

20-56324

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WENDY GISH; et al.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

No. 5:20-cv-00755-JGB-KK

The Honorable Jesus G. Bernal, District Judge

**STATE DEFENDANTS-APPELLEES'
ANSWERING BRIEF**

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

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

TABLE OF CONTENTS

	Page
Introduction and Argument Summary	1
Jurisdictional Statement.....	2
Issues Presented.....	3
Statement of The Case	4
I. The COVID-19 Pandemic and the State’s Response.....	4
A. The Novel Coronavirus and the COVID-19 Disease	4
B. The State’s Early COVID-19 Directives	7
C. The Blueprint for a Safer Economy.....	12
D. The Current Surge and the Regional Stay-At- Home Order	17
II. Procedural History	20
A. Plaintiffs’ Lawsuit and the District Court’s Denial of their Application for Temporary Restraining Order	20
B. The District Court’s Dismissal of the Complaint with Leave to Amend.....	21
C. The District Court’s Denial of Reconsideration	22
D. The District Court’s Grant of Defendants’ Motion for Entry of Judgment, Which Plaintiffs Did Not Oppose	24
Argument.....	25
I. The Court Should Affirm the District Court’s Dismissal of the Complaint as Moot.....	25
A. Plaintiffs’ Operative Complaint is Moot	25
B. Exceptions to Mootness Do Not Apply	29

TABLE OF CONTENTS
(continued)

	Page
II. The Court Should Dismiss the Interlocutory Appeal from the TRO Denial	35
A. Upon Affirming the Dismissal of the Complaint, the Court Should Dismiss Plaintiffs’ Interlocutory Appeal from the TRO Denial.	35
B. The Court Should Also Dismiss the TRO Appeal for Lack of Appellate Jurisdiction.	36
III. In the Alternative, the Court Should Affirm the District Court’s Denial of Equitable Relief.....	37
A. This Court Should Not Reach the Merits of Plaintiffs’ Challenge to the Blueprint in the First Instance.	37
B. Plaintiffs’ Free Exercise Claim Is Unlikely to Succeed for the Reasons Explained in the State’s Answering Brief in South Bay United Pentecostal Church v. Newsom.	38
C. Plaintiffs’ Additional Other Claims Are Also Unlikely to Succeed.....	39
1. Free Speech and Assembly Clauses	40
2. Vagueness.....	42
3. Equal Protection Clause	43
4. State Law Claims.....	44
D. The Record Does Not Demonstrate that Plaintiffs Suffer Irreparable Harm from the Currently Operative COVID-19 Framework.	45
Conclusion.....	47

TABLE OF AUTHORITIES

	Page
CASES	
<i>Abiding Place Ministries v. Wooten</i>	
2020 WL 2991467 (S.D. Cal. June 4, 2020)	34
<i>Agua Caliente Band of Cahuilla Indians v. Hardin</i>	
223 F.3d 1041 (9th Cir. 2000)	44
<i>Alpha Delta Chi-Delta Chapter v. Reed</i>	
648 F.3d 790 (9th Cir. 2011)	44
<i>Am. Cargo Transp., Inc. v. United States</i>	
625 F.3d 1176 (9th Cir. 2010)	29, 31
<i>American Passage Media Corp. v. Cass Comm’ns, Inc.</i>	
750 F.2d 1470 (9th Cir. 1985)	46
<i>Bd. Of Trustees of Glazing Health & Welfare Tr. v. Chambers</i>	
941 F.3d 1195 (9th Cir. 2019) (en banc)	25, 29, 31
<i>Best Supplement Guide, LLC v. Newsom</i>	
2020 WL 2615022 (E.D. Cal. May 22, 2020)	45
<i>Burfitt v. Newsom</i>	
No. BCV-20-102267 (Kern Cty. Sup. Ct. Dec. 10, 2020)	34
<i>Calvary Chapel San Jose v. Cody</i>	
2020 WL 7428322 (N.D. Cal. Dec. 18, 2020)	34
<i>Calvary Chapel Ukiah v. Newsom</i>	
No. 2:20-cv-01431KJM-DMC (E.D. Cal.)	34
<i>Caribbean Marine Servs. Co. v. Baldrige</i>	
844 F.2d 668 (9th Cir. 1988)	46
<i>Chamber of Commerce v. Dep’t of Energy</i>	
627 F.2d 289 (D.C. Cir. 1980)	28

TABLE OF AUTHORITIES
(continued)

	Page
<i>City of Cleburne v. Cleburne Living Ctr.</i> 473 U.S. 432 (1985)	43
<i>City of Los Angeles v. Lyons</i> 461 U.S. 95 (1983)	45, 47
<i>Cook Inlet Treaty Tribes v. Shalala</i> 166 F.3d 986 (9th Cir. 1999).....	25
<i>County of L.A. v. Grace Cmty. Church</i> 2020 WL 6302630 (Super. Ct. Sept. 10, 2020).....	34
<i>County of L.A. v. Superior Court</i> 2020 WL 4876658 (Ct. App. Aug. 15, 2020).....	34
<i>County of Ventura v. Godspeak Calvary Chapel</i> 2020 WL 6557862 (Super Ct. Aug. 7, 2020)	34
<i>Cross Culture Christian Ctr. v. Newsom</i> 2020 WL 2121111 (E.D. Cal. May 5, 2020).....	8
<i>Cross Culture Christian Ctr. v. Newsom</i> 445 F. Supp. 3d 758 (E.D. Cal. 2020)	34
<i>Danville Christian Acad., Inc. v. Beshear</i> No. 20A96, 2020 WL 7395433 (U.S. Dec. 17, 2020).....	32
<i>Doe v. Regents of the Univ. of Cal.</i> 891 F.3d 1147 (9th Cir. 2018).....	44
<i>Edge v. City of Everett</i> 929 F.3d 657 (9th Cir. 2019).....	42
<i>Elim Romanian Pentecostal Church v. Pritzker</i> 140 S. Ct. 2823 (2020)	32

TABLE OF AUTHORITIES
(continued)

	Page
<i>Evans v. Shoshone-Bannock Land Use Policy Comm’n</i> 736 F.3d 1298 (9th Cir. 2013).....	35
<i>Foster v. Carson</i> 347 F.3d 742 (9th Cir. 2003).....	25
<i>Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.</i> 528 U.S. 167 (2000)	29
<i>Gateway City Church v. Newsom</i> No. 5:20-cv-08241-EJD (N.D. Cal.)	34
<i>Gish v. Newsom</i> 2020 WL 6054912 (C.D. Cal. Oct. 9, 2020)	23, 24, 26
<i>Gish v. Newsom</i> 2020 WL 6193306 (C.D. Cal. July 8, 2020)	21, 22, 26
<i>Gish v. Newsom</i> 2020 WL 7382105 (C.D. Cal. Dec. 11, 2020).....	24
<i>Gish v. Newsom</i> 2020 WL 7752732 (9th Cir. Dec. 23, 2020).....	24, 33
<i>Gish v. Newsom</i> No. EDCV-20-755-JGB-KKx, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020).....	21, 36
<i>Givens v. Newsom</i> 830 F. App’x 560 (9th Cir. 2020).....	37
<i>Givens v. Newsom</i> No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224 (E.D. Cal. May 8, 2020).....	42
<i>Great W. Casinos, Inc. v. Morongo Band of Mission Indians</i> 74 Cal. App. 4th 1407 (1999).....	16

TABLE OF AUTHORITIES
(continued)

	Page
<i>Harper v. Poway Unified Sch. Dist.</i> 549 U.S. 1262 (2007)	35
<i>Harvest Rock Church v. Newsom</i> 2020 WL 5265564 (C.D. Cal. Sept. 2, 2020)	34
<i>Harvest Rock Church v. Newsom</i> 592 U.S. __ (Dec. 3, 2020)	33
<i>Harvest Rock Church v. Newsom</i> 977 F.3d 728 (9th Cir. 2020)	34
<i>Harvest Rock Church v. Newsom</i> 9th Cir. No. 20-56357	34
<i>Harvest Rock Church v. Newsom</i> No. EDCV-20-6414-JGB-KKX, 2020 WL 7639584 (C.D. Cal. Dec. 21, 2020)	30, 34, 45, 46
<i>Heffron v. Int’l Soc. for Krishna Consciousness, Inc.</i> 452 U.S. 640 (1981)	40
<i>In re Nat’l Sec. Agency Telecommunication Records Litig.</i> 669 F.3d 928 (9th Cir. 2011)	39
<i>Kingdomware Techs., Inc. v. United States</i> 136 S. Ct. 1969 (2016)	47
<i>Lighthouse Fellowship Church v. Northam</i> No. 20-1515 (4th Cir. Oct. 13, 2020)	32
<i>Maryville Baptist Church v. Beshear</i> 977 F.3d 561 (6th Cir. 2020)	32
<i>N.Y. State Rifle & Pistol Ass’n v. City of New York</i> 140 S. Ct. 1525 (2020)	29

TABLE OF AUTHORITIES
(continued)

