

**No. 21-15228**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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RITESH TANDON, ET AL.

*Plaintiffs-Appellants,*

*v.*

GAVIN NEWSOM, ET AL.

*Defendants-Appellees,*

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On Appeal From The United States District Court  
For The Northern District of California  
Case No. 5:20-cv-07108-LHK  
The Honorable Lucy H. Koh

—————  
**OPENING BRIEF OF PLAINTIFFS-APPELLANTS**

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## **DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiffs-Appellants state that they are natural persons.

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## INTRODUCTION

This case involves constitutional challenges to a string of executive orders issued by the State of California and Santa Clara County in response to the COVID-19 pandemic that severely burden core religious, political, and economic freedoms. As one of the County’s prosecutors candidly admitted last Spring: “Right now we’re putting parts of the Constitution on hold. We really are. Freedom of assembly. Right to practice religion.”<sup>1</sup> Nearly one year later, the Constitution is still “on hold” in California.

Plaintiffs are individuals who seek to exercise their First Amendment rights to free exercise of religion, free speech, and peaceable assembly, and their Fourteenth Amendment right to earn a living and pursue their chosen profession. But for more than a year, Defendants have prevented Plaintiffs from holding Bible studies or political gatherings, even in their own homes, and have placed ruinous restrictions on restaurants, wineries, salons, gyms, and myriad other

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<sup>1</sup> Katey Rusch and Casey Smith, *How Do You Enforce a Law That Tramples the Land of the Free?* The New York Times (May 11, 2020), <https://www.nytimes.com/2020/05/11/us/coronavirus-california-lockdowns.html>.

businesses. Plaintiffs sought a preliminary injunction preventing Defendants from continuing to enforce these unconstitutional orders. But the district court, relying heavily on this Court’s now-vacated order in *South Bay United Pentecostal Church v. Newsom*, 985 F.3d 1128 (9th Cir. 2021), denied the motion, holding that Plaintiffs were not likely to succeed on their claims and that an injunction was not in the public interest.

The Supreme Court’s recent orders in *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (*South Bay II*), and *Gateway City Church v. Newsom*, 2021 WL 753575, at \*1 (Mem) (S. Ct. Feb. 26, 2021), eviscerate both of those conclusions. As five justices agreed in *South Bay II*, the Constitution prohibits California from “impos[ing] more stringent regulations” on core First Amendment-protected activity “than on many businesses,” regardless of whether the regulations ban a large swath of less protected conduct as well. 141 S. Ct. at 717 (Statement of Gorsuch, J.). Applied here, that same test forbids the County from prohibiting religious “gatherings” while allowing people to congregate in comparable commercial settings. *Gateway City Church*, 2021 WL 753575, at \*1. It also bars Defendants from extinguishing core political speech—

including campaign-related events and informal, salon-style political discussions hosted in homes. This Court should thus reverse the district court's ruling and put an end to Defendants' egregious First Amendment violations.

Defendants' unrelenting war of attrition on small businesses must also end. Although the "pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations," *Dittman v. California*, 191 F.3d 1020, 1029 (9th Cir. 1999), Defendants contend, and the district court agreed, that government bureaucrats can unilaterally close businesses for over a year so long as there is some *conceivable* justification for their actions. In other words, Defendants assert that a public health emergency gives them *carte blanche* to bankrupt American citizens, destroy their life work, and deprive them of basic economic liberty. And they claim they can wield this awesome power indefinitely even if, as here, there is no evidence that such restrictions are necessary or effective. Indeed, Defendants have *never* connected the spread of COVID-19 to Plaintiffs' businesses or other similarly situated businesses when operated with basic safety precautions. Nor have Defendants provided any evidence that business

closures are effective in preventing the spread of the disease or reducing hospitalizations and deaths among the most vulnerable populations—residents of nursing homes and long-term care facilities, as well as the elderly receiving in-home care.

This is not the first time government officials have urged this Court to sanction a massive deprivation of liberty because of an asserted emergency. In *Korematsu*, the federal government contended that a wartime emergency prevented this Court from second-guessing its decision to “temporarily infringe some of the inherent rights and liberties of individual citizens.” *Korematsu v. United States*, 140 F.2d 289, 290 (9th Cir. 1943). In a tragic dereliction of duty, this Court uncritically accepted the government’s argument and upheld the internment of thousands of American citizens. The Supreme Court followed suit, and Justice Jackson’s prescient warning in that case rings true here: if the Court defers to Defendants’ assertion of emergency and declines to demand evidence that these deprivations of liberty are both necessary and effective, it “may as well say that any [public health] order will be constitutional and have done with it,” for the principle such a decision would affirm—*e.g.*, public officials may restrict liberty whenever they

perceive a threat to public health—would “lie[] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting).

This Court should not hand Defendants such a weapon because, as the Supreme Court recently affirmed, “even in a pandemic, the Constitution cannot be put away and forgotten.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 68 (2020) (per curiam). Instead, the Court should reverse the decision below and remand with instructions to enter a preliminary injunction that will prevent Defendants from violating Plaintiffs’ rights.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) to review the district court’s denial of Plaintiffs-Appellants’ motion for a preliminary injunction. The district court issued its decision on February 5, 2021, 1-ER-81, and Plaintiffs timely filed their notice of appeal on February 9, 2021, 5-ER-1084. The district court had jurisdiction in this case under 28 U.S.C. §§ 1331 and 1343.



## STATEMENT OF THE ISSUES

1. Whether Defendants' orders restricting gatherings violate Plaintiffs' First Amendment right to free exercise of religion.
2. Whether Defendants' orders restricting gatherings violate Plaintiffs' First Amendment rights to free speech and assembly.
3. Whether Defendants' orders restricting the operations of Plaintiffs' businesses violate Plaintiffs' Fourteenth Amendment rights to equal protection and to earn a living and pursue their chosen professions.

## CONSTITUTIONAL PROVISIONS

This case implicates the First Amendment to the U.S. Constitution.

The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case also implicates the Fourteenth Amendment to the U.S. Constitution. The relevant portion of § 1 of the Fourteenth Amendment states:

No State shall ... deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### I. Factual Background

Governor Newsom proclaimed a state of emergency on March 4, 2020, after the initial outbreak of COVID-19 in California. 4-ER-614–18. Shortly thereafter, Newsom issued Executive Order N-33-20, which directed all California residents “to immediately heed the [State public health directives.]” 4-ER-620–21. On May 4, 2020, Newsom issued Executive Order N-60-20, directing all California residents “to continue to obey State public health directives, as made available [online] and elsewhere as the State Public Health Officer may provide.” 4-ER-623–25. The online resource mentioned in that order, “About COVID-19 restrictions,” claims that the online “[q]uestions and answers” have the same effect as other orders of the State Public Health Officer.<sup>2</sup> Both EO N-33-20 and EO-N-60-20 invoke California Government Code § 8665, threatening any person who fails to obey the orders with a misdemeanor conviction, \$1,000 fine, and six-months’ imprisonment. 4-ER-620, 4-ER-624; Cal. Gov’t Code § 8665.

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<sup>2</sup> See RJN Ex.2; *see also* 4-ER-815

### **A. CDPH Restrictions**

CDPH used its new power to impose and then eliminate several regulatory frameworks—including a four-stage framework for reopening the state, 4-ER-631, and a “County Data Monitoring List,” 4-ER-642–43—before issuing the current four-tiered, color-coded system commonly known as the “Blueprint for a Safer Economy” (“Blueprint”). Under this system, local health jurisdictions in the state may reopen specified sectors according to their respective county’s Tier.

Three metrics govern the Blueprint’s tier system: (1) the average number of “cases” per 100,000 residents over a seven-day period, (2) the average amount of COVID-19 tests that come back “positive” over a seven-day period, and (3) the “health equity metric.” 4-ER-645–46, 4-ER-650. The health equity metric requires a county to identify its “most disadvantaged neighborhoods” and ensure that the same thresholds for positivity rates are met in those specific neighborhoods before the county moves to the less restrictive tier. 4-ER-659–61.

Applying these metrics, the Blueprint color-codes each tier as follows: Purple Tier (Widespread); Red Tier (Substantial); Orange Tier (Moderate); Yellow Tier (Minimal). 4-ER-645–46, 4-ER-651. A county

must remain in a tier for at least three weeks before it can advance to a less restrictive tier. 4-ER-652. It must also meet the criteria for all three metrics of the next less-restrictive tier for two consecutive weeks immediately prior to advancement. *Id.* A county that fails to meet the metrics for its current tier for two consecutive weeks may be sent back to the more restrictive tier, depending on the discretion of CDPH and whether it “determines there are objective signs of improvement.” RJN Ex.3

The Blueprint determines for each tier whether various activities can occur indoors and/or outdoors and at what capacities. RJN Ex.1. Even in the Purple Tier, CDPH allows certain businesses to operate indoors, such as hair salons, retail stores and shopping centers (at 25% capacity), personal care services, hotels, “[l]imited [s]ervices” (e.g., laundromats, pet grooming, and auto repair shops), and “[c]ritical [i]nfastructure,” which includes food manufacturers, warehouses, call centers, legal and accounting services, and “the entertainment industries, studios, and

other related establishments.”<sup>3</sup> 5-ER-915–27. CDPH has also issued guidance documents providing detailed restrictions, requirements, and “checklists” for particular industries.<sup>4</sup> *Id.*

Relatedly, CDPH has issued changing guidance on gatherings. CDPH defines “gatherings” to mean “social situations that bring together people from different households at the same time in a single space or place.” 2-ER-95. On March 16, 2020, CDPH banned all indoor and outdoor gatherings “across the state of California[.]” 4-ER-825. Six months later, CDPH “updated” this guidance but maintained its statewide ban on gatherings “unless otherwise specified.” 4-ER-828. On October 9, 2020, CDPH banned indoor gatherings entirely and restricted outdoor gatherings to no more than three households in a two-hour period, provided that the venue space allows six-foot physical distancing. 4-ER-831. On November 13, CDPH again updated its guidance, prohibiting all indoor gatherings for counties in the Purple Tier,

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<sup>3</sup> California for All, *Essential Workforce* (last updated January 7, 2021), <https://covid19.ca.gov/essential-workforce/>.

<sup>4</sup> *See, e.g.*, 4-ER-662–83 (places of worship and cultural ceremonies); 4-ER-684–739 (restaurants, wineries, and bars); 4-ER-740–55 (hair salons and barbershops); 4-ER-756–83 (personal care services); 4-ER-784–808 (gyms and fitness centers).

prohibiting gatherings in other tiers “that include more than 3 households,” and prohibiting “[s]inging, chanting, shouting, cheering ... and similar activities” at indoor gatherings. 2-ER-96–98.

