covid19-death-rates-us-by-state/.

restrictions.[11] Looking to Rt, the metric of spread, California is currently perfectly average—26 states and the District of Columbia have greater Rt.[12]

San Diego County to date has a total of 1,472 COVID-19 related fatalities. 7ER1654.[13] With a population of 3,338,330, 5ER1144, the probability of dying of COVID-19 in San Diego County is 44.1 out of 100,000. In comparison, annually, 155.2 out of 100,000 San Diegans die from cancer, and 146.8 out of 100,000 from heart disease. 5ER1144.

In terms of hospital capacity, San Diego has 6,416 total licensed hospital beds, with only 4,616 (or 71.9%) currently in use. It also has 853 total licensed ICU bed capacity, with only 621 (or 72.8%) in use.[14]

With its most recent renewed motion, South Bay submitted an expert report comparing the situation in New York and California as of

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[11] *See* Adam McCann, *States with the Fewest Coronavirus Restrictions*, WALLET HUB (Oct. 6, 2020), http://bit.ly/2M0tpf3 (eleven professors examined the jurisdictions based on seventeen metrics).

[12] *See* https://rt.live/ (Dec. 31, 2020).

[13] *See* https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19%20Deaths%20by%20Date%20of%20Death.pdf.

[14] *See* https://www.sandiegocounty.gov/content/dam/sdc/hhsa/programs/phs/Epidemiology/COVID-19_Daily_Status_Update.pdf.

December 9, 2020. 3ER606–09. California's absolute numbers were nearly double that of New York—because it has double the population—but proportionally the statistics were nearly identical. Per million, New York had 551 daily new cases, but California had only 464. Per million, New York had 2.6 daily new deaths, but California only had 2.53. California did have a slightly higher Rt rate, *i.e.*, the metric of spread, and a slightly higher hospitalization rate, but only marginally. 3ER606–09.

In sum, the current state of the pandemic in California generally and San Diego County in particular is no worse than that in New York State, whose 10- and 25-person caps on divine worship under Governor Cuomo's "Cluster Action Initiative" were, as shown above, preliminarily enjoined by the Supreme Court in *Brooklyn Diocese I* and then further preliminarily enjoined by order of the Second Circuit to the District Court, which is also directed to apply strict scrutiny to the Initiative's percentage capacity limitations on remand. Nothing materially distinguishes this case from *Brooklyn Diocese I* or *II*.

LEGAL STANDARD

A plaintiff seeking a preliminary injunction must establish (1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm without injunctive relief, (3) that the balance of harm tips in his favor, and (4) that a temporary restraining order is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). This Court evaluates these factors through a "sliding scale approach." *Id.* So, for example, "a stronger showing of irreparable harm to plaintiff might offset a lesser showing of likelihood of success on the merits." *Id.*

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

This duty of *de novo* review specifically applies in the preliminary injunction context: the "[s]tandard of review for a district court decision regarding a preliminary injunction with First Amendment implications is de novo." *Bays v. City of Fairborn*, 668 F.3d 814, 819 (6th Cir. 2012); *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (Alito, J.); *Procter & Gamble Co. v. Bankers Tr. Co.*, 78 F.3d 219, 227 (6th Cir. 1994); *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996).

In addition, a motion for an injunction pending appeal is reviewed de novo because it is not an appeal from a district court order. *Priorities USA v. Nessel*, 978 F.3d 976, 982 (6th Cir. 2020).

ARGUMENT

1. South Bay Will Likely Succeed on the Merits: California's and San Diego's Restrictions Violate South Bay's Free Exercise Rights.

1.1. California's and San Diego's Restrictions on Worship Are Subject to Strict Scrutiny

In California, "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const. art. I, § 4. Prior to the Supreme Court decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), California courts applied to the California Free Exercise

clause "the test set out in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and now codified in RFRA." *Smith v. Fair Employment & Housing Com.*, 12 Cal. 4th 1143, 1177 (1996) (citations cleaned up).

Following *Employment Div. v. Smith*, the California Supreme Court has repeatedly revisited the California Free Exercise clause, and has continued to apply a pre-*Smith* strict scrutiny while also refusing to decide whether doing so is required. *See North Coast Women's Care Medical Group, Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158 (2008). As a result, all California appellate courts have continued applying a pre-*Smith* standard. *See, e.g., Valov v. Dep't of Motor Vehicles*, 132 Cal. App. 4th 1113, 1126 & n.7 (2005).

Therefore, because San Diego County's orders, 2ER336–44, clearly burden South Bay's religious exercise, *see* § C, *supra*, they must undergo strict scrutiny, which they cannot survive as *Brooklyn Diocese I* makes clear. *See Savage v. Glendale Union High School Dist. No. 205, Maricopa County*, 343 F.3d 1036, 1040 (9th Cir. 2003) (counties do not enjoy Eleventh Amendment immunity).

