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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

19 SOUTH BAY UNITED
20 PENTECOSTAL CHURCH, a California
21 nonprofit corporation, and BISHOP
22 ARTHUR HODGES III, an individual,

Plaintiffs,

v.

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

Defendants.

Case No.: 3:20-cv-865-BAS

**Reply to California’s Opposition to
South Bay Pentecostal Church’s
Renewed Motion for a Temporary
Restraining Order / Preliminary
Injunction**

Judge: Cynthia Bashant
Dept: Courtroom: 4B
Date: TBD
Time: No Oral Argument Unless
Requested by the Court

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No. S264065 (Cal. Aug. 24, 2020)

1 1:24–2:23.) It appears that California courts are beginning to recognize that this
 2 cannot be. *See Orange County Board of Education v. Newsom*, No. S264065 (Cal. Aug.
 3 24, 2020) (ordering California to file opposition to writ petition); *County of Los*
 4 *Angeles v. Grace Community Church*, No. 20STCV30695 (Cal. Super. Aug. 14, 2020),
 5 No. B307056 (Cal. App. Aug. 15, 2020) (refusing to grant TRO to enforce shutdown
 6 order). “[A] country, preserved at the sacrifice of all the cardinal principles of liberty,
 7 is not worth the cost of preservation.” *Ex Parte Milligan*, 71 U.S. 2, 126 (1866). For
 8 the reasons discussed below, this Court should enjoin California from restricting
 9 South Bay Pentecostal Church’s worship services.

10 ARGUMENT

11 1. South Bay Pentecostal Church Will Likely Succeed on the Merits.

12 1.1. California’s Worship Restrictions Violate Plaintiffs’ Free Exercise Rights.

13 1.1.1. California’s worship restrictions are not neutral.

14 As stated in South Bay’s moving papers, a law classifies on the basis of religion
 15 and “lacks facial neutrality if it refers to a religious practice” unless it is clear that the
 16 words used were intended to have “a secular meaning.” *Church of the Lukumi Babalu*
 17 *Aye, Inc. v. City of Hialeah*, 508 U.S. 533, 546 (1993); *see also Espinoza v. Montana*
 18 *Dep’t of Revenue*, 140 S. Ct. 2246, 2256 (2020) (“Status-based discrimination
 19 remains status based even if one of its goals or effects is” a valid, neutral goal); *S. Bay*
 20 *United Pentecostal Church v. Newsom*, 959 F.3d 938, 944 (9th Cir. 2020) (Collins, J.,
 21 dissenting) (“[W]here a regulation’s operative language restricts conduct by explicit
 22 reference to the conduct’s religious character, it is not facially neutral.”).

23 Arguing against this, California primarily cites to non-majority Supreme Court
 24 opinions in *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020) and
 25 *Calvary Chapel Dayton Valley v. Sisolak*, --- S. Ct. ---, 2020 WL 4251360 (2020). *See*
 26 *Dkt. 57, 23:15–24:26*. To be clear, those opinions are *silent* on neutrality—all except
 27 one. Justice Alito expressly noted that regimes that regulate worship qua worship are
 28 not neutral. *Calvary Chapel*, 2020 WL 4251360 at *2.

1 California also cites several cases and states that non-neutrality is only present
2 where “the law at issue . . . regulates or prohibits conduct *because* it is undertaken for
3 religious reasons.” Dkt. 57, 14:21–15:11 (quoting *Lukumi*, 508 U.S. at 532) (italics
4 added). California, however, does not understand the meaning of “*because*.” In
5 essence, California asks this Court to follow the *Korematsu* rule, where the High Court
6 held that classification based on protected characteristics was constitutional “*because*”
7 “the properly constituted [] authorities” determined that the “urgency of the situation
8 demanded that all citizens of Japanese ancestry be segregated from the West Coast.”
9 *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944). In other words, it was
10 “*because*” of urgency, not because of “Japanese ancestry,” that the government could
11 restrict the rights of Mr. Korematsu and his fellow Japanese-Americans. *Id.*

12 Thus, according to California, it can institute an express ban on worship qua
13 worship, and then explain to this Court that its *facially discriminatory* actions are not
14 motivated by *invidious animus*—and so everything is okay—just like in *Korematsu*.
15 There, the government explained that it could not “precisely and quickly ascertain[]”
16 how to engage in “an immediate segregation of the disloyal from the loyal” Japanese-
17 Americans and so necessity (not animus) required confining all. *Id.* at 218–19.