CDPH supplements its various orders through its webpage “About COVID-19 restrictions,” which reiterates that “[a]ll individuals living in the State of California are currently ordered to stay home except ... as otherwise authorized (including in the Questions and answers [contained on the webpage]).” RJN Ex.2. These questions and answers exempt from the gatherings restrictions several types of gatherings, including “political rallies,” “protests,” “cultural ceremonies,” “wedding ceremonies” and “services” at “places of worship.” *Id.*

### **B. Santa Clara County Restrictions**

On July 2, 2020, the Santa Clara County Public Health Officer issued an order “Establishing Mandatory Risk Reduction Measures Applicable to All Activities and Sectors to Address the COVID-19 Pandemic.” 4-ER-834–43. Santa Clara has also issued several versions of its own gatherings directive. 4-ER-844–93; 5-ER-895–905; 2-ER-110–20. For over three months, the county banned all indoor gatherings, including “worship services, cultural ceremonies, protests, and political

events.” 4-ER-878. Outdoor gatherings were limited to a maximum of 60 people. 4-ER-892. On October 13, 2020, after the County moved from the red to the orange tier, the County raised its cap on outdoor gatherings to 200 people. 5-ER-899–900. The County’s October 13 revision “allowed” indoor gatherings authorized by the state to resume but capped such gatherings at 100 people or 25% of a facility’s capacity, whichever is fewer. *Id.*

On December 4, 2020, the County revised its guidance to permit gatherings only to the extent allowed in the County’s “Mandatory Directive on Capacity Limitations.” 2-ER-113.<sup>5</sup> Furthermore, under the State and County orders implementing the Regional Stay at Home Order, “all gatherings with members of other households, whether indoors or outdoors, [were] temporarily prohibited, except outdoor religious worship services, political events, and cultural ceremonies of up to 100 people.” 2-ER-111.

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<sup>5</sup> Santa Clara County has issued and revised numerous times a “Mandatory Directive on Capacity Limitations.” *See, e.g.*, 2-ER-88–93; RJN Ex.5.

\* \* \*

As a result of these orders, indoor gatherings were completely banned in Santa Clara County at the time the district court issued its decision denying Plaintiffs’ motion for preliminary injunction; outdoor gatherings—except for religious services, political rallies and protests, and cultural ceremonies—were limited to no more than three households. And even the exempted outdoor gatherings were subject to the County’s 100-person limit. Meanwhile, indoor dining was prohibited, gyms and wineries were closed, and facial bars and salons were severely restricted.

## **II. Procedural Background**

### **A. Plaintiffs Challenge Defendants’ Gatherings Ban and Business Restrictions Under the First and Fourteenth Amendment**

Plaintiffs’ complaint, filed on October 13, 2020, claims that Defendants’ orders violate their rights to free speech and free exercise under the First Amendment, as well as their rights to earn a living and to equal protection under the Fourteenth Amendment.

**Free Exercise Plaintiffs** - Pastor Jeremy Wong and Karen Busch want to host small in-person Bible studies in their homes, as both have done regularly for over two years. 5-ER-1007 ¶¶2–3; 5-ER-1015 ¶¶2–3. If



allowed to hold such gatherings they could (and would) employ social distancing and other mitigation measures. 5-ER-1007–8 ¶¶4, 6; 5-ER-1015–16 ¶¶4, 6.

**Free Speech Plaintiffs** - Plaintiff Ritesh Tandon ran for the United States Congress in 2020 and plans to run again in 2022. He wants to host both indoor and outdoor gatherings to meet constituents, advisors, and donors to share his ideas for how best to represent the 17th Congressional District. 2-ER-190–91 ¶¶5–7.

Plaintiffs Terry and Carolyn Gannon have hosted a broad and diverse network of persons in their home for over twelve years to discuss public policy. 5-ER-1031 ¶2. At these in-home assemblies, their group would propose topics to discuss, hear each other’s views on the issues, probe the evidentiary support for the ideas, debate the merits of the proposals, and then try and reach a consensus on the best solution. *Id.*

Both Tandon and the Gannons could, if permitted, host in-person gatherings—either indoor or outdoor—safely by social distancing their guests by more than six feet and requiring attendees to wear masks. 5-ER-1028 ¶15; 5-ER-1032 ¶6.

**Small Business Plaintiffs** - Plaintiff Julie Evarkiou co-owns a salon called Wavelength. 5-ER-1011 ¶2. Like many other businesses, Wavelength shut down soon after Newsom declared a state of emergency. *Id.* ¶ 4. Although Wavelength is now allowed to serve individual clients, Defendants’ orders have prohibited Wavelength from hosting group events—such as wine tastings—which are critical marketing tools. 5-ER-1011–12 ¶¶3, 5.

Plaintiff Dhruv Khanna owns Kirigin Cellars, one of the oldest vineyards in California. 5-ER-998 ¶2. The vineyard produces small batch wines, but about one-third of Kirigin’s revenues typically come from events such as wedding receptions and corporate gatherings. *Id.* ¶¶3–5. After Newsom’s emergency declaration, Kirigin Cellars was unable to host events for months. *Id.* ¶5. As a result, more than 30 events were cancelled in 2020, and Kirigin Cellars was forced to reduce payroll by 30 percent. *Id.* ¶7. *Id.* Kirigin has also been prohibited from holding indoor wine tastings since the pandemic began. ECF No. 9 at Ex.E ¶¶4–5.<sup>6</sup>

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<sup>6</sup> All “ECF” citations refer to this Court’s docket.

Plaintiff Maya Mansour founded her business, The Original Facial Bar, in 2016. 5-ER-1019 ¶2. The Original Facial Bar shut down on March 17, 2020, shortly after Newsom’s emergency declaration, and Mansour was forced to lay off her entire staff of eleven. *Id.* ¶3. Until October 4, 2020, Defendants’ Orders completely prevented Mansour from reopening her business. 5-ER-1021 ¶11. And although Defendants allowed the Original Facial Bar to reopen in October, up until March 2, 2021, the orders required “at least 6 feet of social distance from everyone ... at all times,” mandated the use of N95 masks, and prohibited dual services and double bookings. 5-ER-910–12.

Plaintiff Frances Beaudet has co-owned Old City Hall Restaurant in historic downtown Gilroy since 2012. 5-ER-1003 ¶2. The restaurant seats up to 254 customers indoors and has approximately 25,000 square feet of indoor dining space. *Id.* Its outdoor patio seats up to 66 customers. *Id.* Due to Defendants’ orders, Old City Hall Restaurant has been unable to utilize most of its indoor dining space, reducing its business by 60 percent compared to the previous year. *Id.* ¶3.<sup>7</sup>

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<sup>7</sup> Plaintiff Connie Richards opened her business, Better Life Fitness Academy (“BLFA”), four years ago. 5-ER-994 ¶2. Defendants’ Orders

## **B. Plaintiffs' Move for Preliminary Injunction**

On October 22, 2020, Plaintiffs moved for a preliminary injunction. Plaintiffs Wong, Busch, Tandon, and Gannon sought to enjoin Defendants from enforcing the gathering bans against their First Amendment-protected gatherings—indoor Bible studies, campaign fundraisers and other events, and political discussions. Plaintiffs Evarkiou, Khanna, Mansour, Beaudet, and Richards sought to enjoin Defendants from enforcing both the gathering bans and capacity restrictions on their businesses.

In support of that motion, Plaintiffs submitted expert declarations from Dr. Jayanta Bhattacharya and Dr. Rajiv Bhatia, who explained that although COVID-19 is a serious health crisis, Defendants failed to apply “[b]asic standards of health policy design” that require “scientific and ethical” justifications before imposing enormous costs on society. 5-ER-942 ¶22; *see also* 5-ER-980–82 ¶¶90–92; 2-ER-178–84 ¶¶91–105. As they explained, Defendants’ restrictions are arbitrary and irrational for

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forced Richards to close BLFA for several months. *Id.* ¶¶3–4. Although BLFA was eventually permitted to reopen in an extremely limited capacity, it was not enough to sustain Richards’ business, and she was forced to permanently close BLFA. 2-ER-187 ¶4. Richards does not plan on reopening.

several reasons. *First*, the orders fail to account for the vastly different mortality rates experienced by different age groups. Although the disease poses a serious risk to seniors, the infection fatality rate for those under 70 is .05%—and for even younger populations it is far lower than that. 5-ER-946–47 ¶34. Most deaths have involved individuals in nursing homes and other long-term care facilities, and the elderly receiving in-home care. 5-ER-974 ¶¶76–78. The State could achieve far better results, while inflicting much less collateral damage, by devoting its energy and resources to protecting those vulnerable populations while leaving the rest of the community free to live their lives and run their businesses with basic precautions. *See* 5-ER-973–82 ¶¶75–89, 90–92. *Second*, case counts and positivity rates—the metrics used by the state in determining a county’s tier placement—are not an appropriate measure of disease burden. This is because CDPH determines cases based on “positive” polymerase chain reaction (“PCR”) tests, which identify the presence of the virus by repeatedly doubling small biological samples, and the high cycle thresholds used in California can yield “positive” results even for individuals with trace amounts of dead virus in their bodies who are

neither symptomatic nor infectious. 5-ER-961 ¶38; 5-ER-944–45 ¶¶28–30; 2-ER-122–23 ¶¶4–6.

Defendants opposed the motion and provided their own expert declarations. Defendants’ experts argued that the PCR test is the “gold standard” for detecting the presence of SARS-CoV-2, 2-ER-352 ¶34; 3-ER-398 ¶23; 3-ER-423 ¶94, that hospitalizations would not be a reliable metric because of the lag between infection and hospitalization, 2-ER-356–57 ¶44; 3-ER-398–99 ¶¶25–26; 3-ER-451 ¶23, that Defendants had already implemented many strategies to protect the vulnerable and anything short of community-wide restrictions would be insufficient to protect these populations, 2-ER-194–97 ¶¶7–13; 2-ER-216–18 ¶¶9–14; 2-ER-348–51 ¶¶25–29; 3-ER-471–73 ¶¶13–24; 3-ER-461–66 ¶¶11–33, and that Defendants’ orders had worked to slow the spread of the disease, 3-ER-389 ¶74; 3-ER-416 ¶¶61–63.

In response, Plaintiffs’ experts explained that PCR testing, while useful for detecting SARS-CoV-2, is not useful for determining *infectivity* because—as Defendants’ experts did not dispute—the high cycle thresholds used in California result in a substantial amount of functional false positives. 2-ER-123–25 ¶¶7–12. Plaintiffs’ experts also explained

that hospitalizations are a sufficiently responsive and reliable metric, 2-ER-162–163 ¶¶54–57, and that there are numerous options short of population-wide restrictions that may protect the vulnerable, 2-ER-136–41 ¶¶42, 48–55; 2-ER-149, 179–183 ¶¶19, 94–104.