Under the First Amendment, a law burdening religion need only pass rational basis scrutiny if it is "neutral" and "of general application." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). But a law that is not neutral or generally applicable must satisfy strict scrutiny. *Id*. at 546.

As one panel of this Court has already recognized in *Calvary Chapel II*, the Supreme Court has laid down the standard to be followed in challenges to COVID-19 pandemic regulations: strict scrutiny is required of regulations that restrict churches to a greater degree than " 'essential' businesses," "acupuncture facilities, camp grounds, garages," "plants manufacturing chemicals and microelectronics," "transportation facilities," "a large store," "factories and schools," *Brooklyn Diocese I*, 141 S. Ct. at 66–67, "casinos, restaurants and bars, amusement and theme parks, gyms and fitness centers, movie theaters, and mass protests" *Calvary Chapel II*, 2020 WL 7350247, *2. Such orders cannot be defended as neutral or generally applicable. They are also not neutral when "statements made in connection with the challenged rules can be viewed as targeting" religious worshippers. *Brooklyn Diocese I*, 141 S. Ct. at 66.

Moreover, the Supreme Court has also made it clear that challenges to a church-restricting COVID-19 regime are not mooted by the interim installation of another church-restricting regime pending judicial review. Practically, every time this happens, churches suffer the irreparable harm of being forbidden to worship while "another Sabbath passes." *Brooklyn Diocese I*, 141 S. Ct. at 68. Thus, this Court should rule on both the Regional Order and all tiers of the Blueprint.

Here, California's occupancy restrictions on churches are plainly far more severe than those imposed on other industries. Under the Regional Order and the Purple Tier of the Blueprint, churches are at 0% occupancy, while many other industries can open without any occupancy limit, including offices, manufacturing, transit, and schools, while retail is allowed to 25%. *See* §§ A, E, F, *supra*; 3ER379–84, 5ER1170–92.

The ban on singing in church is also not neutral because it applies only to certain industries, while others are exempt. *See* § D, *supra*. As Judge O'Scannlain noted, singing is banned in church but "speaking loudly or shouting [is allowed] on an indoor television studio set filled with actors projecting lines and directors barking orders or in an indoor practice facility or locker room filled with dozens of professional athletes and

coaches shouting instructions to each other[.]" *Harvest Rock I*, 977 F.3d at 736 (O'Scannlain, J., dissenting).

California's declarants confirm that for music and film production, "[s]inging in large groups is permitted" so long as specific, *self-imposed*, safeguards are adhered to, such as arranging singers in a line, and ensuring adequate ventilation and testing. 3ER489–90, 498. California submitted no declarations from individuals in the professional sports industry, implying that that industry has not self-imposed any restrictions on loud vocalizations.

Here, the District Court accepted that the Supreme Court's opinion in *Brooklyn Diocese I* and this Court's opinion in *Calvary Chapel II* compelled it to apply strict scrutiny. 1ER15:22–16:11. The standard was correct, but its application was mere lip service.

In addition, here, just like the alternative holding in *Brooklyn Diocese I* and *II*, here churches have been subjected to invidious discrimination from the very beginning. As noted above, *see* § B, *supra*, on May 7, 2020, Governor Newsom openly declared that houses of worship were not permitted to reopen because they provide a "low reward." 5ER1121. Further, like Governor Cuomo's hasty withdrawal of

his Red Zone "in the shadow of our review," *Brooklyn Diocese I*, 141 S. Ct. at 72, California's restrictions have been gerrymandered to meet the litigation needs of the moment rather than "public health." Governor Newsom's May 25 granting of permission to worship, 5ER1123–24, 6ER1209–21, occurred immediately after Judge Collins' May 22 dissent in *S. Bay I* and South Bay's application to the Supreme Court. And his blessing of all outdoor activity without restriction, 5ER1125, 6ER1247–55, occurred only after his politically expedient approval of George Floyd demonstrations threatened to expose his COVID regime's lack of neutrality and general applicability upon judicial review. 5ER1140; *see Spell v. Edwards*, 962 F.3d 175, 181–83 (5th Cir. Jun. 18, 2020) (Ho, J., concurring); *Soos v. Cuomo*, 470 F.Supp.3d 268, 281–83 (N.D.N.Y. June 26, 2020); *Capitol Hill Baptist Church v. Bowser*, No. 20-CV-02710 (TNM), 2020 WL 5995126, *8 (D.D.C. Oct. 9, 2020); *see also Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2607–08 (Jul. 24, 2020) ("*Calvary Chapel I*") (Alito, J., dissenting).