18 This Court should not take up California’s invitation. Restricting liberties “solely
19 and explicitly on the basis of [a protected characteristic], is objectively unlawful.” *Trump*
20 *v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (abrogating *Korematsu*). Because California’s
21 worship restrictions are not neutral, this Court should apply strict scrutiny. *See S. Bay*,
22 959 F.3d at 944 (Collins, J., dissenting) (“[W]here a regulation’s operative language
23 restricts conduct by explicit reference to the conduct’s religious character, it is not
24 facially neutral. Because the restrictions at issue here explicitly reference religious
25 practice, conduct, belief, or motivation, they are not facially neutral.”) (cleaned up).¹

26 ¹ California further attempts to distinguish *Espinoza*, cited above, on the basis that it “considered a
27 regulation that expressly discriminated against religio[n].” Dkt. 57, 33 n.19. This argument appears to
28 track the California Supreme Court’s statement that “[t]he high court has never prohibited statutory
references to religion for the purpose of accommodating religious practice.” *Catholic Charities of*

1 **1.1.2. California’s worship restrictions are not generally applicable.**

2 For “discriminatory enforcement” to make a law no longer “generally
3 applicable,” what matters is not that some other activities are treated as bad as
4 worship, but that some other activities are treated better. *See Church of the Lukumi*
5 *Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537 (1993) (“[Where] individualized
6 exemptions from a general requirement are available, the government ‘may not refuse
7 to extend that system to cases of “religious hardship” without compelling reason.’”);
8 *Spell v. Edwards*, 962 F.3d 175, 182 (5th Cir. 2020) (Ho, J., concurring) (“To survive
9 First Amendment scrutiny, however, those concerns must be applied consistently”);
10 *Soos v. Cuomo*, --- F. Supp. 3d ---, 2020 WL 3488742, at *9 (N.D.N.Y. 2020)
11 (“[I]ndividualized de facto exemptions can demonstrate that a challenged law is not
12 generally applicable, and is therefore subject to heightened scrutiny. Along these lines,
13 when the challenged law does not carve out an exemption on its face, the history of
14 enforcement is relevant to the existence of an exemption.”) (citation omitted).

15 Here, on May 25, 2020, California very consciously made a uniform regulation
16 covering both political protest and worship (VSAC, ¶ 44, Exs. 1-5, 1-6.) That same
17 day, George Floyd was killed (VSAC, ¶ 94, Ex. 4-1), and only 18 days later, California
18 promulgated gerrymandered regulations blessing the protests by lifting all restrictions
19 on outdoor activities. (VSAC, ¶ 48, Exs. 1-7, 1-8.) Notably, California does not dispute
20 the fact that it did not make any public announcement regarding these gerrymandered
21 regulations. And then to justify this “outdoor is healthier” argument, California only
22 cites to three papers. Two are non-peer-reviewed papers from China, which simply list

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24 *Sacramento, Inc. v. Superior Court*, 32 Cal. 4th 527, 551 (2004). The simple problem with this is that
25 the regulations do discriminate against religion—by prohibiting the form of worship that South Bay’s
26 faith requires. (Dkt. 45-2, Supp. Hodges Decl., ¶¶ 9-16; Dkt. 53-2, 2d Supp. Hodges Decl., ¶¶ 3-23.)
27 There is no general ban on singing—there is only a ban on singing in church. The only general ban
28 (similar to the general regulation at issue in *Catholic Charities*) is the ban on leaving one’s home. (*See*
VSAC ¶ 28, Ex. 1-1 [“I . . . order all individuals living in the State of California to stay home or at their
place of residence”].) But with so many exemptions to that ban granted—so many in fact that few
remember that it is still in place—it could hardly be argued that granting South Bay Pentecostal
Church limited relief from it is an “accommodation” and not discrimination.

1 the location of known outbreaks, and thereby conclude that it is a “plausible”
 2 hypothesis that the virus spreads faster indoors. (Watt Decl., ¶ 44, Exs. 11, 12.) The
 3 third is peer-reviewed, but follows the same tack—simply listing known outbreaks—
 4 and tempers its similar conclusion with the statement that indoor outbreaks may have
 5 occurred “because early spread in China was during their winter.” (Rutherford Decl.,
 6 ¶ 50, Ex. 12.) Reviewing those papers makes clear that forcing millions of Californians
 7 to take their business outside—into 100+ degree temperatures and now smoke from
 8 wildfires—can only be explained as an effort to cure the problem of discriminatory
 9 enforcement. Thus, strict scrutiny must be applied. *See Lukumi*, 508 U.S. at 537 (“The
 10 Court must survey meticulously the circumstances of governmental categories to
 11 eliminate, as it were, religious gerrymanders”).