The district court denied Plaintiffs’ motion for preliminary injunction on February 5, 2021. 1-ER-81. Addressing Plaintiffs’ free exercise claims, the district court upheld the orders, concluding that they were neutral, generally applicable, and rationally related to a legitimate government interest. 1-ER-69–74. In the alternative, the court held that the orders were narrowly tailored to achieve a compelling government interest. 1-ER-74.

Turning to the free speech claim, the district court first held that even though the 2020 election was over, Plaintiff Tandon’s claims are “capable of repetition, yet evading review.” 1-ER-48–49. On the merits of the free speech claim, the court held that intermediate scrutiny applied, even though the County’s total ban on indoor gatherings and its restrictions on outdoor gatherings interfered with Tandon’s ability to hold political events, meet with advisors, and raise money—and barred the Gannon’s from holding political discussions. 1-ER-47–50. The court

held, in the alternative, that the *total ban* on indoor gatherings and the 200-person limit on outdoor gatherings would satisfy even strict scrutiny. 1-ER-63–69.

With respect to Plaintiffs’ due process and equal protection claims, the district court held that the ability to pursue a profession and earn a living is not a fundamental right. 1-ER-30. It thus applied a “narrow” form of judicial review that asks only whether the “government *could* have had a legitimate reason for acting as it did.” *Id.* The district court concluded that Defendants had met this standard. 1-ER-32–35. The court thus concluded that Plaintiffs were unlikely to prevail on the merits of any of their constitutional claims. 1-ER-29, 35, 46.

As to the other preliminary injunction criteria, the court determined that Defendants’ orders irreparably harmed Wong, Busch, Tandon, Gannon, Richards, and Mansour, but did not irreparably harm the other business plaintiffs because they alleged only “monetary injury.” 1-ER-75. The district court held that an injunction would not be in the public interest because public health would be “endangered” if Defendants’ Orders were enjoined. 1-ER-76–80.



### III. Subsequent Developments

Hours after the district court denied Plaintiffs' motion for a preliminary injunction, the Supreme Court issued its order in *South Bay II*, which enjoined California from enforcing its prohibition on indoor worship services in in the Purple Tier on the ground that it violated the Free Exercise Clause. 141 S. Ct. 716.

In response, the State amended the Blueprint to allow indoor services at “places of worship” at up to 25% capacity in the Purple and Red Tiers. *See* RJN Ex.2. The State also now allows for “political rallies and protests,” [w]edding ceremonies” and “cultural ceremonies,” to be held indoors with a maximum of 25% capacity in the Purple Tier (the State had previously prohibited these indoor gatherings in the Purple Tier). RJN Ex. 2; 4-ER-818. Outdoor political rallies and protests, wedding ceremonies, cultural ceremonies, and services at places of worship are not currently subject to capacity limitation by the State. RJN Ex. 2; 4-ER-818–19.

Notwithstanding the ruling in *South Bay II*, Santa Clara County continued to enforce its gathering ban, which completely prohibited indoor worship. On February 26, 2021, the Supreme Court issued a short

order enjoining that policy, explaining that “[t]his outcome is clearly dictated by this Court’s decision in *South Bay [III]*.” *Gateway City Church*, 2021 WL 753575.

On March 2, 2021, the County rescinded its gathering guidance and adopted the State’s framework. *See* RJN Ex.6. The County also “lift[ed] all local activity-specific health directives, effective Wednesday, March 3, 2021.” *Id.* “All activities are still subject to the State’s rules and to the local Risk Reduction Order.” *Id.*

Despite Defendants’ revisions and Santa Clara’s movement to the red tier, which also occurred on March 2, gatherings of more than three households remain prohibited—whether indoors or outdoors—except for political rallies and protests, cultural ceremonies, or religious services at “place[s] of worship.” RJN Ex.1. The exempted gatherings may be held indoors up to 25% capacity and outdoors with no capacity restrictions. Indoor dining is limited to 25% capacity or 100 persons, whichever is less; wineries are prohibited from operating indoors; and fitness centers and gyms are limited to 10% capacity indoors. *See id.*

## STANDARD OF REVIEW

“A denial of a preliminary injunction is generally reviewed for abuse of discretion.” *Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 744 (9th Cir. 2012). But when the denial “rests solely on a premise of law and the facts are either established or undisputed,” this Court’s “review is *de novo*,” *id.*, and it “freely considers the matter anew as if no decision had been rendered below.” *Dawson v. Marshall*, 561 F.3d 930, 933 (9th Cir. 2009).

## SUMMARY OF ARGUMENT

### I.A. Defendants’ orders violate the First Amendment.

1. The orders implicate the Free Exercise Clause because they impose a substantial burden on Wong and Busch’s ability to hold religious gatherings, such as home-based Bible studies. These types of informal, small-group gatherings—which have been part of the Christian tradition for two millennia and are a central practice of contemporary evangelicalism—are essential to their faith. For much of the past year, the orders completely prohibited these “house church” gatherings. And while Defendants have since limited the ban to gatherings involving more than three households, this new rule does not remotely redress

Plaintiffs’ constitutional injury because Wong and Busch’s long-established congregation, though small, comprises individuals from a handful of families.

The orders are subject to strict scrutiny because they are not neutral or generally applicable. In *South Bay II* and *Gateway City Church*—both of which were issued *after* the order at issue—the Supreme Court applied strict scrutiny to Defendants’ orders treating religious services less favorably than commercial activities. This Court should do the same, and for the same reason: Although Plaintiffs’ religious gatherings are held in the home, rather than in formal “houses of worship,” the First Amendment permits no favoritism as between hierarchical faith traditions and less ritualized forms of religious practice. Because Defendants allow people to congregate together in stores, buses, airports, trains, government offices, and various other places, the prohibition on Plaintiffs’ religious gatherings must satisfy strict scrutiny.

2. The orders also trigger strict scrutiny because they severely burden Plaintiffs’ ability to engage in core political speech and peaceably assemble. Tandon ran for Congress in 2020 and is running again in 2022.

During the 2020 campaign, Defendants' gathering bans prevented him from holding indoor gatherings to meet with constituents and potential donors. The current rules prohibit him from holding these events indoors with more than two other households. Defendants' orders also limit the Gannons' ability to hold salon-style political discussions in their own home. Strict scrutiny is also required because Defendants' prohibition on in-person gatherings forecloses an entire medium of expression. Because there is no adequate substitute for in-person gatherings, Defendants' orders prohibit far too much speech. Last but not least, Defendants' orders are also content based. While Defendants allow people to congregate indoors to film a movie, they do not allow them to meet indoors to discuss, say, the importance of respecting equality before the law or the necessity of protecting civil rights. The limitations on outdoor gatherings are also content based, as the State allows protests, rallies, religious services, and cultural ceremonies to occur without numerical caps but imposes a three-household limit on the types of political gatherings the Gannons seek to hold. In other words, the State's regulations require authorities to look to the substance of speech to determine its lawfulness—a classic red flag.

3. The orders fail strict scrutiny because they are not narrowly tailored. As the Supreme Court held in *South Bay II*, Defendants' orders are both overinclusive and underinclusive. They exempt numerous categories of human interaction that entail similar risks as the prohibited religious and political gatherings. And Defendants have not explained why their objectives could not be achieved through less restrictive means, such as focusing protection on the most vulnerable populations while allowing First Amendment-protected activity to occur with basic common-sense precautions.

**I.B. Defendants' orders violate the Fourteenth Amendment.**

1. The Due Process Clause protects the right to earn a living and pursue a profession. Yet for more than a year Defendants have either closed or severely restricted Plaintiffs' businesses. These restrictions, unprecedented both in their scope and duration, must be subjected to something more than ordinary rational basis review. Instead, the court should, at minimum, apply rational basis "with a bite" and evaluate the evidence and determine whether Defendants' extreme deprivations of liberty are justified.

2. They are not. Plaintiffs provided un rebutted declarations showing they could comply with the same basic precautions utilized in other commercial establishments not subject to the orders. Nor have Defendants provided *any* evidence connecting COVID-19 outbreaks to restaurants, wineries, salons, or gyms, when common-sense mitigation strategies are used. The orders are also irrational because they are based on the State's Blueprint, which ties restrictions solely to the results of PCR tests. The high cycle thresholds used by the State's laboratories ensures that a large percentage of positive tests involve individuals with trace amounts of the virus in their bodies who are not infectious. The CDC recommends measuring confirmed cases of *hospitalized* patients to track the course of a pandemic, but the Blueprint ignores hospitalization numbers entirely.

II. Plaintiffs have all demonstrated irreparable harm. The deprivation of First Amendment rights, even for a short time, constitutes irreparable injury, so Wong, Busch, Tandon, and the Gannons will suffer irreparable harm absent an injunction. And each of the business Plaintiffs has provided uncontroverted evidence that Defendants' orders threaten the survival of their businesses.

III. A preliminary injunction is warranted because it is always in the public interest to vindicate constitutional rights. Moreover, there is no evidence that an injunction will create a risk to public health. In *South Bay II* and *Gateway City Church*, the Supreme Court enjoined Defendants’ total ban on indoor worship, and public health measures continued to improve even after the injunction was issued. Moreover, Because Plaintiffs can gather and operate their businesses using the same precautions used effectively elsewhere, there is no reason to believe the health situation would deteriorate if the Court grants an injunction. Indeed, there is no evidence that Defendants’ restrictions have even been effective in preventing the spread of the disease. And the public health situation has improved dramatically since the district court issued its decision, confirming that the restrictions are no longer necessary.

### ARGUMENT

To obtain a preliminary injunction, Plaintiffs must show they are likely to succeed on the merits and suffer irreparable harm absent preliminary relief, and that the balance of equities and public interest favor an injunction. *Hernandez v. Sessions*, 872 F.3d 976, 989–90 (9th Cir. 2017). This Court employs a “sliding scale” approach, balancing those



requirements “so that a stronger showing of one element may offset a weaker showing of another.” *Id.* at 990. Each of these factors supports a preliminary injunction here.<sup>8</sup>

## **I. Plaintiffs Have a Strong Likelihood of Success on the Merits**

### **A. Defendants’ Orders Violate Plaintiffs’ First Amendment Rights**

Defendants’ orders prohibit core religious and political gatherings protected by the First Amendment. They prevent Pastor Wong and Busch from engaging in religious activities central to their faith, interfere with Tandon’s ability to campaign for public office, and prevent the Gannons from holding salon-style political gatherings in their own home. Meanwhile, Defendants allow comparable secular activities that pose

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<sup>8</sup> Although Defendants have revised (or rescinded) certain orders, Plaintiffs’ request for injunctive relief is not moot. The current orders continue to severely burden Plaintiffs’ constitutional rights, and nothing prevents Defendants from re-imposing more stringent restrictions at any time. Indeed, the County itself recently stated that “[i]f conditions worsen, strong local mandatory measures may again be necessary.” RJN, Ex.6 at 5. In *Diocese of Brooklyn*, the Supreme Court granted an injunction even though the defendant had lifted the challenged order “because the [plaintiffs] remain[ed] under a constant threat that” the government would change its policy. 141 S. Ct. at 68; *see also Ill. Republican Party v. Pritzker*, 973 F.3d 760, 763 (7th Cir. 2020). The same is true here.

similar (or greater) risks. Given the availability of far less restrictive alternatives, Defendants cannot satisfy strict scrutiny.