California's public health orders as litigation tactics are precisely the type of orders the Supreme Court views with suspicion: "The Counties' position just bucks common sense: reasonable observers have

reasonable memories, and our precedents sensibly forbid an observer to turn a blind eye to the context in which the policy arose." *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 866 (2005) (cleaned up).[15] Even if Governor Newsom's discrimination was done without "antipathy towards religion," "the constitutional benchmark is government neutrality, not government avoidance of bigotry." *S. Bay I*, 959 F.3d at 945 (Collins, J., dissenting) (quotation marks omitted); *see also Brooklyn Diocese I*, 141 S. Ct. at 66 ("[E]ven if we put those comments aside, the regulations cannot be viewed as neutral").

Thus, under both the California and federal constitutions, strict scrutiny must be applied to San Diego's and California's restrictions on worship.

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[15] The District Court held that Governor Newsom's statements merely indicate that a cost-benefit analysis, *i.e.*, low reward v. high reward, was one of several factors he considered. 1ER15:11–14. South Bay does not contend otherwise, but *any* official consideration of religion as a "low reward" activity compared to secular activities per se violates constitutional protections. *See Calvary Chapel I*, 140 S. Ct. at 2614 (Kavanaugh, J., dissenting) ("But that rationale 'devalues religious reasons' for congregating 'by judging them to be of lesser import than nonreligious reasons,' in violation of the Constitution.").

1.2. California's and San Diego's Restrictions Cannot Satisfy Strict Scrutiny

To satisfy strict scrutiny, "a law restrictive of religious practice must advance interests of the highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 547 (quotations omitted). "The compelling interest standard . . . is not watered down but really means what it says." *Id.* (cleaned up). "A law that targets religious conduct for distinctive treatment . . . will survive strict scrutiny only in rare cases." *Id.*

1.2.1. California and San Diego Have Not Met Their Burden to Establish a Compelling Interest

With respect to the "compelling interest" prong, the purpose of California's restrictions is "1) to help reduce community spread . . . , 2) to protect individuals at higher risk of severe illness or death from COVID-19, and 3) to prevent the state's health care delivery system from being overwhelmed." 3ER530; *see also* 3ER520, 531, 554.

On its face, this is a "compelling interest," but as the future Justice Gorsuch observed when seated on the Tenth Circuit bench: "A law's underinclusiveness—its failure to cover significant tracts of conduct implicating the law's animating and putatively compelling interest—can

raise with it the inference that the government' s claimed interest isn't actually so compelling after all." *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014); *accord Williams v. Annucci*, 895 F.3d 180, 189–90 (2d Cir. 2018).

That is this case, as shown by California's radically underinclusive web of restrictions exempting numerous favored secular business premises from COVID-19 capacity limitations despite their undeniable contribution to viral spread. Indeed, what else but substantial underinclusivity, undermining California's claim of compelling interest, explains the 25,000 deaths attributed to COVID-19 in the State despite the more or less constant closure of churches under the Roadmap, Blueprint and Regional Order?

Furthermore, under California law a "health and safety" regulation must consider both the benefits *and costs* flowing from it. It cannot merely seek a "health and safety"-related outcome—such as prevention of disease—without considering the costs of the measure. *See Cal. Restaurant Ass'n, Inc. v. Cnty. of Los Angeles Dep't of Pub. Health*, No. 20STCP03881, *32–33, 44–47 (Cal. Super. Dec. 8, 2020) (2ER122–74)

(stayed pending appeal) (citing *Carrancho v. California Air Resources Board*, 111 Cal. App. 4th 1255, 1265 (2003)).

Here, California's experts make clear that its only goal is to stop the spread of COVID-19 without regard to massive collateral damage in the form of social, economic and even—irony of ironies—*public health costs* from delay of screenings for cancer and heart disease or the postponement or cancellation of preventive life-saving or life-extending surgery due to COVID lockdowns or the obsessive prioritization of COVID over all other medical concerns. 3ER601–03. Despite its professed "risk-reward" approach to COVID-19-related restrictions—unconstitutional in any case as applied to religion—there is no record evidence that California has ever engaged in a meaningful cost-benefit analysis, despite the obvious harms caused by its ruinous COVID-19 regime. *See* 5ER951–71, 977, 7ER1699–738.[16]

[16] Whether the District Court properly struck South Bay's rebuttal declarations as late-filed is reviewed for abuse of discretion. *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991). It is clearly an abuse of discretion to strike rebuttal declarations as "late"—filed "after the briefing was over"—when they were filed *with* the reply brief in rebuttal to issues raised by the defense. The rebuttal Delgado declaration lists more evidence of the harm of the COVID-19 restrictions. 2ER189–96.

In sum, California and San Diego have not met what is *their* burden—not South Bay's—"of *demonstrating* a compelling interest" rather than merely uttering statements of "broadly formulated interests justifying . . . government mandates." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 420, 429 (2006) (emphasis added).