	Page
<i>Nationwide Biweekly Admin., Inc. v. Owen</i> 873 F.3d 716 (9th Cir. 2017)	35
<i>Nordlinger v. Hahn</i> 505 U.S. 1 (1992)	43
<i>Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.</i> 810 F.3d 631 (9th Cir. 2015)	28
<i>Pennhurst State School & Hosp. v. Halderman</i> 465 U.S. 89 (1984)	2, 44
<i>People v. Calvary Chapel San Jose</i> No. 20CV 372285 (Cal. Sup. Ct. Dec. 4, 2020)	34
<i>Religious Tech. Ctr. v. Scott</i> 869 F.2d 1306 (9th Cir. 1989)	36
<i>Roberts v. U.S. Jaycees</i> 468 U.S. 609 (1984)	40
<i>Roman Catholic Diocese v. Cuomo</i> 141 S.Ct. 63 (2020)	31, 32
<i>Rosebrock v. Mathis</i> 745 F.3d 963 (9th Cir. 2014)	26, 31
<i>S. Bay United Pentecostal Church v. Newsom</i> __ F.Supp.3d __ (S.D. Cal. Oct. 15, 2020)	8, 34
<i>S. Bay United Pentecostal Church v. Newsom</i> 140 S.Ct. 1613 (2020)	33
<i>S. Bay United Pentecostal Church v. Newsom</i> 2020 WL 7263235 (S.D. Cal. May 15, 2020)	34

TABLE OF AUTHORITIES
(continued)

	Page
<i>S. Bay United Pentecostal Church v. Newsom</i> 2020 WL 7488974 (S.D. Cal. Dec. 21, 2020)	34
<i>S. Bay United Pentecostal Church v. Newsom</i> 959 F.3d 938 (9th Cir. 2020)	34
<i>S. Bay United Pentecostal Church v. Newsom</i> No. 20-56358, 2020 WL 7681858 (9th Cir. Dec. 24, 2020)	34
<i>Santa Monica Nativity Scenes Comm. v. City of Santa Monica</i> 784 F.3d 1286 (9th Cir. 2015)	40, 41
<i>SEC v. Mount Vernon Mem’l Park</i> 664 F.2d 1358 (9th Cir. 1982)	35
<i>Seven Words LLC v. Network Solutions</i> 260 F.3d 1089 (9th Cir. 2001)	25
<i>Shirk v. U.S. ex rel. Dep’t of Interior</i> 773 F.3d 999 (9th Cir. 2014)	38
<i>Sierra Club v. Babbitt</i> 69 F.Supp.2d 1202 (E.D. Cal. 1999)	25
<i>Six v. Newsom</i> 2020 WL 2896543 (C.D. Cal. May 22, 2020)	45
<i>Smith v. Marsh</i> 194 F.3d 1045 (9th Cir. 1999)	37
<i>South Bay United Pentecostal Church v. Newsom</i> 9th Cir. No. 20-56358	<i>passim</i>
<i>Spell v. Edwards</i> 962 F.3d 175 (5th Cir. 2020)	32

TABLE OF AUTHORITIES
(continued)

	Page
<i>Tandon v. Newsom</i> No. 5:20-cv-07108 (N.D. Cal.).....	34
<i>United States v. Microsoft Corp.</i> 138 S. Ct. 1186 (2018)	29
<i>Ward v. Rock Against Racism</i> 491 U.S. 781 (1989)	40, 41
<i>Warren v. Wells Fargo & Co.</i> No. 17-56711, 2018 WL 780722 (9th Cir. Jan. 26, 2018)	35
<i>Whitsitt v. Newsom</i> 2020 WL 5944195 (E.D. Cal. Oct. 7, 2020).....	34
<i>Winter v. Natural Resources Defense Council, Inc.</i> 555 U.S. 7 (2008)	45, 46
<i>Ex parte Young</i> 209 U.S. 123 (1908)	44
 STATUTES	
28 U.S.C.	
§ 1291	3
§ 1292	36
§ 1331	2
§ 1343(a).....	2
42 U.S.C.	
§ 1983	2
Cal. Health & Saf. Code	
§ 120140	27, 31

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

United States Constitution

First Amendment *passim*

Eleventh Amendment 44

Fourteenth Amendment 42, 43

California Constitution

Article 1 20, 40 44

INTRODUCTION AND ARGUMENT SUMMARY

Plaintiffs' appeal, which raises challenges to California's currently operative COVID-19-related restrictions on indoor worship services that were not raised in the district court, suffers a host of procedural defects. First, as the district court correctly found, Plaintiffs' complaint is moot: that complaint challenges only the State's total prohibition on all in-person worship services from March of 2020, which has since been superseded by other, more nuanced and lenient directives. These directives (which include an entirely new COVID regulatory framework) all allow in-person worship services to occur. Plaintiffs could have challenged these superseding directives: the district court expressly afforded Plaintiffs leave to amend so that they could challenge the State's currently operative restrictions. But Plaintiffs twice declined the district court's invitations to amend, and instead unequivocally confirmed that they did not wish to amend their complaint. The district court did not err in dismissing Plaintiffs' challenge to restrictions that no longer exist, or in accepting Plaintiffs' refusal to challenge those that do.

For the same reason, this Court should dismiss Plaintiffs' appeal from the district court's April 2020 denial of their request for a temporary restraining order against the State's former prohibition on all in-person worship services. That appeal has been merged with the present appeal, which (as just explained) should be dismissed. Dismissal is also appropriate because this Court has no appellate

jurisdiction to review the TRO denial in its own right. The district court's TRO denial made no mention of a preliminary injunction and was ruled on after highly expedited briefing in which Defendants only had three days to garner evidence and prepare an opposition. Therefore, it was not tantamount to the denial of a preliminary injunction.

Finally, the Court should not consider Plaintiffs' challenge to the State's currently operative COVID-19 regulatory framework, which they bring for the first time on appeal, without affording the district court the opportunity to address that challenge in the first instance, or Defendants the opportunity to present testimony and other evidence defending it. But if, despite these defects, the Court decides to entertain Plaintiffs' challenge in the first instance, it should deny relief for the same reasons the State Defendants have explained in their briefings in *South Bay United Pentecostal Church v. Newsom*, 9th Cir. No. 20-56358, which the Court has related to this appeal.

JURISDICTIONAL STATEMENT

Plaintiffs brought this action under 42 U.S.C. § 1983. Pls.' Excerpts of Record ("ER") 1059. The district court had subject matter jurisdiction over Plaintiffs' federal claims, 28 U.S.C. §§ 1331, 1343(a), but not over Plaintiffs' state law claims, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106, 124-125 (1984).

This Court has jurisdiction over the appeal in Case No. 20-56324, the appeal from the district court's final judgment, 28 U.S.C. § 1291, which was entered after the district court dismissed the complaint with leave to amend, Plaintiffs declined to file an amended complaint, and Plaintiffs did not oppose the State Defendants' motion for entry of judgment. This Court, however, lacks jurisdiction over the appeal in Case No. 20-55445, which is from the district court's order denying Plaintiffs' TRO application because that is not an appealable order, *see infra* Argument Section II.

ISSUES PRESENTED

1. Whether the district court committed reversible error by dismissing the complaint with leave to amend as moot where the total prohibition on in-person worship services that Plaintiffs challenged in their complaint is no longer in effect and has been superseded by an entirely new COVID-19 regulatory framework that allows in-person services.
2. Whether, if not moot, this Court has appellate jurisdiction over Plaintiffs' appeal from the denial of a temporary restraining order.
3. Whether, if the Court were to entertain Plaintiffs' challenge to the State's currently operative COVID-19 regulatory framework in the first instance, it should deny injunctive relief for the reasons the State Defendants' thoroughly

explained in a related appeal concerning entirely overlapping issues and arguments.

STATEMENT OF THE CASE

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

A. The Novel Coronavirus and the COVID-19 Disease

COVID-19 is now the world's deadliest infectious disease. It has killed over 350,000 Americans, more than the number killed in combat in World War II, including more than 27,000 in California.¹ In addition, many of those infected with COVID-19, now totaling over 2.4 million in California alone, suffer cardiac problems and other long-term health detriments. Decl. of Dr. James Watt ¶ 23 (Dkt. 7-9)² ("Watt Decl."); Decl. of Dr. George Rutherford ¶¶ 23-25 (Dkt. 7-10) ("Rutherford Decl."). Fortunately, vaccines have been developed and approved, but they are not widely available yet, and there is no known cure and only limited treatment options for the disease. *Id.* ¶¶ 39-41.

COVID-19 is transmitted primarily by respiratory droplets containing SARS-CoV-2, the virus causing the disease, which are exhaled when individuals breathe,

¹ Ctrs. for Disease Control & Prevention, *CDC COVID Data Tracker*, https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (last accessed Jan. 6, 2021); *Tracking COVID-19 in California*, <https://covid19.ca.gov/state-dashboard/> (last accessed Jan. 6, 2021).

² Except where otherwise indicated, "Dkt." refers to items on the docket of the present appeal, 9th Cir. No. 20-56324.

speak, sing, or chant. Rutherford Decl. ¶¶ 29-34; Watt Decl. ¶¶ 25–28. Many infected people have no symptoms, but may nonetheless transmit COVID-19 to others. Watt Decl. ¶¶ 30-32; Rutherford Decl. ¶¶ 32-34. Thus, until a vaccine is widely distributed, restricting physical interactions in which COVID-19 is likely to spread is crucial to slow the spread of the disease. Watt Decl. ¶¶ 24-25.

The risk that COVID-19 will be transmitted depends on several factors. One is the number of people gathered together: simply put, the greater the number of people, the greater the risk that one or more is infectious, and the more people that may be infected. Watt Decl. ¶¶ 37-43. Indeed, absent precautions slowing the disease’s spread, a single infectious person at a large gathering may unwittingly cause hundreds of infections, Watt Decl. ¶¶ 44, 46, as a study employing genetic tracing demonstrated in linking a single person attending a 200-person conference in Boston to 245,000 COVID-19 cases. Decl. of Todd Grabarsky Ex. 27 (Dkt. 7-7 and 7-8) (“Grabarsky Decl.”).