**1. Defendants’ restrictions on private religious gatherings trigger strict scrutiny.**

a. A law that burdens faith-based conduct (even if only incidentally) is subject to strict scrutiny if it is neither neutral nor generally applicable. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). This “most rigorous [form] of scrutiny” asks whether the rule is “justified by a compelling governmental interest and [is] narrowly tailored to advance that interest.” *Id.* at 531–32, 546. A law that fails this test is unconstitutional.

A law facially discriminates against religion by “refer[ring] to a religious practice without a secular meaning discernable from the language or context.” *Id.* at 533. A law is not neutral as applied if it is overinclusive, “proscrib[ing] more religious conduct than is necessary to achieve [its] stated ends.” *Id.* at 538. Nor is it neutral as applied if it is underinclusive, exempting nonreligious conduct from its purview while failing to give the same treatment “to cases of ‘religious hardship.’” *Id.* at 537.

The general-applicability analysis is similar. Indeed, “[n]eutrality and general applicability are interrelated, and ... failure to satisfy one requirement is a likely indication that the other has not been satisfied.” *Id.* at 531. A law is not generally applicable when it is underinclusive and “[t]he underinclusion is substantial, not inconsequential.” *Id.* at 543. A law is underinclusive when it “fail[s] to prohibit nonreligious conduct that endangers [the government’s proffered] interests in a similar or greater degree than” the burdened religious conduct.” *Id.*

Applying this analysis to COVID-related restrictions is straightforward because the Supreme Court has made clear that a law that treats religious activities less favorably than “comparable” non-religious activities (including commercial activities) triggers strict scrutiny. *Diocese of Brooklyn*, 141 S. Ct. at 66–68. This is true *regardless* of whether the law also treats some *non*-religious activities just as unfavorably. *See id.* at 73 (Kavanaugh, J., concurring).

**b.** Here, Defendants’ orders burden religious conduct, even if only incidentally, and therefore trigger analysis of their neutrality and generally applicability. *See Lukumi*, 508 U.S. at 531. Before the pandemic, both Pastor Wong and Busch hosted in-person Bible studies

and communal worship in their home with groups of 8 to 12 individuals. 5-ER-1007 ¶¶2–3; 5-ER-1015 ¶¶2–3. But Defendants’ orders prevent Wong and Busch, and millions of other individuals, from gathering in their homes with individuals from more than two other households to practice what they consider to be essential elements of their Christian faith. And for much of the past year, such gatherings have been forbidden *completely*.

Both Plaintiffs offered uncontroverted declarations attesting that in-person communal religious assembly, study, and worship are indispensable to their faith, *see* 5-ER-1008 ¶5; 5-ER-1016 ¶5—and, indeed, are indispensable to the faiths of *numerous* practitioners of contemporary Protestant Christianity.<sup>9</sup> *See, e.g., An Introduction to Christian Theology*, The Boisi Center at Boston College 15 (2021), <https://tinyurl.com/98teabak> (explaining that “Protestants” “ritualize[] prayers” through “group prayer” and “Bible study”); *Small Group Bible Study and Its Importance in Early Christianity and Today*, Bible Study

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<sup>9</sup> Remote meetings are not an adequate substitute, as not every member of their faith community has access to such technology, and in-person religious assembly is indispensable to Plaintiffs’ Christian faith. *See* 5-ER-1016 ¶5; 5-ER-1008 ¶5.

Media (June 11, 2018), <https://tinyurl.com/r3x9fyp6> (discussing why Christians “need small group” gatherings including “Bible [s]tudy”). Yet carrying out those necessary, in-person activities with their faith community today, even in the safest of conditions, is a crime. 4-ER-619–21; see *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 425–32 (2006) (orders that prohibit religious ceremonies, enforced by threats of prosecution, amount to a significant burden on religious conduct). Thus, there can be no question that the burdens imposed on these Plaintiffs trigger First Amendment review. See *Diocese of Brooklyn*, 141 S. Ct. at 65–67 (caps on religious worship triggered First Amendment scrutiny)

Because the orders are substantially underinclusive, they are not neutral and generally applicable and are therefore subject to strict scrutiny. See *Lukumi*, 508 U.S. at 536–37, 543. The Supreme Court held as much in *South Bay II*, which addressed earlier versions of the State orders that prohibited indoor worship in the Purple Tier. Justice Gorsuch, joined by four other Justices, explained that California’s ban on indoor worship triggered strict scrutiny because it “so obviously targets religion for differential treatment.” 141 S. Ct. at 717 (statement of

Gorsuch, J.). “California has openly imposed more stringent regulations on religious institutions than on many businesses.” *Id.* While California forbade “any kind of indoor worship,” the state “allow[ed] most retail operations to proceed indoors with 25% occupancy, and other businesses to operate at 50% occupancy or more.” *Id.*

If there was any lingering doubt after *South Bay II* as to whether Defendants could treat religious gatherings less favorably than secular commercial gatherings, the Supreme Court eliminated it in *Gateway City Church*. There, the County insisted that because its orders applied to *all* indoor gatherings—without any specific reference to religious worship—its orders were neutral and generally applicable. *See* Br. of Santa Clara County, No. 20A138, at 12–25 (U.S. Feb. 24, 2021).<sup>10</sup> But given the County’s differential treatment of commercial activities, the Supreme Court rejected that argument and enjoined the County’s order as to religious gatherings at houses of worship. As the Court succinctly put it, “[t]his outcome is clearly dictated by this Court’s decision in [*South Bay II*].” *Gateway City Church*, 2021 WL 753575, at \*1.

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<sup>10</sup> <https://tinyurl.com/nxbcajzp>

There is no meaningful difference between the bans on indoor worship enjoined in *South Bay II* and *Gateway City Church* and California’s restrictions on private religious gathering. Like the prohibition on indoor worship, California’s total ban on such gatherings for purple-tier counties—as well as its three-household limit for red-tier counties—“impos[es] more stringent regulations on religious [gatherings] than on many businesses.” *South Bay II*, 141 S. Ct. at 717 (statement of Gorsuch, J.). Even in the most restrictive tier, California permits indoor operations at hair salons, personal care services, retail stores and shopping centers, laundromats, pet grooming, warehouses, call centers, legal and accounting services, and the entertainment industry. *See supra* pp. 9–10. And *nearly all* businesses may operate outdoors without the three-household limitation imposed on Plaintiffs’ private religious gatherings. *See* RJN Ex.1. The orders therefore trigger strict scrutiny. *See South Bay II*, 141 S. Ct. at 717.

c. Even apart from *South Bay II* and *Gateway City Church*, the decision to apply rational basis betrayed a fundamental misunderstanding of the First Amendment. 1-ER-70–74. Specifically, the court declined to apply *Diocese of Brooklyn* because it concluded that that

case applied exclusively to “houses of worship” and not other forms of religious practice. 1-ER-71–72. But the Free Exercise Clause draws no such distinctions. It is not confined to the walls of a church, synagogue, or mosque. *See Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005) (“[T]he Free Exercise Clause[] requires government respect for, and noninterference with, the religious beliefs and practices of our Nation’s people.”); James C. Phillips, *Is U.S. Legal Scholarship “Losing [Its] Religion” or Just Playing Favorites?: An Empirical Investigation, 1998-2012*, 2018 Pepp. L. Rev. 139, 219 n. 98 (2018) (“Free exercise issues involve religious freedom or liberty—the ability of one to not just worship, but to live one’s religion outside of the confines of a church/synagogue/mosque.”). The Free Exercise Clause is equally concerned (perhaps *more* concerned) with faith practices that fall outside a rigid conception of the conventional “house of worship” model. *See, e.g., Spencer v. World Vision, Inc.*, 633 F.3d 723, 728 (9th Cir. 2011) (O’Scannlain, J., concurring) (concluding that, to afford special treatment only to conventionally defined “church[es]” while denying it to “religious institutions which are organized for a religious purpose and have sincerely held religious tenets, but are not houses of worship,” would be to discriminate on the basis of religion) (cleaned up);



*Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 900 (7th Cir. 2005) (noting “vulnerability” of more informal, less ritualized religious practices “to subtle forms of discrimination”).

Finally, the district court erred in its conclusion that the myriad exempted secular activities are “dissimilar” to the religious gatherings Plaintiffs wish to hold. 1-ER-74. An underinclusive law treats religious conduct worse than it treats “analogous” or “comparable” secular conduct in carrying out the law’s stated purpose. *Lukumi*, 508 U.S. at 546; *Diocese of Brooklyn*, 141 S. Ct. at 69 (Gorsuch, J. concurring). As then-Judge Gorsuch explained, “underinclusiveness” means a “failure to cover significant tracts of conduct implicating the law’s animating and putatively compelling interest.” *Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014). The test for underinclusiveness, then, asks whether exempted secular conduct “endangers these interests in a similar or greater degree than” the restricted religious conduct. *Lukumi*, 508 U.S. at 543. In other words, what matters is whether the exempted activities carry “analogous” or “comparable” *risk*—comparability *in form* is irrelevant. *See, e.g., Monclova Christian Acad. v. Toledo-Lucas Cty.*

*Health Dep't*, 984 F.3d 477, 480 (6th Cir. 2020) (“[C]omparability is measured against the *interests* the State offers in support of its restrictions on conduct.”).

Here, the orders are clearly and substantially underinclusive, as they fail to treat countless activities that pose similar or greater risk of COVID-19 spread as harshly as they treat religious gatherings. Take, for example, gatherings in train stations, shopping malls, movie studios, acupuncture facilities, campgrounds, and garages. They are undeniably dissimilar venues involving dissimilar transactional conduct, yet in *South Bay II* and *Diocese of Brooklyn* the Court treated conduct in these specific secular venues as comparable to houses of worship because they each implicate *similar* (or greater) risk of transmitting COVID-19. *Diocese of Brooklyn*, 141 S. Ct. at 66; *South Bay II*, 141 S. Ct. at 717–20 (Statement of Gorsuch, J.).