12 **1.2. The Worship Restrictions Fail Strict Scrutiny and *Jacobson* Scrutiny.**

13 Because California’s worship restrictions are neither neutral nor generally
 14 applicable (via discriminatory enforcement), they would normally have to satisfy
 15 strict scrutiny—which they could never satisfy. *See Gonzales v. O Centro Espirita*
 16 *Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006). The real question is
 17 whether “*Jacobson* scrutiny” should be applied. *Jacobson* scrutiny is a brand-new
 18 legal concept, based on exigency and emergency, that was created earlier this year in
 19 response to the pandemic, and is derived from *Jacobson v. Commonwealth of*
 20 *Massachusetts*, 197 U.S. 11 (1905). As explained in South Bay’s moving papers, the
 21 actual text of *Jacobson* makes the case particularly irrelevant to the present pandemic,
 22 but in the past six months, numerous courts have developed a new *Jacobson*
 23 jurisprudence that appears more relevant than the text of *Jacobson* itself.²

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 25 ² Most recently, it has come to South Bay’s attention that courts may have misunderstood *Jacobson*’s
 26 reference to “the fundamental law.” *See Jacobson*, 197 U.S. at 31. “Fundamental law” is the
 27 sovereign law of a nation-state (*see Fundamental Law*, Black’s Law Dictionary (11th ed. 2019)), which
 28 in the nineteenth century was used to distinguish sovereign state law from limited federal law. *See*,
e.g., Green v. Biddle, 21 U.S. 1, 60–61 (1823) (“The compact is also recognised as valid and binding by
 the sovereign authority of the people of Kentucky, being incorporated into the State constitution, and
 thus made a part of their fundamental law.”). *Jacobson* dealt with a challenge to Massachusetts’

1 In determining whether to use *Jacobson* scrutiny, perhaps the most important
 2 question is when will the emergency end, so that this lesser scrutiny is no longer
 3 relevant? An “emergency” is, by definition, temporary in duration. *See Emergency*,
 4 Black’s Law Dictionary (11th ed. 2019) (“A sudden and serious event or an
 5 unforeseen change in circumstances that calls for immediate action to avert, control,
 6 or remedy harm.”). It is hardly plausible that *Jacobson* scrutiny applies to all
 7 diseases—otherwise California executive officials could shut down churches every
 8 winter to fight the flu. It is equally implausible that *Jacobson* scrutiny applies to all
 9 public health laws—otherwise it would have been applied by the Supreme Court in
 10 any number of recent cases challenging health and safety laws. *See, e.g., Nat’l Inst. of*
 11 *Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

12 How long should a state of emergency last in California? When a state of war
 13 emergency is declared, the Governor has 30 days in which to call a special session of
 14 the legislature, who can then decide to continue the emergency. (Cal. Gov. Code
 15 § 8624.) In contrast, when a regular state of emergency is declared, the Governor’s
 16 powers continue indefinitely until he relinquishes them, the legislature vetoes them
 17 (Cal. Gov. Code § 8629),³ or a court issues a writ of mandate ordering him to end the
 18 emergency because, objectively, it is over. *See Nat’l Tax-Limitation Com. v.*
 19 *Schwarzenegger*, 8 Cal. Rptr. 3d 4 (2003).⁴ One would expect a state of war emergency

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 21 mandatory vaccination law under the substantive due process clause of the Fourteenth Amendment.
 22 Thus, *Jacobson*’s direction that courts must look to “the fundamental law” is perhaps a statement
 23 that if the mandatory vaccination law would have violated Massachusetts’ law, it also would have
 24 violated the Fourteenth Amendment’s due process clause. South Bay contends that this is a more
 25 appropriate reading of *Jacobson*, permitting it to raise its California constitutional rights as
 26 incorporated into the federal constitution. Nevertheless, South Bay also analyzes *Jacobson* in the
 27 manner which courts have most recently done.

28 ³ Notably, this legislative veto likely violates the California constitution. *See Carmel Valley Fire*
Protection Dist. v. State, 25 Cal.4th 287, 298–308 (2001).