A second risk factor is the nature of the activity. Epidemiologists have found that “[v]iral load”—the number of “viable viral particles” to which a person is exposed—determines whether the virus will “overcome the body’s defenses and cause a COVID 19 infection.” Rutherford Decl. ¶¶ 35-36; *see also* Watt Decl. ¶¶ 33, 44. Accordingly, transmission risk increases when individuals are in close proximity for extended periods because during such time the respiratory droplets

exhaled by an infected person may accumulate into doses large enough to overcome another person's immune system. Rutherford Decl. ¶¶ 29-32; Watt Decl. ¶ 27. Transmission risk also increases when an infected individual engages in activities such as speaking, singing, or shouting that increase their breathing and exhalation of infected droplets. Watt Decl. ¶¶ 45-46; Rutherford Decl. ¶¶ 75, 95-100. Conversely, transmission risk may be reduced—but not eliminated entirely—by precautions such as wearing face coverings and maintaining distancing between individuals from different households. Rutherford Decl. ¶ 75; Watt Decl. ¶¶ 47-53.

A third factor affecting transmission risk is location. Transmission risk is substantially lower outside because respiratory droplets and aerosolized particles will dissipate into the atmosphere, especially if there is wind. Rutherford Decl. ¶¶ 63, 93. Indoors, the amount of ventilation likewise affects the risk of transmission. *Id.* ¶ 92.

Indoor public gatherings create a heightened risk of transmission because they have attributes that increase all three risk factors. First, public gatherings may bring together large numbers of people from different households, increasing the risk that one or more people is unwittingly infected and exposing multiple others to infection. Watt Decl. ¶¶ 37-46; Rutherford Decl. ¶¶ 90-94. Second, at gatherings, individuals may remain in close proximity to each other for extended periods,

allowing the respiratory droplets exhaled by infected individuals to accumulate into doses large enough to cause infection. *Id.* Third, when gatherings are held indoors, there is no wind to dissipate respiratory droplets, and ventilation may be limited. *Id.* Indeed, according to recent studies, public gatherings have caused as much as 80% of COVID-19's spread. Rutherford Decl. ¶ 37.

Worship services are an especially risky type of public gathering. Watt Decl. ¶ 46; Rutherford Decl. ¶¶ 101-11. Worship services are relatively lengthy, generally lasting forty-five minutes to an hour and sometimes up to two hours. *Id.* ¶ 103. Participants tend to know and speak with one another, bringing them into even closer contact while simultaneously increasing exhalations. *Id.* ¶ 102. Singing, chanting, and responsive reading also increase exhalations. *Id.* ¶ 104. And many houses of worship have limited ventilation, allowing even more infected respiratory droplets to accumulate. *Id.* ¶ 105. Thus, worship services unfortunately have become “super-spreader” events, causing dozens, hundreds, and even thousands of infections, *id.* ¶¶ 37-38, 108, and these outbreaks have continued despite adoption of precautions such as masking, hygiene, and distancing. Grabarsky Decl. Exs. 17-24.

B. The State's Early COVID-19 Directives

Throughout the current pandemic, the State has “continued to fine tune its restrictions” in light of developing scientific knowledge and changing conditions in

the State. *See S. Bay United Pentecostal Church v. Newsom*, ___ F.Supp.3d ___, 2020 WL 6081733, at *13 (S.D. Cal. Oct. 15, 2020), *vacated on other grounds*, 981 F.3d 765 (9th Cir. 2020).

On March 4, 2020, near the beginning of the pandemic, the Governor proclaimed a State of Emergency. Pls.’ Excerpts of Record (“ER”) 889. Two weeks later, he issued Executive Order N-33-20, which ordered Californians to obey public health directives and incorporated a State Public Health Officer order (the “Stay-at-Home Order”) directing “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.” ER 897, 1091. On March 22, the Public Health Officer designated a list of “Essential Critical Infrastructure Workers.” ER 900. Religious services have been included in that list since its inception, exempting from the Stay-at-Home Order “Clergy for essential support and faith-based services that are provided through streaming or other technologies that support physical distancing and state public health guidelines.” ER 842, 857. Although the Stay-at-Home Order prohibited in-person worship services, the inclusion of clergy on the list of critical infrastructure workers allowed places of worship to conduct services by online streaming or drive-ins. *See Cross Culture Christian Ctr. v. Newsom*, 2020 WL 2121111, at *3 n.2 (E.D. Cal. May 5, 2020).

In late April, in light of the Stay-at-Home Order's success in slowing the spread of COVID-19 and the State's marshaling of public health resources, the Governor announced the State's four-stage "Resilience Roadmap" for reopening of the State. ER 147-91.

As part of this process, the State formulated guidelines for conducting various activities safely during the pandemic and with those guidelines in place allowed various activities to resume. These guidelines generally require places of employment to take precautions such as physical distancing, and they impose reporting as well as oversight requirements, which make quarantining and contact tracing feasible, all of which mitigate transmission risk and avoid outbreaks. The industry-specific guidelines also require covered industries to take measures designed to deal with the specific risks created by each of them. Grabarsky Decl. Ex. 11. For example, factories are required to screen workers, develop safety plans and, where individuals must work in close proximity, to install engineering controls such as plexiglass barriers to protect those individuals. Grabarsky Decl. Ex. 30; Rutherford Decl. ¶¶ 121. Similarly, personal care services are required to screen customers (as well as workers), to observe special hygiene requirements, and either to limit the amount of time that may be spent within six feet of customers or use secondary barriers such as face shields. Grabarsky Decl. Ex. 11; Rutherford Decl. ¶ 120. Some industries, such as professional sports or music,

film, and television production, have binding labor agreements requiring, among other things, frequent—and sometimes daily—testing, and the relevant industry guidances incorporate these requirements. Grabarsky Decl. Exs. 11, 33-34.

On May 25, 2020, California issued the guidance for places of worship and providers of religious services. ER 133. This guidance contains instructions and recommendations for physical distancing during worship services, cleaning and disinfection protocols, training for employees and volunteers, screening, and monitoring. *Id.* Additionally, in keeping with the CDC’s recognition and recommendation that the size of worship services may be limited in accordance with guidance from state and local authorities, ER 136 (“Take steps to limit the size of gatherings in accordance with guidance and directives of state and local authorities[.]”), the May 25 guidelines limited worship services to either 100 attendees or 25% of building capacity, whichever is less.³ On June 12, in light of developing understanding concerning the significance of air flow in the transmission of COVID-19, the State updated the guidelines to remove numerical limits on outdoor worship services, where air flow and other factors reduce transmission risk. Rutherford Decl. ¶ 93; Watt Decl. ¶ 44.

³ Around this time, the State permitted gatherings for political protests under the same restrictions as worship services. ER 193.

In mid-June, in light of developing scientific evidence as well as increased spread of COVID-19, the State issued state-wide guidance requiring that face covering such as masks be worn in most public spaces, public settings, and workplaces. Grabarsky Decl. Ex. 29; Rutherford Decl. ¶ 71. Face coverings reduce (but do not eliminate) the risk that a person unknowingly infected with COVID-19 will infect others, and they also may reduce the risk that an uninfected individual will become infected. *Id.* ¶¶ 71-75; Watt Decl. ¶¶ 50-53. Physical distancing, which the guidelines for worship services and other activities require, similarly reduces (but does not eliminate) the risk that infected respiratory droplets will reach another person, particularly when exposure to an infected person is brief or outdoors. Watt Decl. ¶¶ 47-48.

The face-covering requirement and industry-specific guidelines, however, proved unable to prevent COVID-19 from spreading over the summer. Accordingly, in July, the State began tightening restrictions. Around the same time, the State prohibited group singing and chanting, which increases vocalization and the volume of potentially infected viral droplets exhaled, indoors in worship services and other places where such activity is likely to occur. Later, the State expanded this restriction to bar singing, chanting, cheering, and similar activities in all indoor gatherings.

COVID-19, however, continued to spread. Accordingly, on July 13, the State tightened the restrictions on public gatherings even further. It closed both indoor and outdoor operations of bars and pubs throughout the state, as well as indoor operations of dine-in restaurants, movie theaters, family entertainment centers (*e.g.*, arcades, bowling alleys, mini-golf, playgrounds), zoos, museums and cardrooms. ER 74. In addition, in counties with elevated transmission rates, hospitalization rates or hospital capacity utilization, the State closed indoor worship services as well as a number of activities, including gyms, offices for non-critical infrastructure, personal care services, hair salons and barber shops, and shopping malls. *Id.* Outdoor worship services, however, continued throughout the State without any attendance limits or restrictions on singing and chanting. *Id.*

C. The Blueprint for a Safer Economy

Conditions improved, and on August 28, 2020, the State implemented the Blueprint for a Safety Economy (“the Blueprint”), which sets forth the State’s currently operative COVID-19 regulatory framework. Pls.’ Mot. for Judicial Notice (“Pls.’ MJN”) (Dkt. No. 22-1) Exs. 2-5. This framework builds on both state-wide regulations such as the masking requirement and industry-specific guidelines.

The Blueprint allows many activities to be conducted so long as they are “with modifications,” that is, subject to statewide and industry-specific guidance.