Defendants likewise exempt a multitude of activities that pose the same (or even greater) risks of virus spread than the Bible studies Pastor Wong and Busch wish to conduct. For example, a 25-person television crew filming in a private residence undoubtedly presents a greater risk than a 5-person Bible study in the same residence—yet the former is

allowed, the latter is not. *See* RJN Ex.4 at 20; 5-ER-919–24 (professional sports, music, film and TV production, laundromats, and hotels, among others, are allowed to operate under less onerous restrictions); *see also South Bay II*, 141 S. Ct. at 720 (Statement of Gorsuch, J.) (describing “California’s uneven regime” due to favoritism given to the entertainment industry). Other examples of riskier, but permissible activities include “pack[ing] into train stations,” “wait[ing] in long checkout lines,” “sit[ting] in relatively close proximity inside buses,” “lingering in shopping malls, salons, or bus terminals,” and “running in and out of other establishments.” *Id.* at 718–19. Because Defendants exempt equally or more risky secular activities from the three-household limit applicable to religious gatherings, Defendants must satisfy strict scrutiny.

**2. Defendants’ restrictions on political gatherings also trigger strict scrutiny.**

Defendants’ orders also prevent Plaintiffs and countless others from holding *political* gatherings, including campaign-related events, debates, and other forms of political activism. These restrictions, which implicate activities at the core of the First Amendment, are subject to strict scrutiny because they severely burden Plaintiffs’ rights of speech

and assembly, foreclose an entire medium of expression, and are content based. The district court's conclusion that Defendants' ban on in-person political gatherings is subject only to intermediate scrutiny is reversible error.

a. "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010). As this Court has recognized, "[p]olitical speech" is "critical to the functioning of our democratic system," placing it "on the highest rung of the hierarchy of First Amendment values." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009) (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980)); accord *Kaahumanu v. Hawaii*, 682 F.3d 789, 798 (9th Cir. 2012) ("[P]olitical speech is entitled to the fullest possible measure of constitutional protection."). "For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 339. "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Id.*

“The right of peaceable assembly is a right cognate to th[at] of free speech ... and is equally fundamental.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577–78 (1980) (plurality op.) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)). Thus, laws that prohibit citizens from assembling *for the purpose* of engaging in political speech trigger strict scrutiny. See *Citizens United*, 558 U.S. at 340–41. And laws prohibiting such assemblies from occurring *in the home* are presumptively unlawful given the “special respect for individual liberty in the home [that] has long been part of our culture and our law.” *City of Ladue v. Gilleo*, 512 U.S. 43, 58 (1994) (respect for individual liberty “has special resonance when the government seeks to constrain a person’s ability to *speak*” in the home).

In addition to heightened standards of review for restrictions on political speech and assembly, the Supreme Court has expressed “particular concern with laws that foreclose an entire medium of expression.” *Id.* at 55. The Court has thus invalidated “ordinances that completely banned the distribution of pamphlets within the municipality, handbills on the public streets, the door-to-door distribution of literature, and live entertainment. *Id.* (citing cases). Courts will invalidate such

restrictions where no “adequate substitutes exist” for the “medium of speech” the law has “closed off.” *Id.* at 56.

Similarly, “[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government” satisfies strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). A law is content based if it “applies to particular speech because of the topic discussed or the idea or message expressed.” *Id.* “Some facial distinctions ... are obvious” while “others are more subtle” because they regulate “speech by its function or purpose.” *Id.* Laws are also content based if they cannot be “justified without reference to the content of the regulated speech.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

**b.** Defendants’ orders trigger strict scrutiny under each of these established doctrines.

*First*, strict scrutiny applies because the orders severely burden core political speech by inhibiting campaign-related activities and barring private political gatherings in the home. For much of the 2020 campaign, Defendants’ orders prohibited Tandon from holding *any* type of political gatherings. When Plaintiffs filed their complaint in mid-

October 2020, the State banned both indoor *and* outdoor gatherings, with exemptions only for outdoor religious services, cultural ceremonies, and “political protests.” 5-ER-1062–63 ¶¶70–72. Days after Plaintiffs filed this lawsuit, the State amended its orders to add political “rallies” to the list of activities exempted from the ban on outdoor gatherings. 5-ER-1036. That exemption did not apply to indoor political events, including fundraisers, meet-the-candidate opportunities, or any other type of political discussion. *Id.* The County, meanwhile, imposed a 60-person limit on all outdoor gatherings, including those exempted by the State. 5-ER-1061–62 ¶66. Although the County no longer imposes its own restrictions on gatherings (but of course it could toggle back to the old rules at any time merely by updating its website), the State continues to limit non-exempted gatherings to no more than three households. RJN Ex.1 at 1.

These restrictions make it effectively impossible for Tandon reach the approximately 800,000 persons in the congressional district he hopes to represent. 5-ER-1025–26 ¶¶3, 7, 9. Many of his prospective constituents do not have Internet access. And even if he could reach everyone in the district via social media, it would be prohibitively

expensive to do so. An effective online strategy costs millions of dollars, whereas his pre-COVID campaign strategy involved negligible sums of money—mostly gas and food for his roadshow. *Id.* ¶8.

Although the 2020 election is over, Tandon is running for Congress again in 2022. 2-ER-190 ¶5. Defendants’ orders are currently hindering his efforts to develop a viable campaign. While the County remains in the Red Tier, indoor gatherings are limited to no more than three households, meaning that Tandon is forbidden from holding indoor fundraisers or meeting with constituents to promote his ideas and grow his name recognition. *Id.* ¶¶6–7. And if the County moves back to the Purple Tier or reimposes “strong local mandatory measures,” RJN Ex.6 at 5—which it could do with the click of a mouse—indoor gatherings could again be completely banned. These limitations on Tandon’s ability to campaign for public office “significantly inhibit communication with voters about proposed political change.” *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 192 (1999). And by impairing Tandon’s ability to “disseminate information” to voters and “debate issues of public importance,” the orders prevent him from “hold[ing] [the incumbent] to account for [his]



decisions in our democracy.” *Nat’l Ass’n for Gun Rights, Inc. v. Mangan*, 933 F.3d 1102, 1111 (9th Cir. 2019) (“*NAGR*”).

Until recently, the State’s orders similarly prohibited the Gannons from hosting any indoor gatherings at their home to discuss important matters of public policy. Now that Santa Clara is in the Red Tier, such gatherings are limited to three households, meaning the Gannons could invite only two other “households” to attend. RJN Ex.1 at 1. Defendants’ orders thus burden the “right of citizens to inquire, to hear, to speak, and to use information to reach consensus.” *Citizens United*, 558 U.S. at 339. Although the Gannons are not campaigning, “core political speech need not center on a candidate for office.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995); accord *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1068 (9th Cir. 1998) (“[P]ublic policy matter[s]” are “part of the ongoing political debate that is protected by the First Amendment.”).

Gathering together with other members of the community to debate and discuss contentious political issues is a tradition as old as our Republic. See Alexis de Tocqueville, *Democracy in America* 221–25 (1835) (describing the importance of political association to the early Republic, including through “the power of meeting,” in which “[m]en have the

opportunity of seeing each other; means of execution are more readily combined, and opinions are maintained with a degree of warmth and energy which written language cannot approach”). For example, Martha Washington hosted weekly “salons” at the presidential mansion, bringing together “members of Congress, visiting dignitaries, and men and women from the local community.” George Washington’s Mount Vernon, *The First Lady*; see also Jeanne E. Abrams, *First Ladies of the Republic* 34 (2018) (“Although they were modeled loosely on French salons, American salons were much more intentionally political in nature.”).<sup>11</sup> And in more modern times, prominent women in the African American community held salons in their homes, which “played a vital role in the development of the Harlem Renaissance.” Chelsea Olsen, *Networking Subversion: A Feminist Analysis of the Modernist Salon*, University of Sussex, at 189.<sup>12</sup> Because Defendants’ orders severely “burden[ this] core political speech,” they can be upheld only if they are “narrowly tailored to serve an overriding state interest.” *McIntyre*, 514 U.S. at 347.

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<sup>11</sup> <https://www.mountvernon.org/george-washington/martha-washington/the-first-first-lady/>.

<sup>12</sup> <https://core.ac.uk/download/pdf/156857909.pdf>

*Second*, Defendants’ orders are subject to exacting scrutiny because they “foreclose an entire medium of expression” that “unduly constrict[s] the opportunit[y] for free expression.” *Gilleo*, 512 U.S. at 55, 56 n.13. Indeed, the medium of expression targeted here—in-person gatherings—is the *most* fundamental and universally accessible means of communication that exists. A total ban on in-person gatherings “eliminat[es] [this] common means of speaking,” *id.* at 55, which has the power to “bring[] about ... political and social changes.” *Pest Comm. v. Miller*, 626 F.3d 1097, 1105 (9th Cir. 2010). Indeed, totalitarian regimes often prohibit informal gatherings precisely *because* they cannot control or surveil what is said, and they fear the “unfettered interchange of ideas” *See id.* Given the lack of adequate substitutes for in-person gatherings, especially in the privacy and comfort of the home, Defendants’ orders clearly “suppress too much speech” to trigger anything less than strict scrutiny. *Gilleo*, 512 U.S. at 55.

*Third*, Defendants’ orders are content based. From the outset, the State’s gathering ban has drawn “distinctions based on the message ... convey[ed].” *Reed*, 576 U.S. at 163. While generally banning all outdoor gatherings, the State’s orders originally exempted certain types of

expressive conduct: “religious services,” “political protests,” “[w]edding ceremonies,” and “cultural ceremonies.” 4-ER-817–18. The State later added “political rallies” and recently announced that outdoor live music and theatre performances—*i.e.*, expressive speech—may soon be permitted with up to “100 people” in the Purple Tier and a “[m]ax 20%” of occupancy in Red Tier. RJN Ex.1 at 4, Ex.2. Thus, while the State continues to expand the list of First Amendment-protected conduct allowed to occur both indoors and outdoors, political gatherings are still sharply restricted.

As these exceptions illustrate, to determine whether a gathering is illegal, a government official must refer to the *message* the participants wish to convey. If the Gannons hosted an in-person gathering in their front yard, the official would have to determine whether the participants were there to “protest” climate change policies (allowed) or “discuss” a plan for recalling the governor because of his climate change policies (forbidden). Likewise, before dragging the participants of an indoor gathering to jail, the hapless official would have to determine whether the participants were filming a movie (allowed) or engaging in political debate after watching the movie (forbidden). In short, Defendants’

“regulation of expressive activity” cannot be “justified without reference to the content of the regulated speech.” *Ward*, 491 U.S. at 791; *see also* *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226 (9th Cir. 2019) (“The most commonsense way a law can be content-based is if it distinguishes particular speech based on ... the function or purpose of the speech.”).

c. Although Defendants’ orders are hamstringing Tandon’s ability to campaign for public office and restricting the Gannons’ ability to hold political discussions in their own home, the district court concluded that the orders triggered only intermediate scrutiny. In reaching that astonishing conclusion, the court wholly ignored the severe burdens the orders impose on political speech. Indeed, the court appeared to believe that strict scrutiny applies *only* to content-based laws. 1-ER-49 (“To evaluate a free speech claim, the Court must first decide whether a law restricting speech is content based or content neutral”). That is a fundamental misunderstanding of First Amendment doctrine. While content-based laws undoubtedly trigger strict scrutiny, so do *content-neutral* laws that impose a substantial burden on core political speech. *See, e.g., Buckley*, 525 U.S. 182 (applying strict scrutiny without considering whether restrictions are content-based); *NAGR*, 933 F.3d at

1111–14 (same); *Az. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1007–08 (9th Cir. 2003) (same). Likewise, “[a]lthough prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent.” *Gilleo*, 512 U.S. at 55. If allowed to stand, the district court’s decision to apply intermediate scrutiny to Defendants’ restrictions would blow a gaping hole through the heart of the First Amendment.

