

No. 20-55445

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WENDY GISH, *et al.*,
Plaintiffs and Appellants,

v.

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

On Appeal from the Order of the United States
District Court for the Central District of California
The Honorable Jesus G. Bernal
District Court Case Number: 5:20-00755-JGB-KK

APPELLANTS' OPENING BRIEF

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INTRODUCTION

There is no pandemic exception to the Constitution. Yet, for months, the Government's Orders have prohibited Appellants Wendy Gish, Patrick Scales, James Dean Moffatt, and Brenda Wood ("Church Members") and their congregations from engaging in communal worship.¹ The Orders allow secular activities of an indistinguishable nature to continue provided that social distancing

¹ "Orders" hereinafter refers to the Stay-at-Home Executive Order issued by California Governor Gavin Newsom, ER 96-97, the San Bernardino Order, ER 99-102, the San Bernardino Order Clarification, ER 197, the Riverside Order, ER 104-111, as modified by Governor Newsom's May 4, 2020 Order detailing California's Reopening Plan, Executive Order N-60-20, RJN Exs. 1-2. The Counties have since rescinded their orders, and now rely solely on the Governor's Executive Orders for purposes of enforcement. RJN Ex. 5.

"Government" hereinafter refers to Defendants-Appellees Gavin Newsom, in his official capacity as Governor of California; Xavier Becerra, in his official capacity as Attorney General of California; Erin Gustafson, in her official capacity as the San Bernardino County Acting Public Health Officer; John McMahan, in his official capacity as the San Bernardino County Sheriff; Robert A. Lovingood, in his official capacity as a San Bernardino County Supervisor; Janice Rutherford, in her official capacity as a San Bernardino County Supervisor; Dawn Rowe, in her official capacity as a San Bernardino County Supervisor; Curt Hagman, in his official capacity as a San Bernardino County Supervisor; Josie Gonzales, in his official capacity as a San Bernardino County Supervisor; Cameron Kaiser, in his official capacity as the Riverside County Public Health Officer; George Johnson, in his official capacity as the Riverside County Executive Officer and Director of Emergency Services; Chad Bianco, in his official capacity as the Riverside County Sheriff; Kevin Jeffries, in his official capacity as a Riverside County Supervisor; Karen Spiegel, in her official capacity as a Riverside County Supervisor; Chuck Washington, in his official capacity as a Riverside County Supervisor; V. Manuel Perez, in his official capacity as a Riverside County Supervisor; and Jeff Hewitt, in his official capacity as a Riverside County Supervisor.

protocols are observed, while denying religious communities the opportunity to meet under the same standards.

For the duration of California's coronavirus lockdown, the Government has let the public stroll freely down the busy aisles of their local grocery store for an indefinite period of time; go to the hospital for certain types of elective surgeries; and even arrange for plumbers, electricians, and exterminators to come into their homes for extended periods. Yet, the Church Members cannot not go to church; attend a baptism; gather to pray for the sick and dying; or even attend an outdoor funeral service for departed loved ones, regardless of the number of persons attending or the precautions they offered to take.

As the Governor has now started to move toward a phased reopening, shopping malls, swap meets, hair salons, and dine-in restaurants will soon be allowed to open with social distancing, but churches, mosques, synagogues, and other places of worship will, at best, be subjected to cumbersome capacity and other restrictions applicable to religious activities only. At worst, communal worship will remain or revert to being altogether criminalized by the Government, which the Government has indicated is a real possibility. RJN Ex. 9, p. 2 (“[n]ot adhering to all of the guidelines in their entirety [sic] could result in . . . the re-closing of places of worship”).

The Government's criminalization of communal worship violates the Church Members' fundamental rights to religious liberty, freedom of speech and assembly, and due process and equal protection under the law. Accordingly, the Church Members respectfully request that this Court reverse the district court's denial of interlocutory injunctive relief, and remand to the district court for further proceedings.

ISSUES PRESENTED

1. Did the district court err by creating an unprecedented "minimal scrutiny" standard for emergencies when reviewing the Church Members' claims for the deprivation of their fundamental rights?
2. Are the Church Members likely to succeed on the merits of their claims that the Government's actual and threatened prohibition on communal religious worship violates the United States and California Constitutions?
3. Are the Church Members likely to suffer irreparable harm absent an injunction prohibiting the Government from further criminalizing communal religious worship?
4. Do the public consequences of a preliminary injunction weigh in favor of temporarily enjoining the Government from further prohibiting religious worship on terms more restrictive than those applicable to comparable secular activities?

STATEMENT OF JURISDICTION

The district court had federal question subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a) and supplemental jurisdiction over state law claims pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction over appeals from interlocutory orders of the district court that grant, continue, modify, refuse, or dissolve injunctions. 28 U.S.C. § 1292(a)(1). An order denying a temporary restraining order may be appealable if it is tantamount to the denial of a preliminary injunction. *Religious Tech. Ctr., Church of Scientology Int'l, Inc. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (citing *Env'tl. Defense Fund, Inc. v. Andrus*, 625 F.2d 861, 862 (9th Cir. 1980)). This is so where the denial followed a “full adversary hearing” and if, “in the absence of review, the appellant would be effectively foreclosed from pursuing further interlocutory relief.” *Andrus*, 625 F.2d at 862.

Here, this Court has jurisdiction over this appeal because the order below is tantamount to the denial of a preliminary injunction. *See* 28 U.S.C. § 1292(a)(1). Appellants had moved for (1) a temporary restraining order and (2) an order to show cause why a preliminary injunction should not issue. ER 129. The district court denied their requests following a full briefing on the merits and a lengthy telephonic hearing, at which all parties were represented by counsel. ER 10-46.

At the conclusion of the hearing, the Church Members’ counsel renewed their request for a further hearing on whether a preliminary injunction should issue. ER 45:8-16. The Honorable Jesus G. Bernal responded by stating that he would “consider that,” and thereafter issued the order denying the Church Members’ motion in full, and without setting any further hearing on the Church Members’ request for a preliminary injunction. *Id.*

By denying the Church Members’ motion, the district court effectively decided the merits of the case and foreclosed the possibility of any further interlocutory relief. In the order, the district court erroneously held, for example, that “as acts of the executive in response to a national emergency, the [Government’s] Orders are subject to only minimal scrutiny, which they easily survive.” ER 4-5. The court further held that “even absent consideration of greater leeway afforded to executive acts during a state of emergency, the Orders do not violate [the Church Members’] rights under traditional constitutional analysis,” because the Orders survive rational basis review. ER 5.