⁴ California Rules of Court, rule 8.1115 prohibits citing unpublished or depublished cases in
 California court. This rule, however, does not apply to citing the same cases in federal court. *See*
Cole v. Doe 1 thru 2 Officers of City of Emeryville Police Dep’t, 387 F. Supp. 2d 1084, 1103 n.7 (N.D.
 Cal. 2005). Further, the fact that *Nat’l Tax-Limitation Com.* is depublished is irrelevant. “A
 Supreme Court order to depublish is not an expression of the court’s opinion of the correctness of

1 to last longer than a regular state of emergency, and so it seems incongruous that the
 2 former has a 30 day sunset clause—unless the Legislature believed that a regular state
 3 of emergency would naturally end before even 30 days were reached. If so, this makes
 4 the present six-month emergency egregious. But more importantly, from all outward
 5 signs, the emergency is over. (*See* Trissell Reply Decl., Exs. NN, OO.) Nothing in
 6 California’s coronavirus response is now happening “sudden[ly].” *Emergency*,
 7 Black’s Law Dictionary (11th ed. 2019). Rather, As Justice Alito recently noted,
 8 “months have passed since the original declaration. The problem is no longer one of
 9 exigency, but one of considered yet discriminatory treatment of places of worship.”
 10 *Calvary Chapel*, 2020 WL 4251360, at *2. This Court should therefore apply regular
 11 strict scrutiny, not *Jacobson* scrutiny.

12 **1.2.1. The worship restrictions fail to satisfy regular strict scrutiny.**

13 Arguing that its worship restrictions satisfy strict scrutiny, California states that
 14 “of course, there’s a compelling government interest in safety and health.” Dkt. 57,
 15 31:25–27 (citing May 15, 2020, hearing transcript at 27). Assuming this is true, then
 16 there is a compelling government interest in ending the shutdown—as it is killing more
 17 people than it is saving (Supp. Delgado Decl., ¶ 9; Rebuttal Delgado Decl., ¶ 30)—and
 18 there is a compelling government interest in shuttering all hamburger joints because
 19 heart disease kills twice as many people as the coronavirus. (Mtn., 1:24–2:23).⁵

20 But California’s analysis misses the point. The question is not whether there is
 21 generically a compelling government interest in restricting “gatherings such as worship
 22 services where large numbers of people who interact only once a week in the same place
 23 for an extended period of time to engage in a shared communal experience that features

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 25 the result of the decision or of any law stated in the opinion.” Cal. Rules of Court, rule 8.1125(d).

26 ⁵ California states that South Bay “ignore[s] the serious, long-term effects the disease may have in
 27 those who survive it.” Dkt. 57, 10:2–4 (citing Watt Decl., ¶ 23, Ex. 2; Rutherford Decl., ¶ 41.)
 28 Unsurprisingly, both declarations equivocate, stating that there “may” be unforeseen, long-term
 consequences. Exhibit 2 to the Watt declaration is simply an article—not a study—with a doctor
 opining that such long-term effects may be “fatigue, headaches, vertigo.” In other words, there is
 no science backing up these opinions.

1 singing and chanting[.]” Dkt. 57, 32:3–5. Rather, the question is whether there is a
 2 compelling government interest in preventing South Bay Pentecostal Church from
 3 holding worship services (with singing) in its sanctuary, when the Church practices
 4 social distancing, requires masks, checks temperature, regularly disinfects its sanctuary,
 5 requires people showing symptoms to stay home, and so far has a perfect record—no
 6 coronavirus infections. (VSAC, ¶¶ 76–77, 179; Rebuttal Hodges Decl., ¶¶ 2–3.)

7 As explained by the Supreme Court in *Gonzales*,

8 [T]he strict scrutiny test . . . contemplate[s] an inquiry more
 9 focused than the Government’s categorical approach. [Strict
 10 scrutiny] requires the Government to demonstrate that the
 11 compelling interest test is satisfied through application of the
 12 challenged law “to the person” — the particular claimant whose
 13 sincere exercise of religion is being substantially burdened. . . . In
 14 [*Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406
 15 U.S. 205 (1972)], this Court looked beyond broadly formulated
 16 interests justifying the general applicability of government
 17 mandates and scrutinized the asserted harm of granting specific
 18 exemptions to particular religious claimants. In *Yoder*, for example,
 19 we permitted an exemption for Amish children from a compulsory
 20 school attendance law. We recognized that the State had a
 21 “paramount” interest in education, but held that “despite its
 22 admitted validity in the generality of cases, we must searchingly
 23 examine the interests that the State seeks to promote . . . and the
 24 impediment to those objectives that would flow from recognizing
 25 *the claimed Amish exemption.*” 406 U.S., at 213, 221, 92 S.Ct. 1526
 26 (emphasis added). The Court explained that the State needed “to
 27 show with more particularity how its admittedly strong interest . . .
 28 would be adversely affected by granting an exemption *to the*
Amish.” *Id.*, at 236, 92 S.Ct. 1526 (emphasis added).