As noted above, however, public gatherings pose a heightened risk of transmission. For activities involving such gatherings, state-wide requirements and industry-specific guidelines are insufficient where the spread of COVID-19 is elevated and, in some cases, anywhere. Watt Decl. ¶¶ 38, 53, 70, 99; Rutherford Decl. ¶¶ 90-94, 106; Decl. of Michael A. Stoto, Ph.D, ¶¶ 33-40 (Dkt. 7-11) (“Stoto Decl.”). The Blueprint bars these activities from operating indoors or limits the number of people that may participate in them.

The Blueprint determines the need for additional restrictions based on objective “risk-based criteria.” Pls.’ MJN Ex. 3. These criteria, which apply to *all* activities and sectors, are:

- Ability to accommodate face covering wearing at all times (e.g. eating and drinking would require removal of face covering)
- Ability to physically distance between individuals from different households
- Ability to limit the number of people per square foot
- Ability to limit duration of exposure
- Ability to limit amount of mixing of people from differing households and communities
- Ability to limit amount of physical interactions of visitors/patrons
- Ability to optimize ventilation (e.g. indoor vs outdoor, air exchange and filtration)
- Ability to limit activities that are known to cause increased spread (e.g. singing, shouting, heavy breathing; loud environs will cause people to raise voice)

Id.; see also Watt Decl. ¶¶ 82-86; Rutherford Decl. ¶¶ 52, 57-65.

The Blueprint also assigns each county to one of four tiers, ranging from Tier 1 (“Widespread”) to Tier 4 (“Minimal”), which are based on the extent of COVID-19 spread. Pls.’ MJN Exs. 3-5. Because the transmission risk posed by an activity depends in part upon the extent of community spread, the restrictions imposed by the Blueprint generally increase or decrease as counties move up or down in the tiers.

For example, in Tier 1 counties (where COVID is “widespread”), worship services are allowed “with modifications” —that is, subject to the industry-specific guidance—outdoors only. Pls.’ MJN Ex. 4. In Tier 2 counties (with “substantial” spread), worship services are allowed indoors, with modifications, subject to a maximum 25% capacity or 100 people, whichever is less. *Id.* In Tier 3 counties (with “moderate” spread), worship services are allowed indoors with modifications subject to a maximum 50% capacity or 200 persons. *Id.* In Tier 4 counties (with “minimal” spread), worship services are allowed indoors with modifications subject to a 50% capacity maximum and no numerical cap. *Id.*

Like the restrictions on worship services, the Blueprint’s restrictions on other activities reflect their relative transmission risk. Many activities such as hair salons, limited services (like laundromats and auto shops), personal care services, and hotels that do not involve large gatherings and thus pose less risk than worship services are allowed to open “with modifications” in all tiers. Pls.’ MJN Exs. 6A,

6B; Rutherford Decl. ¶¶ 117, 120. Professional sports, which as mentioned above are subject to strenuous testing requirements, are likewise allowed to open “with modifications” in all tiers, and “critical infrastructure,” which contains many activities that do not involve gatherings and others such as factories or film production that are subject to stringent industry-specific restrictions, are likewise allowed to operate with modifications in all tiers. Grabarsky Decl. Exs. 33-34; Rutherford Decl. ¶ 121.

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

Other activities involving public gatherings are subject to similar restrictions. For example, museums and zoos which bring together many people in the same place but for independent activities and not in proximity for extended periods are

subject to slightly less stringent restrictions than worship services: no indoor operations in Tier 1, 25% capacity in Tier 2, 50% capacity in Tier 3, and no limit in Tier 4. Pls.’ MJN Ex. 4. Retail and shopping malls, where interactions are briefer and more transient, are allowed to operate indoors at 25% capacity in Tier 1, 50% capacity in Tier 2, and with no capacity limits in Tier 4. *Id.*

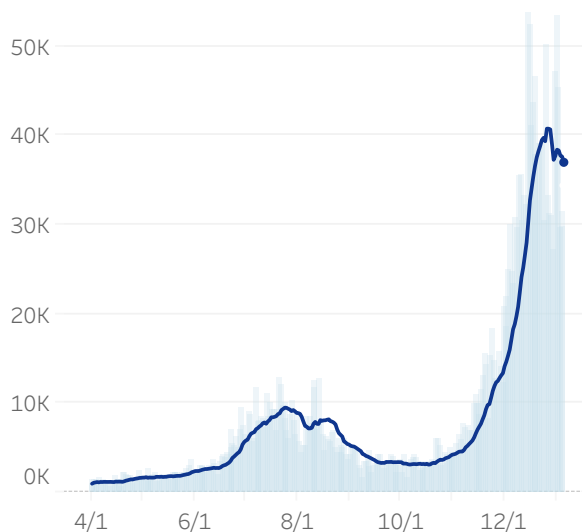
Activities posing greater transmission risk than worship services are subject to correspondingly greater restrictions. For example, gyms and fitness centers, where exertion increases potentially infected exhalations, are not allowed to open indoors in Tier 1 and restricted to 10% capacity in Tier 2 and 25% in Tier 3 (but 50% in Tier 4). *Id.* Other activities such as wineries, family entertainment centers, and cardrooms⁴ are not allowed to operate indoors in either Tier 1 or Tier 2, and are subject to the same or lower capacity limits as worship services in the remaining tiers. *Id.*; *see also id.* (closing offices in Tiers 1 and 2). Bars are allowed to operate indoors only in Tier 4. Amusement parks are closed outright in Tiers 1 and 2, and allowed to operate only outdoors in Tier 3. *Id.* Indoor spectator sports and concerts are prohibited in all tiers. *Id.*

⁴ The Blueprint does not regulate casinos because in California casinos are permitted only on tribal lands, which are not subject to most state regulation. *See Great W. Casinos, Inc. v. Morongo Band of Mission Indians*, 74 Cal. App. 4th 1407, 1426 (1999).

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

After the Blueprint was instituted infections initially fell, but infection rates began to increase in late October, and recently California, like the rest of the country, has been experiencing a massive surge in the pandemic. Daily cases have skyrocketed, quadrupling in the last month to reach an average of more than 37,000 per day over a 14-day period:⁵

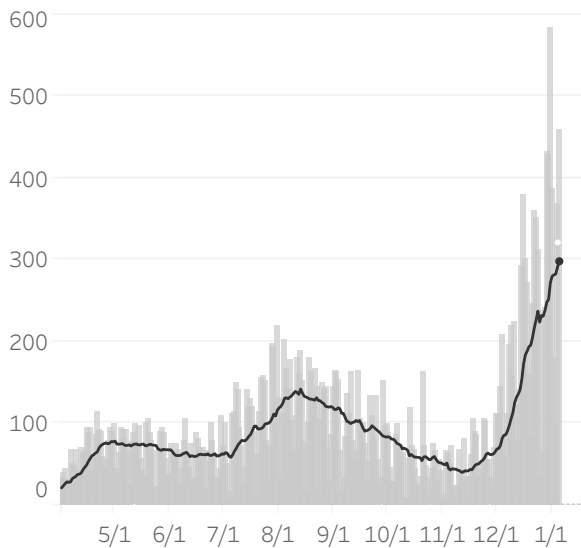
Daily New COVID-19 Cases



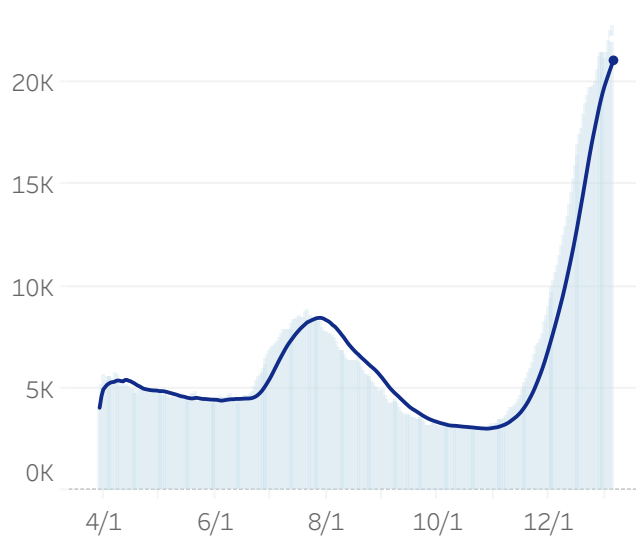
The increase in daily cases has been accompanied by skyrocketing hospitalizations and deaths, the latter of which has quadrupled to 291 on average each day over a 14-day period, with 585 in a single day on New Year's Eve:

⁵ These charts are taken from <https://covid19.ca.gov/state-dashboard> (Jan. 6, 2021).

Daily COVID-19 Deaths

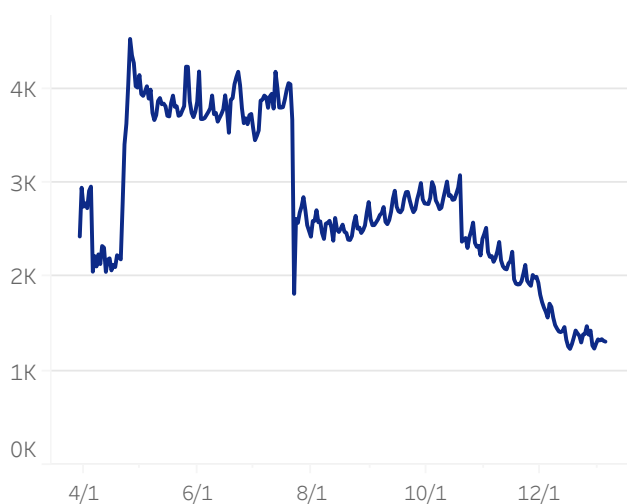


COVID-19 Hospitalized Patients



Ominously, the increased hospitalization rates have shrunk ICU availability to the disturbingly low level of *less than 1% statewide and 0% in Southern California, where Plaintiffs' churches are located.*⁶

Available ICU Beds



⁶ See <https://covid19.ca.gov/safer-economy/> (last accessed Jan. 6, 2021).