The district court’s decision not only conclusively denies interlocutory injunctive relief, but it effectively decided the merits of the case, providing this Court jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

On March 4, 2020, California Governor Gavin Newsom proclaimed a State of Emergency as a result of the threat of COVID-19. ER 274-78. He then issued Executive Order N-33-20 on March 19, 2020, requiring that “all residents . . . heed the current State public health directives.” ER 96-97. The state public health directive requires “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors” *Id.* The directive provides that it “shall stay in effect until further notice.” *Id.*

On March 22, 2020, the California Public Health Officer designated a list of “Essential Critical Infrastructure Workers.”² ER 285-98. Listed as a part of the “essential workforce” were coffee baristas, grocery store workers, laundromats employees, workers supporting the entertainment industry, and workers supporting ecommerce. *Id.* The list also included “faith based services [] provided through streaming or other technology.”³ ER 295. Accordingly, the Executive Order

² On April 28, 2020, state officials issued an amended “Essential Critical Infrastructure Workers” list, revising slightly the list of allowable “essential” activities under the Governor’s shelter-in-place order. RJN Ex. 4.

³ After the Church Members initiated this action, Governor Newsom stated in court filings that drive-in worship services were permitted under the Executive Order as

prohibits religious leaders from providing communal religious services to their congregations, regardless of whether any non-technological measures might be taken to reduce or eliminate the risk of the virus spreading, such as offering socially-distanced seating for family units, or mask and glove requirements. ER 96-97.

On May 4, 2020, Governor Newsom issued Executive Order N-60-20, also called California's Reopening Plan. RJN Exs. 1, 2. The plan allows schools, restaurants, factories, offices, shopping malls, swap meets, and others to operate with social distancing in Stage 2 of California's four-stage reopening process, but does not permit houses of worship to hold religious worship services until Stage 3, which may be several months from now. *Id.* The Reopening Plan permits counties to "move through Stage 2 faster if they are able to show greater progress," through a "variance and attestation" procedure. *Id.*; *see also* RJN Ex. 3. San Bernardino and Riverside Counties submitted variance and attestation forms that do not indicate that communal worship reopen earlier than Stage 3. RJN Ex. 3.

On May 19, 2020, the United States Department of Justice Civil Rights Division sent a letter to Governor Gavin Newsom raising "several civil rights

a form of "other technology." ER 17:2-13. Thereafter, San Bernardino and Riverside Counties issued statements indicating that drive-in worship services would henceforth be permitted. *Id.*

concerns with the treatment of places of worship” in Executive Orders N-33-20 and N-60-20 and documents relating to the California Reopening Plan. RJN Ex. 6. Four days later, on May 23, 2020, the CDC issued guidance declaring religious worship to be “essential,” and offering suggestions on how religious communities may practice their faiths while minimizing the risk of transmission of the virus. RJN Ex. 7.

Despite the federal government’s insistence that places of worship be allowed to reopen safely, Governor Newsom has refused to do so. Instead, on May 25, 2020, the Government issued guidance materials imposing *additional* constraints on religious activities. RJN Ex. 8. Under these new guidelines, even if a county obtains a variance from the State’s orders, religious observers must still comply with a laundry list of requirements that other variance-approved activities need not. *Id.*

For example, under the May 25 guidance, “[p]laces of worship must [] limit attendance to 25% of building capacity or a maximum of 100 attendees, whichever is lower.” *Id.* This is regardless of the size of the house of worship. No other sector of California’s economy is subjected to such arbitrary burdens. *See* RJN Ex. 3, p. 101 (establishing Stage 2 variances in San Bernardino County for, *inter alia*, retail stores to operate at 50% capacity and dine-in restaurants to operate at any capacity provided there is “safe physical distance” between patrons). Further, because such

variances would be subject to review every three weeks, even if requested by the counties and approved by the State, there remains a real possibility that the Government will simply reinstate its totalitarian ban on communal worship at any time through an unelected county bureaucrat revoking the government “license to pray” that variance renewals constitute.

On May 25, 2020, San Bernardino County issued a News Release stating that religious services could resume in a limited capacity, subject to the State’s May 25 guidance. RJN Ex. 9. In the release, the County threatens that “[n]ot adhering to all of the guidelines in their entirety [sic] could result in . . . the re-closing of places of worship.” RJN Ex. 9, p. 2.

Appellant Patrick Scales’ church, Shield of Faith Family Church, Inc., is located in San Bernardino County. ER 234-236. He desires to hold in-person religious services for those congregants who desire to attend church. *Id.* Scales believes that he can hold such religious services and abide by social distancing tips recommended by the CDC by keeping congregants at least six feet apart and providing masks and gloves. *Id.* He believes that religious services are essential for the spiritual health of the congregation so that the congregants may exhort one another during these difficult times. *Id.* Scales recognizes that most of his congregants will stay at home, but he wants to be available for those who are

healthy and feel that in-person church service can be safely attended with social distancing and other measures. *Id.*

Appellant Wendy Gish attends Shield of Faith Family Church and would attend an in-person church service should it be made available to her. ER 232-33. She regularly attends church services and believes that she has a scriptural command to “not neglect meeting together.” *Id.*

Appellant James Moffatt’s church, Church Unlimited, is located in Riverside County. ER 217-20. Upon learning about the coronavirus, he immediately had his church building cleaned and disinfected. *Id.* Moffatt ensured that sanitizing materials were available to each person who entered his church and encouraged family units to sit at least six feet apart. *Id.* He encouraged anyone who was uncomfortable with gathering to stay at home. *Id.* He also encouraged anyone experiencing symptoms of illness to stay at home. *Id.*

On April 9, 2020, Moffatt was threatened with a fine of one thousand dollars for holding a church service on April 5, 2020, Palm Sunday. ER 218. But for the Orders, Moffatt would continue to hold in-person religious services in Riverside County, while taking the same social distancing precautions taken by the multitude of “essential businesses” that continue to operate in the county, despite any prevalence of COVID-19. He believes that it is important for Christians to come together, remember, and celebrate all that Jesus has done for this world. *Id.*

Appellant Brenda Wood's church, Word of Life Ministries International Inc. is located in Riverside County. ER 237-39. Word of Life Ministries International Inc. has approximately 20-30 regular attendees. *Id.* Wood believes Scripture commands her to provide opportunities for the believers to obey Hebrews 10:25 where the believers meet together and encourage one another. *Id.*