1.2.2. California and San Diego's Restrictions are Overinclusive

Turning to narrow tailoring, a regulation may not be either overinclusive or underinclusive. *Lukumi*, 508 U.S. at 546. With respect to overinclusiveness, the issue is whether the government's "interests could be achieved by narrower ordinances that burdened religion to a far lesser degree." *Id.*

California's argument that a ban on worship in churches for more than 99% of Californians is "narrowly tailored" is absurd on its face. It is even more absurd than New York's defense of the 10- and 25-person caps in the color-coded zone system invalidated by *Brooklyn Diocese I*. *Id.* 141 S. Ct. at 63 ("Not only is there no evidence that the applicants have contributed to the spread of COVID–19 but there are many other less restrictive rules that could be adopted"; "[a]lmost all of the 26 Diocese

churches immediately affected by the Executive Order can seat at least 500 people, about 14 can accommodate at least 700, and 2 can seat over 1,000").

Indeed, two factors make this perfectly clear. First, Los Angeles County—the epicenter of the pandemic in California—has lifted its restrictions on churches, and yet the pandemic has not spiraled out of control. 2ER87–104. Second, the fact that South Bay has a "perfect record," 4ER689, means that a total closure of its church, while Walmart shoppers go their merry way, is *per se* overinclusive. Even with the threat of "asymptomatic transmission," South Bay's safety measures *have proven sufficient*. *See Brooklyn Diocese II*, 2020 WL 7691715 ("Those limits are 'far more severe than has been shown to be required to prevent the spread of the virus at [Appellants'] services,' particularly because the Governor has pointed to no evidence of any outbreaks related to Appellants' churches and synagogues") (quoting *Brooklyn Diocese I*, 141 S. Ct. at 67).[17]

[17] To date, the discussion regarding asymptomatic transmission has largely centered around whether there *may or may not* be asymptomatic transmission, and therefore the threat of the unknown. *See* 2ER202. But a recent study of 10 million subjects has confirmed the WHO's prior

Given the lesser restrictions California has imposed on other industries, it is the State's burden to establish that such measures would *necessarily* be ineffective at South Bay. *Brooklyn Diocese I*, 141 S. Ct. 63 ("[T]he State must justify why houses of worship are excluded from that favored class."); *see also First Pentecostal Church of Holly Springs*, 959 F.3d at 670 (granting injunction "upon the assurances by the Church that it will satisfy the requirements entitling similarly situated businesses and operations to reopen") (cleaned up); *Maryville Baptist Church*, 957 F.3d at 616 (enjoining enforcement of COVID-19 restrictions "if the Church, its ministers, and its congregants adhere to the public health requirements mandated for 'life-sustaining' entities").

California cannot meet its burden. For the Blueprint, California's argument is that it has identified eight factors relating to the transmission risk of a specific activity, and that it then applies them to all industries to determine their risk profile. 2ER361–62. But these factors do not apply to businesses deemed "critical infrastructure," which

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conclusion that asymptomatic transmission is very rare. *See* 8ER1813–17; Shiyi Cao, et al., *Post-lockdown SARS-CoV-2 nucleic acid screening in nearly ten million residents of Wuhan, China*, NATURE COMMC'NS (Nov. 20, 2020), https://go.nature.com/38G21uC.

operate under both the Blueprint and the Regional Order regardless of transmission risk. Nor is there any scientific basis for concluding that the eight "factors" show that church services lasting an hour or so have a greater transmission risk than, say, buses and trains filled with passengers during hours-long journeys, or meatpacking plants filled with workers laboring shoulder-to-shoulder for eight or more hours per day.

At any rate, the eight "factors" are the same sort of superficially plausible "science," masking secular value judgments, rejected by the Supreme Court in *Brooklyn Diocese I*. There, New York argued that, "indoor religious gatherings commonly possess 'problematic features' from an epidemiological perspective that create an outsized risk of COVID-19 spread. They tend to involve large numbers of people from different households arriving simultaneously; congregating as an audience for an extended period of time to talk, sing, or chant; and then leaving simultaneously—as well as the possibility that participants will mingle in close proximity throughout." Opposition to Application for Writ of Injunction, p.22, *Roman Catholic Diocese of Brooklyn v. Cuomo*, No. 20A87 (U.S. Nov. 18, 2020) (citations omitted), https://bit.ly/3mMBTmM.

In agreement with New York, Justice Sotomayor emphasized in her dissent "the conditions medical experts tell us facilitate the spread of COVID–19 [are] large groups of people gathering, speaking, and singing in close proximity indoors for extended periods of time," and therefore "religious services are among the riskiest activities." *Brooklyn Diocese I*, 141 S. Ct. at 79.