24 *Gonzales*, 546 U.S. at 430–31.

25 California does not even attempt to answer this tailored question, instead
 26 simply stating that “worship services frequently have become ‘super-spreader’
 27 events,” and citing newspaper articles “recounting such ‘super-spreader events in
 28 California, other parts of the United States, as well as Canada, Germany, and South

1 Korea.” Dkt. 57, 32:6–12. But none of this anecdotal hearsay relates to South Bay
 2 Pentecostal Church. California’s habit of string-citing articles and cases is only
 3 impressive from a distance. When each of those anecdotal events are reviewed, they
 4 show that by taking precautions, South Bay Pentecostal Church can worship safely.
 5 (*See* Rebuttal Delgado Decl., ¶¶ 2–27.)⁶

6 Next, California disputes the Supreme Court’s statement that “[a] law does
 7 not advance ‘an interest of the highest order when it leaves appreciable damage to
 8 that supposedly vital interest unprohibited.’” *Espinoza*, 140 S. Ct. at 2261 (quoting
 9 *Lukumi*, 508 U.S. at 547). Under that analysis, California cannot simply say that it
 10 treats restaurants, factories, transit, and schools different from churches because they
 11 have different physical layouts. Churches are not only entitled to equal treatment,
 12 “churches are entitled to special treatment under the constitution.” (Reply Trissell
 13 Decl., Ex. PP, Hearing Transcript at 9, *County of Los Angeles v. Grace Community*
 14 *Church*, No. 20STCV30695 (Aug. 14, 2020).)

15 For example, one database lists 1,199 churches in San Diego County.⁷ In
 16 contrast, San Diego County has approximately 7,000 restaurants.⁸ So churches
 17 would need to be 5.84 times more likely to spread the coronavirus than restaurants
 18 for California’s regulations to truly be even-handed across industries. This, of course,
 19 California cannot show. By letting other industries spread the coronavirus—even if
 20 they do so at a different risk ratio than churches—California’s regulations fail for
 21 underinclusiveness. *See Soos*, 2020 WL 3488742, at *11 (New York’s regulations,
 22 which had very similar 25% capacity limits for worship, 50% for select businesses, and

23 ⁶ California also points to a sermon given by a local minister at the Church on July 26, 2020, in
 24 which he asked for prayers for a congregant who had tested positive for the coronavirus. Dkt. 57,
 25 32:13–15 & n.17. However, that congregant has not been back to church since February, and caught
 26 the virus elsewhere. So far, South Bay Pentecostal Church has a perfect safety record, and it intends
 27 to keep that record. (Rebuttal Hodges Decl., ¶¶ 2–3.)

28 ⁷ *San Diego County Churches Alphabetical Index*, CA HOME TOWN LOCATER (as of Sep. 7, 2020),
<https://bit.ly/2R5Izzc>.

⁸ Lori Weisberg, *Restaurants growing in SoCal, but not in U.S.*, THE SAN DIEGO UNION TRIBUNE
 (Feb. 24, 2016), <https://bit.ly/3jWoHuI>.

1 no limit for other businesses, were underinclusive); *see also Reed v. Town of Gilbert*,
2 *Ariz.*, 576 U.S. 155, 172 (2015).

3 Even if a mere “equal protection” analysis were engaged in, *cf. S. Bay*, 140 S.
4 Ct. 1613; *Calvary Chapel*, 2020 WL 4251360, churches are treated far from equally.
5 For example, San Diego elementary and high schools are permitted to open back up
6 again at full-service capacity, where adults and children are inside of buildings for
7 prolonged periods of time, with only a social distancing requirement—no capacity
8 limit. (Reply Trissell Decl., Ex. QQ.) For colleges, a per-room capacity limit of 25% or
9 100 individuals has been implemented, but a per-room limit means that larger
10 buildings can house hundreds, if not thousands of students. (See Trissell Decl., Ex.
11 RR.) Remarkably, California even permits counties that are on the “State County
12 Data Monitoring List” to offer certain college courses indoors, including lab and art
13 classes. (Reply Trissell Decl., Ex. RR, p. 10.)