During a drive-up Easter Sunday service at Wood's church, communion was served by an individual wearing a mask and gloves and the elements were pre-packaged. *Id.* The person serving Holy Communion used tongs to remove the communion cups from the pre-packaged box. *Id.* At this time, Wood has postponed all baptisms at her church. *Id.* She would like to hold drive-up church services every Sunday, including by following reasonable precautions while sharing Holy Communion with her congregation. *Id.*

II. PROCEDURAL HISTORY

On April 13, 2020, the Church Members filed their Verified Complaint, followed by an emergency motion for a temporary restraining order and for an order to show cause why a preliminary injunction should not issue on April 14, 2020. ER 56, 129. The Government filed oppositions to the motion on April 17, 2020. ER 242, 378, 745. The Church Members filed their reply and motion for leave to file the same on April 19. ER 999. On April 22, 2020, the district court

held a telephonic hearing on the motion, and later issued the order denying the motion on April 24, 2020. ER 1-46, 47-55.

The Church Members filed their notice of appeal on the following court day, April 27, 2020. ER 1072. On May 3, 2020, the Church Members filed an emergency motion for an injunction pending appeal with this Court, Dkt. 9, which was denied on May 7, 2020. Dkt. 21.

STANDARD OF REVIEW

This Court reviews a district court's "denial of a preliminary injunction for abuse of discretion." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In deciding whether the district court has abused its discretion, the Court employs a two-part test: first the Court "determine[s] de novo whether the trial court identified the correct legal rule to apply to the relief requested; second, [the court] determine[s] if the district court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record." *California v. U.S. Dep't of Health & Human Servs.*, 941 F.3d 410, 420 (9th Cir. 2019) (citing *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012)); see also *Zepeda v. U.S. I.N.S.*, 753 F.2d 719, 724 (9th Cir. 1983). The district court in this case based its decision on multiple erroneous legal standards, and applied such standards in a manner that is illogical, implausible, and draws upon unreasonable inferences from facts in the record.

SUMMARY OF THE ARGUMENT

The Government’s criminalization of gatherings for religious purposes violates multiple provisions of the U.S. and California Constitutions.⁴ The district court abused its discretion by holding that “traditional constitutional scrutiny does not apply” to constitutional violations in an emergency and creating a new, never before recognized “minimal scrutiny” standard to analyze the violations of the Church Members’ constitutional rights. ER 4-5. The district court invented this standard by misapprehended the Supreme Court’s 1905 decision in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27 (1905). When the Supreme Court has cited *Jacobson* over the last century, the case has been analyzed within the Court’s traditional tiered scrutiny analysis, not in the context of a “minimal scrutiny” standard for emergencies.

⁴ The Verified Complaint asserts the following causes of action: (1) violation of the Free Exercise Clause of First Amendment; (2) violation of the Establishment Clause of First Amendment; (3) violation of the Free Speech Clause of First Amendment; (4) violation of the First Amendment Freedom of Assembly; (5) violation of the Due Process Clause of Fourteenth Amendment by reason of vagueness; (6) violation of substantive rights protected by the Due Process Clause of Fourteenth Amendment; (7) violation of the Equal Protection Clause of Fourteenth Amendment; (8) violation of the Right to Liberty (Cal. Const. Art. I, § 1); (9) Freedom of Speech (Cal. Const. Art. I, § 2); (10) Freedom of Assembly (Cal. Const. Art. I, § 3); and (11) Free Exercise and Enjoyment of Religion (Cal. Const. Art. I, § 4). ER 56-91.

The district court further abused its discretion in finding that the Government's Orders are neutral and generally applicable, and therefore only considering the Church Members' free exercise claims under rational basis review. ER 5. The Orders are neither neutral, nor generally applicable. They single out religious gatherings for explicit restrictions when similarly situated secular entities may remain open while following social distancing guidelines. In its reasoning, the district court inserted its own value judgment that religious worship deserved lesser protection than going to the grocery store or picking up coffee, because there remains an inherent risk in any community gathering during the pandemic. In determining that the Church Members' fulfillment of deeply held religious beliefs was worthy of less protection than picking up fast food or marijuana, the Court lumped religious worship, a fundamental civil right protected by our Constitution since its inception, in a column with mere entertainment at concerts or sporting events. ER 6. Free exercise jurisprudence does not permit the government to allow some activities to proceed with risk, but then prohibit comparable religiously-motivated activities. Supreme Court precedent holds freedom of religion in much higher regard.

Finally, the district court chose not to address the Church Members' other claims in detail, stating they fail because the Orders were neutral. The Church Members' other claims state independent bases for relief and should not have been

dismissed out of hand. For these reasons, the Church Members ask that this Court reverse the decision of the district court and remand to the district court for further proceedings.

ARGUMENT

This Court has established two sets of criteria for evaluating a request for injunctive relief. *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1297 (9th Cir. 2003). Under the “traditional” criteria, a plaintiff must show (1) a strong likelihood of success on the merits, (2) a likelihood of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest. *See, e.g., Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Where the government is the opposing party, balancing of the harm and the public interest merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, the Court asks whether any significant “public consequences” would result from issuing the preliminary injunction. *Winter*, 555 U.S. at 24.

Alternatively, injunctive relief may be appropriate when a movant raises “serious questions going to the merits” and the “balance of hardships tips sharply in the plaintiff’s favor,” provided that the plaintiff is able to show there is a likelihood of irreparable injury and that the injunction is in the public interest. *All. for Wild Rockies*, 632 F.3d at 1131.

For the reasons addressed below, the Church Members meet all the criteria for injunctive relief. They have proved a clear violation of their constitutional rights; they will continue to be irreparably injured if relief is not granted; the balance of hardships tips in favor of protecting the Church Members' constitutional rights; and it is in the public interest to protect constitutional rights from government overreach.

I. THE DISTRICT COURT IS NOT FREE TO INVENT AND THEN MISAPPLY A NEW CONSTITUTIONAL STANDARD UNMOORED FROM ESTABLISHED SUPREME COURT PRECEDENT.

A. *Jacobson* Does Not Establish a “Minimal Scrutiny” Standard for Reviewing the Government’s Actions During an Emergency.