The District Court's opinion and California's position here are essentially Justice Sotomayor's dissent, while California's briefing is strikingly similar to New York's. But Justice Sotomayor and New York did not win the day. Supposedly scientific "factors" are not enough to justify discrimination against places of worship as they do not "assess the transmission risk of religious worship based on any data[.]" *Brooklyn Diocese II*, 2020 WL 7691715, *3. When those data-free factors were analyzed, the Supreme Court concluded that "[t]he only [real] explanation for treating religious places differently seems to be a judgment that what happens there just isn't as 'essential' as what happens in secular

spaces. . . . *That* is exactly the kind of discrimination the First Amendment forbids." *Brooklyn Diocese I*, 141 S. Ct. at 69 (Gorsuch, J., concurring).[18]

In their declarations, California's experts argue that all the "critical infrastructure" industries happen to be low-risk, in their opinion, and so "no harm, no foul." *See* 3ER534–35, 568–77. But "[t]he government's justification 'must be genuine, not hypothesized or invented *post hoc* in response to litigation.'" *Brooklyn Diocese II*, 2020 WL 7691715, *8 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). Courts "cannot and will not uphold a statute that abridges an enumerated constitutional right on the basis of a factitious governmental interest found nowhere but in the defendants' litigating papers." *Id*. at *9 (quoting *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268 (10th Cir. 2008)).

That California's new, pseudo-scientific "risk factor" argument is a litigation strategy rather than an actual public policy is shown by the State's contemporaneous conduct. Back in March, grocery stores were allowed to remain open—*not* because California believed them to be

[18] Tellingly, when South Bay earlier put forth its own comparative risk analysis, California ridiculed it, arguing that with the current scientific knowledge there was no meaningful way to actually engage in a comparative risk analysis, and that the court should just defer to its suppositions. 3ER601.

perfectly safe but because people *need* to eat. As the future Justice Alito observed when serving on the Third Circuit, foreshadowing his holding in *Brooklyn Diocese I*, that is precisely the kind of "value judgment in favor of secular motivations . . . but not religious motivations" that "must survive heightened scrutiny." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (medical exemption from no-beard policy triggered strict scrutiny of refusal to grant religious exemption).

This Court should not allow California to argue now, for the first time, that its secular value judgments privileging bodily needs over religion were really "science" based on "risk factors" all along. [19]

1.2.3. California and San Diego's Restrictions are Underinclusive

With respect to underinclusiveness, a law must not "leave[] appreciable damage to [its] supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 547 (cleaned up). This requirement is related to the

[19] *See Cal. Restaurant Ass'n*, No. 20STCP03881, *41 n.16 (with respect to a list of outbreaks, noting that number of outbreaks does not necessarily translate to transmission risk in an industry: "essential sectors that were never required to cease indoor operations will necessarily be overrepresented on this list.").

"compelling interest" test. To recall Justice Gorsuch's observation, quoted above, a challenged law's "failure to cover significant tracts of conduct implicating [its] animating and putatively compelling interest—can raise with it the inference that the government's claimed interest isn't actually so compelling after all." *Yellowbear*, 741 F.3d at 60.

Both the Regional Order and the Blueprint leave unprohibited a vast amount of damage to the professed interest in stopping COVID-19, given numerous exemptions for activities that involve large groups of people in close proximity for long durations (*e.g.*, factories, warehouses, meatpacking plants, homeless shelters, drop-in centers, public transportation, protests, airlines and airline terminals, etc.), or that are impossible to conduct outdoors (*e.g.*, retail, office-based businesses, etc.), or that require loud vocalizations (*e.g.*, professional sports and film production).

As noted above, under the Regional Order, essential offices (finance, government, supply chain, or otherwise supporting an essential industry), film production, laundromats, essential manufacturing, and schools can all stay open with only neutral requirements of social distancing and face coverings—and no limit on the number of people that may attend.

3ER440–43, 5ER1170–92. And, once San Diego County moves back into the Blueprint, with each Tier more and more industries will be favored over churches. 3ER379–84.

Besides political protestors, perhaps the clearest example of invidiously discriminatory official favoritism in California's regulations is the Hollywood exemption. According to California, in-person, indoor, singing in music and film productions is safe because those industries have taken "stringent precautions" to make it safe. But "[t]he State cannot 'assume the worst when people go to worship but assume the best when people go to work" in Hollywood. *Burfitt*, No. BCV-20-102267, *2 (quoting *S. Bay II*, 140 S. Ct. at 1615 (Kavanaugh, J., dissenting)); *see also Brooklyn Diocese II*, 2020 WL 7691715, *8 (same).

If any "industry" should be allowed to entirely self-regulate, it should not be Hollywood, *see* 3ER489, 497–98, but rather churches. This is precisely what the CDC recommends, due to the constitutional issues with government entanglement. *See* 4ER886 (due to the First Amendment, "[t]he federal government may not prescribe standards for interactions of faith communities in houses of worship," and therefore "CDC offers these

suggestions for faith communities to consider and accept, reject, or modify, consistent with their own faith traditions") (emphasis added).