As a consequence, the State is losing the ability to treat those who become most seriously ill from COVID-19, as well as those suffering other serious injuries or medical emergencies. This means that lives may be lost unnecessarily. Indeed, the CDC director has warned the next few months may be “the most difficult in the public health history of this nation.” Grabarsky Decl. Ex. 28.

In response to this surge, on November 19, the State issued the Limited Stay-At-Home Order, a one-month nighttime prohibition against non-essential work and gatherings in Tier 1 counties.⁷ On December 3, 2020, the State implemented a Regional Stay-At-Home Order in regions where ICU availability drops below 15%.⁸ In those regions, all private gatherings are prohibited, and individuals are required to stay home unless their conduct is expressly allowed by the order or related to critical infrastructure. Worship services, political protests, and college lectures are expressly allowed outdoors; retail is permitted indoors at 20% capacity; and grocery stores (which are considered critical infrastructure) are permitted at 35% capacity. Limited services not requiring close contact are allowed to continue, as are previously open schools. Most other activities—including dine-in restaurants, hair salons and barbershops, personal care services,

⁷ See <https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/limited-stay-at-home-order.aspx>.

⁸ See <https://covid19.ca.gov/stay-home-except-for-essential-needs/#regional-stay-home-order>.

and limited services, as well as bars, cardrooms, gyms, museums, family entertainment centers, and campgrounds—are closed or (in the case of gyms) allowed only outdoors.

II. PROCEDURAL HISTORY

A. Plaintiffs' Lawsuit and the District Court's Denial of their Application for Temporary Restraining Order

On April 13, Plaintiffs sued the State Defendants and various county officials. *See* ER 1055. Plaintiffs challenged the constitutionality of California's March Stay-at-Home Order and related county orders as they pertain to in-person religious worship services under the First Amendment's Free Exercise, Establishment, Free Speech, and Assembly Clauses; the Fourteenth Amendment's Due Process and Equal Protection Clauses; and the rights to liberty, freedom of speech, freedom of assembly, and free exercise of religion enumerated in Article 1, sections 1 through 4, of the California Constitution. *Id.* Since the filing of the Complaint, the State's COVID-19 restrictions have changed several times, as detailed above. But Plaintiffs never sought to amend the Complaint to include allegations regarding any subsequent, superseding orders or directives, including the Blueprint, which they are now challenging, for the first time, in this appeal.

Upon filing suit, Plaintiffs applied for a temporary restraining order. The district court denied the application, after highly expedited briefing in which

Defendants only had three days to gather evidence and prepare an opposition. ER 1124; *Gish v. Newsom*, No. EDCV-20-755-JGB-KKx, 2020 WL 1979970 (C.D. Cal. Apr. 23, 2020). Plaintiffs noticed an appeal (9th Cir. No. 20-55445) and filed an emergency motion for a preliminary injunction pending appeal, which this Court denied. *See* No. 20-55445 (9th Cir. May 7, 2020, Dkt. No. 21). Plaintiffs never sought a preliminary injunction in the district court.

B. The District Court’s Dismissal of the Complaint with Leave to Amend

On July 8, the district court dismissed the complaint as moot because Plaintiffs’ claims were based on “a prohibition of in-person religious services that is no longer in effect”—namely, “the absolute prohibition on in-person religious services” in the March Stay-at-Home Order. *Gish v. Newsom*, 2020 WL 6193306, *4-*5 (C.D. Cal. July 8, 2020). Under the then-operative restrictions on in-person worship services, Plaintiffs were allowed to congregate indoors up to the lesser of 25% capacity or 100 persons, and outdoors in unlimited numbers. *Id.* The court also rejected three supposed mootness exceptions invoked by Plaintiffs.

First, the district court rejected the suggestion that it issue declaratory relief, holding there was no “live controversy” over the Stay-at-Home Order’s absolute prohibition on in-person services, and that “Plaintiffs’ desire for the Court to opine

on the validity of a law that no longer restricts them does not revive the controversy.” *Id.* at *4.

Second, the district court ruled the “voluntary cessation of challenged conduct” exception inapplicable because, “as Defendants rightly point out, they did not voluntarily cease their conduct—instead, they changed the relevant laws.” *Id.* at 5-6. That change in the law, the court held, is “enough to render [the] case moot,” even though the State “possesses the power to reenact the [law] after the lawsuit is dismissed.” *Id.* (internal quotation marks omitted).

Third, the district court ruled the “capable of repetition yet evading review” exception inapplicable because there is “no reason to conclude that any hypothetical future restrictions on in-person religious services will evade review.” *Id.* at *4-*5.

The district court also granted Plaintiffs leave to amend the complaint “to allow Plaintiffs to bring claims based on the [State’s] orders . . . that remain in effect.” *Id.* at *5 & n. 2.

C. The District Court’s Denial of Reconsideration

Plaintiffs declined the district court’s invitation to amend the complaint within the time prescribed and instead moved for reconsideration, based on the tightening of restrictions in July. The Court denied reconsideration on October 9,

but, once again, afforded Plaintiffs leave to amend their complaint. *Gish v. Newsom*, 2020 WL 6054912 (C.D. Cal. Oct. 9, 2020).

The district court declined to grant reconsideration based on Plaintiffs' argument that their complaint is not moot because Executive Order N-33-20, the March Order mandating compliance with state public health orders, remains in effect. *Id.* at *3. "Nothing material has changed" since the complaint was dismissed in July, the court explained, because "[t]hat Order urging Californians to obey public health guidance was in effect at the time of the Court's Order and remains in effect today. And it does not, itself, prohibit worship." *Id.*

In addition, the court found that, although the Blueprint tightened restrictions, "the operative directives are not challenged in the Complaint, despite Plaintiffs' opportunity to amend." *Id.* The court explained that the "the operative guidance in effect at the time of the Complaint[, which] completely prohibited outdoor in-person worship, . . . is no longer in effect." *Id.*; *see also id.* ("[T]he [currently operative] guidance allows in-person worship to occur outside in all counties and in-person indoor worship in California counties with low Covid-19 rates."). Under the Blueprint, however, it is "no longer true" that "the State 'prohibits all religious leaders from conducting in-person and out-of-home religious services.'" *Id.* (quoting Compl. ¶ 34). Finally, the court emphasized the need and opportunity afforded to Plaintiffs to amend their complaint:

If this is the legal regime Plaintiffs wish to challenge as violative of their rights, the Court deserves the benefit of a challenge to these guidelines specifically. It may not offer an advisory opinion on the absolute prohibition of religious worship in California.

Id. Therefore, the court held Plaintiffs' claims asserted in the complaint remained moot. *Id.*

D. The District Court's Grant of Defendants' Motion for Entry of Judgment, Which Plaintiffs Did Not Oppose

After conferring with Plaintiffs' counsel, who confirmed that Plaintiffs did not intend to file an amended complaint, the State Defendants filed a motion to dismiss the case with prejudice and enter judgment, which Plaintiffs did not oppose. Dkt. 7-4, 7-5. The Court granted the motion and entered judgment on December 11. *Gish v. Newsom*, 2020 WL 7382105 (C.D. Cal. Dec. 11, 2020).

Plaintiffs appealed and moved this Court for an emergency injunction pending appeal, which the Court denied on December 23 after reviewing full briefing. *Gish v. Newsom*, 2020 WL 7752732 (9th Cir. Dec. 23, 2020). On January 5, 2020, Plaintiffs moved to voluntarily dismiss the prior appeal from the TRO denial, 9th Cir. No. 20-55445 (Dkt. No. 117).

ARGUMENT

I. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S DISMISSAL OF THE COMPLAINT AS MOOT.

A. Plaintiffs' Operative Complaint is Moot.

Plaintiffs' operative complaint is moot because it challenged only the Stay-at-Home Order from March of 2020, which has been superseded by an entirely different regulatory framework that allows in-person worship.

Where a case or controversy is no longer live, the case is moot and must be dismissed for lack of jurisdiction. *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003); *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir. 1999). To survive a mootness challenge, “an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir. 2001) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). Thus, a case must be dismissed if only prospective relief has been sought and an event that occurs while the case is pending removes the threat of injury. *Sierra Club v. Babbitt*, 69 F.Supp.2d 1202, 1244 (E.D. Cal. 1999) (citing *Fund for Animals v. Babbitt*, 89 F.3d 128, 133 (2d Cir. 1996)). “[T]he repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal.” *Bd. Of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019) (en banc).

Indeed, even “a policy change not reflected in statutory changes or even in changes in ordinance or regulations” may be sufficient to render a case moot—particularly where there is “little concern that the [government entity] is engaged in gamesmanship.” *Rosebrock v. Mathis*, 745 F.3d 963, 973 (9th Cir. 2014).