The district court erred by determining that “traditional constitutional scrutiny does not apply” during an emergency and then inventing a new standard of “minimal scrutiny” out of whole cloth. ER 4, 7. No court has ever held that Constitutional rights give way to plenary state power wholesale in an emergency, and *Jacobson*, a case examining liberty interests in the context of the Fourteenth Amendment, does not suggest or require this result. *Jacobson*, 197 U.S. at 27; *see also Ex parte Milligan*, 71 U.S. 2, 39 (1866) (holding during the Civil War that civilians cannot be convicted by military tribunals while courts remain open); *Korematsu v. U.S.*, 323 U.S. 214 (1944) (condoning internment of Japanese citizens during World Word II); *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“*Korematsu* [*v. U.S.*, 323 U.S. 214 (1944)], condoning internment of Japanese

citizens during World Word II,] was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—“has no place in law under the Constitution.”).

The district court’s analysis of *Jacobson* both misinterprets the case itself and fails to consider the last century of Supreme Court precedent both applying *Jacobson* and developing an established constitutional framework for analyzing potential violations of constitutional rights, sometimes in very trying circumstances. *Jacobson* did not create a “minimal scrutiny” standard for violations of constitutional rights in emergency situations and the Supreme Court has never recognized such a standard. *Id.*

In *Jacobson*, the Supreme Court upheld a conviction under a Massachusetts statute that criminalized the defendant’s refusal to vaccinate himself from smallpox, despite the defendant’s assertion that the statute violated his liberty interests under the Fourteenth Amendment. *Id.* at 12.

Jacobson was decided decades before the First Amendment was held to apply to the States by incorporation. *See Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940); (incorporating the Free Exercise Clause against the States); *Gitlow v. New York*, 268 U.S. 652 (1925) (Free Speech Clause); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (Free Assembly Clause); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (Right to Petition). It was not a case involving

religious liberty, and therefore does not, and could not, control this Court's analysis of the Church Members' First Amendment claims.

Subsequent Supreme Court citations of *Jacobson* focus largely on questions surrounding interpretations of the Fourteenth Amendment. For example, in *Cruzan by Cruzan v. Dir., Missouri Department of Health*, the Supreme Court compared the liberty interest at issue in *Jacobson* with the liberty interest at issue in the decision to withhold life-sustaining treatment before applying traditional constitutional scrutiny to the Missouri policy at issue. *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278 (1990). Similarly, in *Mills v. Rogers*, the Court cited *Jacobson* in its discussion of how, under the applicable constitutional framework, individuals' liberty interests should be weighed against competing state interests. *Mills v. Rogers*, 457 U.S. 291, 299 (1982).

The Supreme Court has frequently cited *Jacobson* in its discussion of the right to privacy under the Fourteenth Amendment in the reproductive rights context. *See, e.g., Roe v. Wade*, 410 U.S. 113, 154 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992). When cited outside the context of Fourteenth Amendment violations, the Court has used it as an example of potentially permissible restrictions on rights if neutrally applied. *See, e.g., Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878–79 (1990); *Everson v. Board of Ed. Ewing Tp.*, 330 U.S. 1, 32 (1947).

During the 115 years since *Jacobson* was decided, the Supreme Court has developed a substantial and durable body of case law establishing, unequivocally, that a state's infringement of fundamental rights enshrined by the First Amendment to the U.S. Constitution is subject to the most rigorous form of judicial scrutiny: strict scrutiny. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 546 (1993); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) ("The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."). The Court should not abandon this analysis here, for the first time.

The Supreme Court cases citing *Jacobson* show the Court intends *Jacobson's* analysis be incorporated within the Court's traditional tiered scrutiny framework for constitutional rights. Emergency use of the police power is to be considered in the context of the court's broader traditional constitutional tests, as evidence of the government's rational or compelling purpose, *see Roberts*, No. 20-5465, 2020 WL 2316679, at *3, not as a separate standard to be applied in emergency situations. None of the Supreme Court's citations to *Jacobson* in the last century suggest *Jacobson* established a separate tier of scrutiny courts should apply in emergencies. The district court abused its discretion by dismissing the Supreme Court's traditional constitutional analysis in favor a new "minimal scrutiny" standard.

B. The Church Members Are Likely to Prevail Even Under the District Court’s Faulty Minimal Scrutiny Standard.

Even under the district court’s erroneous interpretation of *Jacobson*, government action is still rendered unconstitutional if it “has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law.” *Jacobson*, 197 U.S. at 31; *see also Robinson v. Marshall*, No. 2:19CV365-MHT, 2020 WL 1847128 (M.D. Ala. Apr. 12, 2020) (granting a temporary restraining order to abortion providers) (appeal pending); *First Baptist Church*, No. 20-1102-JWB, 2020 WL 1910021, at *3 (applying strict scrutiny to the plaintiff’s claims of constitutional violations arising from Kansas’ prohibition on public gatherings).

For reasons discussed in greater detail in Section II below, the Government cannot meet even this standard; its indefinite and total ban on gatherings undertaken for purposes of communal worship is beyond all question, a plain, palpable invasion of fundamental rights. *See Roberts*, No. 20-5465, 2020 WL 2316679, at *4. Allowing the entertainment industry to continue business under CDC guidelines but restricting houses of worship from continuing under the same exact guidelines clearly singles out religion for disfavored treatment. All pretenses of neutrality found in the original Orders have been shed in the Government’s recently released plans for reopening as the State will allow restaurants, shopping malls, and swap meets to open, but will continue to restrict houses of worship from

meeting under the exact same standards, or at least threaten to do so. RJN Exs. 1-2, 8, 9. Under California's Reopening Plan, a church that has a coffee shop can serve coffee as long as people refrain from prayer and the barista refrains from distributing Holy Communion. The arbitrary Orders are a plain and palpable invasion of the Church Members' rights and do not satisfy even the district court's newly created *Jacobson* "minimal scrutiny" standard.

The district court abused its discretion both in its interpretation of *Jacobson* as providing a free-standing tier of minimal constitutional scrutiny to be applied in emergency situations, and in its application of that standard to the facts of this case. Thus, this Court should reverse the district court's order denying injunctive relief.

II. THE CHURCH MEMBERS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. The Government's Criminalization of Communal Religious Worship Violates the Church Members' Free Exercise Rights.