As Judge O'Scannlain has observed, California's declarants are "not qualified as an expert to opine on what takes place at religious worship services or how people interact there as opposed to in other settings of public life." *Harvest Rock I*, 977 F.3d at 734 n.4. Due to constitutional restraints, "[t]he government must normally refrain from making assumptions about what religious worship requires" and so "identification of [] risks [based] on broad generalizations made by public-health officials about inherent features of religious worship" is constitutionally problematic. *Brooklyn Diocese II*, 2020 WL 7691715, *8 (citing *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2055 (2020)).

Pentecostals are not Catholics, nor Calvinists, nor Jews, and "[i]n a country with the religious diversity of the United States, judges [and government officials] cannot be expected to have a complete understanding" of the requirements of various faiths. *Our Lady of Guadalupe Sch.*, 140 S. Ct. at 2066.[20]

[20] Indeed, the statements in those experts' declarations regarding what "generally" happens at "[w]orship services" makes clear that they may

Finally, while courts are generally "not in a position to rewrite the restrictions or dictate to Defendants specifically how the restrictions may be cured," they can "prohibit enforcement of the restrictions" altogether when they violate constitutional rights. *Burfitt*, No. BCV-20-102267, *3. Because California's ban on worship in churches is both overinclusive and underinclusive—as to both the Regional Order and the Blueprint—all enforcement should immediately be enjoined. *See id.*

Nevertheless, South Bay seeks only a tailored injunction, treating it identically to the most favored industries. Erroneously, the District Court stated in its order that South Bay requested 20% occupancy in line with non-essential retail. 1ER24:24–26. South Bay has never made such a request and did not do so at oral argument. *See* 1ER27–82. The injunction South Bay seeks would allow churches what the most favored businesses are allowed: *i.e.*, 100% occupancy with social distancing and the other health protocols.

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have a general understanding of the Christian faith, but little idea of what actually happens at a Pentecostal Sunday service, and that they did not bother to read South Bay's declarations to find out. *See* 3ER514–16, 522, 567. As a result, their comparative risk analyses of religion are of no value. *See* 3ER534–35, 568–77.

Indeed, the relief South Bay seeks here has already been implemented by Los Angeles County, which revised its health order in light of the U.S. Supreme Court's recent rulings. This Court should order Governor Newsom and his subordinates to do the same for the whole State of California—while also injunctively insuring that Los Angeles County does not go back on its belated commitment to equal treatment for religion once the shadow of judicial review has passed.

1.2.4.The Errors in the District Court's Analysis

In *Brooklyn Diocese I*, the Supreme Court made clear that a traditional Free Exercise analysis is required—not a deferential *Jacobson* analysis. *See Brooklyn Diocese I*, 141 S. Ct. at 66–67 (citing and applying *Lukumi*, 508 U.S. at 546); *see also id.* at 70 (Gorsuch, J., concurring) ("[A]ppl[ying] . . . the traditional legal test associated with the right at issue [is] exactly what the Court does today"). But the District Court did not apply a traditional Free Exercise analysis, instead applying an analysis more akin to equal protection—the analyses offered by concurring Justice Roberts in *S. Bay II*, and by dissenting Justices Breyer and Sotomayor in *Brooklyn Diocese I*. *Compare* 1ER17–24; *with Brooklyn Diocese I*, 141 S. Ct. at 78–81 (Sotomayor, J., dissenting).

According to the District Court, "California did exactly what the narrow tailoring requirement mandates—that is, California has carefully designed the different exemptions to match its goal of reducing community spread, based on a neutral, [eight]-factor risk analysis," "which explains the different restrictions that apply to various exempt sectors." 1ER21–22. This is the same *Jacobson*/pseudo-equal protection analysis rejected by *Brooklyn Diocese I*.

Brooklyn Diocese I stands for the proposition 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. *Brooklyn Diocese I*, 141 S. Ct. at 66–67 (listing personal care services such as acupuncture; automotive garages; manufacturing; transportation; retail; and schools). As this Court has already recognized, there is no other way to read *Brooklyn Diocese I*. *Calvary Chapel II*, 2020 WL 7350247, *3 (adding to the list of comparators entertainment such as casinos and amusement parks; restaurants; gyms; theaters; and protests).

Stated otherwise, under *Brooklyn Diocese I* the Free Exercise clause is not made redundant of the Equal Protection clause in an emergency.

Under the Free Exercise clause, the issue is whether the government is "using *the least restrictive means* available" to achieve its compelling interest. *Brooklyn Diocese I*, 141 S. Ct. at 69 (Gorsuch J., concurring) (emphasis added) (citing *Lukumi*, 508 U.S. at 546). Under the "least restrictive means" test, the question is whether there is a compelling government interest in preventing *Plaintiff South Bay* from holding worship services (with singing) in its sanctuary, *see Gonzales*, 546 U.S. at 430–31, when South Bay practices social distancing, requires masks, checks temperature, regularly disinfects its sanctuary, requires people showing symptoms to stay home, and so far has a perfect record—no coronavirus infections. 4ER689, 5ER1134.