Here, the district court correctly held that the reopening of in-person worship services beginning in May 2020 mooted the claims Plaintiffs asserted in the complaint. In their complaint, Plaintiffs challenged only the State’s original Stay-at-Home Order and accompanying public health directives issued in March, challenging the total prohibition on all in-person worship services, indoors and outdoors. But those directives have long been superseded, and every subsequent directive adopted by the State has allowed in-person worship, especially outside where transmission risk is lowered. In July, when the district court dismissed the Complaint with leave to amend, Plaintiffs could congregate outdoors without any numerical limit and indoors up to 100 persons or 25% building capacity. *Gish*, 2020 WL 6193306. In October, when the district court denied reconsideration of that dismissal, Plaintiffs could still congregate outdoors in unlimited numbers, and indoors in Riverside County, where some of their churches were located. *Gish*, 2020 WL 6054912, at *3. And even at present, Plaintiffs may congregate for outdoor worship services with no attendance limit.

As they did in the district court, Plaintiffs argue that their claim is not moot because “the order they challenge, EO N-33-20, remains in effect.” OB 21. But to the extent Executive Order N-33-20 is still in effect, it is not relevant here, as the district court correctly held when it denied Plaintiffs’ motion for reconsideration. It is true that the executive order’s instruction to “heed the current State public health directives” (ER 1091) remains in place. But the State Public Health Officer has separate and independent authority to take measures that prevent the spread of infectious diseases such as COVID-19, Cal. Health & Saf. Code § 120140, and the aspect of Executive Order N-33-20 that Plaintiffs challenged as prohibitive of in-person worship services—the incorporated State Public Health Officer directive “to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure” (*id.*)—has been superseded by subsequent directives. In addition, as explained, every one of those superseding directives, including the currently operative Blueprint and Regional Stay-at-Home Order, have allowed Plaintiffs to worship outdoors in unlimited numbers in any part of the State, and indoors in certain counties. And the Executive Order itself contains no restrictions on religious worship to enjoin.

Finally, even if the Complaint were not moot strictly “in the Article III sense,” the district court still would have been justified in dismissing the complaint *with leave to amend* because the complaint was “so attenuated” from the present

reality on the ground “that considerations of prudence and comity for coordinate branches of government counsel the court to stay its hand, and to withhold relief it has the power to grant.” *Chamber of Commerce v. Dep’t of Energy*, 627 F.2d 289, 291 (D.C. Cir. 1980). This is especially true because there is no nexus between Plaintiffs’ complaint and the relief that they are now seeking for the first time on appeal, namely, enjoining the Blueprint. *See Pac. Radiation Oncology, LLC v. Queen’s Med. Ctr.*, 810 F.3d 631, 636 (9th Cir. 2015) (courts only have authority to grant injunctive relief where the relationship between the requested injunctive relief and the underlying complaint is “sufficiently strong” that it is “of the same character as that which may be granted finally”) (citing *De Beers Consol. Mines v. United States*, 325 U.S. 212, 220 (1945)). As explained, Plaintiffs’ operative complaint—filed in April of 2020—does not and could not contain allegations explaining why the Blueprint (first implemented in August) harms them or should be enjoined. Nor have Defendants have had the opportunity to defend against any such allegations in the district court.

In sum, the district court correctly dismissed the complaint as moot with leave to amend, so that Plaintiffs could plead claims challenging the currently operative COVID-19 regulatory framework and restrictions on in-person worship services.

B. Exceptions to Mootness Do Not Apply.

Contrary to Plaintiffs' argument, neither the "voluntary cessation" nor the "capable of repetition, yet evading review" exceptions to mootness apply.

The "voluntary cessation" exception does not apply. As this Court has made clear, a government's change in legal framework "should not be treated the same as voluntary cessation of challenged acts by a private party." *Glazing Health*, 941 F.3d at 1199; *see also id.* at 1198-99 (describing the decisions from "nearly all [other] circuits" that support the rule that a change in governing law moots a plaintiff's injunction request) (internal quotation marks omitted); *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010) ("[C]essation of the allegedly illegal conduct by government officials has been treated with more solicitude by the courts than similar action by private parties.") (quotation marks omitted); *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (declining to apply standard for private parties articulated in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000)); *United States v. Microsoft Corp.*, 138 S. Ct. 1186 (2018) (same). Under the standard for *government* defendants, mootness caused by changes in the governing law can only be overcome with "evidence in the record" that the prior law or policy is likely to be reimposed. *Glazing Health*, 941 F.3d at 1199.

Plaintiffs do not even begin to satisfy this standard. They cite no evidence that the State is likely to reimpose the categorical prohibition against all in-person worship by banning outdoor services. Nor does the State's decision to restrict *indoor* worship suggest that *outdoor* worship will also be restricted, because "outdoor activity is safer than indoor activity." *Harvest Rock Church v. Newsom*, No. EDCV-20-6414-JGB-KKX, 2020 WL 7639584, at *7 (C.D. Cal. Dec. 21, 2020). Indeed, the State's allowance of outdoor services has been in place for over seven months, since May of last year. The Blueprint, which sets forth the currently operative attendance caps for indoor services, similarly has been in place since August of last year. And even the Regional Stay-At-Home Order, which tightens restrictions on many other activities, leaves outdoor worship services untouched.

In addition, given the fast-moving pace of the pandemic and scientific understanding of COVID-19, the State's actions have been and will continue to be closely tied to developing knowledge and changing circumstances such as the infection rate, current public health guidance, and available treatments. Thus, it is unlikely that the same circumstances that prompted the State in March to categorically prohibit all in-person services will recur. Again, even with the massive surge of infections, hospitalizations, and deaths, the State has continued to permit outdoor worship services with no attendance cap, in light of the established understanding of the reduced transmission risks outside.

Plaintiffs cite this Court’s decision in *Rosebrock v. Mathis* (OB 25), but the change in law mooting Plaintiff’s claims is even clearer here than in *Rosebrock*—which found the relevant policy change sufficient to render that case moot. *Rosebrock* treated a single email from the associate director of a Veterans Administration campus as a “policy change” sufficient to establish mootness and not subject to the “voluntary cessation” exception. *Rosebrock*, 745 F.3d at 972-74. Far clearer than an email, the policy changes that have mooted Plaintiffs’ claims were effected by directives from the California Department of Public Health—directives that have the force of law. *See, e.g.*, EO N-33-20; Cal. Health & Saf. Code § 120140. These changes are therefore comparable to other legal changes sufficient to render a case moot. *See Glazing Health*, 941 F.3d at 1199 (9th Cir. 2019); *Am. Cargo Transp.*, 625 F.3d at 1180 (citing cases). Moreover, as these new directives have been in place for several months, there is no question that these changes will be adhered to. *Cf. Rosebrock*, 745 F.3d at 973 (noting “little concern that the VA is engaged in gamesmanship”). Thus, far from supporting Plaintiffs’ arguments, *Rosebrock* undermines them.

Plaintiffs also point to the Supreme Court’s decision in *Roman Catholic Diocese*, which found no mootness after New York’s Governor reclassified the plaintiffs’ zones of restrictions less than one week prior to the Court’s decision. *Roman Catholic Diocese v. Cuomo*, 141 S.Ct. 63, 68 (2020). But in *Roman*

Catholic Diocese, the directive establishing the varying restrictions in certain zones was never withdrawn or superseded; rather, the plaintiffs' houses of worship were simply reclassified to a different zone and made subject to different restrictions within the same regulatory framework that the plaintiffs had challenged in their complaint. *Id.* Here, by contrast, Plaintiffs' complaint challenged the total prohibition of all in-person worship services from March 2020 contained in a separate directive, which has since been replaced by an entirely new regulatory framework, as explained above. And, for nearly eight months, Plaintiffs have been able to congregate for in-person services, much of that time indoors. Indeed, faced with similar changes in COVID-related directives restricting worship gatherings, the Supreme Court as well as other circuit courts of appeals have dismissed, rejected, or remanded challenges as moot. *E.g.*, *Elim Romanian Pentecostal Church v. Pritzker*, 140 S. Ct. 2823 (2020); *Maryville Baptist Church v. Beshear*, 977 F.3d 561 (6th Cir. 2020); *Lighthouse Fellowship Church v. Northam*, No. 20-1515 (4th Cir. Oct. 13, 2020) (Doc. 31); *Spell v. Edwards*, 962 F.3d 175 (5th Cir. 2020); *cf. Danville Christian Acad., Inc. v. Beshear*, No. 20A96, 2020 WL 7395433 (U.S. Dec. 17, 2020).

Nor is this case "capable of repetition, yet evading review." As explained above, the district court only dismissed the complaint *with leave to amend*, and it afforded Plaintiffs numerous opportunities to file an amended complaint and even

to seek preliminary injunctive relief on claims and allegations asserted in such an amended complaint. Plaintiffs, however, repeatedly chose not to amend their complaint and even chose not to oppose the State Defendants' motion for entry of judgment. Therefore, whatever review Plaintiffs believe has been evaded, it is due to Plaintiffs' own decisions not to amend.

Even more importantly, Plaintiffs' grievances about the State's COVID-related restrictions on in-person worship services have certainly *not* evaded review: Plaintiffs recently filed with this Court a motion to enjoin the State's currently operative restrictions, which the Court denied after reviewing full briefing. *Gish v. Newsom*, 2020 WL 7752732 (9th Cir. Dec. 23, 2020). And plaintiffs in many other cases have challenged (albeit with little success) the same COVID-related restrictions that Plaintiffs now seek to challenge at *all* levels of the federal judiciary, including twice at the United States Supreme Court,⁹ several more times

⁹ *Harvest Rock Church v. Newsom*, 592 U.S. ___, 2020 WL 7061630 (Dec. 3, 2020); *S. Bay United Pentecostal Church v. Newsom*, 140 S.Ct. 1613 (2020).

before this Court,¹⁰ and at all California federal district courts,¹¹ as well as before many California state courts.¹²

¹⁰ *S. Bay United Pentecostal Church v. Newsom*, No. 20-56358, 2020 WL 7681858 (9th Cir. Dec. 24, 2020); *Harvest Rock Church v. Newsom*, 977 F.3d 728 (9th Cir. 2020), *vacated*, 2020 WL 7061630; *S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938 (9th Cir. 2020). See also pending motions for injunctions pending appeal in *S. Bay United Pentecostal Church v. Newsom*, 9th Cir. No. 20-56358 (Dkt. No. 20), and *Harvest Rock Church v. Newsom*, 9th Cir. No. 20-56357 (Dkt. No. 3-1).