The First Amendment to the U.S. Constitution prohibits government actors from enforcing any "law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const. amend. I. Fundamental to this protection is the right to gather and worship. *See W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943); *Cantwell*, 310 U.S. at 304. Because of this fundamental protection, "a law burdening religious practice that is not neutral or not of general

application must undergo the most rigorous of scrutiny.” *Lukumi*, 508 U.S. at 546. The requirements to satisfy this scrutiny are so high that the government action will only survive this standard “in rare cases,” and the government bears the burden of proving they further a compelling interest and are pursued through the least restrictive means possible. *Id.*

Similarly, Article I, Section 4 of the California Constitution provides that “[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed.” California Courts largely defer to the federal Free Exercise standard when examining potential constitutional violations. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 562 (2004) (stating the California Supreme Court has thus far not decided whether an independent interpretation of California’s Free Exercise clause exists apart from the federal standard articulated in *Employment Division v. Smith*, 494 U.S. 872 (1990)).

1. The Orders are not neutral nor generally applicable because they restrict religiously-motivated activity but not comparable secular activity.

“[I]f a law pursues the government’s interest ‘only against conduct motivated by religious belief,’ but fails to include in its prohibitions substantial, comparable secular conduct that would similarly threaten the government’s interest, then the law is not generally applicable.” *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1079 (9th Cir. 2015) (citing *Lukumi*, 508 U.S. at 542–46). Laws that

accomplish a “religious gerrymander,” singling out religious practices while not restricting similar secular practices, are not generally applicable. *See id.* at 535–37. The Free Exercise Clause “‘forbids subtle departures from neutrality,’ and ‘covert suppression of particular religious beliefs.’” *Id.* at 542. This is because “an exception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy and just the kind of state action that must run the gauntlet of strict scrutiny.” *Roberts*, No. 20-5465, 2020 WL 2316679, at *3.

Since the Free Exercise Clause “protect[s] religious observers against unequal treatment,” *id.*, prohibitions are not generally applicable if they “substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is designed to protect.” *Wiesman*, 794 F.3d at 1079. Similarly, an overinclusive law that includes more protected conduct than necessary to achieve its goal is not generally applicable. *Lukumi*, 508 U.S. at 579.

The Governments’ Orders are neither neutral nor generally applicable. Religious gatherings have been singled out for disfavored treatment. Executive Order N-33-20 (March 19, 2020) ordered Californians to remain home but deemed “faith-based services” as essential only if the services can be “provided through streaming or other technologies.” ER 295; RJN Ex. 4. Yet the list of essential

workers not restricted exclusively to telework included workers in the “entertainment industries, studios, and other related establishments” and “workers supporting ecommerce,” without reference to whether the goods provided are life-preserving. As noted by the United States Justice Department in its May 19, 2020, letter to Governor Newsom raising civil rights concerns about the treatment of houses of worship, this sliding scale of “essential worker” that allows Hollywood and Amazon to maintain their activities with appropriate social distancing but prohibits churches, synagogues, and mosques from doing the same “facially discriminates against religious exercise.” RJN Ex. 6.

Even more egregious is the disparate treatment of houses of worship in California’s Reopening Plan. Localities moving to Stage 2 of the plan may reopen schools, restaurants, factories, offices, shopping malls, swap meets, and other general business with social distancing, but houses of worship are not permitted to hold religious services until Stage 3, regardless of what social distancing measures they employ, unless special permission is acquired from the State. RJN Exs. 1-3. A reopening plan that allows people to gather in schools, restaurants, shopping malls and swap meets, but excludes houses of worship from meeting under the exact same standards, is not neutral or generally applicable.

The law does not permit a finding that activity undertaken for a secular purpose, can suddenly become criminal if undertaken for a religious purpose. *See,*

e.g., *Roberts*, No. 20-5465, 2020 WL 2316679, at *3. The Orders criminalize activity when it is undertaken for a religious purpose and single out religious institutions for disfavored treatment in violation of the Church Members’ constitutional rights.

The Orders are both underinclusive—by permitting equally risky non-religiously motivated activities—and overinclusive—by restricting religious activities to a degree greater than necessary. *See Wiesman*, 794 F.3d at 1079. The district court’s opinion effectively admitted the Orders were underinclusive when it declared there was inherent and unavoidable risk in having grocery stores, pharmacies, and restaurants with takeout services remain open. ER 6. The Court made an unpermitted value judgment on the worthiness of religious exercise in deeming the religious exercise in question “nonessential” in comparison to the permissible activities. *Id.*

The Government clearly has a legitimate interest in mitigating the effects of the pandemic. Allowing businesses such as grocery stores, movie studios, and fast food restaurants to remain open endangers the governmental interest in flattening the curve of infection. The Constitution does not allow the Government to endanger its stated goal by allowing secular activity to continue while shuttering the doors of religious institutions under the same risk threshold. *Wiesman*, 794 F.3d at 1079; *On Fire Christian Ctr., Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020

WL 1820249, at *7 (W.D. Ky. Apr. 11, 2020) (granting a temporary restraining order against Louisville's prohibition on religious gatherings); *First Baptist Church v. Kelly*, No. 20-1102-JWB, 2020 WL 1910021, at *6 (D. Kan. Apr. 18, 2020) (granting a temporary restraining order against Kansas State's prohibition on religious gatherings); *Berean Baptist Church v. Cooper*, No. 4:20-CV-81-D, 2020 WL 2514313, at *7 (E.D. N.C. May 16, 2020) (granting injunction).

Similarly, the Orders are overinclusive because they restrict more religious activity than necessary to achieve the Government's stated goals. *See* RJN Exs. 7 (CDC guidelines for places of worship), 10 (finding that most states have religious exemptions to COVID-19 social distancing rules). California's blanket prohibition on religious gatherings means there are lots religious activities prohibited which could be undertaken with appropriate safety measures. The Government has provided no defense as to why a church could not gather for a religious service with a limited number of participants, or an outdoor baptism where individuals keep safe distances from one another.

Because the Orders are neither neutral nor generally applicable, they violate the First Amendment to the U.S. Constitution and Article I, Section 4 of the California Constitution unless the Government can prove they further a compelling interest pursued through the least restrictive means. The Government has not met that standard.

2. The district court impermissibly weighed the reasonableness of the Church Members' religious beliefs in coming to its determination that the Orders did not violate the Free Exercise Clause.

Determinations as to the sincerity of religious belief “[are] not to turn upon a judicial perception of the particular belief or practice in question.” *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 714 (1981). “[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.” *Id.* In applying the Free Exercise clause of the First Amendment, “courts may not inquire into the truth, validity, or reasonableness of a claimant’s religious beliefs.” *See United States v. Ballard*, 322 U.S. 78, 87 (1944). “[T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect,” and courts are not to be “arbiters of scriptural interpretation.” *Thomas*, 450 U.S. at 716. And as discussed above, when the government designs a law to further a particular government interest, the law is not permitted to allow secularly motivated conduct endangering that interest while restricting religious conduct endangering the same interest. *Wiesman*, 794 F.3d at 1079.