14 Notably, college athletic programs are also given special treatment. College
15 athletic facilities are allowed to have players, coaches, and trainers indoors for
16 extended periods of time with no express limit on the amount of occupants inside
17 such facilities. In particular, California’s restrictions merely state that the “athletic
18 facilities must limit occupancy to essential personnel,” but do not put an actual limit
19 on the number of total people that can occupy that facility. (Reply Trissell Decl., Ex.
20 RR, pp. 10, 24–34.) Like California’s notable exemption of Hollywood from the
21 coronavirus lockdown (VSAC, ¶ 29, Ex. 1-2), this exemption may make economic
22 sense, but not constitutional sense.

23 Transit, manufacturing, and warehousing are also entitled to preferential
24 treatment, with California’s guidelines providing no capacity limit. (VSAC, ¶ 96;
25 Dkt. 12-4, Trissell Decl., ¶ 31, Ex. 1-3; Reply Trissell Decl., Ex. SS; *see also* Ex. TT
26 [Los Angeles Times article noting how airlines have only self-imposed restrictions].)
27 Finally, according to California’s new Blueprint, in San Diego County, bookstores,
28 clothing and shoe stores, hair salons and barbershops, home and furniture stores,

1 jewelry stores, libraries, shopping malls, retailers, and nail salons are allowed to be
 2 opened at 50% capacity; museums are allowed to open at 25% capacity; and movie
 3 theaters are allowed to open at 25%/100 person per screen. (See Reply Trissell Decl.,
 4 Ex. UU.) As Justice Gorsuch said,

5 This is a simple case. Under the Governor’s edict, a 10-screen
 6 “multiplex” may host [1,000] moviegoers at any time. . . . Large
 7 numbers and close quarters are fine in such places. But churches,
 8 synagogues, and mosques are banned from admitting more than [100]
 9 worshippers—no matter how large the building, how distant the
 10 individuals, how many wear face masks, no matter the precautions at
 11 all. In [California], it seems, it is better to be in entertainment than
 12 religion. Maybe that is nothing new. But the First Amendment
 13 prohibits such obvious discrimination against the exercise of religion.
 14 The world we inhabit today, with a pandemic upon us, poses unusual
 15 challenges. But there is no world in which the Constitution permits
 16 [California] to favor [Hollywood] over Calvary Chapel.

14 *Calvary Chapel*, 2020 WL 4251360, at *6. California’s restrictions on worship cannot
 15 survive strict scrutiny, and so must be enjoined as to South Bay Pentecostal Church.

16 **1.2.2. The worship restrictions fail to satisfy *Jacobson* scrutiny.**

17 As explained in South Bay’s moving papers, there are three reasons why
 18 *Jacobson* scrutiny is satisfied, none of which California has meaningfully rebutted.

19 *First*, imposing burdens on Plaintiffs *because* of their religion is *per se* a “palpable
 20 invasion” of their rights. *See Jew Ho v. Williamson*, 103 F. 10 (C.C. Cal. 1900).

21 California argues that *Jew Ho* is inapposite “because that case involved not a global
 22 pandemic in which hundreds of thousands have perished and tens of millions have
 23 gotten sick, but rather a ‘racially-motivated and scientifically-unfounded quarantine
 24 of San Francisco’s Chinatown’ [citation], that would likely ‘increase [the disease’s]
 25 danger and its destructive force.’” Dkt. 57, 24:13–19 (brackets in original).

26 Despite California’s protestations to the contrary, this case presents the exact
 27 same situation. The present case involves a “[religiously]-motivated” (*see* VSAC,
 28 ¶ 37), “and scientifically-unfounded quarantine of” California’s churches (*see*

1 *generally* Expert Declarations), involving an unknown but heavily exaggerated
 2 number of fatalities (Lyons-Weiler Decl., ¶¶ 10–20), and a general quarantine regime
 3 that is leading to greater “danger and [] destructive force” than the disease itself.
 4 (Lyons-Weiler Decl., ¶ 30; Supp. Delgado Decl., ¶ 9; Rebuttal Delgado Decl., ¶ 30.)⁹