The district court’s decision fails even on its own terms. For example, while the court concluded that the State applies a “blanket ban[] on all gatherings,” 1-ER-51, it did not explain how that conclusion could be reconciled with the exemptions for “political protests and rallies,” “religious services,” “cultural ceremonies,” and more. Indeed, the district court ignored outdoor gatherings altogether. Its discussion of indoor gatherings is also hopelessly flawed. Instead of asking whether the restrictions can be justified without reference to the purpose of the gathering (which they cannot), the court declined to apply strict scrutiny because “socially distanced commercial activities” supposedly have a “lower risk of spreading COVID-19 than gatherings.” 1-ER-52–53. But

while alleged safety differences might be relevant to *the narrow tailoring* inquiry, they have no bearing on the proper level of scrutiny. The district court thus botched the analysis by importing the narrow tailoring inquiry (which it answered incorrectly) into the threshold question of whether the orders are content based.

### **3. Defendants’ orders cannot satisfy heightened scrutiny**

Strict scrutiny is a “demanding standard” that Defendants do not come close to satisfying because the orders are both “underinclusive [and] overinclusive in scope” and there are obvious “less restrictive alternative[s] would serve the Government’s purpose.” *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1125 (9th Cir. 2020).

a. The orders fail strict scrutiny for the reasons enumerated by Justice Gorsuch in *South Bay II*. Although the State has either banned indoor “gatherings” or limited them to three households for nearly a year, it allows dozens or even hundreds of people to congregate in various commercial settings. *See* 4-ER-810–13; RJN Ex.1. In *South Bay II*, the State attempted to defend a similar gathering ban on the ground that worship services “involve (1) large numbers of people mixing from different households; (2) in close physical proximity; (3) for extended

periods; (4) with singing.” 141 S. Ct. at 718 (Statement of Gorsuch, J.). Although the Court recognized the State’s compelling interest in reducing the spread of COVID-19, it nonetheless invalidated the orders insofar as they imposed more severe restrictions on religious gatherings than commercial activities. *See id.* at 716. As the Court explained, the State could not satisfy narrow tailoring because it is not true that those “four factors are always present in worship, or always absent from other secular activities its regulations allow.” *Id.* at 718 (Statement of Gorsuch, J.). For example, while the State “presume[d] that worship inherently involves a large number of people,” “some worshippers may seek only to pray in solitude, go to confession, or *study in small groups.*” *Id.* (emphasis added). Moreover, while the State asserted that commercial activities entailed less human contact—“scores might pack into train stations or wait in long checkout lines in the businesses the State allows to remain open.” *Id.*

The same logic applies here. While the Defendants proffered eight “objective risk criteria” purporting to “show that private gatherings greatly risk the spread of COVID 19,” 1-ER-64–65, it is simply not the case that these factors “are always present in [private gatherings] or



always absent from other [ ] activities [the] regulations allow.” *South Bay II*, 141 S. Ct. at 718 (Statement of Gorsuch, J.).

Nor have Defendants “explain[ed] why [they] cannot address [their] legitimate concerns with rules short of a total ban.” *Id.* Although Defendants assert that political and religious gatherings will lead to close physical interactions, “California is not as concerned with the close physical proximity of hairstylists or manicurists to their customers, whom they touch and remain near for extended periods.” *Id.* Defendants also “allow[] people to sit in relatively close proximity inside buses.” *Id.* Defendants have decided that less restrictive options are available for these settings—including “social distancing requirements, masks, cleaning, plexiglass barriers, and the like”—yet they have persisted in completely banning (or severely limiting) other First Amendment-protected gatherings regardless whether such precautions are used. *Id.* at 718–19.

And though Defendants fret that people attending religious or political gatherings may spend long periods of time together, they do “not limit ... citizens to running in and out of other establishments; no one is barred from lingering in shopping malls, salons, or bus terminals.” *Id.* at

719. And Defendants have not explained their decision to adopt a total ban (or three household cap) rather than placing a “reasonable limit on the length of indoor religious [or political] gatherings.” *Id.* at 719. Indeed, Defendants’ restrictions “appear[] to reflect not expertise or discretion, but instead an insufficient appreciation or consideration of the interests at stake.” *Id.* at 717 (Roberts, C.J., concurring).

**b.** Although the district court concluded that strict scrutiny did not apply, it ruled in the alternative that the orders were narrowly tailored. 1-ER-63–69, 74. That analysis largely followed this Court’s now-vacated order in *South Bay*. 1-ER-63–66. Because the precedent the district court relied on is no longer good law, its legal conclusions are necessarily flawed.

The district court stated that its own “independent review” of the record confirmed its conclusion that the orders were narrowly tailored. 1-ER-64–65. But that review cannot be squared with *South Bay II*. Nor is it supported by the record. For example, the court pointed to risk factors supposedly associated with private gatherings, but Plaintiffs attested that they could (and would) incorporate the same mitigation measures used in commercial settings—masks, distancing, ventilation,

sanitizing—“to protect and inhibit the spread of COVID-19.” 5-ER-1008 ¶6; 5-ER-1016 ¶6; 5-ER-1032 ¶6; 5-ER-1028 ¶15. And contrary to the district court’s suggestion, Plaintiffs never expressed a desire to “sing[], chant[], or shout[].” 1-ER-55, 62, 65. Plaintiffs’ experts did not contradict this testimony, but merely opined that gatherings present a high risk of transmission *if* people congregate in close proximity in poorly ventilated areas for long periods of time *without* covering their faces or practicing social distancing. 3-ER-583–84 ¶¶42–44; 3-ER-415–16, 419–20 ¶¶60, 76–77; 3-ER-375 ¶¶34–35. Defendants never explained why the same mitigation measures that allow hundreds of people to shop in a Wal-Mart or wait in an airport terminal could not be used to responsibly host political and religious gatherings—both indoors and outdoors.

The orders also fail narrow tailoring because to the extent Defendants are seeking to reduce sickness, hospitalizations, and death, there are far less restrictive means available to achieve those ends. Specifically, Defendants could target their interventions to protect the most vulnerable, including those in nursing homes and long-term care facilities, and those receiving in-home services. *See* 2-ER-139–41, ¶¶50–55; 2-ER-179–83 ¶¶95–104. For example, Defendants could implement

increased testing for workers at these locations, reduce staff rotations, and test visitors. 2-ER-182–83 ¶¶100–02; 2-ER-140 ¶51. Although the State and County insist that they have taken many of these precautions, the health outcomes in California tell a different story. *See* 5-ER-974–76 ¶¶76–81. And other states avoided these health outcomes while imposing far less draconian restrictions on gatherings than California. *See* 2-ER-129 ¶23; 2-ER-177–78 ¶89.

c. For the same reasons, Defendants’ orders also fail intermediate scrutiny. Courts will uphold regulations under intermediate scrutiny only if they do not “burden substantially more speech than is necessary.” *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947 (9th Cir. 2011). But as Plaintiffs have demonstrated, Defendants could achieve their goals by “employ[ing] various less restrictive alternatives” than an outright ban on First-Amendment activities. *Id.* at 948–51. Defendants’ orders also fail to “leave open ample alternative channels for communication,” as virtual meetings are no substitute for in-person gatherings. *Id.* at 945; 5-ER-1032 ¶5; 5-ER-1028 ¶¶ 8–10, 14.

**B. Defendants’ Orders Violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment**

Defendants have yet to provide a shred of evidence linking Plaintiffs’ businesses—restaurants, salons, wineries, and gyms—to the spread of COVID-19 once basic precautions are taken. Yet for the past year Defendants have either completely closed those businesses or saddled them with onerous capacity restrictions. As a result, one of Plaintiffs’ businesses has failed and several others are on the brink of financial ruin. Given the breathtaking scope of Defendants’ orders and their devastating impact on people’s economic livelihoods, ordinary rational basis review is plainly inappropriate. Instead, this Court should require Defendants’ to justify their orders with *evidence*. And here, the record demonstrates that Defendants’ business restrictions are unnecessary, unscientific, and irrational.

**1. Given the unprecedented nature of Defendants’ crippling business restrictions, the appropriate standard of review is rational basis with bite.**

a. The right to practice one’s profession and earn a living free of arbitrary government regulation has long been recognized as a right encompassed by the Due Process Clause of the Fourteenth Amendment. The “liberty” protected by the Fourteenth Amendment “denotes not

merely freedom from bodily restraint but also the right of the individual to ... engage in any of the common occupations of life.” *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); accord *Conn v. Gabbert*, 526 U.S. 286, 291–92 (1999) (“[T]he liberty component of the Fourteenth Amendment’s Due Process Clause includes some generalized due process right to choose one’s field of private employment.”); *Sagana v. Tenorio*, 384 F.3d 731, 742 (9th Cir. 2004) (Due Process Clause applies to “[r]estrictions on selecting and pursuing work”); *Bols v. Newsom*, 2021 WL 268609 (S.D. Cal. Jan. 26, 2021) (same). Indeed, “the right to work for a living in the common occupations of the community is of *the very essence* of the personal freedom and opportunity that it was the purpose of the Amendment to secure.” *Truax v. Raich*, 239 U.S. 33, 41 (1915) (emphasis added); see also *Dittman*, 191 F.3d at 1029 (“the pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations.”). In short, “a person’s right to work for a living in one of the common occupations of the community is a core personal freedom guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments.” *Bols*, 2021 WL 268609, at \*4.