¹¹ *S. Bay United Pentecostal Church v. Newsom*, 2020 WL 7488974 (S.D. Cal. Dec. 21, 2020); *Harvest Rock Church v. Newsom*, 2020 WL 7639584 (C.D. Cal. Dec. 21, 2020); *Calvary Chapel San Jose v. Cody*, 2020 WL 7428322 (N.D. Cal. Dec. 18, 2020); *S. Bay United Pentecostal Church v. Newsom*, ___ F. Supp. 3d ___, 2020 WL 6081733 (S.D. Cal. Oct. 15, 2020); *Harvest Rock Church v. Newsom*, 2020 WL 5265564 (C.D. Cal. Sept. 2, 2020), *vacated*, 2020 WL 7061630; *Abiding Place Ministries v. Wooten*, 2020 WL 2991467 (S.D. Cal. June 4, 2020); *Cross Culture Christian Ctr. v. Newsom*, 445 F. Supp. 3d 758 (E.D. Cal. 2020); *Whitsitt v. Newsom*, 2020 WL 5944195 (E.D. Cal. Oct. 7, 2020); *S. Bay United Pentecostal Church v. Newsom*, 2020 WL 7263235 (S.D. Cal. May 15, 2020). See also pending motions for preliminary injunctions in *Calvary Chapel Ukiah v. Newsom*, No. 2:20-cv-01431KJM-DMC (E.D. Cal.), *Gateway City Church v. Newsom*, No. 5:20-cv-08241-EJD (N.D. Cal.), and *Tandon v. Newsom*, No. 5:20-cv-07108 (N.D. Cal.).

¹² *People v. Calvary Chapel San Jose*, No. 20CV 372285 (Cal. Sup. Ct. Dec. 4, 2020); *Burfitt v. Newsom*, No. BCV-20-102267 (Kern Cty. Sup. Ct. Dec. 10, 2020); *County of L.A. v. Superior Court*, 2020 WL 4876658 (Ct. App. Aug. 15, 2020); *County of L.A. v. Grace Cmty. Church*, 2020 WL 6302630 (Super. Ct. Sept. 10, 2020); *County of Ventura v. Godspcak Calvary Chapel*, 2020 WL 6557862 (Super Ct. Aug. 7, 2020).

II. THE COURT SHOULD DISMISS THE INTERLOCUTORY APPEAL FROM THE TRO DENIAL.

A. Upon Affirming the Dismissal of the Complaint, the Court Should Dismiss Plaintiffs' Interlocutory Appeal from the TRO Denial.

As explained above, the district court correctly dismissed the Complaint with leave to amend. As a consequence, this Court should dismiss Plaintiffs' appeal from the district court's TRO denial.

When a case is dismissed while an interlocutory appeal of a denial of preliminary injunctive relief is pending, the interlocutory appeal "merges" into the appeal from judgment, *SEC v. Mount Vernon Mem'l Park*, 664 F.2d 1358, 1361 (9th Cir. 1982), as this Court has already done, *see* 9th Cir. No. 20-55445 Dkt. Nos. 103, 104. Dismissal of the merged interlocutory appeal is appropriate even where the final judgment was not based on the merits. *Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 730-31 (9th Cir. 2017); *Evans v. Shoshone-Bannock Land Use Policy Comm'n*, 736 F.3d 1298, 1301 & n.4 (9th Cir. 2013); *Warren v. Wells Fargo & Co.*, No. 17-56711, 2018 WL 780722, at *1 (9th Cir. Jan. 26, 2018).

Here, as shown above, the district court properly dismissed Plaintiffs' complaint with leave to amend and entered judgment after Plaintiffs elected to neither file an amended complaint nor oppose the State Defendants' motion for

entry of judgment. Therefore, the merged interlocutory appeal from the TRO denial should be dismissed.

B. The Court Should Also Dismiss the TRO Appeal for Lack of Appellate Jurisdiction.

Even apart from the merger and dismissal doctrine, the appeal from the TRO denial should be dismissed because that is not an appealable order. *See* 28 U.S.C. § 1292. Appeals from TRO denials are generally “considered premature and are disallowed [i]n the interests of avoiding uneconomical piecemeal appellate review.” *Religious Tech. Ctr. v. Scott*, 869 F.2d 1306, 1308 (9th Cir. 1989) (quotation marks omitted). In rare and narrow instances, this Court has entertained appeals from such denials where “the circumstances render the denial tantamount to the denial of a preliminary injunction,” such as where the denial “followed a full adversary hearing and in the absence of review, the appellants would be effectively foreclosed from pursuing further interlocutory relief.” *Id.*

Plaintiffs have not satisfied these requirements. The district court’s ruling was limited to Plaintiffs’ TRO application; it made no mention of any request for a preliminary injunction, let alone ruled on such a request. *Gish*, 2020 WL 1979970. In contrast to *Religious Tech. Ctr.*, 869 F.2d at 1308 n.6, there was no evidence presented at the hearing, which was only about an hour long, ER 15, and the hearing was conducted on a highly expedited basis in which Defendants were

afforded only three days to prepare their responsive briefs and gather and present evidence in support thereof, *see* ER 1117. Additionally, although Plaintiffs' counsel inquired about a preliminary injunction hearing at the conclusion of the telephonic hearing, ER 50, Plaintiffs do not explain why they chose not to follow up on that request before noticing an appeal, for example, via a formal motion to the district court or by stipulation with opposing counsel. *Cf. Givens v. Newsom*, 830 F. App'x 560 (9th Cir. 2020) (dismissing appeal from TRO denial for lack of jurisdiction).

For these reasons, the Court should dismiss the appeal from the TRO denial.

III. IN THE ALTERNATIVE, THE COURT SHOULD AFFIRM THE DISTRICT COURT'S DENIAL OF EQUITABLE RELIEF.

A. This Court Should Not Reach the Merits of Plaintiffs' Challenge to the Blueprint in the First Instance.

As explained, Plaintiffs' complaint, which challenged the long-superseded Stay-At-Home Order from March of 2020, is moot. The judgment should be affirmed on that basis alone, and any separate appeal from the district court's denial of a TRO should be dismissed. But if the Court nevertheless reaches the merits, it should affirm the district court's denial of equitable relief.

In general, this Court "will not consider arguments that are raised for the first time on appeal." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Yet Plaintiffs now seek to challenge, for the first time in this litigation, the Blueprint.

That challenge was not presented to the district court, however, and should therefore not be considered.

The district court gave Plaintiffs multiple opportunities to challenge current State public health directives, such as the Blueprint. Plaintiffs, however, made a considered, strategic decision not to do that. Without explanation, Plaintiffs now press this Court to review and enjoin the Blueprint for the first time on appeal. But Plaintiffs cannot simply bypass the district court and take their challenge directly to this Court, which is “a court of review, not first view.” *Shirk v. U.S. ex rel. Dep’t of Interior*, 773 F.3d 999, 1007 (9th Cir. 2014). It was for the district court, not this Court, to have the parties assemble a factual record, apply the law, and balance the equities in the first instance. Moreover, Plaintiffs will not be prejudiced in any way by these ordinary rules of appellate review: they can still file a new action in the district court and, if necessary, seek review after the district court rules.

B. Plaintiffs’ Free Exercise Claim Is Unlikely to Succeed for the Reasons Explained in the State’s Answering Brief in *South Bay United Pentecostal Church v. Newsom*.

If, despite these defects, the Court nonetheless decides to entertain Plaintiffs’ challenge to the Blueprint in the first instance, it should deny relief. Plaintiffs’ constitutional theories and request for an injunction are entirely overlapping to those presented by the plaintiffs in *South Bay United Pentecostal Church v.*

Newsom, 9th Cir. No. 20-56358, which the Court has related to this appeal, *see* 9th Cir. No. 20-55445 Dkt. Nos. 103, 104, and set on the same briefing and oral argument schedule. Those arguments should be rejected for the same reasons presented by the State Defendants in that case. The evidence presented by the State Defendants in *South Bay* is already in the record of this appeal. *See* Dkt. 7-6 through 7-14. Moreover, Plaintiffs here make no arguments in favor of an injunction that have not already been presented to the Court in connection with the *South Bay* appeal. The two cases have thus “followed a parallel path” in relevant part. *See In re Nat’l Sec. Agency Telecommunication Records Litig.*, 669 F.3d 928, 931 (9th Cir. 2011). Accordingly, the State Defendants hereby incorporate by reference in its entirety the brief they filed today in the *South Bay* case, *see* 9th Cir. No. 20-56358, State Defs.’ Answering Br. & Opp’n to Renewed Mot. for Inj. Pending Appeal. In the interest of judicial economy (to avoid presenting the Court with two separate sets of identical briefing on these issues), Plaintiffs respectfully request that the Court refer to that brief in the event it decides to reach the merits of Plaintiffs’ request for equitable relief here.