5 In *Jew Ho*, the government argued that practices unique to the Chinese
 6 population made them more likely to spread disease. *Jew Ho*, 103 F. at 23. Here,
 7 California similarly argues that practices unique to church worshippers makes them
 8 more likely to spread disease. (Watt Decl., ¶¶ 72–74.) At the very least, *Jew Ho*
 9 stands for the proposition that when the government makes classifications based on
 10 Constitutionally protected characteristics, such as race or religion, the science of the
 11 classification should be carefully scrutinized. And here, when scrutinized,
 12 California’s classification based on protected characteristics does not withstand
 13 scrutiny. *See Calvary Chapel*, 2020 WL 4251360, at *11 (Kavanaugh, J., dissenting)
 14 (“There are certain constitutional red lines that a State may not cross even in a crisis.
 15 Those red lines include racial discrimination, religious discrimination, and content-
 16 based suppression of speech.”).

17 *Second*, courts have held that discriminatory enforcement of the pandemic
 18 restrictions results in a palpable violation of fundamental rights. *Soos*, 2020 WL
 19 3488742; *Spell*, 962 F.3d at 180–83 & n.1 (Ho, J., concurring); *Calvary Chapel*, 2020
 20 WL 4251360, at *4 (Alito, J., dissenting). In response, as to the protests, California
 21 argues that Governor Newsom only encouraged the protestors’ message, not their
 22 violation of his coronavirus restrictions. Dkt. 57, 26:7–10. This is not supported by
 23 the evidence itself. (VSAC, ¶¶ 100–101, Exs. 4-3, 4-4, 4-5; Supp. Trissell Decl., Ex.
 24 LL.) Governor Newsom “thank[ed] *all*” without any indication he was only thanking
 25 them for part of what they did. (VSAC, Ex. 4-3.) He also tweeted that “[p]rotesters

26 ⁹ Despite California’s unseemly attack on Dr. Delgado’s unrelated research and activities, Dr.
 27 Delgado remains uniquely qualified to provide expert opinion in this case. Indeed, of all of the
 28 experts in this case, Dr. Delgado is the only one engaged in both research and planning from a high-
 level, and actually treating COVID-19 patients on the ground. (Rebuttal Delgado Decl., ¶¶ 32–37.)

1 have the right to protest peacefully,” and that “[m]illions of people are” “rightfully”
 2 “lifting their voices in anger.” (Trissell Decl., Ex. LL.)¹⁰ According to California, he
 3 must have meant that “protestors have the right to protest,” *if* they comply with his
 4 restrictions, and that it is “rightful[]” for millions of people to protest—*so long* as
 5 they join in separate protests of 100 persons max. This is not what Governor
 6 Newsom said or meant. When asked specifically about “how worried [he was] about
 7 the spread of COVID-19 at these protests,” he did not respond with a suggestion that
 8 protestors comply with his restrictions. (VSAC, Ex. 4-5, pp. 15–16.)

9 California also argues that it has enforced its restrictions against George Floyd
 10 protestors when it denied the NAACP a protest permit, and arrested protestors for
 11 trespassing (not illegally protesting). Dkt. 57, 26:11–19 (citing Lyons Decl., ¶¶ 5–6,
 12 13.) But again, the fact that California treats NAACP as a second-class citizen like
 13 South Bay is irrelevant. What matters is that the BLM organization is treated like a
 14 first-class citizen. California also argues that enforcing its restrictions against
 15 protestors would be counterproductive, and could have spread the coronavirus
 16 further. Dkt. 57, 26:20–27:5. If this circular reasoning is acceptable to the Court, then
 17 the Church must be equally given the right to attempt to gather enough congregants
 18 together such that enforcement of a ban on worship is no longer feasible.

19 Finally, California asserts that South Bay Pentecostal Church “wrongly
 20 assert[s]” that the government “must show that it had enforced its regulations
 21 uniformly.” Dkt. 57 28:8–10 (brackets and quotation marks omitted). As explained
 22 above, discriminatory enforcement is simply general applicability in practice—such
 23 that if a de facto exemption is granted for a secular reason, a similar exemption must
 24 be granted for a religious reason. In that context, the government has the burden of
 25 explaining why *only* a secular exemption is permissible. *Fraternal Order of Police*
 26 *Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366–67 (3d Cir. 1999). Contrary

27 _____
 28 ¹⁰ Gavin Newsom (@GavinNewsom), TWITTER (Jun. 5, 2020), <https://bit.ly/3m2BEVJ>; Gavin Newsom (@GavinNewsom), TWITTER (May 31, 2020), <https://bit.ly/35eCpow>.