Where, as here, the State's orders threaten the livelihoods of hundreds of thousands of citizens, "the relevant test requires *something more*" than "'pure' rational basis." *Dittman*, 191 F.3d at 1030 (emphasis added). Given the sweeping nature of the restrictions imposed here, the Court should, at minimum, apply what has been called rational basis "with a bite." *Dairy v. Bonham*, 2013 WL 3829268, at \*5 n.4 (N.D. Cal. 2013) (explaining that this form of rational basis "has been applied in ... situations where important but not fundamental rights or sensitive but not suspect classifications are involved.") (collecting cases); *see also United States v. Pickard*, 100 F. Supp. 3d 981, 1005 (E.D. Cal. 2015) (describing more "rigorous rational basis review"). When conducting such review, the court explores "the government's actual motivation and justification" for the challenged orders. *Desoto CAB Co., Inc. v. Picker*, 228 F. Supp. 3d 950, 957 (N.D. Cal. 2017). Put simply, under "active rational basis review," "facts matter." *United States v. Wilde*, 74 F. Supp. 3d 1092, 1096 (N.D. Cal. 2014).

**b.** Instead of applying a rigorous form of rational basis review, the district court held that *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)—a case upholding a mandatory vaccination requirement during a

smallpox outbreak—mandated extreme deference. But *Jacobson* “involved an entirely different mode of analysis ... and an entirely different kind of restriction,” and “[n]othing in [that decision] purported to address, let alone approve, such serious and long-lasting intrusions into settled constitutional rights.” *Diocese of Brooklyn*, 141 S. Ct. at 70–71 (Gorsuch, J., concurring). Defendants’ restrictions here have continued *for a year*, and the Blueprint does not even have a “green tier” where all restrictions cease, meaning counties with *no cases* will be subject to restrictions while the Blueprint is in effect. Even if “[c]ourts are generally willing to give temporary deference to temporary measures aimed at remedying a fleeting crisis,” “that deference cannot go on forever.” *Cty. of Butler v. Wolf*, – F. Supp. 3d – 2020 WL 5510690, at \*9 (W.D. Penn. 2020); see *Roberts v. Neace*, 958 F.3d 409, 414–15 (6th Cir. 2020) (per curiam) (“While the law may take periodic naps during a pandemic, we will not let it sleep through one.”). “[W]hen a crisis stops being temporary, and as days and weeks turn to months and years, the slack in the leash eventually runs out.” *Capitol Hill Baptist Church v. Bowser*, 2020 WL 5995126, at \*7 (D.D.C. 2020).



And though courts are typically deferential when confronted with run-of-the-mill health and safety regulations, the statewide business shutdowns and restrictions here are “unprecedented in the history of ... the nation.” *Wolf*, 2020 WL 5510690, \*24. Our state “has faced many epidemics and pandemics,” but “[n]ever before” have Defendants “exercised such vast and immediate power over every business, business owner, and employee.” *Id.* at 19, \*24. Accordingly, “the ongoing and indefinite nature of Defendants’ actions weigh strongly against application of a more deferential standard of review.” *Id.* at \*8.

Given the record in this case, Defendants’ orders cannot withstand any form of heightened review.

**2. Defendants’ orders are irrational and arbitrary.**

a. The record demonstrates that Defendants’ orders violate Plaintiffs’ right to earn a living and practice their professions. For starters, Defendants do not (and could not) dispute that the orders have destroyed or devastated Plaintiffs’ businesses. 2-ER-187 ¶4; 5-ER-1000 ¶7, 5-ER-1003–4 ¶3, 5-ER-1011–12 ¶¶4–5, 5-ER-1020 ¶7. Nor have Defendants rebutted Plaintiffs’ evidence showing that they can implement the same basic public health precautions as other retail and

big-box stores, which have been allowed to operate at far higher capacity. 5-ER-994–95 ¶¶3–7; 5-ER-999–1000 ¶¶5–6; 5-ER-1003–4 ¶¶ 3–5; 5-ER-1011–12 ¶¶5–6; 5-ER-1019–21 ¶¶5–12.

Even more damning, Defendants have not produced any evidence connecting COVID-19 outbreaks to restaurants, wineries, or facial salons that have taken appropriate precautions. Nor has the State released any studies showing how the SARS-CoV-2 virus has been transmitted in California, or provided any evidence showing that the government’s restrictions have prevented (or will prevent) transmission. 5-ER-966–68 ¶¶51–58; 2-ER-168–69 ¶¶70–71. Instead of evidence, “both the County and State appear to be imposing restrictions based solely on their own professional judgment without any empirical basis.” 5-ER-968 ¶59. This dearth of evidence is particularly striking given the abundant contact tracing data available to Defendants. *See* 2-ER-164 ¶59, 168–69 ¶70, 178–79 ¶¶92–93.

Given Defendants’ evidentiary failures, there is no rational basis for prohibiting indoor dining or limiting it to only 25% capacity. Nor is there any rational basis for prohibiting Mansour and her staff from performing facials while allowing estheticians working in dermatologists’

offices—who have *identical* training and licensing requirements—to perform *identical* procedures. 5-ER-929–34.<sup>13</sup> Likewise, there is no rational basis for prohibiting Khanna from hosting an outdoor wedding reception at his winery, while permitting outdoor Bat Mitzvahs at venues with far less room for social distancing. Nor is there a rational basis for the total ban on indoor wine tasting given that people are allowed to congregate in retail stores. Defendants have also failed to demonstrate a rational basis for preventing Evarkiou from holding gatherings at her salon.

**b.** More fundamentally, Defendants’ orders violate Due Process and Equal Protection because the Blueprint itself is irrational. The CDC has recommended that “syndromic illness measures,” such as laboratory-confirmed hospital cases, are the best measures of disease burden because they accurately reflect the actual impact of the disease on the healthcare system. 2-ER-153 ¶¶34, 158–59 ¶¶48, 162–63 ¶¶55, 57. Yet the Blueprint ignores hospitalizations and instead relies entirely on positive results from PCR tests. Even if PCR tests are the “gold standard” for

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<sup>13</sup> See Cal. Bus. & Prof. Code § 7324; Cal. Emp. Dev. Dep’t, *Detailed Guide for Skin Care Specialists in Cal.*, <https://tinyurl.com/yxhf9ffx> (last accessed Mar. 9, 2021).

determining whether someone has had contact with the virus, it makes no sense to base statewide restrictions on those test results. For one thing, not all positive test results are of equal importance. An outbreak on a college campus is unlikely to burden the healthcare system or threaten nursing home patients, but the large number of positive tests can affect the county's tier designation, leading directly to increased business restrictions.

PCR tests also produce a significant number of functional false positives. “Because the RT-PCR test is based on a very small sample of genetic material, the test amplifies the virus—if present—by a process of repeatedly doubling the concentration of viral genetic material.” 5-ER-945 ¶28. “If the sample genetic material is doubled enough times, the test will detect the presence of the virus even when the viral load is very small.” *Id.* The number of times a test “double[s]” the genetic material is known as a “cycle threshold.” *Id.* ¶29. If a cycle threshold is high, the test is more likely to result in a false positive “because even if a non-infectious viral load is present in the sample obtained from the patient,” the high number of doublings could result in a positive test. *Id.* According to a careful study in a top epidemiology journal, if 32 cycles are needed for

viral particles to be detected, the functional false positive rate is 72%, and if 37 cycles are needed, the functional false positive rate rises to 92%. 2-ER-122–23 ¶4. Put simply, when high cycle thresholds are required to identify viral particles, most positive tests will reflect non-infectious individuals who pose no public health threat. *Id.* ¶6; *see also* 5-ER-944–45 ¶28. Many PCR tests in California run at 37 cycles or above, with some running up to *45 cycles*. 2-ER-123 ¶5. The “case counts” reported by the State are thus inflated to the point of being meaningless. Although the “government need not provide a perfectly logical solution to regulatory problems, it cannot hope to survive *rational* basis review by resorting to irrationality,” as it has done here. *Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008).

The district court held that the orders “bear[] a real and substantial relation to public health.” 1-ER-32. But Defendants’ experts did not provide any evidence supporting the application of their “objective” criteria to Plaintiffs’ businesses. 1-ER-33. Defendants simply speculated that certain businesses would be unable to physically distance customers, limit the duration of exposure, etc. Such guesswork might have been

justified in the first days and weeks of the pandemic, but it cannot provide a rational basis for restrictions one year later.

## **II. Plaintiffs Face Irreparable Harm Absent Immediate Injunctive Relief**

Defendants' orders have violated Plaintiffs' constitutional rights and destroyed their businesses for nearly a year. Absent an injunction, Plaintiffs will continue to suffer irreparable harm every day the challenged orders remain in effect.

“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Diocese of Brooklyn*, 141 S. Ct. at 67; *Warsoldier v. Woodford*, 418 F.3d 989, 1001–02 (9th Cir. 2005). Here, as the district court correctly found, Tandon, the Gannons, Wong, and Busch claimed loss of political and religious freedoms and thus have established irreparable harm. 1-ER-75–76.

“[T]he threat of being driven out of business” is also sufficient to establish irreparable harm. *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019). The district court agreed that Richards and Mansour demonstrated such a threat, but it found that Khanna, Beaudet, and Evarkiou had supposedly claimed mere monetary injuries. 1-ER-75. That finding was incorrect for three reasons.

First, all three of these Plaintiffs showed that their businesses were threatened with “extinction,” which suffices “even when damages may be available and the amount of direct financial harm is ascertainable.” *hiQ Labs, Inc.*, 938 F.3d at 993; *see* 5-ER-1000 ¶7; 5-ER-1003–4 ¶3; 5-ER-1011 ¶4. Should the Blueprint’s arbitrary and indefinite regime persist, the losses Plaintiffs are incurring will “likely” prove fatal. *Az. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014).

Second, Plaintiffs have demonstrated that Defendants’ orders have “limited their professional opportunities,” “hurt [their] ability to advance their careers,” “hinder[ed] [their] ability to work and engage in other everyday activities,” and prevent[ed] them from “expand[ing] [their] business to new customers.” *Az. Dream Act Coal.*, 757 F.3d at 1068; *see* ECF No. 9 at Ex.D ¶¶3, 5; 5-ER-1003–04 ¶3; 5-ER-1011 ¶¶4–5.

Finally, irreparable harm exists where a plaintiff lacks an “adequate legal remedy, such as an award of damages,” *Az. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017), and Plaintiffs have no such remedy against the government Defendants here.

### **III. The Remaining Factors Weigh in Favor of Granting Injunctive Relief**

The balance of equities factor focuses on the “effect on each party of the granting or withholding of the requested relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). “The public interest inquiry primarily addresses impact on non-parties rather than parties.” *League of Wilderness Defs/Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 766 (9th Cir. 2014). When the government is the defendant, the analyses of these two “factors merge.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

A preliminary injunction is warranted here because “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Am. Bev. Ass’n v. City and Cty. of S.F.*, 916 F.3d 749, 758 (9th Cir. 2019) (en banc). The district court discounted this aspect of the public interest because it concluded that Plaintiffs’ constitutional rights were *not* being violated. 1-ER-79. But as explained above, that conclusion is incorrect.