California has never even attempted to answer this question, instead simply stating that some worship services at some other churches, somewhere or other, have led to some outbreaks, which the District Court found sufficient. 1ER19. But the church-related outbreaks in the State's handful of anecdotes were actually caused by a failure to adhere to commonsense safety precautions such as social distancing and mask-wearing. 4ER673–83.

As far as real science is concerned, an actual study by Real Clear Science, cited by South Bay's expert, found zero transmissions of COVID-19 at 17,000 Catholic parishes where more than one million Masses have been offered during the pandemic period under study. 4ER674. On the other hand, it is undisputed that there have been COVID-19 outbreaks tied to virtually every industry. *See* 5ER1138–39, 7ER1785–811[21] *see also Brooklyn Diocese I*, 141 S. Ct. at 67 (noting there have been outbreaks at factories and schools).

In sum, a few anecdotes about putative viral spread at church services are no basis for the suppression of indoor worship throughout the vast State of California, especially when outbreaks on secular premises are ignored. *See* 4ER726–27, 735, 739–40 (California Superior Court Judge Chalfant reviewing the same anecdotes and concluding that they are "not evidence," "not good enough," and "you can't just make stuff up" to justify restricting religious rights). There is simply no record

[21] The District Court faulted South Bay for not string-citing its own anecdotal cases. 1ER20:7–9, 1ER21:6–7. Although South Bay believes such anecdotal cases are irrelevant, it in fact did cite them. 5ER1138–39, 7ER1785–811.

evidence that South Bay Pentecostal Church cannot worship safely. *See* 4ER683.

Turning to singing, California's experts are unanimous that "louder and more forceful expression" is more likely to spread COVID-19. 3ER513–14, 544, 565–68. But in terms of an actual study, South Bay submitted a comprehensive report produced by a collaboration between a university and three music institutes in Germany, titled "Risk Assessment of a Coronavirus Infection in the Field of Music." 5ER979–82 (citing https://bit.ly/31Q9Ni6).

That study cites research conducted by medical, engineering, and vocal experts and concludes that singing can safely take place in worship services with social distancing, mask wearing and adequate ventilation. 5ER979–82. California's experts ignored this study, resting on their general assertion that singing is a riskier activity. 3ER513–14, 544, 565–68. Yet the same experts see no problem with indoor singing of all kinds, including simulated church signing, during music and film production under the same health protocols noted in the study presented by South Bay. 3ER489–90, 498.

South Bay is determined to follow expert guidance so that it can maintain all of its moral obligations, protecting the safety of its congregants as well as leading them to praise God in song. And with California failing to address South Bay's evidence for singing in churches, while accepting the same evidence when it comes to singing for Hollywood, this Court has no recourse but to assume that the safety of South Bay's services is conceded. *See Calvary Chapel I*, 140 S. Ct. at 2612–13 (Kavanaugh, J., dissenting) (burden is on the state to justify its actions); *Midway Venture LLC v. County of San Diego*, No. 37-2020-00038194, *3–4, 5–6 (Cal. Super. Dec. 16, 2020) (2ER176–84) (stayed pending appeal).

2. The Other Preliminary Injunction Factors Favor South Bay

2.1. South Bay Is Suffering Irreparable Harm

It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Brooklyn Diocese I*, 141 S. Ct. at 67 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Indeed, "[r]eligious adherents are not required to establish irreparable harm independent of showing a Free Exercise Clause violation because a presumption of irreparable injury flows from

a violation of constitutional rights." *Brooklyn Diocese II*, 2020 WL 7691715, *10 (quotation marks and ellipses omitted).

Here, the District Court recognized that South Bay was suffering irreparable harm. 1ER13. This conclusion was correct. The mandated remedy, however, was lacking.

2.2. The Balance of Hardships and the Public Interest Favor South Bay

The balance of hardships and the public interest also favor South Bay. Where there are "serious First Amendment questions" at play, that "compels a finding" that the balance of hardships favors the plaintiff. *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007). And courts have "consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002).

Here, as stated above, the District Court held that because "the climate in [the] Southern California Region is warm year-round," "the Court does not find that the Regional Stay at Home Order . . . places an effective ban on religious services," and therefore does not "strike at the very heart of the First Amendment's guarantee of religious liberty." 1ER22:26–23:7 (quoting *Brooklyn Diocese I*, 141 S. Ct. at 68). Further,

with respect to the balance of harms and the public interest, the District Court held that "COVID-19 poses a significant health risk to everyone in Southern California, and in fact, the world," and cited some recent statistics. 1ER25:1–5; *see also* 1ER6:15–21.