C. Plaintiffs’ Additional Claims Are Also Unlikely to Succeed.

In addition to their Free Exercise Clause claim, Plaintiffs assert on appeal their claims under the First Amendment’s Speech and Assembly Clauses, the Fourteenth Amendment’s Due Process Clause as void for vagueness, the

Fourteenth Amendment's Equal Protection Clause, and Article 1, sections 1 through 4 of the California Constitution. *See* OB 36-44. Notwithstanding the procedural defects in Plaintiffs' asserting those claims at present, as explained at length above, those claims are not likely to succeed on the merits.

1. Free Speech and Assembly Clauses

“[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.” *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Time, place, or manner restrictions are permitted if they are “justified without reference to the content of the regulated speech[,] . . . narrowly tailored to serve a governmental interest, and . . . leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Likewise, restrictions on the freedom of assembly “may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984). These requirements are easily satisfied here.

The State's directives are permissible time, place, manner restrictions that simply limit where people may gather and the number that may do so at one time. *See Santa Monica Nativity Scenes Comm. v. City of Santa Monica*, 784 F.3d 1286,

1292, 1295 n.5 (9th Cir. 2015). They do not limit gatherings based on the viewpoint that will be communicated or based on who the speaker or sponsor of the gathering is. *Id.* In addition, far from seeking to suppress speech, the directives recommend holding multiple services so that all people who want to do so may participate. ER 140. There are ample opportunities for Plaintiffs to engage in the religious speech and assembly they wish to engage in, including in-person gatherings for worship services.

The directives are also narrowly tailored to serve a legitimate governmental interest. No one, Plaintiffs included, has denied that the government has a substantial interest in slowing the spread of COVID-19. In addition, the restrictions imposed on worship services do not burden substantially more speech than is necessary to achieve that interest. *Ward*, 491 U.S. at 791. Plaintiffs are presently permitted by the State to congregate for in-person worship, and even the original Stay-at-Home Order from March left open alternative channels for the Plaintiffs' communication of their intended speech via the internet and at drive-in services.

Therefore, Plaintiffs are unlikely to succeed on the merits of their claims under the Free Speech and Assembly Clauses.

2. Vagueness

Under the Fourteenth Amendment’s vagueness doctrine, a government directive must be sufficiently definite to “give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” and to avoid “arbitrary and discriminatory enforcement.” *Edge v. City of Everett*, 929 F.3d 657, 664-65 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1297 (2020). But people can “never expect mathematical certainty from our language,” and “perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.” *Id.* at 664 (quoting *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *United States v. Williams*, 553 U.S. 285, 304 (2008)).

In support of their vagueness claim, Plaintiffs merely contend that they “cannot reasonably be expected to understand precisely what is being ordered versus what is merely a recommendation.” OB 40. But, as courts have recognized, “[w]hile the request to ‘heed the current State public health directives’ might be understood as a recommendation, the remainder of the State’s order, and the incorporated health directives, are unambiguous.” *Givens v. Newsom*, No. 2:20-cv-00852-JAM-CKD, 2020 WL 2307224, at *9 (E.D. Cal. May 8, 2020). Any possible confusion whether the state public health directives issued during the COVID-19 pandemic are binding was dispelled on May 4, when the Governor

issued Executive Order N-60-20 stating that “[a]ll residents are directed to obey State public health directives.” ER 178-79.

Therefore, Plaintiffs’ vagueness claim is unlikely to succeed.

3. Equal Protection Clause

The Equal Protection Clause forbids the government from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Equal Protection Clause requires only that the classification rationally further a legitimate state interest unless “a [statutory] classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic[.]” *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

As shown above, and in the State’s *South Bay* Answering Brief, the restrictions at issue do not impinge on any fundamental right. Plaintiffs also contend that the classifications of “essential” and “nonessential” workers and activities violates their right to equal protection as well, but those are not suspect classifications. *See Nordlinger*, 505 U.S. at 21. And the distinctions about what activities may be permitted are rationally based on assessment of risk of transmission of COVID-19. Furthermore, even under the Stay-At-Home Order from March of 2020, faith-based work has been exempted from the stay-home provisions as “essential” to provide worship opportunities through remote

technology or drive-ins.¹³ Finally, although adverse targeting of groups on the basis of religious may support an equal protection claim, *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790, 804 (9th Cir. 2011), the State’s directives do no such thing.

For these reasons, Plaintiffs’ equal protection claim is likely to fail.

4. State Law Claims

Under the Eleventh Amendment, federal courts lack jurisdiction to enjoin state institutions and state officials on the basis of state law. *Pennhurst State School & Hosp. v. Halderman* 465 U.S. 89, 124-125 (1984). Although there is a limited exception under which state officials may be enjoined from violating federal law, *Ex parte Young*, 209 U.S. 123 (1908); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000), that exception does not apply “when a plaintiff alleges that a state official has violated state law.” *Pennhurst*, 465 U.S. at 106; *Doe v. Regents of the Univ. of Cal.*, 891 F.3d 1147 (9th Cir. 2018). Accordingly, as several courts considering challenges to the Stay-at-Home Order have recognized, Plaintiffs’ claims under Article 1, sections 1 through 4 of the California Constitution fail under the Eleventh Amendment. *E.g.*,

¹³ Contrary to Plaintiffs’ assertion, federal guidance does not “provide that places of worship are ‘essential’ across the country.” OB 44. It simply notes that “Millions of Americans embrace worship as an essential part of life.” Pls.’ MJN Ex. 1, at 1.

Best Supplement Guide, LLC v. Newsom, 2020 WL 2615022, at *7 (E.D. Cal. May 22, 2020); *Six v. Newsom*, 2020 WL 2896543, at *8 (C.D. Cal. May 22, 2020).

D. The Record Does Not Demonstrate that Plaintiffs Suffer Irreparable Harm from the Currently Operative COVID-19 Framework.

In addition to failing to establish a likelihood of success on the merits, Plaintiffs have failed to show the irreparable harm required for injunctive relief, which alone is a sufficient basis to deny relief.

“[T]he basic requisite[] of the issuance of equitable relief” is a showing of “substantial and immediate irreparable injury.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 104, 111 (1983) (internal quotation marks omitted); *see also Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008) (“A plaintiff seeking a preliminary injunction must establish that he is . . . likely to suffer irreparable harm in the absence of preliminary relief.”). The only allegations of harm in the record below concern the State’s prohibition of in-person worship services in the March Stay-At-Home Order. But that injury no longer exists: as explained above, under California’s newly issued guidance, Plaintiffs are no longer prohibited from congregating for religious worship, and they may now resume in-person services for their congregations. *See Harvest Rock Church*, 2020 WL 7639584, at *10.

Plaintiffs' Opening Brief devotes only one paragraph to the irreparable harm question, OB 44-45, and noticeably absent from the brief is any assertion that they are harmed from the Blueprint or Regional Stay-At-Home Order. Instead, Plaintiffs contend in conclusory fashion that the irreparable harm requirement is satisfied because they are likely to prevail on the merits and show a constitutional violation. *Id.* But, as explained, the record on appeal does not contain any facts or evidence concerning the Blueprint, and, therefore, does *not* demonstrate how Plaintiffs are suffering harm from it, especially as they may now congregate for in-person worship services. *See Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (“A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief.”); *American Passage Media Corp. v. Cass Comm'ns, Inc.*, 750 F.2d 1470, 1473 (9th Cir. 1985) (reversing the entry of a preliminary injunction because the movant had adduced no evidence of irreparable harm).

Plaintiffs are not excused from satisfying the requirements for injunctive relief, including the need to show that “they are likely to suffer irreparable harm in the absence of preliminary relief,” even in light of a change in the law. *Winter*, 555 U.S. at 20. Indeed, “no court can enjoin” conduct that has ceased and thus no

longer threatens irreparable injury. *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016); *Lyons*, 461 U.S. at 101, 111-12.

For this reason alone, the Court should affirm the district court's TRO denial. Additionally, as explained in the *South Bay*, in light of the dire circumstances created by the current surge in infections, the public interest also weighs strongly against injunctive relief.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's dismissal of the complaint. The Court should also dismiss the interlocutory appeal from the district court's TRO denial as moot or, alternatively, for lack of appellate jurisdiction. But if the Court finds it does have jurisdiction over Plaintiffs' challenge to the Blueprint, it should affirm the district court's denial of equitable relief.

Dated: January 7, 2020

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

s/ Todd Grabarsky
TODD GRABARSKY
Deputy Attorney General
*Attorneys for Defendants-Appellees Governor
Gavin Newsom and Attorney General Xavier
Becerra*

STATEMENT OF RELATED CASES

The following cases pending before this Court are related to the present matter because they also involve challenges to the State's COVID-19-related guidelines for religious worship services: *South Bay United Pentecostal Church v. Newsom*, 9th Cir. Nos. 20-56358, 20-55533; *Harvest Rock Church v. Newsom*, 9th Cir. Nos. 20-56357, 20-55907.

Dated: January 7, 2021

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

s/ Todd Grabarsky
TODD GRABARSKY
Deputy Attorney General
*Attorneys for Defendants-Appellees Governor
Gavin Newsom and Attorney General Xavier
Becerra*

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 10,224 words excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and type face comply with Federal Rules of Appellate Procedure 32(a)(5) and (6).

Dated: January 7, 2021

/s/ Todd Grabarsky
TODD GRABARSKY

CERTIFICATE OF SERVICE

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

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

Dated: January 7, 2021

/s/ Todd Grabarsky
TODD GRABARSKY