The district court’s conclusion that an injunction is not in the public interest relied on this Court’s now-vacated opinion in *South Bay*, which erroneously held that an injunction would endanger the public and cause



the state’s healthcare system to “collapse.” 1-ER-76 (quoting *South Bay*, 985 F.3d at 1150). But the *South Bay* panel’s prediction of doom has been proved false—infections and hospitalizations fell significantly even *after* the Supreme Court granted the injunction in *South Bay II*. On February 5, the 14-day rolling average of positive cases in the state was 16,844.<sup>14</sup> By March 8, the rolling average had dropped below 4,200.<sup>15</sup> Similarly, the number of patients hospitalized statewide with COVID-19 was 13,137 on February 5.<sup>16</sup> By March 8, this number had dropped below 4,300.<sup>17</sup> The Supreme Court’s injunction inflicted no discernible harm on the public health situation in California. Nor would an injunction in this case strain California’s healthcare system, which has never been “overburdened,” as the district court erroneously asserted. 1-ER-78. Even during the peak of the winter surge in early January, ICU availability in the State never dropped below 1,000 beds,<sup>18</sup> and in Santa Clara County there were never

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<sup>14</sup> Cal. Dep’t of Pub. Health, *Tracking COVID-19 in California*, <https://covid19.ca.gov/state-dashboard/>.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See* CDPH, *Tracking COVID-19 in California*, <https://covid19.ca.gov/state-dashboard/>.

fewer than 25 ICU beds available, even without the use of surge capacity.<sup>19</sup>

Moreover, there is little evidence that Defendants’ restrictions have been effective. Indeed, “[t]he best studies, which account for environmental, epidemiological, and economic factors alongside policy interventions conclude that the mortality from COVID-19 infection in different regions is not primarily driven by policy decisions like lockdowns, but rather by other factors specific to each region.” 1-ER-128

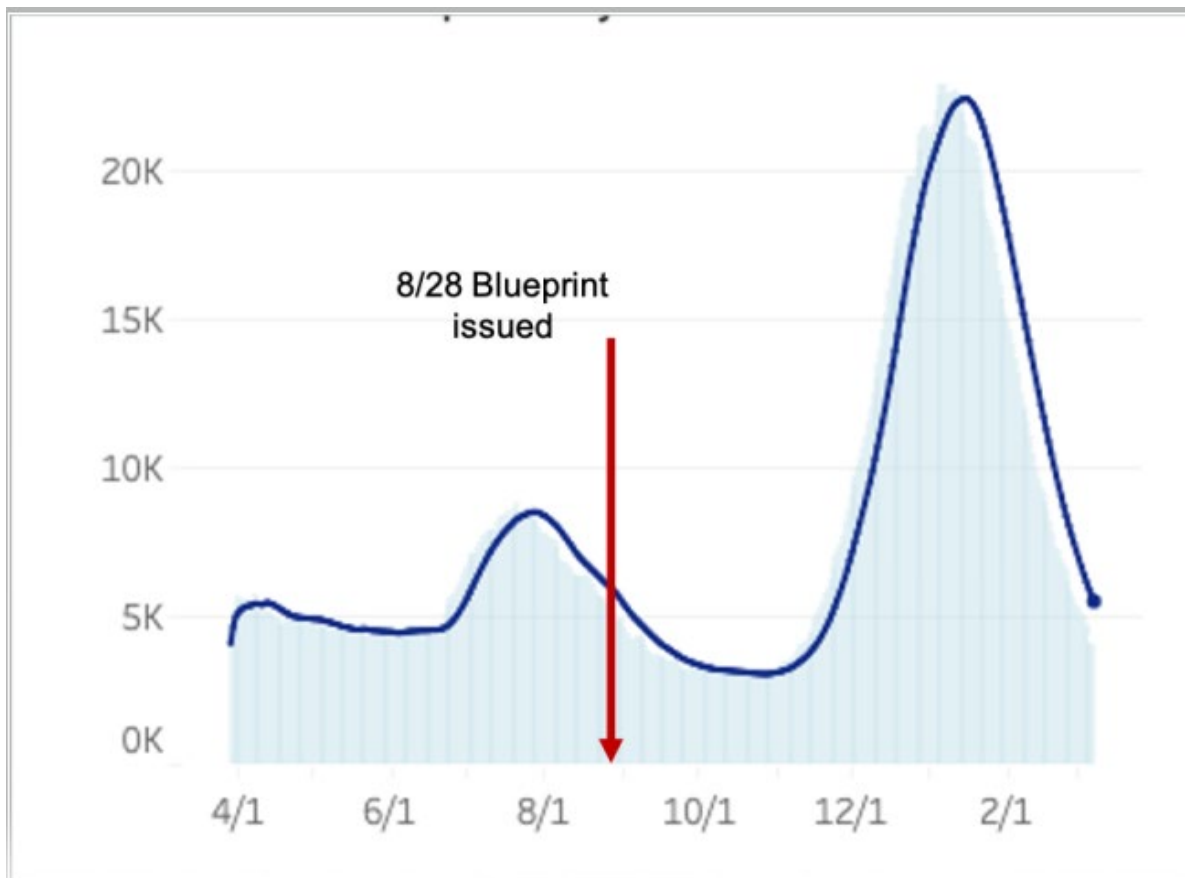
¶21. Like other states, California experienced a steady increase in cases, hospitalizations, and deaths from November to mid-January, followed by steady decreases.<sup>20</sup> The following graphic from the State’s COVID-19

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<sup>19</sup> *COVID-19: Hospitals* (last accessed March 9, 2021), <https://tinyurl.com/d6jrkcj>. The district court erroneously asserted that Santa Clara County “had 0 percent remaining ICU capacity.” 1-ER-78. However, the State was deliberately undercounting ICU availability to justify the regional stay at home order. See Erin Allday & Dominic Fracassa, *California is at 0% ICU availability. Here’s what that number really means*, San Francisco Chronicle (Dec. 29, 2020), <https://tinyurl.com/ma3m2czh>.

<sup>20</sup> See, e.g., Ctrs. for Disease Control & Prevention, *COVID Data Tracker* (last accessed Mar. 9, 2021), <https://tinyurl.com/3xw57cdc>; *The COVID Tracking Project*, The Atlantic (last accessed Mar. 9, 2021), <https://covidtracking.com/data>.

tracking website illustrates the rise and fall of hospitalizations across California over the past year<sup>21</sup>:



It is difficult to look at that graph and conclude that Defendants' restrictions had any meaningful effect on the course of the virus. In fact, although the State imposed a near-total lockdown from December 2020 through January 2021, California's daily new case totals at the height of

<sup>21</sup> CDPH, *Tracking COVID-19 in California*, <https://covid19.ca.gov/state-dashboard/>.

the winter surge surpassed the *combined* daily totals of Texas and Florida, both of which eschewed California’s heavy-handed approach.<sup>22</sup> See 2-ER-129 ¶23; 2-ER-177–78 ¶¶87–89.

To support its dire prediction, the district court cherry-picked anecdotes suggesting that unknown health problems *might* emerge if restrictions were lifted. For example, the court stated that college football players who recovered from mild cases of COVID-19 had higher rates of myocarditis, a condition that could lead to cardiac arrest during heavy exercise. 1-ER-77–78. But the “evidence” for that assertion was a New York Times article reporting on a single non-peer reviewed study from August. 3-ER-430–39. Meanwhile, college football was played for months around the country with no reports of increased cardiac problems.

An injunction is also in the public interest because Defendants’ restrictions continue to inflict devastating collateral damage. See, e.g., 5-ER-942–43 ¶23; 5-ER-983–85 ¶¶95–96. Defendants’ widespread business closures and gathering bans have caused dramatic increases in mental

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<sup>22</sup> See Johns Hopkins Univ. & Med., *Coronavirus Resource Center*, <https://tinyurl.com/22sb4d5b>.

health issues—linked to substance abuse, domestic violence, and suicide—as well as unemployment, food and housing insecurity, and poverty. 2-ER-134–36 ¶¶37–41; 5-ER-983–95 ¶¶95–96.<sup>23</sup> *Not one of Plaintiffs’ experts even attempted to respond to these points. Instead, their “entirely one-sided” defense completely ignored the “long-term public [] harms” caused by the orders, even though these harms “likely [] outweigh [the orders’] benefits.”* 5-ER-942 ¶22; 5-ER-982 ¶93. The district court opined that “some of these harms are at least partially due to the pandemic itself,” 1-ER-80, but that rank speculation finds no support in the record.

In all events, even if the public-interest factor tilted toward Defendants in early February (which it did not), it tilts strongly in Plaintiffs’ favor *today*. Although hospitalizations peaked in early January—as they do every year during flu season<sup>24</sup>—and reached a high

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<sup>23</sup> See Dan Walters, *COVID-19 may have permanent economic impacts*, CalMatters (Dec. 27, 2020), <https://tinyurl.com/ywjbr3ny>.

<sup>24</sup> See CDC, *The Flu Season*, (accessed Mar. 9, 2021), CDC, available at <https://tinyurl.com/4dskyjrp> (reporting that flu activity “peaks between months of December and February”); CDC, *Weekly U.S. Influenza Surveillance Report* (accessed Mar. 9, 2021), <https://tinyurl.com/3j5zcv55>.

of 22,821 positive patients on January 5, 2021, there are now fewer than 4,200 patients with COVID-19 hospitalized in California.<sup>25</sup> And despite the substantial over-counting of positive cases due to high cycle thresholds, case counts have also plummeted. The 14-day rolling average of positive cases reached 40,827 on January 13, 2021.<sup>26</sup> By March 8, the 14-day average had dropped *tenfold*, to 4,086.<sup>27</sup> Because California's healthcare system is not at risk of overcapacity, an injunction vindicating Plaintiffs' constitutional rights is strongly in the public interest.

## CONCLUSION

For the reasons set forth above, this Court should reverse with instructions to enter a preliminary injunction.

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<sup>25</sup> See CDPH, *Tracking COVID-19 in California*, <https://covid19.ca.gov/state-dashboard/>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

March 9, 2021

Respectfully Submitted,

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## STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Appellants state that the following related cases are pending before this Court:

*Gateway City Church, et al. v. Newsom, et al.*, No. 21-15189: raises closely related issues, namely whether California's and Santa Clara County's percentage capacity restrictions on places of worship, and Santa Clara County's ban on indoor religious worship violate the Free Exercise Clause.

*Harvest Rock Church, Inc., et al. v. Newsom*, No. 20-56357: raises closely related issues, namely whether California's ban on indoor religious worship violates the Free Exercise Clause

/s/ ROBERT E. DUNN  
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March 9, 2021



## CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1 because it contains 13,957 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook type.

/s/ ROBERT E. DUNN

ROBERT E. DUNN

March 9, 2021

### **CERTIFICATE OF SERVICE**

I hereby certify that on March 9, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ ROBERT E. DUNN*

ROBERT E. DUNN