These holdings are problematic. In the morning, when church services are often held, the temperature in San Diego County is currently in the 40s—hardly "warm."[22] But more importantly, these holdings mirror those rejected in *Brooklyn Diocese I*. There, the Supreme Court paid attention to the *actual problems* raised by the religious adherents in explaining why live-streamed services are inadequate. As the Court observed: "[W]hile those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance." *Brooklyn Diocese I*, 141 S. Ct. at 68. Here, there are "important religious traditions" in the Pentecostal faith that require worship services "*in the temple*," with

[22] *See Hourly Weather: Chula Vista, CA*, THE WEATHER CHANNEL (Dec. 31, 2020), http://bit.ly/2Mn68UX.

"*sing[ing] praise to God*," and with "*all*" *gathering* "*in one place*." Most basically, worship is sacred, it does not belong in a parking lot. 4ER907, 8ER1854.

The District Court "misse[d] the point." *Capitol Hill Baptist Church*, 2020 WL 5995126, *5. "The District [Court] may think that its proposed alternatives are sensible substitutes. And for many churches they may be. But . . . [i]t is for the Church, not the [government], to define for itself the meaning of 'not forsaking the assembling of ourselves together.' Hebrews 10:25." *Id*. (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); *On Fire Christian Ctr.*, 453 F. Supp. 3d at 911). It is a "[g]iven that the issues presented in this appeal 'strike at the very heart of the First Amendment's guarantee of religious liberty.'" *S. Bay VI*, 2020 WL 7641799, at *1 (quoting *Brooklyn Diocese I*, 141 S. Ct. at 68.)

As the Second Circuit concluded with appropriate bluntness: "The court below concluded that Agudath Israel had not demonstrated irreparable harm because its congregants could 'continue to observe their religion' with 'modifications.' This was error. It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith[.]" *Brooklyn Diocese II*, 2020 WL 7691715, *10 (citation omitted); *see*

also Denver Bible Church v. Azar, No. 1:20-cv-02362-DDD-NRN, 2020 WL 6128994, at *12 (D. Colo. Oct. 15, 2020) ("[T]his court does not believe government officials in any branch have the power to tell churches and congregants what is necessary to feed their spiritual needs.").

Turning to the statistics, for whatever they are worth, the principle enunciated by *Brooklyn Diocese I* and *Calvary Chapel II*—binding precedent—as well as numerous persuasive opinions, is simply this: If the pandemic is not so bad as to require the shuttering of Costco and Hollywood, then *as a matter of law* it cannot be so bad as to require the shuttering of churches. *Brooklyn Diocese I*, 141 S. Ct. at 68–69; *Calvary Chapel II*, 2020 WL 7350247, *3.

In New York, the Supreme Court held that letting "hundreds of people shop[]" at a big box store, but not letting them enter a church, imposes "especially harsh treatment" on people of faith that cannot be tolerated, *Brooklyn Diocese I*, 141 S. Ct. at 66–67, and California's restrictions are even "harsher." *Burfitt*, No. BCV-20-102267, *2.

All arguments about the severity of the pandemic are thus irrelevant, for "*there is no world* in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but

shutter churches, synagogues, and mosques." *Brooklyn Diocese I*, 141 S. Ct. at 72 (Gorsuch, J., concurring) (italics added).

Thus, all preliminary injunction factors favor South Bay.

CONCLUSION

Before he became one of the Justices in the majority in *Brooklyn Diocese I*, Justice Kavanaugh issued this salutary warning: "[H]istory is littered with unfortunate examples of overly broad judicial deference to the government when the government has invoked emergency powers and asserted crisis circumstances to override equal-treatment and free-speech principles. The court of history has rejected those jurisprudential mistakes[.]" *Calvary Chapel I*, 140 S. Ct. at 2615 (Kavanaugh, J., dissenting).

This Court should reject California's urging that it commit the massive "jurisprudential mistake" of affirming the District Court's decision in defiance of clearly controlling Supreme Court precedent, which another panel of this Court has already acknowledged as such. *Calvary Chapel II,* 2020 WL 7350247 at *3.

For all the reasons stated, South Bay respectfully requests that this Court reverse the District Court, with instructions to enter an injunction in South Bay's favor.

Respectfully submitted,

Dated: December 31, 2020

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FOR THE NINTH CIRCUIT

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I hereby certify that on December 31, 2020, I electronically filed Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. After discovering an error in the pagination, I hereby certify that on January 1, 2021, I electronically filed the foregoing Corrected Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The corrected brief only fixes the pagination error, and corrects the tables of contents and authorities in line with the fixed pagination.

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

/s/ Charles S. LiMandri
Charles S. LiMandri