1 to California’s assertions (Dkt. 57, 29 n.15), the Ninth Circuit has not held otherwise.
 2 *See Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1083–84 (9th Cir. 2015).¹¹

3 *Third*, South Bay Pentecostal Church noted that under its faith, physical,
 4 indoor, in-person worship services are required, with singing—not live-streamed or
 5 outdoor services. (VSAC, ¶¶ 58–61, 67–70, 79–81.) In response, California argues that
 6 “[b]ecause [its ban] does not affect the ‘right to believe and profess whatever religious
 7 doctrine one desires,’ *Emp’t Div. v. Smith*, 494 U.S. 872, 877 (1990), it does not impact
 8 the core right protected by the Free Exercise Clause and thus is not a plain and
 9 palpable invasion of the Clause.” Dkt. 57, 31:13–16. *Smith*, however, makes very clear
 10 that, “[i]t is no more appropriate for judges to determine the ‘centrality’ of religious
 11 beliefs . . . in the free exercise field, than it would be for them to determine the
 12 ‘importance’ of ideas . . . in the free speech field.” *Smith*, 494 U.S. at 886–87 & n.4.
 13 Further, taking for granted California’s position that under *Jacobson* one is left with
 14 only the “core” religious rights, under *Smith* this core would include not only a right
 15 to *believe*, but also the following *exercise* rights: “assembling with others for a worship
 16 service, participating in sacramental use of bread and wine, proselytizing, abstaining
 17 from certain foods or certain modes of transportation.” *Id.* at 877. It should require no
 18 legal citation to substantiate the basic proposition that engaging in worship is a core
 19 religious right, but in any event, the Supreme Court has made clear that is the law.

20 **2. The Other Injunction Factors Favor South Bay.**

21 This Court has already acknowledged that South Bay is suffering irreparable harm
 22 due to violations of its constitutional rights (Dkt. 38, 6:3–6), but the balance of hardships
 23 also tips overwhelming in favor the Church. California can point to no evidence that

24 _____
 25 ¹¹ California also points to the fact that it has changed its regulations to bless political protests, and
 26 therefore, “in pointing to enforcement of restrictions against *indoor* worship and *outdoor* protests,
 27 Plaintiffs are comparing apples and oranges.” Dkt. 57, 28:2–4. But as explained above, to prevent
 28 “religious gerrymanders,” *Lukumi*, 508 U.S. at 534, courts must not “turn a blind eye to the
 context in which [a] policy” arises. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S.
 844, 866 (2005). The Church is entitled to an equally gerrymandered regulation permitting it to
 worship in its sanctuary.

1 South Bay Pentecostal Church’s worship services have spread the coronavirus—it can
2 only meekly argue that other churches, not taking precautions, have done so. With no
3 evidence that any harm will follow South Bay engaging in worship, there is no actual
4 harm—let alone any technical harm. *See Joelner v. Vill. of Washington Park*, 378 F.3d 613,
5 620 (7th Cir. 2004) (“[T]here can be no harm to [the government] when it is prevented
6 from enforcing an unconstitutional statute.”). Further, an injunction is in the public
7 interest. As this Court has stated, “it is in the public interest to continue to protect the
8 population as a whole” (Dkt. 38, at 30), and now we know that California’s unduly
9 prolonged shutdown is doing far more harm than good.

10 **CONCLUSION**

11 California argues that “[e]njoining restrictions because they have proven
12 effective in curbing COVID-19 would be ‘like throwing away your umbrella in a
13 rainstorm because you are not getting wet.’” Dkt. 57, 10:26–28. But although you do
14 not throw away your umbrella in a rainstorm just because you’re not getting wet,
15 when others are allowed to fold up their umbrellas as the rain slows to a drizzle and
16 the sun peeks through the clouds, the First Amendment guarantees that religious
17 claimants get to do so as well. Indeed, “[n]o provision in our Constitution ought to be
18 dearer to man than that which protects the rights of conscience against the
19 enterprises of the civil authority.” *Smith v. Fair Employment & Hous.*, 30 Cal. Rptr. 2d
20 395, 412 (1994) (quoting Thomas Jefferson), *aff’d in part, rev’d in part*, 12 Cal. 4th
21 1143 (1996). For the foregoing reasons, South Bay Pentecostal Church respectfully
22 requests that this Court grant its renewed motion for a temporary restraining order /
23 preliminary injunction.

24 LiMANDRI & JONNA LLP

25
26 Dated: September 8, 2020

By:



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