In its order, the district court refused to apply the neutral social distancing rules available for the operation of grocery stores and movie studios to houses of worship because, the court reasoned, if it applied “the same rules to in-person religious gatherings as it does to grocery stores, people will get sick and die from

attending religious gatherings just as they are dying from working in grocery stores.” ER 6. The Court then went on to determine that religious gatherings were “non-essential activities,” likening them to a concert or a sporting event, that must be suspended so that “essential functions,” as defined by the Orders, may be undertaken more safely. *Id.* In so doing, the district court substituted its own judgment of the level of risk the Church Members should be willing to take to follow the tenets of their faith for that of the faithful, including the Church Members.

For the Church Members, following biblical commands to gather with believers for communal worship is as essential, if not more so, than grocery shopping, picking up coffee, and going to the local hardware store. ER 217-19, 232-39. While the district court judged fulfillment of their beliefs not worthy of the level of risk the Orders allow for similar secular activities, it is not a prerogative of the court to be the arbiter of what the Church Members’ faiths require. This was not the court’s judgment to make. If “[w]orkers supporting the entertainment industries, studios, and other related establishments” or “supporting ecommerce” are allowed to gather with some risk to themselves in order to perform the secular tasks they undertake on a daily basis, the fact that the court does not consider the Church Members’ religious beliefs of similar import does not mean religious adherents should not have the opportunity to meet under the same standards. As

discussed by the Sixth Circuit in its recent decision striking down similarly unconstitutional restrictions on religious freedom, “[a]ssuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?” *Roberts*, No. 20-5465, 2020 WL 2316679, at *4.

The Free Exercise Clause is not limited to supporting religious freedom for faith decisions with which a Judge agrees. That the district court Judge does not find in-person religious worship “essential” is not the governing principle of the law, and is also contrary to guidelines issued by the federal government. RJN Exs. 6, 7. The Government has a right to enforce neutral laws to stop the flow of a virus. It does not have the right to declare that selected businesses may continue with a lessened risk of transmission but houses of worship may not. The Church Members only ask to be held to the same standards as the other secular activities in the Orders, as recommended by the CDC.

3. The Government does not have a compelling interest pursued through the least restrictive means for its disparate treatment of houses of worship.

When a government practice restricts fundamental rights, it is subject to strict scrutiny and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. *See, e.g.,*

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

The Government does not have a compelling government purpose for continuing to restrict houses of worship from meeting when they are increasingly allowing comparable secular entities to open and meet with social distancing. In their current form, the Orders do not allow any gatherings undertaken for a religious purpose, even those that can take place while maintaining CDC guidelines. RJN Ex. 7. Further, San Bernardino and Riverside Counties have both stated in documents provided to the State that healthcare facilities are well-below surge capacity and the Counties have increased their readiness to respond to the crisis. RJN Ex. 3, p. 114 (“hospitals within the County of San Bernardino have additional surge capacity sufficient to handle current projections”); p. 149 (“Riverside County has sufficient hospital capacity, including Intensive Care Unit (ICU) beds and ventilators, and adequate PPE to handle standard healthcare needs, current COVID-19 cases, and a potential surge due to COVID-19.”). The Orders substantially burden the free exercise of religion by prohibiting every Californian from attending religious services during this time of crisis. Not all Californians own cars or have access to “other technology” needed to engage in communal worship while sheltering at home, and not all religious practices may be observed remotely.

Even if the Government did have a compelling purpose for singling out religious worship in this way, there are less restrictive means to achieve the same end. *See, e.g.*, Ex. 5, 8. The Government could limit the numbers of family units allowed in church buildings based on square footage, or allow churches to provide religious worship for those who may not have electronic access for remote participation. *See, e.g.*, Ex. 6. There are numerous other measures the government could pursue that would be less restrictive on the Church Members' Free Exercise rights. Rather than do so, the Government opted to criminalize communal worship altogether.⁵ Accordingly, the Orders violate the Free Exercise Clause of the U.S. and California constitutions.

B. The Government's Orders Violate the Establishment Clause.

The "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).⁶ If a secular group receives more favorable treatment than a religious group because they are secular, such treatment violates

⁵ While San Bernardino has indicated it intends to reopen places of worship, RJN Ex. 9, it also threatens that it may revert to the Governor's Order to shutter such facilities at any time. *Id.*

⁶ The Establishment Clause applies to the states through the Due Process Clause of the Fourteenth Amendment. *Everson*, 330 U.S. at 10.

the Establishment Clause. *Id.* Article I, Section 4 of the California Constitution also guarantees the “[f]ree exercise and enjoyment of religion without discrimination or preference.” Cal. Const. Art. I, § 4; *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 571 (1989) (“ ‘California’s constitutional provisions are more comprehensive than those of the federal Constitution’ ”). “Notwithstanding the clear differences between the state and federal guarantees, California courts have recognized that an analysis of establishment claims under the California Constitution frequently produces the same results as one under the federal constitution.” *Id.* (incorporating the federal Establishment Clause’s *Lemon* test into state law analysis); *see also Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396 (9th Cir. 1994) (discussing state and federal standards in religious liberty cases).

Under the *Lemon* test, government action violates the establishment clause unless it (1) has a secular purpose; (2) has a “principle or primary effect” that “neither advances nor inhibits religion”; and (3) does not foster “an excessive government entanglement with religion.” *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *but see Am. Legion v. Am Humanist Ass’n*, 139 S. Ct. 2067 (2019) (writing for the plurality, Justice Samuel Alito refused to apply the *Lemon* test, but failed to garner majority support for an alternate test.) Failure to satisfy any of these factors

renders the challenged state action unconstitutional. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

The Government's Orders violate the Establishment Clause and Article I, Section 4 of the California Constitution by favoring secular over religious activity and impermissibly subjecting the faithful the comprehensive, discriminatory, and continuous surveillance so as to excessively entangle itself with religion. *See Vernon*, 27 F.3d at 1399. The Stage 2 reopening plan sheds all suggestion of the Government's neutrality towards religious observance by reopening secular institutions like schools, restaurants, and shopping malls while singling out religious institutions for further restrictions. RJN Exs. 1-2. Under Stage 2 reopening, a church could meet for a garage sale, but not for a funeral. It could host a spaghetti dinner, but not the Lord's supper.

Further, if a county successfully obtains a variance from the State to allow religious worship, the State will require places of worship to comply with a lengthy, detailed set of conditions. RJN Ex. 8. A subset of those conditions is applicable to religious gatherings, only. *Compare* RJN Ex. 8 (limiting religious services to the lesser of 25% of the facility's capacity or 100 persons, regardless of the size of the facility) *with* RJN Ex. 3 (establishing Stage 2 variances in San Bernardino County for, *inter alia*, retail stores to operate at 50% capacity and dine-in restaurants to operate at any capacity provided there is "safe physical distance"

between patrons). In order to ensure compliance with these discriminatory conditions, the Government will need to continuously surveil places of worship in a manner wholly inconsistent with the Church Members' fundamental right to religious liberty. Thus, the Government's Orders violate the Establishment Clause and Article I, Section 4 of the California Constitution by favoring the secular over the religious and excessively entangling the government in the affairs of religious institutions.

C. The Orders Ban All Public and Private Assembly in Violation of the First Amendment to the U.S. Constitution and California Constitution.

The Court erred in its one-paragraph dismissal of the Church Members' multiple alternate, independent, and free-standing grounds for relief. The First Amendment right to free speech and to peaceably assemble are fundamental rights protected by the U.S. and California Constitutions. U.S. Const. amend. I; Cal. Const. Art. I §§ 2-3; *Whitney v. California*, 274 U.S. 357, 373 (1927); *People v. Chambers*, 22 Cal. App. 2d 687, 706 (1937) ("laws should not infringe upon our guaranteed freedom of speech and lawful assembly."). California courts treat the prior restraint and overbreadth doctrine similarly to federal courts. *See Wilson v. Superior Court*, 13 Cal.3d 652, 658-62 (1975) (relying mostly on federal citations to analyze prior restraint doctrine under California Constitution); *In re J.M.*, 36 Cal. App. 5th 668, 680 (2019) (citing some federal cases and paralleling

overbreadth doctrine analysis under California Constitution with that under the U.S. Constitution).

“Religious worship and discussion are protected speech under the First Amendment.” *Widmar v. Vincent* (“*Widmar*”), 454 U.S. 263, 269, n. 6 (1981). Accordingly, “[t]he Constitution guarantees Appellants’ right to associate for the purpose of engaging in activities protected by the First Amendment.” *Roberts v. United States Jaycees*, 468 U.S. 609, 618 (1984). When a government practice restricts fundamental rights, it is subject to “strict scrutiny” and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. *See, e.g., San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973).

The Government’s Orders constitute a prior restraint on the Church Members’ fundamental rights to freedom of speech and assembly and therefore fail to pass constitutional scrutiny. The Orders are also substantially overbroad, producing a chilling effect on the Church Members’ ability to engage in religious worship safely, pursuant to federal guidelines and recommendations. RJN Ex. 7. As discussed above, the Government cannot overcome strict scrutiny. The CDC’s social distancing guidelines are appropriate to limit the spread of COVID-19. *Id.* Imposing more restrictive requirements that target churches while at the same time allowing restaurants, coffee shops, and marijuana dispensaries to operate drive-ups

is not the least restrictive means of achieving the Government's public safety goals.

In this case, law enforcement officers have unfettered discretion in enforcing the law because they are provided no standards as to when to enforce, or exempt religious services from the law. *See, e.g., Houston v. Hill*, 482 U.S. 451 (1987). Counties have already exercised that discretion to provide *ad hoc* exemptions for Christians, only. ER 211. Violators of the Orders are liable for criminal penalties, further raising the stakes.

Requiring the Church Members to abstain from religious gatherings, under threat of criminal enforcement, and despite substantial modifications to satisfy the public health interests at stake (modifications that have been deemed acceptable in the cases of operations deemed "essential" by government decree, and by the federal government), violates Church Members' constitutional rights to free speech and peaceful assembly.

D. The Government's Orders Are Void for Reasons of Vagueness.

A regulation is constitutionally void on its face when, as matter of due process, it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391 (1926); *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1115 (1997). Vague laws "trap the innocent by not providing fair warning." *Grayned v. City of*

Rockford, 408 U.S. 104, 108–109 (1972). If “arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Id.* The problem with a vague regulation is that it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.” *Id.*; *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

The Orders at issue in this case are so vague as to their scope and application as to run afoul of the Due Process Clause of the Fourteenth Amendment. Embedded within Executive Order N-33-20 is a public health directive to shelter in place. The order itself merely directs the public to “heed” the public health directive, it does not appear to order compliance therewith; Webster’s Dictionary defines the word “heed” to mean “to give consideration or attention to”—not to “adhere” or comply. Despite this, state and local officials have widely reported the Governor’s order to require compliance with the public health directive by sheltering in place. ER 185.

Given this ambiguity, and particularly in light of the fundamental rights at stake, neither the Church Members, nor any other reasonable person, can understand precisely what is being ordered, and what actions may result in criminal penalties, fines, or imprisonment. Statements by local officials have muddled the

issue further. San Bernardino County, for example, has indicated that it “does not expect law enforcement to broadly impose citations on violators” and that “the expectation is that law enforcement will rely upon community members to use good judgment, common sense, and act in the best interest of their own health and the health of their loved ones and the community at large.” ER 179. As no reasonable person can make sense of what conduct is permitted under the Orders and what conduct will result in criminal penalties, the Government’s Orders are void for vagueness.

E. The Orders Violate Article I, Section 1 of the California Constitution.

All Californians “are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy. Cal. Const. Art. I, § 1. Understanding the basic fundamental right of liberty, California courts have held that Public Health Officials’ authority is limited. Before exercising their full powers to quarantine, there must be “reasonable grounds [] to support the belief that the person so held is infected.” *Ex parte Martin*, 83 Cal. App. 2d 164 (1948). Public Health Officials must be able to show “probable cause to believe the person so held has an infectious disease” *Id.*

In a case that is somewhat analogous to what Californians are facing with the coronavirus pandemic of 2020, California courts found that Public Health Officials could not quarantine 12 blocks of San Francisco Chinatown because of nine deaths due to bubonic plague. *See Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900); *Wong Wai v. Williamson*, 103 F. 1 (C.C. Cal. 1900). These courts found it “purely arbitrary, unreasonable, unwarranted, wrongful, and oppressive interference with the personal liberty of complainant” who had “never had or contracted said bubonic plague; that he has never been at any time exposed to the danger of contracting it, and has never been in any locality where said bubonic plague, or any germs of bacteria thereof, has or have existed.” *Jew Ho*, 103 F. at 10. In *Jew Ho* and *Wong Wai*, the courts found that there were more than 15,000 people living in the twelve blocks of San Francisco Chinatown who were to be quarantined. The courts found it unreasonable to shut down the ability of over 15,000 people to make a living because of nine deaths.

California courts have found that “a mere suspicion [of a contagious disease], unsupported by facts giving rise to reasonable or probable cause, will afford no justification at all for depriving persons of their liberty and subjecting them to virtual imprisonment under a purported order of quarantine.” *Ex parte Arta*, 52 Cal. App. 380, 383 (1921) (emphasis added). Under prevailing law, the Church Members are presumed to be free of communicable disease unless and

until the Government establishes otherwise. Requiring the Church Members to abstain from all religious gatherings, despite substantial modifications to satisfy the public health interests at stake, violates their California Constitutional liberty rights.

F. The Government Violates the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment of the Constitution provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Equal protection requires the state to govern impartially—not draw arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objection. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

Strict scrutiny under the Equal Protection Clause applies where, as here, the classification impinges on a fundamental right, including the right to practice religion freely, to right to free speech and assembly, and the right to travel, among others. *Maynard v. U.S. Dist. Court for the Cent. Dist. of California*, 701 F. Supp. 738, 742 (C.D. Cal. 1988) (“When a law disadvantages a suspect class or impinges upon a ‘fundamental right,’ the court will examine the law by applying a strict scrutiny standard”), *aff’d sub nom. Maynard v. U.S. Dist. Court for Cent. Dist. of California*, 915 F.2d 1581 (9th Cir. 1990). Under strict scrutiny review, the law can be justified only if it furthers a compelling government purpose, and, even

then, only if no less restrictive alternative is available. *See, e.g. Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 257-58 (1974).

Here, the Government intentionally and arbitrarily categorizes individuals and conduct as either “essential” or “non-essential.” RJN Ex. 4; ER 285. Those persons classified as “essential,” or as participating in essential services, are permitted to go about their business and activities provided certain social distancing practices are employed. *Id.* Those classified as “nonessential,” or as engaging in non-essential activities, are required to stay in their residence, unless it becomes necessary for them to leave for one of the enumerated “essential” activities. *Id.*

For reasons discussed above, the Government has not and cannot satisfy strict scrutiny; its arbitrary classifications are not narrowly tailored measures that further a compelling government interest. Indeed, the Government’s Orders defy federal guidance, which provides that places of worship are “essential” across the country. RJN Exs. 6, 7. Accordingly, the Government must permit the Church Members to engage in equivalent constitutionally protected activities provided that the Church Members also adhere to the social distancing guidelines established by the CDC.

III. THE CHURCH MEMBERS FACE IMMINENT IRREPARABLE HARM ABSENT IMMEDIATE INJUNCTIVE RELIEF.

Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors. *Roberts*, No. 20-5465, 2020 WL 2316679, at *5. “In a case like the one at bar, where the First Amendment is implicated, the Supreme Court has made clear that ‘[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury’ for purposes of the issuance of a preliminary injunction.” *College Republicans at San Francisco State University v. Reed*, 523 F. Supp. 2d 1005, 1011 (N.D. Cal. 2007) (citing *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 973-74 (9th Cir. 2002), in turn citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); see also *S.O.C., Inc. v. Cnty. of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998). “Unlike a monetary injury, violations of the First Amendment ‘cannot be adequately remedied through damages.’” *Americans for Prosperity Foundation v. Harris*, 182 F. Supp. 3d 1049, 1058 (C.D. Cal. 2016) (citing *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)).

Without an injunction preventing the Government from further enforcing the Orders, the Church Members will suffer irreparable harm in the form of deprivations of fundamental freedoms secured by the First and Fourteenth Amendments to the U.S. and the California Constitutions. Thus, irreparable injury is demonstrated and interim injunctive relief is proper and necessary.

IV. THE REMAINING FACTORS WEIGH IN FAVOR OF GRANTING INJUNCTIVE RELIEF.

Where the government is the opposing party, balancing of the harm and the public interest merge. *See Nken*, 556 U.S. at 435. Thus, the Court asks whether any significant “public consequences” would result from issuing the preliminary injunction. *Winter*, 555 U.S. at 24. “[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.” *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (*quoting Elrod*, 427 U.S. at 373). “Faced with . . . preventable human suffering, [the Ninth Circuit] ha[s] little difficulty concluding that the balance of hardships tips decidedly in plaintiffs’ favor.” *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) (*quoting Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)). “The fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [movant’s] favor.” *Sammartano*, 303 F.3d at 973.

Here, at a minimum, the balance of hardships tips strongly in favor of granting relief because the Orders raise serious constitutional questions concerning the Church Members’ fundamental rights. *G & V Lounge, Inc. v. Mich. Liquor Control Comm’n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (“it is always in the public interest to prevent the violation of a party’s constitutional rights”); *see also Reed*, 523 F. Supp. 2d at 1101; *Sammartano*, 303 F.3d at 974.

Further, protecting religious liberty will result in positive consequences for the public. There is minimal increased risk to the public by allowing the Church Members to practice their faiths in accordance with federal guidelines issued by the CDC. RJN Ex. 7. Indeed, San Bernardino and Riverside Counties have both stated in documents provided to the State that healthcare facilities are well-below surge capacity and have acquired a measure of control over the situation. RJN Ex. 3, pp. 114, 149 (“Riverside County has sufficient hospital capacity, including Intensive Care Unit (ICU) beds and ventilators, and adequate PPE to handle standard healthcare needs, current COVID-19 cases, and a potential surge due to COVID-19.”). As such, there is no public interest justification for allowing the continued suspension of the Church Members’ fundamental rights, and this Court should reverse the district court’s order.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court reverse the district court’s order denying injunctive relief and remand to the district court for further proceedings.

May 26, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion complies with the requirements of FRAP 27(d). The Motion was prepared in Times New Roman 14-point font, and contains 10,100 words, as counted by Microsoft Word 2016.

May 26, 2020

/s/ Harmeet K. Dhillon
Harmeet K. Dhillon

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2020, I filed the foregoing 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.

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.

May 26, 2020

/s/ Harmeet K. Dhillon
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